

TANZANIA / JUDGMENT

CIVIL APPLICATION NO

COURT
TANZLIIDECIDED
1 January 2025

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IN THE COURT OF APPEAL OF TANZANIA AT DODOMA CIVIL APPLICATION NO. 140 OF 2025 HI
BROS CANVAS AND TENTS LIMITED.....1st APPLICANT PARVEZ
ABDULHUSSEIN HIRJI..... 2nd APPLICANT VERSUS I & M BANK (T)
LIMITED..... RESPONDENT (Application for stay of execution of the
Decree of the High Court of Tanzania (Commercial Division) at Dar-Es-Salaam £Mag.oiaqJ J.,)
dated the 25th day of March 2022 in Commercial Case No. 3 of 2018

RULING

14th & 20th February, 2025 NANGELA. J.A.: This is an application for stay of execution of the decree of the High Court (Commercial Division) in Commercial Case No. 03 of 2018. For clarity, I will set out the context under which the application arose. Having lost Commercial Case No. 3 of 2018 to the respondent, the applicants filed a notice of appeal on 13th of April 2022, intending to challenge the decision of the High Court (Commercial Division). Subsequently, by way of a notice of motion, the applicants filed Civil Application No.300/16 of 2022, moving this Court to stay the execution of the decree deriving from that judgment of the High Court. However, on the 1 was struck out by this Court on the ground that it was premature and had essentially contravened rules 11 (4) and 11 (7) (d) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Undeterred, the applicants made a second attempt and filed Civil Application No.489/16 of 2024 in this Court seeking a stay of execution of the samedecree. On the date when that application was scheduled for hearing, the applicant's counsel withdrew it from the Court under rule 58

(1) of the Rules. Subsequently, however, the applicants approached this Court with this a fresh application. At the threshold of its hearing, the respondent's counsel blocked the applicants' way by raising two pertinent points of law as follows, that:

1. To the extent that there is no application for execution filed, this application contravenes mandatory provisions of Rule 11 (4) and 11 (7) (d) of the Court of Appeal Rules, 2009, G.N. No. 368 of 2009 as amended by G.N. No. 362 of 2017, G.N. No. 344 of 2019, G.N. No. 188 of 2024 and the decisions of this Court in Civil Application No. 300/16 of 2022: Hi Bros Canvas and Tents Limited & Another vs. I & M Babk (T) Limited at page 9- 10; Civil Application No. 621/17 of 2021: S.M Saeed vs. Corporate Security Ltd & 2 Others, at pages 9-10; Civil Application No. 613/16 of 2023: 2 Maginga Business Holdings Company Limited & 4 Others vs. CRDB Bank PLC at page 1-2.

2. This Court has no jurisdiction to grant the prayers sought pursuant to this Court's decisions in Civil Application No. 243 of 2016: National Housing Corporation vs. Peter Kassidi & 4 Others, at page 9-11 and Civil Application 1273 of 2024: Maginga Business Holdings Company Limited & 4 Others vs. CRDB Bank PLC at page 6-8. On the 14th of February, 2025, the advocates representing the parties appeared before me through Video Conference from Dar-es-Salaam sub- registry of this Court. Mr. Godwin Muganyizi appeared for the applicants while Mr. Godwin Nyaisa appeared for the respondent. According to Mr. Nyaisa the gist of the first objection is the applicant's failure to attach a copy of the notice of execution as required by rule 11 (7)
- (d) of the Rules. He contended that there is no proof of execution proceedings capable of being stayed. Instead, he argued, what the applicants attached to their application as Annex. H-21 is a letter issued by the Registrar for Lands under Section 78 (6) of the Land Registration Act, Cap. 334, R.E. 2019. He argued that, the same cannot and does not amount to a notice of an intended execution capable of being stayed by this Court. It was his contention, therefore that, the applicants are in breach of rule 11 (7) (d) of 3 the Rules, and the application is premature given that there is no application for execution pending before any Court in Tanzania. To buttress his submission, he referred to this Court its own decisions in the cases of Hi Bros Canvas and Tents Limited & Another vs. I & M Bank (T) Limited, in Civil Application No. 300/16 of 2022[2024] TZCA 251 (28 March 2024) (at page 9-11); Hassan Seif Mtungakoa & Others vs. Kuruthum Yusuf, (Civil Application No.33 of 2023) [2023] TZCA 87 (3 March 2023); Joseph Chacha Magabe vs. Board of Trustees of CCM (Civil Application No.562/8 of 2023) [2024] TZCA 322 (7 May 2024); and Mountain Hill Nursery & Primary School Limited vs. International Commercial Bank (Tanzania) Limited, (Civil Application No. 810/16 of 2023) [2024] TZCA 915 (20 September 2024). He therefore urged this Court to uphold the respondent's first objection. Mr. Muganyizi disagreed with what Mr. Nyaisa submitted. He held a firm view that the first preliminary objection is devoid of merits. First, he contended that, since it is not disputed that there is currently a pending appeal in this Court, all subordinate courts have no jurisdiction to issue any other order while the appeal is pending. He referred to this Court the case of AERO Helicopters (T) Ltd Vs. F.N. Janem [1990] TLR. 142. Second, he distinguished most of the authorities which Mr. Nyaisa referred to when supporting the first objection. As for him, while it is true that in the Hi Bros Case (Civil Application No. 300/16 of 2022) (supra), the Court found that there were no execution proceedings or any recovery process capable of being stayed, in the present application the applicants have revealed that the respondent has initiated a recovery process, and, for that reason, they have a right of stay of that recovery process. According to Mr. Muganyizi, an application of this nature can be filed either when a recovery process has been initiated or when there is a pending application for execution. To support that submission, he relied on the same Hi Bros Case (Civil Application No. 300/16 of 2022) (supra), particularly on page 9. Rejoining on the first objection, Mr. Nyaisa stated that, in no way can the process of transfer of property in recovery of a loan be equated with

execution proceedings envisaged under rule 11 (7) (d) of the Rules. He maintained that, unless execution proceedings are shown to be on-going in the High Court, this application is premature and should be struck out with costs. I have carefully considered the rival submissions by both counsel for the parties. I have also examined the record of this application and the authorities relied upon. In my view, the crux of the matter in this application revolves on two issues. The first issue relates to the first objection and it is whether a transfer 5 application under section 78 (6) of the Land Registration Act, Cap.334 R.E. 2019 can be equated to execution proceedings before the High Court and, if so, whether by attaching a notice made under section 78 (6) of the Land Registration Act, Cap.334 R.E 2019, the applicant has complied with rule 11 of the Rules of this Court. I shall shortly afterwards consider this issue first. The second issue, which relates to the second objection, and which I shall consider afterwards, is whether this Court's inherent jurisdiction under rule 4 (2) can be invoked where an applicant has not complied with the requirements of rule 11 of the Rules. Starting with the first issue, it is trite that, if this Court is to grant an application for stay of execution of a decree, the respective applicant must satisfy the Court that he/she is in full compliance with the requirements set out under rule 11 (4) and 5 (a) and (b) of the Rules as well as the requirements set out under rule 11 (7) (a), (b), (c) and (d) of the Rules. The case of Hassan Seif Mtikungoja (*supra*) is quite instructive. One of the requirements that need to be satisfied under rule 11 (7)

- (d) of the Rules is that a notice of the intended execution must accompany an application for stay of execution whenever such application is filed in Court. In his submission, Mr. Nyaisa argued that the applicants have not complied with the requirements of that rule 11 (7) (d) of the Rules. Mr. 6 Muganyizi is opposed to Mr. Nyaisa's submission, arguing that, the applicants are fully compliant with the said rule. In his submission, however, he seems to be relying on a notice issued by the Registrar of Titles in respect of an application for transfer of title under power of sale. Can such a notice be the same as a notice of an application for execution of a decree? The answer to the above question is in the negative. First, rule 11
- (7) (d) of the Rules is clear that what is to be attached in support of the notice of motion is a notice of the intended execution. That notice of execution is issued by the executing officer and served on the applicant to inform him/her about the existence of an application for execution as envisaged under rule 11 (4) of the Rules. It follows, therefore, that, the notice envisaged under rule 11 (4) of the Rules cannot be a notice issued by the Registrar of Titles under Section 78 (6) of the Land Registration Act, Cap. 334 R.E. 2019 because, the Registrar of Titles is not an execution officer envisaged under rule 11 (4) of the Rules. Second, an application for transfer of title under the Land Registration Act is a separate legal process whose focus is on a formal change of title over the particular property in question. On the contrary, execution proceedings for which a notice of execution is issued, are a court- driven process to enforce a judgment against a debtor and, it may involve selling the judgement debtor's property to satisfy the debt. It follows, 7 therefore, that the two processes are not directly related to the extent of one being a replica of the other. A similar observation was made by this Court in the case of Hassan Seif Mtikungoja (*supra*). In that case, the applicant

did not attach a notice of execution to his application for stay of execution. Instead, what was attached thereto was a notice of transfer of title on the suit property addressed to the applicant by the City Council. This Court held that neither was the City Council an executing officer referred to in rule 11 (4) of the Rules nor was the respondent's request for a transfer of title same as an application for execution of the decree. The application before the Court was, thus, struck out for being non-compliant with rule 11 (4) of the Rules. In the current application, however, the counsel for the applicant argued, relying on what this Court stated on page 9 of the Hi Bros case (supra), that since the respondent has embarked on a recovery process, a stay application can be made against such a process. I have looked at page 9 of this Court's decision. For ease of reference, I will excerpt what this Court stated in that case. It reads as follows: "As argued by the applicants' counsel without doubt, for the respondent to enjoy the awards accorded to them by the decree and to recover the amount\ a process o f execution/recovery would have to take place. I f such process had been initiated, it would have acted as a notice to the applicant of impending process of execution/recovery o f the rights under the impugned decree." In my view, the applicants' counsel seems to have failed to grasp what this Court meant in that passage, especially when one considers the words "execution/discovery" and the context in which they were used. Essentially, that passage does not signify two separate processes. I hold that view because, in the context of a money decree, "execution" and "recovery" are words used interchangeably to mean the process of actively taking steps to recover money owed to the decree holder based on the court's judgment. When there has been a judgment of the Court granting victory to the decree holder, that process is initiated by way of filing execution proceedings before the executing court. In Hi Bros case (supra) the Court was also very clear on page 9 of its judgement, that: "if such a process had occurred, it would have been within the applicants' rights to apply for stay o f the execution processf armed with all the requisite documents in compliance with the law." (Emphasis added.) As provided for under rule 11 (7) (d) of the Rules, the "requisite documents" include, among others, a notice of execution. Generally, the above passage resonates well with what this Court stated in the cases of S.M. Saeed vs. Corporate Security Ltd & Another (supra) and National Housing Corporation vs. Peter Kassidi & 4 Others (supra). In these authorities it was emphasised that, an order of stay of execution can only be made to stay a process of execution of decree or order which is subject of an intended appeal and the same is addressed to an executing court (not to a party or a third party). Based on all those deliberations, I find substance in the first objection and, I hereby sustain it. As regards the second objection, Mr. Nyaisa argued that, although this application is premised under rules 4 (2) and 11 of the Rules, since rule 11 has not been fully complied with, rule 4 (2) of the Rules cannot come into play. He supported that view by relying on the decisions of this Court in the cases of National Housing Corporation vs. Peter Kassidi & 4 Others, Civil Application No.243 of 2016 [2019] TZCA 153 (4 June 2019), S.M Saeed vs. Corporate Security Ltd & 2 Others Civil Application No. 621/17 of 2021 [2023] TZCA 17373 (30 June 2023) and Maginga Business Holding Company Ltd & 4 Others vs. CRDB Bank Pic, Civil Application No. 1273 of 2024 [2024] TZCA 1309 (2 December 2024). He therefore urged this Court to sustain the second objections as well. 10 However, Mr. Muganyizi argued that the

second objection is devoid of merits as the applicants have rightly invoked rule 4 of the Rules which confers inherent jurisdiction on this Court. He distinguished most of the cases relied on by Mr. Nyaisa, including the case of National Housing Corporation (supra) which he contended that, the applicant therein was seeking for injunctive relief unlike in the present application where the applicants are seeking for a stay of execution. I have examined at respective authority which Mr. Nyaisa relied on but Mr. Muganyizi distinguished. In that case the question for determination by the Court was whether the Court could have invoked its inherent powers under rule 4 (2) (a) and (b) of the Rules to issue restraint orders against the first, second and third respondents from executing a decree of an inferior tribunal. The gist of the matter, therefore, was about injunctive relief rather than an order of stay of execution. On pages 18-19 of its decision, the Court, finding logic in rule 11 of the Rules, observed that had it been an application for stay of execution it "would have inherent powers to issue such an order, but not one of injunction." but, having said so, is Mr. Nyaisa's submission out of place? I do not think so. In my view, the provisions of rule 4 (2) (a) and (b) of the Rules, as correctly argued by Mr. Nyaisa, cannot be invoked while there is nothing as to execution process to be stayed and nowhere to direct the order of stay of execution if made by the Court. In fact, as alluded to earlier, an order of stay of execution is directed to a court officer overseeing the process of execution. Since there is no evidence in this application of existence of such a process, I fully agree with Mr. Nyaisa that rule 4 (2) of the Rules cannot be invoked if rule 11 of the Rules has not been complied with. The second objection is therefore laden with substance, and I hereby uphold it. Having sustained the two points of law raised by the respondent's counsel, I find this application to be misconceived, premature, and essentially filed in contravention of rule 11 (4) and 11 (7) (d) of the Rules. Accordingly, I strike it out with costs. It is so ordered. DATED at DODOMA this 20th day of February, 2025. D. J. NANGELA JUSTICE OF APPEAL The Ruling delivered this 20th day of February, 2025, in the presence of Mr. Sosthenes John Kato, learned counsel for the Applicant, Mr. George and Mr. Kapola Semu, learned counsel for the Respondent is hereby certified as a true copy of the original.

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Prepared on 14 October 2026 · Esheria