

TANZANIA / JUDGMENT

otto mark mosha and another vs peter alfred mpine and another 2024 tzhc 69 30 january 2024

COURT
TZHCDECIDED
30 January 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MOROGORO DISTRICT
REGISTRY AT MOROGORO MISC. CIVIL APPLICATION NO. 28354 OF 2023 (Arising from Civil
Appeal No. 27766/2023 High Court of Tanzania at Morogoro; originating from the Judgement of
the District Court of Morogoro in Civil Case No. 6 of 2023) OTTO MARK MOSHA APPLICANT
ROWLAND AUGUST MLAY 2nd APPLICANT VERSUS PETER ALFRED MPINE RESPONDENT
APOLINARY JOSEPH RUSINGIZA 2nd RESPONDENT

RULING

17/01/2024 & 30/01/2024 KINYAKA, J.: Pursuant to sections 95, 68(c) and (e) and Order XXXVII, Rule 1(a) of the Civil Procedure Code Cap. 33 R.E. 2019, the Applicants preferred the Instant application seeking the intervention of the Court to grant temporary injunction against the Respondents, their agents, assignees, and any other person exercising authority on their behalf, from removing, taking away, alienating, processing, selling or otherwise dealing with the uncrushed stones containing gold minerals; and generally from dealing with the mining area bearing Primary Mining License No. PML 0842 MOR located at Mazizi, Maseyu Village, Morogoro District in Morogoro, pending hearing and determination of Civil Appeal No. 27766 of 2023 before this Court. From the uncontested facts deduced from the joint affidavit sworn by the Applicants in support of the application, the Applicants are judgement debtors pursuant to the decision of the District Court of Morogoro in Civil Case No. 6 of 2023. In the said suit, the Applicants were held to have breached the agreement dated 03/07/2021. Consequently, the District Court ordered the appointed site manager to distribute the uncrushed gold stones in accordance with the share percentage agreed under the agreement. Immediately upon delivery of the decision of the District Court, the Respondents embarked on executing the orders of the District Court without lodging an application for execution and obtaining an order thereof. At the hearing of the application. Advocates Ignas Seti Punge and Mandela Nuhu Kisawani represented the Applicants and Respondents, respectively. In his submissions in support of the application, Mr. Punge adopted the contents of the affidavit sworn by the Applicants as forming part of the Applicants' submissions. He referred the Court to the case of Atilio v. Mbowe(1969) HCD 284 which outlined

three conditions for the grant of an order of temporary injunction namely, there must a serious question to be tried by the Court; the Applicant is likely to suffer injuries which will be irreparable before his legal rights are established; and that there will be greater hardship and mischief suffered by the Applicant from the withholding of the injunction than will be suffered by the Respondents from granting the same. He informed the Court that the application was preferred upon the Respondents' ongoing actions of executing the order of the Court without involving the Applicants which call for the Court's interference to protect the Applicants from irreparable loss. He argued that the three conditions were met in the present application. In his submission opposing the application, Mr. Mandela adopted the contents of his counter affidavit as forming part of the Respondents' submissions. He admitted that temporary injunction can be ordered when the conditions articulated in the case of *Atilio v. Mbowe* are met. He argued that the Applicant failed to establish how they will be prejudiced and affected by the ongoing activities at the mining site described as PML/0842/MOR. He contended that the Applicants should have satisfied the Court that if injunction is not granted, they will suffer injury which cannot be compensated by monetary value. He added that the Applicants can still be compensated monetarily even if the present application is not granted as the contract is not vitiated and is still being performed. He referred the Court to the decisions in *Misc. Land Application No. 72 of 2020 between Gwabo Mwansasu & 10 Others v. Tanzania National Road Agency (TANROADS) and Attorney General and Cosmos Properties Limited V. Exim Bank Limited*, *Misc. Civil Application No. 566/2021*, where the High Court had similar position that if damages can be paid by the Defendant, injunction cannot be granted, however strong the Plaintiff's claim appear to be strong. Mr. Mandela submitted in respect of the condition on balance of convenience that it is the Respondents who own majority of the shares compared to the Applicants. He argued that if injunction is granted, it will affect the Respondents than the Applicants. Counsel prayed for dismissal of the application. Mr. Punge rejoined that the application was not pegged on the contract but the decision of the trial court, the subject of a pending appeal before the Court. He submitted that the Respondents were still taking the uncrushed gold stones contrary to the decision of the trial court and without obtaining an order for execution. He reiterated that the Applicants complied with the conditions set In *Atilio's* case and prayed for the grant of the application. Upon hearing the parties' respective submissions, I now turn to determine whether the Applicants' application is tenable. It is clear from the facts and submissions of the parties herein that the application for temporary injunction is sought to restrain the Respondents from executing the decree of the District Court of Morogoro in Civil Case No. 6 of 2023. The Applicants contended in their affidavit that they preferred the present application instead of an application for stay of execution because the Respondents have neither preferred an application for execution nor served upon them a notice of execution. It is a common knowledge that temporary injunction is an interim preventive remedy granted to a party to a suit, who is aggrieved by the acts of another party until there has been trial or court action. It is normally granted to maintain status quo in order to prevent damage or preserve the subject matter until the suit is determined. In my considered view, temporary Injunction is normally applied for either before one lodges a suit (*mareva* injunction), at the beginning of the suit, or in the course of proceedings of a suit, in case there are actions of a party that are likely to damage or alienate a property, the subject

matter of a suit. It means that temporary injunction is not an appropriate relief or remedy when a suit is determined and a decree is obtained. In the instant application, where there is a decree of the court, the judgement debtor was obliged to apply for stay of execution instead of temporary injunction. See the decision of the Court of Appeal in the case of Hyasinta Elias Malisa v. The Ministry of Land, Housing & Human Settlements Development & Others (Civil Application No. 614/17 of 2021) [2023] TZCA 17752 (11 October 2023) at www.Tanzlii.org on page 5 through to 6 of the decision. My above position is based on a simple logic that while a decree holder is entitled to execute his decree upon determination of a dispute by a competent court, in cases requiring an order for temporary injunctions, the rights of litigants are yet to be established. In such instances, a court issuing injunction is normally unsure as to who between the plaintiff and the defendant, is the lawful owner of the disputed property. However, in cases where a suit is determined and a decree is obtained, the decree holder is entitled to enjoy the fruits of his judgement, unless there is a lawful order — staying execution of such decree. It is the judgement debtor who has the obligation to apply for stay of execution and show cause why the decree holder should not execute his decree. It is from the above observations, I find the present application misconceived. This being an appellate Court, it has no powers to grant temporary injunction order to prevent an execution of the decree of the lower court. The Applicants ought to have applied for stay of execution instead of preferring an application for temporary Injunction. I am not travelling in no man's land in holding as I do. The Court of Appeal had similar views in the case of Prada Enterprises Co. Limited v. Joyce Alex Khalid and 2 Others Civil Application No. 279/01 of 2020 [2023] TZCA 17468 (3 August 2023) at www.Tanzlii.org where the Applicant lodged an application for stay of execution of the decree of the High Court under Rule 4(2)(a) and (b) and 11 (3) of the Court of Appeal Rules, 2009 as amended. The Applicant preferred the application upon noting the Respondents' development of the suit plot after the Respondent obtained a decree of the court. The Court Appeal held on page 9 through 10 of the decision that:—"Our examination of the record has revealed that it is crystal clear that the applicant is seeking a restraint order aimed at preventing the respondents from carrying out developments in the suit property which will alter the status quo. However, it is our view that this Court is not vested with the powers to issue restraining orders in matters which come before it by way of appeal. In the case of National Housing Corporation (supra) cited by Ms. Tenga, the Court explained the difference between the injunctive orders and stay of execution orders as follows: "It bears reflecting that a temporary injunction is an equitable relief for maintaining the status quo between the parties pending the hearing and determination of an action in court. The remedy is in the nature of a prohibitory order granted at the discretion of the court against a party. On the other hand, while an order for stay of execution is also in the nature of a prohibitory order, it is addressed to the court carrying out the execution to suspend or delay the enforcement of the decree concerned pending hearing and determination of a proceeding, most certainly an appeal. What a stay of execution does, therefore, is to prohibit the court from proceeding with the execution further." The Court of Appeal proceeded to hold that the two judicial processes cannot be used interchangeably as an injunction is usually passed against a party while a stay order is addressed to the court. It means that an appellate court cannot issue an injunction order to prohibit a judicial process like execution of a decree. In the present matter, the Applicants

averred that the Respondents are wrongly executing the decree of the court without obtaining an order of the court allowing execution of the decree. I am of the position that a temporary injunction cannot be pegged on the Respondents' failure to follow the procedure of obtaining an order of the court in order to execute their decree. The reason being that a decree holder does not necessarily need to apply to court for an order of execution before he mounts execution. I am fortified by the decision in the case of Ibrahim Twahili Kusundwa & Another v. CRDB Bank PLC & Others (Civil Appeal No. 194 of 2021)[2024] TZCA 7 (19 January 2024) at www.Tanziii.orQ, where the Court of Appeal held on page 24 through to 25 of the decision that;- , V -I' • ■ ^5 held in Shell and BP Tanzania Limited v. University ofDaresSaiaam[2002]TLR. 225, at232and233, a decree-holder need not seek the assistance of the court to execute a decree in his favour ifhe can do so peaceably. Put differently, if the decree can be satisfiedsmoothly withoutany breach ofpeace or violence occurring, the decree-holder can proceed to enforce the decree singly. Depending on the nature ofthe subject-matter and the disposition of the judgment-debtor, execution of a decree may not require an order ofthe court. Having found that the Respondents were engaging in executing the decree of the trial court, the Applicants were obliged to lodge an application for stay of execution of the decree of the trial court and not the present application. It is on the basis of the above findings, I hold the Applicants' application a misconception. I accordingly dismiss the same with costs. It is so ordered. DATED at MOROGORO this 30^^ day of January 2024. O c H. A. KINYAKA ■ir JUDGE X LJ 30/01/2024 10 ; -■ , s.

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