

TANZANIA / JUDGMENT

# sofia jacob vs monica tsakhali

## another 2022 tzhc 952 31 march 2022

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TZHCDECIDED  
31 March 2022

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY AT ARUSHA MISC. CIVIL APPLICATION No. 15 OF 2022 (Arising from Civil Appeal No. 22 of 2021 of Babati District Court Originating from Civil Case No. 01 of 2021 of the Primary Court of Babati at Dareda) SOFIA JACOB..... APPLICANT VERSUS MONICA TSAKHALI..... 1st RESPONDENT KIBAIGWA AUCTION MART & COMPANY LTD..... 2nd RESPONDENT

### RULING

31st March, 2022 TIGANGA, J Under Certificate of Urgency the applicant Sophia Jacob filed to this Court an application asking for stay of execution of the decision of the Primary Court of Babati District at Dareda in Civil Case No. 01/2021. The application was filed under Order XXXIX Rule 6(2) of the Civil Procedure Code Act [Cap 33 R.E. 2019]. It was filed by the Chamber Summons supported by the affidavit sworn by the applicant. From the affidavit and arguments of Mr. Pascal Peter the counsel for the applicant, after Dareda Primary Court had decided the dispute between i parties, the applicant was aggrieved by the decision, she appealed to the District Court where her appeal failed consequent of which she decided to appeal to this Court where she proved to have filed her appeal since January, 2022. The counsel submitted that since the fact that there is an appeal before this Court has not been disputed by the respondent, he at the end asked this Court to allow the application and stay the execution as prayed. The 1st respondent opposed the application by filing the counter affidavit sworn by the 1st respondent and at the hearing of the application, through the service of Mr. Festo Jackson, learned counsel, the respondent replied by first attacking the application, that it has been brought under the provision of Order XXXIX, Rule 6(2) of the CPC (supra) which is not applicable to the proceedings originating from the Primary Court. Further to that he complained that the chamber summons and the affidavit seeks an order for staying execution, while the trial Primary Court has already ordered execution to proceed, though the same has not been carried out. Furthermore, he complained that the applicant counsel has not managed to explain the possibility of success of the 2 appeal before this Court, and he has not made any commitment of depositing security should the stay be granted. In his view the application is a calculated delay tactics preventing the respondent from enjoying the fruit of the decree. He prayed the application to be dismissed with costs. In a brief rejoinder

made by the counsel for the applicant, firstly, he said the Court has been properly moved because Civil Procedure Code [Cap 33 R.E 2019] hereinafter the CPC, applies to the High Court, therefore it was correct for the applicant to use Order XXXIX Rule 6(2) of the CPC (supra), secondly, he submitted that since the respondent has no dispute on the existence of the appeal against them. He submitted that the presence of appeal is a proper ground for staying execution. He submitted that since the execution has not been carried forward then the same can be stayed. Regarding the issue of deposition of security, he submitted that, the issue was not raised in the counter affidavit; therefore it can not be raised at the stage of hearing. In the end he asked for the application to be granted pending determination of the appeal. After considering the submission made by the parties in support and against the application, I find that the counsel for the respondent in 3 his argument raised a point of law that the application was preferred under improper or inapplicable or wrong provision and wrong law. It is a trite law that, in any case where a point of law is raised, the Court is required to first consider the point of law before considering the point of facts. On that base, I will first deal with the point raised by the counsel for respondent regarding the legality of the application it being filed under the CPC. As earlier on submitted and actually agreed by both parties, the application at hand seeks to stay the execution of the decree passed by Dareda Primary Court in Civil Case No. 01/2021. The contention of the counsel for the respondent is that, CPC does not apply to the proceedings which originate from Primary Court, he said the applicable law is the Magistrates Courts Act, though he did not say any particular provision in the Magistrates Court's Act. In considering this point, I have had an opportunity of passing through the law related to the complained of matter, in that bid, I find section 2 of the CPC, it provides that, the CPC applies to the proceedings before the High Court, Resident Magistrates' Court and District Court. In section 3 of the same the Court is defined to mean and include the High Court, Resident Magistrates' Court and the District Court. 4 In the Magistrates Courts Act, there is no express provision providing for stay of execution by the High Court in the proceedings or orders originating from the Primary Courts. However, section 32 of the said law provides for the general powers of the High Court on appeal or revision, that is; 32 (1) Where:-

- (a) N/A
- (b) The High Court calls for the recording of any proceedings or any record is forwarded to the High Court under Section 30, the High Court or the District Court may for the reasons to be recorded in writing
  - i) N/A ii) In any other case, order that the execution of the decision or order appealed against shall be suspended pending the hearing of the appeal or termination of revisions! proceedings" Further to that, Rule 8 (1) of the Civil Procedure (Appeal in Proceedings Originating in Primary Courts) Rules G.N. 312 of 1964 provides that; 5 " 8(1) Any person who has filed an appeal to a district court may apply in writing to that court for a stay of execution of the decision or order against which he is appealing." Reading the provision herein cited between lines, I find with powers to stay execution upon application by the person who has filed an appeal to stay execution of the decision or order against which that person is appealing. .That provision does not provide similar powers to the High Court in

the similar situation, however since there is no that direct provision for the High Court, an inspiration may be drawn from Rule 8(1) to provide the High Court with similar powers. Now looking at these two laws elaborated hereinabove, I find it justified to find that the matter for staying of execution of the decree passed by the Primary Court, the laws applicable are the Magistrates Courts Act [Cap 11 R.E. 2019] and the Civil Procedure (Appeal in proceedings originating in Primary Courts) Rule GN No. 312 of 1964. The Civil Procedure Code [Cap 33 R.E. 2019] does not apply. On that reasoning I find the arguments raised by the counsel for the respondent to be meritorious and the application at hand deserves to be struck out. 6 That said, the application is struck out for the reasons given, the applicant is advised if still interested to file the same by using the proper law. Since the point upon which the order for struck out has based was not raised by the counsel on his own but after being probed by the Court, the respondent is not entitled to costs. It is accordingly ordered. DATED at ARUSHA this 31th day of March, 2022. TIGANGA JUDGE 7

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