

**IN THE COURT OF APPEAL OF TANZANIA  
AT ARUSHA**

**CIVIL APPLICATION NO. 2 OF 2006**

**AWINIA MUSHI.....APPLICANT**

**VERSUS**

**TROPICAL PESTICIDES RESEARCH  
INSTITUTE.....RESPONDENT**

**(Application for Execution of decree from the Decision of the  
High Court of Tanzania at Arusha)**

**(Kileo, J.)**

**dated the 13<sup>th</sup> day of March, 2006**

**in**

**Land Case No. 3 of 2005**

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**RULING**

**5 October 2007**

**KAJI, J.A.:**

By a notice of motion the applicant, Awinia Mushi, is moving the Court for an order that the execution of the decree in High Court Land Case No. 3 of 2005 delivered at Arusha on 5<sup>th</sup> December, 2005 be stayed pending determination of the intended appeal. The application has been made under Rule 9 (2) (b) of the Court of

Appeal Rules, 1979. The notice of motion is supported by the affidavit deponed to by the applicant.

The matter refers to house No. 163 (hereinafter to be referred to as the suit premises) situated on Plot No. 74 Block I Haile Sellasie Road within Arusha City. According to the applicant's affidavit he is in occupation of the same as a lawful tenant since 1981 as Director of Kibo Agromed Services, and that he rented the suit premises from the Arusha International Conference Centre. But according to the respondent, Tropical Pesticides Research Institute (TPRI), the applicant is a trespasser, and that they are the lawful owner of the said suit premises. As owner of the suit premises the respondent wanted vacant possession of the same and to be paid arrears of rent/mesne profit for the whole period the applicant had been in occupation. The applicant refused to comply with. The respondent took the matter to the High Court Land Division and claimed for, *inter alia*, declaration of ownership and vacant possession.

On the hearing date neither the applicant who was the defendant nor his advocate appeared. The hearing proceeded

exparte and the respondent was declared to be the sole owner of the suit premises, and the applicant was declared a trespasser. It was also declared that the applicant, at all material times, had occupied the suit premises illegally. He was ordered to give vacant possession of the suit premises immediately. He was also ordered to pay rent to the respondent for all the time he had been in occupation of the suit premises. The applicant was also ordered to pay the costs of the suit and an interest at 10% on the decretal amount.

The applicant was aggrieved with the exparte judgment. However he opted to apply in the same court for setting aside the exparte judgment rather than to appeal against the merits of the judgment itself. The learned trial judge was not satisfied with the applicant's grounds for his absence and that of his advocate on the hearing date. The applicant was aggrieved with the refusal and lodged a notice of appeal and applied for leave which was granted. While the intended appeal is pending the applicant has filed this application on the following grounds: -

- (a) That there are good and sufficient reasons for the grant of a stay of execution on grounds of hardship.*
- (b) That there are good and sufficient reasons for the grant of stay order on the balance of convenience.*
- (c) That the appeal has good chances of success; and*
- (d) That the applicant is in peril of being evicted from the suit premises before determination of the intended appeal unless a stay order is granted.*

The grounds were elaborated on by the applicant's counsel Mr. Nelson S. Merinyo who also adopted the applicant's affidavit in his oral submission. Dr. A. M. Mapunda, learned counsel for the respondent, strongly objected the application in his oral submission which was mainly based on the respondent's counter affidavit deposed to by Morandi M. Matemu, the Principal Personnel and Administrative Officer of the respondent.

On my part I think, before considering whether the grounds given by the applicant are sufficient to grant the order applied for,

there is one issue which must be resolved first. As indicated above, the application is for stay of execution of the decree in High Court Land Case No. 3 of 2005, which was delivered at Arusha on 5.12.2005, pending determination of the intended appeal. On its face value it gives the impression that the decree which is sought to be stayed is the one which is intended to be appealed against. Indeed that is what it should be, otherwise how can a party apply for stay of execution of a decree which he is not intending to appeal against? But incredibly that is what the applicant is doing in the instant case. The applicant is applying for stay of execution of the decree delivered on 5.12.2005. It is the decree in the *exparte* judgment. But according to the oral submission by his advocate, the intended appeal is not against the merits of the *exparte* judgment but against the refusal to set it aside. Mr. Merinyo was very categorical that the notice of appeal which was filed on 26.3.2006 is against the refusal to set aside the *exparte* judgment. Unfortunately a copy of the said notice of appeal was not annexed with the application. But there is no reason to doubt what the learned counsel said on the bar in his oral submission. In fact even

paragraphs 11, 12 and 13 of the applicant's affidavit accompanying the notice of motion appear to suggest what the learned counsel said. These paragraphs read as follows: -

11. *On becoming aware of the ex parte judgment and decree I immediately applied for the setting aside of such judgment and decree principally for the reason that I had been prevented from appearing on account of poor health. Annexed and collectively marked Annexure A '5', is a copy of the doctor's report on his diagnosis;*
12. *On March 13, 2006 my application was refused. Annexed and marked Annexures A '6' and A '7' respectively, are copies of the Ruling and Order.*
13. ***Dissatisfied with such order I filed a Notice of Appeal*** and applied for copies of the relevant documents, duly serving such notice and application on the respondent (emphasis supplied).

Since the intended appeal is not against the merits of the ex parte judgment delivered on 5.12.2005 but against the refusal delivered on 15.3.2006, in my view, it would be improper to invoke the provisions of Rule 9 (2) (b) of the Court of Appeal Rules 1979 and grant the order sought. Rule 9 (2) (b) reads: -

*.....the Court may, in any Civil proceedings,  
**where a notice of appeal has been  
lodged in accordance with Rule 76,  
order a stay of execution,** on such terms  
as the Court may think just (emphasis  
supplied).*

In my view this provision confers jurisdiction to the Court to order stay of execution of a decree or order where the said decree or order is intended to be appealed against as reflected in the notice of appeal. In the instant case the decree which is sought to be stayed is not intended to be appealed against, and the refusal order which is intended to be appealed against is not executable, and so incapable of being stayed. The applicant appears to be in a dilemma. He is asking the Court to invoke the provisions of Rule 9 (2) (b) to stay execution of a decree which he is not intending to appeal against,

and the order which he is intending to appeal against is unexecutable and incapable of being stayed. Perhaps if the notice of motion had been made under Rule 3 (2) (a) or (b) the position would have been different.

In the event, and for the reasons stated above, I strike out the application with costs.

DATED at DAR ES SALAAM this 9<sup>th</sup> day of November, 2007.

S. N. KAJI  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.

I. P. KITUSI  
**DEPUTY REGISTRAR**



Delivered under my hand and Court Seal in Open Court/Chambers at  
.....this .....day of .....2007.

.....  
**DEPUTY REGISTRAR**