

Citation	Parties	Legal Principles Discussed
<p><b>CIVIL APPLICATION NO. 40 OF 2007- COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM- LUBUVA, J.A</b></p>	<p>1. SHABIR EBRAHIM BHAJEE 2. FAZA SHABIR BHAJEE 3. HUZAIRA SHABIR BHAJEE Vs. 1. SELEMANI RAJABU MIZINO, 2. REGISTRAR OF TITLES-</p> <p>(Application for Stay of Execution from the Judgment of the High Court of Tanzania at Dar es Salaam District Registry- Civil Application No. 43 of 2004 <b>Kalegeya, J.A.</b>)</p>	<p><b>STAY OF EXECUTION</b>-whether the application has been overtaken- usually, stay of execution is sought by the losing party in order to maintain the status quo obtaining at the time of the application until the appeal pending is determined.</p> <p>Where the status quo obtaining at the moment has changed from what it was when the application was instituted for instance if there is nothing as it were, no order to be restrained can be issued by the order of stay of execution</p> <p>The transfer of ownership and the registration of the Certificate of Title having already been effected, stay of execution would serve no practical purpose.</p>

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**CIVIL APPLICATION NO. 40 OF 2007**

1. SHABIR EBRAHIM BHAIJEE  
2. FAZA SHABIR BHAIJEE  
3. HUZAIRA SHABIR BHAIJEE } ..... APPLICANTS

**VERSUS**

SELEMANI RAJABU MIZINO ..... 1<sup>ST</sup> RESPONDENT  
REGISTRAR OF TITLES ..... 2<sup>ND</sup> RESPONDENT

(Application for Stay of Execution from the Judgment of the  
High Court of Tanzania at Dar es Salaam District Registry)

(Kalegeya, J.A.)

dated the 16<sup>th</sup> day of August, 2006

in

Civil Application No. 43 of 2004

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**R U L I N G**

23 November & 21 December 2007

**LUBUVA, J.A.:**

By notice of motion, the applicants are moving the Court for an order that the execution of the decision and decree of the High Court in Civil Appeal No. 243 of 2004 and any other orders made subsequent thereto be stayed pending the determination of the intended appeal.

In this application, Mr. Kesaria, learned counsel appeared for the applicants after Mr. Maira, learned counsel, had withdrawn from further conduct of the case.

The sequence of events leading to this application is summarized in the affidavit in support of the application. Briefly stated, it is as follows: In Ilala District Court Civil Case No. 154 of 2004 the respondent unsuccessfully sued the applicants. The case involved a house under Certificate of Title No. 35359, Plot No. 4, Block 74 Kariakoo. Dissatisfied, the respondent successfully appealed to the High Court in Civil Appeal No. 243 of 2004 in which judgment was delivered on 16<sup>th</sup> August, 2006. On 17<sup>th</sup> August 2006, the applicants filed notice of appeal.

Meanwhile, as the applicants set about taking necessary steps in obtaining relevant copies of the proceedings for the institution of the appeal in this Court, on 11.12.2006 the Assistant Registrar of Titles wrote a letter to the applicants. In the letter, the applicants were notified that the respondent had applied for the registration and transfer of the Certificate of Title No. 35359 to his name. The

applicants were further required to surrender the said Certificate of Title failure to which the Title would be cancelled and that another Certificate would be issued in favour of the respondent.

In the circumstances, fearing the threat that the Certificate of Title would be registered in the name of the respondent as indicated in the letter of the Assistant Registrar of Titles, this application has been filed.

When the application was called on for hearing, Ms Rwechungura, learned counsel for the first respondent, Selemani Rajab Mizino, raised a preliminary objection notice of which he had earlier given. The preliminary objection was based upon the ground that the application for stay of execution has been overtaken by the event. In her submission in support of the preliminary objection, Ms Rwechungura stated that following the letter of 11.12.2006 by the Assistant Registrar of Titles, the property, subject of the case, namely the house on Plot No. 4 Block 74, Kariakoo area under Certificate of Title No. 35359, was transferred and registered on 9.3.2007. In that situation, Ms Rwechungura submitted, the application for stay of

execution has been overtaken by the event. The reason, she further submitted, is that the registration and transfer of the property under Certificate of Title No. 35359, Plot No. 4 Block 74 Kariakoo was central in so far as the execution of the court decision in High Court Civil Appeal No. 243 of 2004 was concerned. The registration and transfer having taken place, counsel went on in her submission, there is nothing that the Court could do at this stage to reverse the action which was sought to be stayed in this application. She urged the Court to dismiss the application.

Mr. Kesaria, learned counsel, vehemently resisted the preliminary objection. His submission was based on two grounds. **First**, that the prayer by the respondent to be registered as the owner of the property, subject of the case by transfer of the Certificate of Title to his name flies against the decision of the High Court, (Kalegeya, J. as he then was). Mr. Kesaria elaborated that under prayer 2 of the plaint, the respondent, the initial plaintiff at the trial and the appellant in the High Court, prayed for a declaration that the respondent is the owner of the house No. 99 Aggrey Street in

Kariakoo. However, on appeal in the High Court Kalegeya, J. (as he then was) did not grant the prayer.

**Second,** with regard to what the Court can do at this stage when the registration of the house has taken place, Mr. Kesaria maintained that the Court should invoke rule 3 (2) (b) in order to do substantial justice. In this case, he urged, acting under the provisions of rule 3 (2) (b) the Court should restrain the respondent from further execution of the orders based on the High Court decision.

Finally, Mr. Kesaria drew the attention of the Court to what seems to me most unfortunate, inordinate and ugly development of the case lately. He said after the hearing of this application on 2.11.2007, the respondent has initiated a move in the Primary Court at Kimara for the eviction of the applicants from the house, subject of this application. This, Mr. Kesaria stressed, amounts to disrespect and contempt of the Court. He prayed the Court to make appropriate orders.

The determination of the preliminary objection raised in this application depends upon the issue whether the application has been overtaken by the event as urged by Ms Rwechungura, learned counsel for the respondent. In resolving this issue I think it is relevant at this juncture to reflect on the rationale behind the process of seeking stay of execution. Briefly stated, after the decision of the court in any particular civil or criminal case, usually, stay of execution is sought by the losing party in order to maintain the status quo obtaining at the time of the application until the appeal pending is determined.

In this case, what was the position obtaining at the time Kalegeya, J. (as he then was) delivered the decision of the High Court on 16.8.2006. A glance through the judgment of the High Court reveals that this matter has had a chequered history. It all started with Kariakoo Primary Court Probate and Administration Cause No. 6 of 1985. In that case one Abdul Ramadhani was appointed administrator of the estate of the late Ramadhani Mohamed. The estate, among others, involved house on Plot No. 10 Block 74, Aggrey Street, Kariakoo area, subject of this case.

Curiously, at that stage Abdul Ramadhani, the administrator, changed the ownership of the house into his name. Thereafter, it seems that the ownership of the house has changed hands several times. Eventually, at the time when the case was instituted in court the applicants were registered as the owners of the house, subject of this case.

In the circumstances, I am increasingly inclined to answer the question raised earlier in the negative. That is that the status quo obtaining at the moment has changed from what it was when the application was instituted on 27.3.2007. It is not disputed by both parties that the ownership of the House on Plot No. 10, Aggrey Street, Kariakoo was changed from the applicant into the name of the respondent, Selemani Rajabu Mizino. The Certificate of Title No. 35359 was transferred and duly registered in the Land Registry on 30.3.2007. The copy of the Certificate of Title availed to the Court as well as to Mr. Kesaria, learned counsel for the applicant, bears testimony to this effect.

In that situation, there is nothing as it were, to be restrained by the order of stay of execution if granted. The transfer of ownership and the registration of the Certificate of Title having already been effected, stay of execution at this stage would, in my view, serve no practical purpose. It is for this reason that I am respectfully in agreement with Ms Rwechungura that the application for stay of execution in this case has been overtaken by the event. The matter in respect of which stay of execution is sought has gone beyond the stage in which a stay order would meaningfully serve any purpose to restrain the respondent. In a number of cases where it is shown that the application has been overtaken by the event, the Court has dismissed such applications. See for instance, **Joachim Kalembe v M.K. Mwamlima**, Civil Application No. 76 of 1998 and **Shell and BP Tanzania Limited v The University of Dar es Salaam**, Civil Application No. 68 of 1999 (both unreported).

In this regard, Mr. Kesaria has vigorously urged the Court to dismiss the preliminary objection with a view to do substantial justice to the case. He invited the Court to invoke the provisions of rule 3 (2) (a) of the Court Rules, 1979. I appreciate Mr. Kesaria's great

industry and zeal to argue the matter before me on this point. However, with great respect, I am unable to accept this submission. It is common knowledge that rule 3 (2) (a) is invoked in situations for which no provision is made under the rules or any other written law. In this matter, it is crystal clear that rule 9 (2) (b) specifically provides for stay of execution. Therefore there is no basis upon which to resort to rule 3 (2) (b) as urged by Mr. Kesaria. I reject the submission on this point.

Before concluding this ruling I wish to make the following brief comment. This relates to what the attention of the Court was drawn to by Mr. Kesaria, learned counsel for the applicants. He said that as shown earlier after this application was heard on 2.11.2007, the respondent has applied to the Primary Court at Kimara for the eviction of the applicants from the house. This, Mr. Kesaria submitted, was a very serious move on the part of the respondent which amounts to disrespect for the Court.

At the instance of the Court, Ms Rwechungura, learned counsel for the respondent, vehemently denied any involvement in this move.

From the historical background of the matter, there is no denying the fact that the Primary Court was involved in this matter in relation to probate proceedings before the case went on appeal to the High Court and this Court as well. To this extent, I can see no problem whatsoever in the involvement of the Primary Court in this matter.

However, the most disquieting and irregular aspect of the matter, to say the least, is the alleged move by one of the parties, as alleged by Mr. Kesaria if it is true, to initiate another action in the matter in the court below when the same matter is still being dealt with in this Court. To do so, or any attempt to do so, would, in my view, closely amount to disrespect for the Court which should not be allowed. For this reason, in view of the seriousness of the allegation raised, it is directed that the Registrar, Court of Appeal should instruct the Registrar of the High Court to investigate the matter in this regard so as to establish what exactly happened in the Primary Court after the hearing of the application on 2.11.2007.

Reverting to the preliminary objection raised in this application, as the application for stay of execution has been overtaken by the event, it is accordingly dismissed with costs.

DATED at DAR ES SALAAM this 18<sup>th</sup> day of December, 2007.

D. Z. LUBUVA  
**JUSTICE OF APPEAL**

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

(I. P. KITUSI)  
**DEPUTY REGISTRAR**