

## INTRODUCTION

**Execution** is the process of enforcing or giving effect to the court orders, decrees or judgements. Execution enables the decree holder to enjoy the fruits of the decree. In terms of **Section 33 of the Civil Procedure Code**<sup>1</sup>, a decree may be executed either by the court which passed it or the court to which it is sent for execution. Also, the court which passed the decree may, upon application by the decree holder or its own motion transfer it to another court for execution as explained under **Section 34 (1) & (2) of the Civil Procedure Code**<sup>2</sup>

Further, Stay of execution is a judicial order that prevents a judgement from being executed or the suspension of carrying out a court order for a specified period of time. Execution of decree can be either by the court to which the decree has been sent for execution in accordance with **Order XXI Rule 24 of the Civil Procedure Code** or by the court itself or an appellate court under **Order XXXIX Rule 5 of the Civil Procedure Code**.

## MAIN BODY

The following are the factors that may necessitate a stay of execution.

**1. If it is likely that an irreparable or substantial loss may result to the party applying for stay of execution unless the order is made :**

A stay of execution may be granted where an execution will result into a substantial loss or which cannot be atoned by an award of damages. As general rule, a Court of Appeal cannot grant a stay of execution on this ground of an irreparable injury on a mere allegation that the applicant will suffer an irreparable loss, nevertheless, a stay of execution will be granted on the ground of an irreparable injury without the particulars of the harm being specified in the application where the facts of the case speaks for themselves.

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<sup>1</sup> [Cap. 33 R.E 2022]

<sup>2</sup> Ibid

In reference to the case of **LINUS FURAHA SHAO V NATIONAL BANK OF COMMERCE** <sup>3</sup> (supra) the Court of Appeal granted an application for a stay of an execution in because the appellant proved that he would suffer an irreparable injury because the execution of the decree involved attaching a residential house in which he and his family were living.

**2. Prima facie likelihood of an appeal to succeed:** A stay of an execution may be granted when an appeal has a greater chance of success. The general rule as gleaned from decided cases is that the ground that an appeal has greater like hood of success is an exception to the general rule because during the application for stay of execution, the Court Of Appeal is not in a position to know whether the appeal has greater likelihood of success. So this factor may be applied in some circumstances, For instance if judgement complained of is problematic.

This position was set out in **RAVINDRA R DESAI & ANOTHER V COOPERATIVE AND RURAL DEVELOPMENT BANK** <sup>4</sup> Nyalali CJ speaking for the full Court of Appeal observed: We think in a case like this one, where there is a notice of appeal against a problematic judgement, the interests of justice require a stay of execution to be granted pending the hearing and decision of the appeal so that the judgement of the High Court may be sorted out, However, the court can not a stay of an execution merely because an appeal has been lodged.

Also in a recent case of **JOHNSON KITUNGURA V SARARA NYAKARIGA** <sup>5</sup> Rweyemamu J, has deplored the current practice in relation to stay of execution, there is a practice and belief by unsuccessful parties of assuming that the decree will automatically be stayed merely because an appeal has been field. This belief is born out of practice of forwarding the

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<sup>3</sup> [C.A No. 9 1999]

<sup>4</sup> [C A No. 2 1996]

<sup>5</sup> [168 2002]

original court record to the appeal court once an appeal is filed; making it practically impossible for the successful party to proceed with execution.

The trial court remains with no copy, an unhealthy situation for effective dispensation of justice to all parties, apart from other risks that may arise. Hopefully a solution will be found to enable the appeal to proceed without hindering the trial court's process of execution of decree which has not been stayed. A stay of an execution is an exception to that general rule where a court gives a temporary injunction order suspending the judgment decree pending the determination of an appeal.

**3. Balance of convenience** : A balance of convenience is struck when the court gives an order that would not put either party in jeopardy. In a number of cases where a stay of execution has been granted the applicant has almost always been ordered to deposit a security for costs within a particular specified period. Ramadhani JA (as he then was) allowing a stay of execution on this ground, In **TANZANIA FISH PROCESSORS L.T.D V CHRISTOPHER LUHANYULA** <sup>6</sup> case said:

The applicant would not be allowed to be in a position of flourishing in his business as if there is no court order against him, at the same time the applicant should not be exposed to peril of having to do an uphill task of recovering his monies. On the other hand the respondent should not be the one denied to start afresh because of a stay of execution. There is also a need to protect him from undue anxiety of when he will carve his pound of flesh. There has to be a way of making the applicant serious in prosecuting the appeal and should not be allowed to play cat and mouse with the respondent.

## **CONCLUSION**

**Generally**, the factors explained above may necessitate stay of execution but, they are not exhaustive, their application depends on the

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<sup>6</sup> [C.A No.21 2010]

individual circumstances and merit of each case. However, High Court may order the execution to be stayed where an application is made for stay of execution before the time allowed for appealing if the it is satisfied that;

(i) that substantial loss may result to the party applying for stay of execution unless the order is made; (ii) that the application has been made without unreasonable delay, in accordance to the **Laws of Limitation Act**<sup>7</sup> and (iii) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

## **REFERENCES**

### **STATUTES**

THE CIVIL PROCEDURE CODE [CAP. 33 R.E 2022]

### **CASES**

JOHNSON KITUNGURA V SARARA NYAKARIGA, Civil Appeal 168, [2002]

LINUS FURAHA SHAO V NATIONAL BANK OF COMMERCE, Civil Appeal No. 9 1999

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<sup>7</sup> 1971

RAVINDRA R DESAI & ANOTHER V COOPERATIVE AND RURAL  
DEVELOPMENT BANK, Civil Appeal No. 2, 1996

TANZANIA FISH PROCESSORS L.T.D V CHRISTOPHER LUHANYULA Civil  
Appeal No.21 [2010]

### **BOOKS**

Frank Mirindo, 2011 ADMINISTRATION OF JUSTICE IN MAINLAND  
TANZANIA.