

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

**ARS. CIVIL APPLICATION NO. 16 OF 2009**

**(CORAM: KILEO, J.A., MBAROUK, J.A., And MASSATI, J.A.)**

**JOSEPHINE ISMAIL SWAI.....APPLICANT  
VERSUS**

**1. MISHAKI NALAMA OLE SHANGUYA  
2. ROSE M. NALAMA..... RESPONDENTS**

**(Application for stay of execution from the Judgment of the  
High Court of Tanzania  
at Arusha)**

**(Ngwala, J.)**

**dated the 16<sup>th</sup> day of November, 2009  
in  
Land Appeal No. 31 of 2006**

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**RULING OF THE COURT**

7<sup>th</sup> & 12<sup>th</sup> September, 2012

**MBAROUK, J.A.:**

By way of notice of motion filed on 24<sup>th</sup> November, 2009 the applicant seeks under Rule 9 (2) (b) of the Tanzania Court of Appeal Rules, 1979 (Old Rules), for an order of this Court to stay the execution of an amended decree in Land Appeal Case No. 31

of 2006. The application was supported by an affidavit of Josephine Ismail Swai, the applicant.

The background leading to this application gathered through the affidavit information is as follow: The judgment in Land Appeal No. 31 of 2006 was delivered on 13/12/2007 where the High Court (Land Division) before Rugazia, J. quashed and set aside the decision of the District Land and Housing Tribunal of Arusha District at Arusha in Land Case No. 199 of 2005. Following that decision the respondents applied to the High Court (Land Division) at Arusha for the following orders:-

- (i) That, the court be pleased to grant declaratory orders as to the rights of the parties over the disputed house in Land Appeal No. 31 of 2006.
- (ii) That, the court further be pleased to issue an order to the respondent and her tenants to immediately vacate

the premises currently occupied by them, in order to allow the applicants to take vacant possession.

The High Court, (Ngwala, J.) proceeded to determine the application and granted the reliefs prayed for. Following the ruling of the learned judge (Ngwala, J.) an "amended decree on appeal" was drawn.

Aggrieved with the decision of Ngwala, J., the applicant filed a notice of appeal and leave to appeal to the Court of Appeal which has already been granted. He is now in the process of preparing the record of appeal. In her affidavit, the applicant claimed that, if the "amended decree on appeal" is to be executed, the intended appeal will be nugatory and she stands to suffer irreparably.

In this appeal, the applicant was represented by Mr. John Lundu, learned advocate, whereas the respondents appeared in person unrepresented.

At the hearing, Mr. Lundu briefly and concisely submitted that as Rugazia, J. had quashed and set aside the decision of the District Land and Housing Tribunal, that means there was no decision to be executed. He faulted the decision of Ngwala, J. being problematic as there was no decree to be amended. Mr. Lundu submitted that the record shows only the judgment of Rugazia, J. without a decree thereof from that judgment. He added that, the extracted amended decree from the ruling of Ngwala, J., is at variance with the judgment of Rugazia, J. For that reason, he urged us to find that the "amended decree on appeal" which is the subject of the intended appeal is problematic. Mr. Lundu further urged us to find that their appeal has great chances of success, because there is no decision to be executed.

In his reply, the 1<sup>st</sup> Respondent initially submitted that the application has no merits, but he later changed his mind after understanding the real situation to the effect that there was no decree extracted from the judgment of Rugazia, J. He also contended that, since there was no decree to be amended, there was no need for them (the respondents) to file an application before Ngwala, J. He then claimed that it was through the misdirection of the advice they received which led them to file such an application before Ngwala, J. Finally, he left it to the Court to reach to a just decision.

On the part of the 2<sup>nd</sup> Respondent, she opposed the application simply for the reason that Ngwala, J. gave the chance to the applicant to be heard.

As pointed out earlier, the applicant has moved this Court under Rule 9 (2) (b) of the Old Rules which states as follows:-

9 (2) *"Subject to the provisions of sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may\_*

(a) .....

(b) ***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 added).*

Factors or circumstances under which stay may be granted under the 1979 Rules were not closed. See the decisions of this Court in Civil Application No. 125 of 2002 Between **Tanzania Telecommunications Company Ltd vs Mic Tanzania Limited**; Civil Application No. 104 of 2005, **In the matter of an Intended Appeal, Ramadhani Badi Ramadhani vs Patrick M. Chacha**; consolidated Civil Application No. 19 and 27 of 1999,

**Tanzania Electric Supply Co. Ltd vs Independent Power Tanzania Ltd;** Civil Application No. 146 of 2001, **Stanbic Bank Ltd vs Woods Tanzania Ltd;** Civil Application No. 39 of 1995, **Joseph K. Mlay vs Ahmed Mohamed** (All unreported); **Tanzania Posts and Telecommunications Corporation vs M/S B.S. Henrita Supplies** (1997) TLR 141; Civil Reference No. 26 of 2006, **Farida Mbarak and Farid Ahmed Mbarak vs Domina Kagaruki** (unreported); **Tanzania Cotton Marketing Board vs Cogeat S.A** (1997) TLR 63, to mention just a few. Taking in account that this application has been made under the Old Rules, that means we have wide discretionary powers in reaching to our decision.

The record herein shows that the main problem arose when the respondents filed their application before Ngwala, J. at the High Court Land Division at Arusha after an appeal before Rugazia, J. had quashed and set aside the decision of the Tribunal which arrived at a wrong decision. We have also noted that the ruling of Ngwala, J. was under the title "amended decree

on appeal” while there was no decree on record extracted from Rugazia, J’s judgment. Secondly, even looking at the contents of the “amended decree on appeal,” it varies with what is found in the judgment of Rugazia, J. There is no doubt that the decree is problematic and where a decree is problematic the Court is enjoined to stay it. In the case of **N.B.C. Holding Corporation vs Hassan Nuru Hassan**, Civil Application No. 89 of 2001 (unreported), this Court held that:-

*"It is common knowledge that in a situation such as this, where, the judgment or decree is problematic and an appeal in respect of such problematic judgment, order or decree has been preferred, the Court normally grants stay pending the determination of the appeal."*

See also, **Revindra H. Desai and Another vs Co-operation Rural Development Bank**, Civil Reference No. 2 and 3 of 1996,



**Sayi Trading Company Ltd. Vs Regnald Francis Hapinga,**  
Civil Application No. 53 of 1999 and **Zacharia Balrie Bura vs**  
**Teresia H. J. Mubeirs,** Civil Application No. 10 of 1991 (All  
unreported).

We have also noted that, as per the requirements under  
Rule 9 (2) (b) of the Old Rules, the applicant has already filed his  
notice of appeal and has also been granted leave to appeal. See,  
the decisions of this Court in **Tanzania Electric Supply**  
**Company (TANESCO) vs Independent Power Tanzania**  
**Ltd. (IPTL) and Two others** [2000] TLR 324 and **Wankira**  
**Bathuel Maise and National Housing Corporation vs**  
**Karikupya** [1999] TLR 348.

For those reasons, we think it is prudent to use our  
discretion conferred upon us and grant the application. In the  
event, stay of execution is hereby granted as prayed pending the  
hearing of the intended appeal. As to the issue of costs, since the

application was not seriously contested, we find it fair and just that each party should bear his/her costs. It is so ordered.

DATED at ARUSHA this 10<sup>th</sup> day of September, 2012.

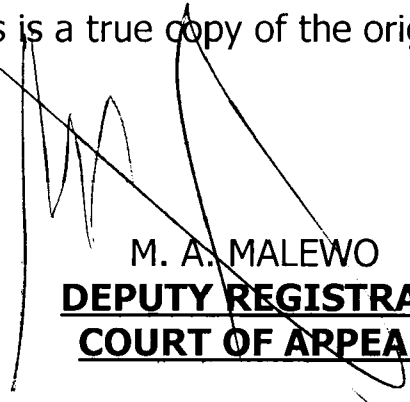
E. A. KILEO  
**JUSTICE OF APPEAL**

M. S. MBAROUK  
**JUSTICE OF APPEAL**

S. A. MASSATI  
**JUSTICE OF APPEAL**

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



  
M. A. MALEWO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**