

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

(CORAM: KIMARO, J.A., MANDIA, J.A. And KAIJAGE, J.A.

CIVIL APPLICATION NO. 6 OF 2012

**JOSEPH ANTHONY SOARES @ GOHA.....APPLICANT
VERSUS
HUSSEIN S/O OMARY.....RESPONDENT**

**(Application for stay of execution from the Decision of the High Court
of Tanzania at Tabora)**

(Rumanyika, J.)

Dated 29th day of October, 2012

In

Land Appeal No. 32 of 2008

RULING OF THE COURT

7th & 9th May, 2013

MANDIA, J.A.:

On 14th November, 2013, the applicant lodged in this Court a Notice of Motion in which he prayed for stay of execution of the decree passed on 29th October, 2012, and an order restraining the respondent from disposing of property situated on Plots 57 and 58 Mwisela area of Nzega township pending the determination of an intended appeal to the Court of Appeal of Tanzania. The grounds upon which the Notice of Motion is based are:-

- (i) that the applicant on a balance of convenience will suffer great hardship if execution of the decree of the High Court in appeal is not stayed.
- (ii) that the respondent intends to sell the disputed property and if not restrained, in the event the applicant's appeal succeeds, it will render nugatory and the applicant cannot adequately be compensated by the respondent.

The Notice of Motion is supported by an affidavit sworn by Mr. Kamaliza Kamoga Kayaga who also swore a supplementary affidavit sworn by the same person on 8th March, 2013 and lodged in this Court of 11th March, 2013. The applicant is represented in this application by Kamaliza Kamoga Kayaga, learned advocate.

The respondent who is represented by Mr. Method Kabuguzi, learned advocate, filed a counter affidavit on 3rd May, 2013 as well as an affidavit in reply sworn by Method Raymond Gabriel Kabuguzi and lodged in this Court on 3rd May, 2013.

The affidavital evidence on record shows that the respondent Hussein Omary owed one Hamza Salum Sh. 880,000/=. Hamza Salum sued the respondent Hussein Omari at Nzega Urban Primary Court for the decretal amount plus costs and obtained an ex-parte judgment on 19/5/2005. Thereafter execution proceedings were undertaken and the respondent's **milling machine** was sold in an auction. There was no appeal against the conduct of the auction but the matter ended up in revision at the High Court of Tanzania in Civil Revision No. 3 of 2005. In the revisional order, the High Court acknowledged the fact the respondent's milling machine was attached to realize a decretal amount of sh. 880,000/= owed to one Hamza Salum. The High Court remarked that sh. 5,000,000/= was realized from the auction, and that sh. 3,136,000/= was to be paid back to the respondent after decree had been satisfied. It appears there was a simmering dispute on the interpretation of the order attaching the respondent's property. The respondent contended that the property attached in the Nzega Urban Primary Court case was a milling machine only. The successful bidder in the auction, who is the applicant, contended that the attached property, which he bought for sh. 5,000,000/= (five million shillings) included Plots 57 and 58 on which land stood a milling

machine, a godown, a dwelling house and an unfinished building. All these properties are situated at Mwisela Industrial Area of Nzega Town. The dispute sent the parties to the District Land and Housing Tribunal for Tabora at Tabora in Application No. 37 of 2007. After a hearing and a visit **in situ**, the tribunal held that the buyer of the property in the auction who is the applicant in the present application was entitled only to the paddy milling machine which is the property sold in the auction. The Tribunal ordered all the premises situated on Plot 57 and 58 restored to the respondent Hussein Omary.

The present applicant was not satisfied with the decision of the Tribunal and he filed an appeal to the High Court of Tanzania, Land Division, at Tabora. The High Court supported the finding of the District Land and Housing Tribunal for Tabora and found that only the paddy dehusking machine was sold in the auction and nothing else.

The decision of the High Court of Tanzania, Land Division, was pronounced on 29/10/2012 and a decree signed on the same date, which is just a little over six months ago. On 9th November, the applicant filed an application for leave in the High Court, Civil application No. 63 of 2013,

which is yet to be determined. Five days later, on 14th November, 2012, the applicant lodged the application for stay of execution as indicated above.

In arguing his application Mr. Kayaga relied on two decisions which are 1. **IGNAZIO MASSINA 2. NATIONAL SHIPPING AGENCIES versus 1. WILLOW INVESTMENT 2. COSTA SHINGANYA**, Civil Reference No. 8 of 1999 (unreported) and 2. **TANZANIA MOTOR SERVICES versus TANTRACK AGENCIES LTD**, Civil Application No. 86 of 2004 (unreported). He agreed that these two decisions are based on Rule 9 (2) of the Court of Appeal Rules, 1979 but submitted that the principle enunciated in the two cases are similar to the requirements of Rule 11 (2) (b) under which he has filed the present application. He is basing his argument on the principles of **balance of convenience**, and the fact the respondent is intending to dispose of the disputed plot.

Our understanding of the present state of the law with regard to stay of execution is that there has been a paradigm shift in the requirements of the law as set down in Rule 9 (2) (b) of the 1979 Court Rules and in Rule

11 (2) (b) (c) and (d) of the 2009 Court Rules. The operative rule in the 1979 Rules is Rule 9 (2) (b) which reads thus:-

"9. (1).....
(2)
(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."

In the 2009 Rules, however, the ground has shifted. The Court no longer has the luxury of granting an order of stay of execution "on such terms as the Court may think just," but it must find that the cumulative conditions enumerated in Rule 11 (2) (b) (c) and (d) exist before granting the order. The conditions are:-

- (i) Lodging a Notice of Appeal in accordance with Rule 83;
- (ii) Showing good cause; and
- (iii) Complying with the provisions of item (d) of sub-rule 2.

This Court has spelt out these conditions in **MANTRAC TANZANIA LIMITED versus RAYMOND COSTA**, Civil Application No. 11 of 2010 (unreported) and in **LAURENT KAVISHE versus ENELY HEZRON**, Civil Application No. 5 of 2012 (unreported), amongst other authorities. It is therefore not correct to say Rule 9 (2) (b) of the 1979 Rules is in pari material with Rule 11 (2) (b) (c) and (d) of the 2009 Rules. The authorities which Mr. Kamaliza Kayaga, learned advocate, quoted, and which are based on the 1979 Rules, are out of context in the present application.

Asked to address the Court on the question of security as laid down under Rule 11 (2) (d) (iii), the learned advocate argued that the property the applicant bought is in the hands of the respondent so this is enough security. We are unable to subscribe to this position. First, under Rule 11 (2) (d) (iii) the obligation to furnish security is on the **applicant** and not the respondent. Secondly, the High Court of Tanzania in Civil Revision No. 3 of 2005, the District Land and Housing Tribunal for Tabora in Application No. 37 of 2007 and the High Court of Tanzania, Land Division, in Land Appeal No 32 of 2008 all made concurrent findings that what was sold to the applicant in an auction was a milling machine **only** and nothing else, and that Plot 57 and 58 as well as the buildings standing on the Plots

should be restituted to the respondent Hussein s/o Omary. In such a situation one fails to understand how the applicant can still claim ownership of the property and offer it as security under Rule 11 (2) (d) (iii). The applicant has not furnished security, nor has he given a guarantee of security as held in the MANTRAC case (**supra**) cited above. The application for stay of execution therefore lacks merit and is hereby dismissed with costs.

DATED at **TABORA** this 8th day of May 2013.

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

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



M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL