

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KIMARO, J.A., MASSATI, J.A., And MANDIA, J.A.)

CIVIL APPLICATION NO.74 OF 2013

1. MTAKUJA KONDO
2. MWANGAZA KONDO
3. MUSTAFA KONDO
4. LWINDE KONDO

}.....APPLICANTS

VERSUS

WENDO MALIKI.....RESPONDENT

**(Application for stay of execution of the judgment of the
High Court of Tanzania at Dar es Salaam)**

(Shangwa, J.)

dated the 16th day of July, 2010

in

Misc Civil Appeal No. 8 of 2008

RULING OF THE COURT

25 June & 29 July, 2013

KIMARO, J.A:

Through legal services of Mr. Abdi Ally Kinguji, learned advocate, the Court is requested in a notice of motion filed under Rule 11(2) (b) of the Court of Appeal Rules, 2009 to grant an order for stay of execution of the judgment of the High Court of Tanzania at Dar es Salaam dated 16th July, 2010. In the said judgment, the High Court, (Shangwa, J.) upheld the decision of the District Court of Ilala, where Maweda R.M. set aside a consent order made by Asajile D. M.(deceased) on 22nd April, 2002.

The affidavit of the applicants affirmed jointly in support of the application aver as follows:

One Kondo Selemani died in 1959. He was survived by a widow (Ashia Juma) and five children; the applicants and Kibibi Kondo. Kondo Selemani left behind two houses; one built on plot No. 101 Kichwele Street, house No. 74 Block "J" Ilala District and another one at Magomeni area. The widow of the late Kondo Selemani sold the house located at plot No. 101 Kichwele Street and purchased house No. 30 located at Plot No. 89 Block "U" Chunya Street, Ilala.

Kibibi Kondo died on 28th August, 1990. She was survived by Wendo Malaki who was born out of wedlock. With the death of Kibibi Kondo, and that of the widow of the deceased Kondo Selemani, the respondent was appointed administrator of the estate of his deceased mother at Buguruni Primary Court Probate No.211 of 2001. By the consent of the applicants and the respondent, and after the valuation was done, the house at Magomeni was sold at a price of T. shillings 8,000,000/=, The house on plot No. 89 Block "U" House No. 30 Chunya Street, Ilala District was valued at shillings 16,000,000/=. The respondent agreed to take

T.shillings 3,700,000/= as his share of his mother's estate. A consent agreement was then recorded to that effect by the District Court of Ilala by the late Asajile, D.M.

This consent order was later challenged by the respondent. In proceedings that followed, Maweda R.M. varied the consent order made by the late Asajile, D.M. and ordered that the house located on plot No. 89 Block "U" House No. 30 Chunya Street Ilala District, be sold at market price and the proceeds be remitted to court for equal distribution between the parties. The applicants appeal to the High Court was not successful. Being aggrieved by the decision of the High Court, they intend to appeal to this Court and hence the application for stay of execution.

As indicated earlier, the application is made under Rule 11(2) (b) of the Court of Appeal Rules, 2009. The Rule reads:

"In any civil proceedings, where a notice of appeal has been lodged, in accordance with Rule 83, an appeal shall not operate as a stay of execution of the decree or order appealed from except so far as the High Court or tribunal may order, nor shall execution

of a decree be stayed by the reason only of an appeal having been preferred from the decree or order; but the Court, may upon good cause shown, order stay of execution of such decree or order."

The reasons given to support the application are that the property was not lawfully sold by a court broker, as no advertisement was made to the public. The house was not even sold at its market value. The applicants also aver that there are questions of law to be determined by the Court. They also complain of being threatened with eviction. They assert that if the eviction is carried out, the applicants living in the house will suffer irreparable loss. The learned advocate supported his submission by the decision of the Court in the case of Tanzania **Electric Supplies Company (TANESCO) V Independent Power Tanzania Ltd (IPTL) and two others** [2000] T.L.R.324. The case gives the factors to be considered by the Court in granting an application for stay of execution. These are:

"(a) Whether the appeal has, prima facie, a likelihood of success.

- (b) Whether its refusal is likely to cause substantial and irreparable injury to the applicant.
- (c) Who will suffer more as between the applicant and the respondent if the order for stay of execution is not granted.

The learned advocate prayed that the application be granted.

The respondent was represented by Mr. Juma Nassoro, learned advocate. The respondent also filed an affidavit in reply and he conceded that the house has been sold and has passed hands to third parties and there is nothing to be stayed. In opposing the application the learned advocate for the respondent challenged the notice of motion for not showing the grounds for the application. He also said that since the house forming the subject matter of the application has already been sold, the application does not serve any purpose. In his considered opinion, the remedy available to the applicants is to file a suit to challenge the sale. The other shortcoming pointed out by the learned advocate for the respondent is failure by the applicants to satisfy the conditions laid down in Rule 11(2) (c) and 11(2) (d) of the Rules. He prayed that the application be dismissed with costs.

Having heard the learned advocates, the issue for determination by the Court is whether the applicants have satisfied the conditions for being granted an order for stay of execution? The conditions which the applicants have to satisfy so as to be granted the order for stay of execution are laid out in Rules 11(2) (b); (c) and (d). All conditions must be satisfied. The applicant must show the following: a notice of appeal was given, they have sufficient cause for praying for the order for stay, the application was filed within time, they will suffer substantial loss if the order is not granted; and they have furnished security. Some of the condition were laid out in the case of **The Managing Director Breweries Tanzania Ltd vs Bonifance Kakiziba and John Asenga** Civil Application No. 14 of 2010 (unreported)).

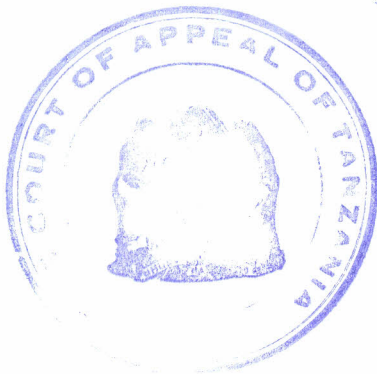
In the case of **Irene Williams V Costa Othiniel Ahia** Civil Application No.4 of 2011(unreported), the Court in giving a correct interpretation of Rule 11(2) (c) held that it must be read together with Rule 90 (1) which sets out a limitation period of sixty days for filing an appeal. This means that an application for stay of execution must be filed within a period of sixty days from the date the judgment was given. The same

principle is found in the case of **Anael Kyaka V Emmanuel Kikoti** Civil Application No. 19 of 2008 (unreported).

We agree with the learned advocate for the respondent that the application suffers serious defects which make the applicants not to be entitled to the order they are praying for. **First**, the application was filed on 13th May, 2013. The judgement sought to be stayed was delivered on 16th July, 2010. Rules 11(2) (c) read together with Rule 90(1) requires the application to be filed within a period of sixty days. There is no order attached to the application showing that the applicants were granted extension of time to file an application for stay of execution. The application was filed beyond the sixty days limitation period. **Second**, the learned advocate for the respondent pointed out correctly that the notice of motion contains no grounds for filing the application. The format for filing a notice of motion is given in Rule 48(1) of the Court Rules. The applicants had to state in the notice of motion the grounds for the relief sought. The notice of motion has no such grounds. **Third**, the applicants have not complied with Rule 11(2)(d)(iii) of the Rules by furnishing security. The application is completely silent on this aspect. Even the

learned advocate for the applicant did not say anything in respect of this requirement in his submission. **Fourth** it is on record that the suit premises have already been sold so it will not serve any useful purpose to grant an order for stay of execution. The application has been overtaken by events. The learned advocate for the respondent pointed out correctly that the remedy for the applicants lies elsewhere but not in filing this application for stay of execution. For these reasons, the application is dismissed with costs.

DATED at **DAR ES SALAAM** this 12th day of July, 2013.



N.P.KIMARO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

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


(P. M. KENTE)
REGISTRAR
COURT OF APPEAL