

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

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

**CIVIL APPLICATION NO. 5 OF 2012**

**LAURENT KAVISHE.....APPLICANT**

**VERSUS**

**ENELY HEZRON.....RESPONDENT**

**(Application from the Judgment and Decree of the High Court  
of Tanzania at Tabora )**

**(Rumanyika, J.)**

**Dated 29<sup>th</sup> day of October, 2012**

**In**

**Tabora High Court Land Appeal No. 40 of 2010**

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**RULING OF THE COURT**

**30<sup>th</sup> April & 3<sup>rd</sup> May, 2013**

**MANDIA, J.A.:**

On 10<sup>th</sup> December, 2012, the applicant lodged in this Court a Notice of Motion in which he prayed for stay of execution of the decree in Tabora High Court Land Appeal No. 40 of 2010. The grounds upon which the prayer for stay of execution are based are:-

- (i) that the judgment from which the appeal emanates is problematic,

- (ii) there are points of law which the High Court is yet to certify for this Court to consider in an application which has already been lodged under Section 47 (1) and (2) of Cap 216 R.E. 2002.

An affidavit sworn by the applicant **Laurent Kavishe** accompanied the Notice of Motion. The respondent in turn swore a counter-affidavit in which she deposed that the applicant is the title holder to plot 1070 Block PP while she (respondent) is the title holder to Plot No. 1166 Block PP, and that the applicant has moved from his plot No. 1070 Block PP and invaded Plot No. 1166 owned by the respondent. The respondent further avers in paragraph 4 of her affidavit that the applicant has declined to be shown the boundaries of his plot 1070 Block PP by the Land Officer and instead he is insisting on claiming ownership of Plot 1166 Block PP owned by the respondent.

The act of the respondent filing a counter-affidavit to the applicant's affidavit made the applicant raise a preliminary objection in which he is arguing that the respondent is at fault in filing a counter-affidavit to the affidavit filed by the applicant. He reasons that Rule 56 (1) of the Court of

Appeal Rules, 2009, envisages the filing of an affidavit in reply and not a counter-affidavit. He therefore prays that the counter-affidavit be struck out with costs.

At the hearing of the preliminary objection we took arguments and then decided to reserve our ruling which we proposed to include in our ruling on the main application for stay of execution.

The applicant in this application is represented by Mr. P.R.K. Rugaimukamu, learned advocate, while the respondent appeared in person, unrepresented.

Arguing the application, Mr. P.R.K. Rugaimukamu, learned advocate, advanced the argument that this is a case of double allocation whereby the applicant was offered Plot 1070 Block PP in 1997 and the respondent was offered the same plot in 2008. Mr. Rugaimukamu contended that there is a building on the disputed site which the tribunal of first instance and the High Court Land Division on appeal have ordered demolition, and that the applicant is praying for stay of execution pending appeal to avoid loss to be occasioned to the applicant if the demolition is carried out as ordered. In retort, the respondent disclosed that the applicant has his own plot with a

number separate from her plot, and that the two plots are distinct and separate. The respondent further disclosed that it is the applicant who encroached onto her plot and started construction there. She disclosed further that when the applicant started his encroachment he was served with a “stop order”, which he ignored, and went on to put the walls of the structure on her plot. Mr. P.P.K. Rugaimukamu countered this allegation of there being a “stop order” by saying that there was no written order to stop construction, and that what was there was an “X” mark which anybody could put.

Let us deal with the preliminary objection first. We take note that the preliminary objection is raised under Rule 107(1) of the Court of Appeal Rules, 2009. Our understanding of Rule 107 of the Court of Appeal Rules, 2009, is that it grants a **respondent**, in an **appeal** which has been set down for hearing, the right to raise a preliminary objection provided that a three clear days notice is given to the appellant, and that the respondent fulfills all the requirements of Rule 107 with regard to service of the required documentation to all parties concerned. We also acknowledge the development of the law in the cases of **The University of Dar es Salaam versus Silvester Cyprian and 210 Others (1998) T.L.R. 175** and

**Haji Hassan Amour and 112 Others versus The Managing Director, Peoples' Bank of Zanzibar**, Civil Application No. 20 of 2011, which have respectively held that a preliminary objection on a point/points of law can be raised in an **application**, earlier on using Rule 100 of the 1979 Rules which is now Rule 4 (2) (a) of the 2009 Rules. In the authorities cited above, it is clear as daylight that the raising of preliminary objection is a weapon available to a **respondent**, not to an applicant. In the present case, the **applicant** is purporting to move us through a preliminary objection. This effort is clearly misplaced. We find the preliminary objection raised by the application devoid of legality and strike it out.

Coming to the main application for stay we reiterate that there are three cumulative conditions that an applicant must satisfy before an order for stay of execution is granted. These are:-

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

These conditions were spelt out in the case of, amongst many others, **MANTRAC TANZANIA LIMITED versus RAYMOND COSTA**, Civil

Application No. 11 of 2010 (unreported). The applicant has shown that he has filed a Notice of Appeal as required under the law. The next question is, has he shown good cause? Mr. P.R.K. Rugaimukamu, advocate for the applicant, has tried to show this court that the issue in this application is double allocation. This allegation has been refuted by the respondent who showed that there are two district plots involved, Number 1070 Block PP for the applicant, and number 1166 for the respondent, and that the applicant encroached on the respondent's plot despite warnings from the Land Authorities. Mr. Rugaimukamu did not controvert this assertion made in open court. We are satisfied that no good cause is shown where the application for stay is shown to be the offending party. The powers under Rule 11 (2) (b) are discretionary and equitable, and one can go to equity only with clean hands. Furthermore, the applicant has not furnished security or given an undertaking for security as required under Rule 11 (2) (d) (iii), which is one of the cumulative conditions under Rule 11 (2) (d). We are thus constrained to find that the application for stay of execution has no merit. We dismiss it with costs.

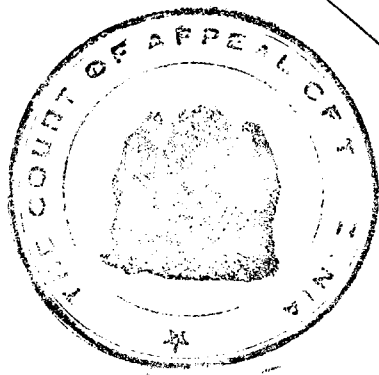
**DATED** at **TABORA** this 1<sup>st</sup> day of May 2013.

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**