

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA
(CORAM: KILEO, J.A., MJASIRI, J.A., And MUSSA, J.A.)

CIVIL APPLICATION NO. 34 OF 2014

JUMA HAMISI APPLICANT

VERSUS

MWANAMKASI RAMADHANI RESPONDENT

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

(Moshi, J.)

dated the 4th day of September, 2014

in

Land Case No. 37 of 2013

RULING OF THE COURT

25th & 27th February, 2015

MUSSA, J.A.:

In the High Court (Land Division) sitting at Arusha, the respondent (original Plaintiff) sued the applicant (Original defendant) over a three acres piece of Land located at Olasiti Village, Arusha District. At the end of the trial, the respondent emerged successful and in a verdict pronounced on the 4th September, 2014 the trial court (S.C. Moshi, J.) decreed that :-

"(i) The plaintiff is the lawful owner of the suit land

(ii) The suit land be returned to her.

(iii) Costs of the suit to be paid by the defendant."

Dissatisfied, on the 18th September, 2014 the applicant duly lodged a Notice of Appeal to this Court and, in the present quest, the applicant moves the Court for an order that the High Court decree be stayed pending the hearing and determination of the intended appeal. The application is by Notice of Motion which has been taken out under the provisions of Rule 11(2) (b) of the Tanzania Court of Appeal Rules, 2009 ("the Rules"). The Notice of Motion is supported by an affidavit, duly affirmed by the applicant. As it turns out, the application is being resisted by the respondent in her affidavit in reply.

At the hearing before us, the applicant had the services of Mr. John Lundu, learned Advocate, whereas the respondent was fending for herself, unrepresented. The learned counsel for the applicant fully adopted the Notice of Motion as well as its accompanying affidavit. The adopted documents are predicated upon four substantive grounds: **First**, that the

applicant has already lodged a Notice of Appeal to this Court; **second**, that the intended appeal stands good chances of success; **third**, that substantial inconvenience would be suffered by the applicant unless the stay is made and; **fourth**, that the applicant offers the land in dispute as security for the due performance of the decree as may ultimately be binding upon him.

From the documents supporting the application, it is beyond question that the applicant seeks to impress, among other grounds, that his intended appeal stands overwhelming chances of success. With respect, if we may express at once, with the advent of the new Rules, the likelihood of a successful appeal is no longer a requirement for granting a stay. Our understanding of the present state of the law with regard to stay of execution is as was reiterated in Civil Application No. 11 of 2010 – **Mantrac Tanzania Limited Vs Raymond Costa**; Civil Application No. 5 of 2012 – **Laurent Kavishe Vs Enely Hezron**; Civil Application No. 6 of 2012 – **Joseph Soares @ Goha Vs Hussein Omary** and; Civil Application No. 12 of 2012 – **Anthony Ngoo and Another Vs Kitinda**

Kimaro (All unreported), that is, among other decisions. More particularly, in *Joseph Soares @ Goha* the Court stated:-

"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."*

To cull from the referred item (d) of sub-rule 2, it is provided therein that no order for stay of execution shall be made under this rule unless the Court is satisfied:-

- (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 delay; 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."*

When all is said and applied to the factual situation at hand, it cannot be doubted that the applicant has lodged a Notice of Appeal to this Court in accordance with Rule 83, and that this application was instituted without delay. Furthermore, the applicant had deponed that if stay is not granted, there is real likelihood that he will suffer irreparable inconvenience. But those are not the only requirements which must be fulfilled to entitle an applicant for an order of stay. As has been previously held, all the requirements stipulated in Rule 11(2) (d) must be satisfied before an application for stay is granted (see the unreported Civil Application No. 3 of 2011 – **Frida Kanule Mwijage Vs The Tanzania Building Agency**).

As hinted upon, the applicant offers the land in dispute to come to terms with the requirement to furnish security which is comprised under item (iii) of Rule 11 (2) (d). The question is whether the applicant may conveniently be allowed to offer the land in dispute as security for the due performance of the decree. Before us, Mr. Lundu gave an affirmative answer, more so, he contended, as the applicant is still in occupation of the suit land. From the adversary side, the respondent strenuously disagreed and reiterated what she deponed in her affidavit to the effect that a disputed property cannot stand as security for the due performance of the decree.

On our part, we are respectfully inclined to share the sentiments of the respondent. As already intimated, the decree forming the subject of the application categorically adjudged that the respondent (plaintiff) is the lawful owner of the suit land and that the same should be returned to her. The decree is, so to speak, not in favour of the applicant. Under the circumstances, it will be against reason for the applicant to be allowed to offer the land in dispute as security for the due performance of the decree. We note that similar offers were declined by the Court in two of the cases referred above viz- *Joseph Soares @ Goha and Anthony Ngoo*.

To this end, we are of the decided view that the applicant has failed to furnish security for the due performance of the decree as may ultimately be binding upon him. In the result, the application for stay of execution lacks merits and is, hereby, dismissed with costs.

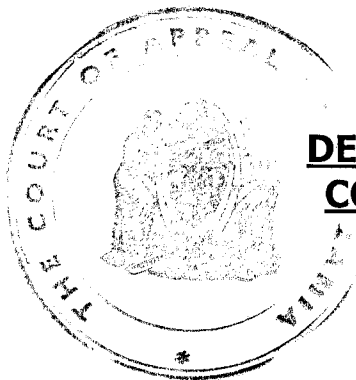
DATED at **ARUSHA** this 26th day of February, 2015.


E. A. KILEO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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




Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL