

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

**(CORAM: RUTAKANGWA, J.A., KIMARO, J.A., And JUMA, J.A.)**

**(BK) CIVIL APPLICATION NO. 1 OF 2008**

**1. SELEMAN ZAHORO**  
**2. MRS REHEMA SAID**  
**3. SAID ALLY YAKU** } .....**APPLICANTS**

**VERSUS**

**FAISAL AHMED ABDUL**  
Legal Representative of deceased  
**AHMED S. ABDUL** .....**RESPONDENT**

(Application for stay of execution of the order of the  
decision of the High Court of Tanzania at Bukoba)

(Mussa J.)

dated 26<sup>th</sup> day of May, 2010

in

**Civil Revision No.41 of 2006**

.....

**RULING OF THE COURT**

16<sup>t</sup> & 19<sup>th</sup> February, 2015

**KIMARO, J.A.:-**

In Civil Application No. 41 of 2006 filed at the High Court of Tanzania, at Bukoba, Ahmed Abdul filed an application for revision of an order for stay of execution which was granted to the respondents by the District Court of Karagwe. The learned judge set aside the order for stay

of execution on the ground that execution had already taken place and the order was granted without notice to the applicant. Although Ahmed S. Abdul was dead by then, the proceedings were conducted in his name.

The respondents were aggrieved by the order setting aside the order for stay of execution granted by the High Court in the revision proceedings. That order was made on 26<sup>th</sup> August, 2008. On 15<sup>th</sup> October, 2008 Mr. Mathias Rweyemamu learned advocate filed an application seeking for stay of execution of the order for revision under Rule 9(2) (b) of the Court of Appeal Rules 1979. The application was supported by an affidavit sworn by him.

The application was called for hearing on 6<sup>th</sup> May 2010. On that day the Court sat at Mwanza. The application was adjourned to give the applicant time to substitute the name of the deceased applicant with that of his legal representative as required by rule 57(3) of the Court of Appeal Rules 2009. On 10<sup>th</sup> May, 2010 the learned advocate duly complied with the order and he filed an amended application substituting the name of the

deceased with that of his legal representative. Faisal Ahmed Abdul was the one substituted for Ahmed S. Abdul.

When the application came for hearing, Mr. Rweyemamu learned advocate represented the applicants. The respondents were represented by Mr. Aaron Kabunga learned advocate. The learned advocate for the respondent filed a preliminary objection consisting of three grounds but he abandoned the first two grounds of objection and remained with the third one.

His contention on this ground of objection is that the application is misconceived and has been overtaken by events because execution took place on 22<sup>nd</sup> July, 2002 before the revision order was made. He submitted that given that position, the preliminary objection should be upheld and the application be dismissed with costs.

In reply the learned advocate for the applicants said that the amended application for stay of execution is now filed under Rule 11(2) (b), (c) and (d) (i) (ii) and rule 48 of the Court of Appeal Rules 2009.

However, he was not in a position to satisfy the Court that the mandatory requirements under the rule had been satisfied so as to enable the applicants get the remedy they are praying for. He opted to leave the matter to the decision of the Court.

We must out rightly say that the application before the Court is incompetent. Why? The application is seeking for an order for stay of execution. Rule 11(2)(b), (c) and (d) of the Court Rules is clear on the conditions which the applicant must comply with before being granted the order for stay of execution. There must be a notice of appeal lodged in accordance with Rule 83 of the Court Rules. It must be lodged within thirty days from the decision the applicant seeks to impugn. The decree which forms the subject matter of the application must also accompany the application for stay of execution. In the case **Peter Siniga V New National Steel (2000) Limited and 8 others** Civil Application No. 98 of 2011(unreported), the Court held that:

*"...this court has jurisdiction under Rule 11(2) (b) of the Rules to issue an order to stay execution of the decree*

*or order appealed from and not a judgment. We are alive to the fact that a judgment can in law be arrested before it is delivered. However, we are a shade unsure if can be stayed once it is has been delivered. It is trite law that once a judgment or a ruling has been delivered, a decree or order must be extracted therefrom. It is this decree or order from which an appeal lies to the High Court. If that decree or order is capable of execution, it is that decree or order which can legally capable of being stayed pending appeal."*

In this application, Mr. Rweyemamu has not complied with the condition of attaching to the notice of motion the order sought to be stayed. This renders the application incompetent. But for the benefit of the applicant we shall elaborate further on the other requirements.

The application must be made before the expiration of the time allowed for appealing and good cause must be shown. The applicant must also show that he/she will suffer substantial loss if the order for stay is not granted and it must be made without reasonable delay. Lastly the

applicant must furnish security for the due performance of the decree or order that may ultimately be binding to him/her.

A thorough perusal of the affidavit filed in support of the application is clear evidence that the applicant has not complied with all the conditions necessary to entitle the applicants get the remedy they are asking for. For instance the decree or order complained of is not attached to the application.

There is nothing in the affidavit of the learned advocate showing the loss which the applicants will suffer. The decision of the learned judge sought to be stayed shows that execution has already taken place. It is more than thirteen years since execution took place. The execution took place on 22<sup>nd</sup> July 2002. Under the circumstances what loss will the applicant suffer? In our considered opinion, given the time which has elapsed since execution took place, it is the respondent who will suffer substantial loss if the order the applicants are seeking for is granted. In this period of thirteen years the applicants must have sought for accommodation somewhere else. Moreover, the applicants have not even

complied with the provision of Rule 11(2) (d)(iii) of the Rules which requires them to furnish security for due performance of such decree or order as may ultimately be binding upon them.

We hence find the objection raised by the learned advocate for the respondents having merit. We accordingly uphold the preliminary objection and strike out the application for stay of execution with costs. It is ordered.

DATED at BUKOBA this 18<sup>th</sup> day of February, 2015.

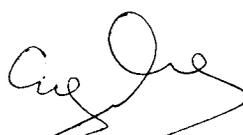


E.M.K.RUTAKANGWA  
**JUSTICE OF APPEAL**

N.P.KIMARO  
**JUSTICE OF APPEAL**

I.H.JUMA  
**JUSTICE OF APPEAL**

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

  
E.Y. MKWIZU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**