

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

(CORAM: MBAROUK, J.A., LUANDA, J.A., And MUSSA, J.A.)

CIVIL APPLICATION NO. 3 OF 2015

PRECIOUS KALINGA.....APPLICANT

VERSUS

KIZOLIOUS CHARLES WATACHOKA.....RESPONDENT

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

(Mugasha, J.)

Dated 29th day of January, 2015

in

DC Civil Appeal No. 25 of 2014

RULING OF THE COURT

26th & 29th February, 2016.

MBAROUK, J.A.:

In this application, the applicant Precious Kalinga, is seeking an order of this Court for stay of execution of the decree of the High Court Civil Appeal No. 25 of 2014 delivered on 29th January, 2015. The application was made under Rule 11 (2), (b), (c), (d) i-iii and 48 (1), (2), (3) and (4) of the Court of Appeal Rules, 2009. The notice of motion was supported by the affidavit of Precious Kalinga sworn on 10th February, 2015.

Briefly stated, the historical background of this application is that, in the Resident Magistrate's Court of Arusha at Arusha, the applicant sued the respondent for declaration that the marriage between the applicant and the respondent was irreparably broken down; custody of the child born in the marriage be placed to the applicant; payment of maintenance in favour of the applicant at T.shs. 500,000/= per month, and equal distribution of the joint properties acquired during subsistence of the marriage. The trial court held that there was no valid marriage between the parties, and ordered that the custody of the child to be in the applicant while the respondent was ordered to pay school fees and other daily expenditures.

Aggrieved by the decision of the trial Resident Magistrates' Court, the applicant unsuccessfully appealed before the High Court of Tanzania, at Arusha (Mugasha, J. as she then was) who found the appeal to have lacked merit and hence dismissed it. Dissatisfied with that decision, the applicant is intended to appeal to this Court. She filed a notice of appeal and then preferred this application for stay of execution pending the hearing of the intended appeal.

At the hearing, both parties fended for themselves. At the outset, the applicant prayed to adopt her affidavit in support of her notice of motion. We have seen it prudent to cite the relevant parts of the affidavit so as to see whether the conditions stated in Rule 11 (2) of the Court of Appeal Rules, 2009 (the Rules) have been complied with. The relevant paragraphs are as follows:-

"5. *That, the Respondent herein and his agent(s) visited the suit property for purposes of evaluating it in order to effect the execution of the decree passed by the High Court and the subordinate Court and dispose it to a third party by sale.*

i. In this occasion, the agent, categorically inform the Applicant that the house is on sale and as soon as the Respondent secure an order for execution the Applicant and the child will be thrown out of the house and the house be sold.

- ii. *That, the Respondent care for nobody but himself and in this circumstances he will do almost anything to make sure his intentions are met and the Applicant is thrown off the house.*
 - iii. *That, only remedy which was available for the Applicant to venture pending final determination of the intended appeal was the Application for stay of execution.*
6. *That, if Respondent's movement to execute the decree will not stayed pending what is stated in paragraphs 2, 3 and 4 above, the Applicant and her child will suffer irreparable loss physically and psychological as they will become homeless.*
- i. *that, if the order for stay of execution is granted and the Applicant herein lose in the intended appeal proceedings, she is willing, ready to*

put the matrimonial house as security

for costs."

On his part, the respondent strongly objected to the application for stay of execution and adopted what he stated in his affidavit in reply, where he disputed to what was stated in the applicant's affidavit in support of the application.

It is now trite law that no order for stay of execution shall be made under Rule 11 of the Rules unless the Court is satisfied that the following conditions precedent have been fulfilled:-

1. That substantial loss may result to the party applying for stay of execution unless the order is made;
2. That the application has been made without unreasonable delay; and
3. That security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(See, Rule 11 (2) (d) (i)-(iii) of the Rules).

In the case of **Joseph Soares @ Goha v. Hussein Omary**, Civil Application No. 6 of 2012, this Court held as follows:-

"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 condition 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."*

(Also see **Anthony Ngoo and Another v. Kitinda Kimaro**, Civil Application No. 12 of 2012, **Juma Hamisi v. Mwanamkasi Ramadhani**, Civil Application No. 34 of 2014 and **Rehema Emanuel and Another v. Alois Boniface**, Civil Application No. 5 of 2013 to name a few).

Looking at the affidavit in support of the notice of motion, we have failed to see Rule 11 (2) of the Rules to have been sufficiently

complied with especially the conditions under Rule 11 (2) (d) of the Rules. According to the decision of the High Court in Civil Appeal No. 25 of 2014 dated 29th January, 2015 to which the applicant seeks to be stayed, the applicant has failed to establish her contribution to the matrimonial house. Therefore, her claim on the contribution failed. That means the matrimonial house solely belongs to the respondent.

At paragraph 6 of her affidavit, the applicant has shown that she is ready to put the matrimonial house as security. However, we have asked ourselves, how that suit property can be surrendered as a security while the same is taken to be the property of the respondent until such time when this Court in the intended appeal decides otherwise. Therefore the applicant cannot rely on such property as security as it is not her property. (See the recent decision of this Court in the case of **Rehema Emanuel** (*supra*)). And so long the house is not her property, the issue of substantial loss does not arise. The applicant has also failed to comply with that condition stipulated under Rule 11 (2) (d) of the Rules.

For those reasons, we dismiss the application in its entirety.
As the matter arises from a matrimonial suit, we issue no order as to costs.

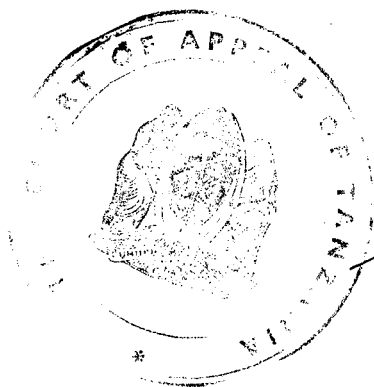
DATED at ARUSHA this 29th day of February, 2016.


M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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




E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL