

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

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

CIVIL APPLICATION NO. 40 OF 2014

**TSERE SELLY.....APPLICANT
VERSUS
SERIKALI YA KIJJI CHA CHEMCHAM..... RESPONDENT**

**(Application for stay of execution of the Judgment and decree of the High
Court of Tanzania at Arusha)**

(Massengi, J.)

Dated 20th day of December, 2012

in

Civil Appeal No. 44 of 2006

RULING OF THE COURT

29th February & 1st March, 2016.

MUSSA, J.A.:

The applicant seeks an order of this Court staying the execution of the judgment and decree of the High Court (Massengi, J.) dated the 20th December, 2012 in Civil Appeal No. 44 of 2006. The application is by a Notice of Motion which has been taken out under Rules, 11 (2) (b), (c), (d), (e) and 48 (1), (2), (3) and (4) of the Court of Appeal Rules, 2009 (the Rules). The same is supported by an affidavit duly sworn by the applicant. In addition, the applicant, through counsel, filed written submissions in support of the

Notice of Motion. On the adversary side, for some obscure cause, the respondent did not file an affidavit in reply and neither did she lodge reply submissions.

At the hearing before us, the applicant entered appearance through Mr. Emmanuel Safari, learned Advocate, whereas the respondent was represented by Mr. Severine Lawena, also learned Advocate. As it were, the learned counsel for the applicant fully adopted the Notice of Motion, the affidavit in support as well as the written submissions and, on the strength of the documents, he urged us to allow the application. For this part, Mr. Lawena initially sought to dispute the applicant's claim that he is in occupation of the suit land but, when we reminded him that the respondent has not filed any affidavit in reply, the learned counsel abandoned the approach and left the determination of the application to the wisdom of the Court.

Addressing the application, it should be observed, first thing, that the referred Rule 11 (2) of the Rules under which the Notice of Motion is predicated is more restrictive in scope than the former Rule 9 (2) of the 1979

Rules. As was observed in the unreported Civil Application No. 7 of 2012 –

Therod Fredrick Vs. Abdusamudu Salim:-

*"On the terms of the present Rules, the Court no longer has the luxury of granting an order of stay of execution **on such terms as the Court may think just**; rather, the court must be satisfied, just as the applicant will be required to fulfill the following **cumulative** requirements:-*

- 1. Lodging a Notice of Appeal in accordance with Rule 83;*
- 2. Showing good cause and ;*
- 3. Complying with the provisions of item (d) (i), (ii) and (iii)."*[Emphasis supplied].

In terms of the third requirement, no order for stay of execution shall be made unless the court is cumulatively 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 unreasonable delay; and*

(iii) that security has been given by the applicant for due performance of such decree or order as may be binding upon him."

Thus, as will be discerned from the foregoing, the only decisive issue calling for our attention and determination is whether or not the applicant has satisfied the enlisted preconditions cumulatively. That may be deduced from the Notice of Motion or his affidavit and, in this regard, it is noteworthy that with twenty three (23) paragraphs, the applicant's affidavit is lengthy but, in due course, we shall only relate to its relevant paragraphs.

To begin with, from the averment in paragraph 4 of the affidavit as well as the supporting annexure "PA-2", it is beyond doubt that the applicant has fulfilled the first requirement by duly lodging a Notice of Appeal in accordance with Rule 83 of the Rules. We are equally satisfied that the applicant has demonstrated good cause by lodging the Notice of Appeal as well as in his steps towards obtaining leave to appeal as deponed in paragraphs 5 to 11 of the affidavit. That suffices to meet the requirements in Rule 11 (2) (b) and (c) of the Rules.

Coming now to Rule 11 (2) (d) (i) of the Rules, the applicant states in paragraphs 18 and 19 that substantial loss will result to him unless the order is made. Since this claim sails through uncontested by any affidavital reply, the same fulfils the requirement which is stipulated therein. With respect to Rule 11 (2) (d) (ii) of the Rules, it is to be noted that on the 17th October, 2014 the Court (Kaijage, J.A.) granted to the applicant an extension of thirty (30) days within which to lodge the application for stay. Incidentally, the application at hand was lodged on the 10th November, 2014 and, for that matter, it was so lodged without unreasonable delay as required by the Rule. Finally, on the requirement for security of costs, the applicant avers as follows in paragraph 20 of the affidavit:-

"That, as security for this application for stay of execution, I make firm and binding undertaking that my 12 acres land is bonded, which is different from the land in dispute, for due performance of the decree as may ultimately be binding upon me. Annexed hereto and marked "PA-12" is a copy of the sale agreement, attesting to the above stated facts,

for which leave is craved for this Honourable Court to refer to it as part of this affidavit."

In Civil Application No. 11 of 2010 – **Mantrac Tanzania Ltd vs. Raymond Costa** (unreported), the Court gave the following guidance on the subject:-

"One other condition is that the applicant for a stay order must give security for the due performance of the decree against him. To meet this condition, the law does not strictly demand that the said security must be given prior to the grant of the stay order. To us, a firm undertaking by the applicant to provide security might prove sufficient to move the court, all things being equal, to grant a stay order, provided the Court sets a reasonable time limit within which the applicant should give the same."

In the situation at hand, the applicant undertakes to give his 12 acres farm as security for the due performance of the decree which, in our view, suffices to meet the requirement under Rule 11 (2) (d) (iii) of the Rules. Thus, in fine, the applicant has met all the conditions and, that being so, this application succeeds and the same is, accordingly, granted as prayed by the applicant. The costs should abide by the result of the intended appeal. It is so ordered.

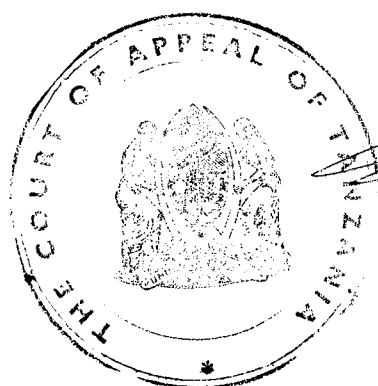
DATED at **ARUSHA** this 29th day of February, 2016.

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
E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL