

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPLICATION NO 193 OF 2016

(CORAM: OTHMAN, C.J., JUMA, J. A. And, MWARIJA, J. A.)

**IBRAHIM ALLY YUSUF MPORE APPLICANT
(ADMINISTRATOR OF THE ESTATE OF SALUM ALLY YUSUF MPORE)**

VERSUS

**NALGIS ALLY YUSUF MROPE 1stRESPONDENT
RAHMAT AHMAD JUMA 2nd RESPONDENT**

**(Application for stay of execution from the Judgment and Decree of the High
Court of Tanzania at Dar es Salaam)**

(Hon. Rugazia, J.)

**dated the 12th day of May, 2016
in**

Land Case No 175 of 201

RULING OF THE COURT

5th September, 2016 & 26th October, 2016

OTHMAN, C.J.

The applicant, Ibrahim Ally Yusuf Mrope (Administrator of the Estate of Salum Ally Yusuf Mrope) is a half-brother of the 1st respondent, Nalgis Ally Yusuf Mrope and step son of the 2nd respondent, Rahmat Ahmad Juma.

He seeks under rule 11(2)(b) of the Court of Appeal Rules, 2009 a stay of execution of the decree of the High Court (Land Division)

(Rugazia, J.) in Land Case No. 175 of 2011 delivered on 12/05/2016 which among reliefs, declared the 1st respondent the rightful title holder of plots Nos. 65 and 66, Pugu Road, Gerezani, respectively bearing Titles Nos. 18622/29 and 18622/30 and its transfer to the applicant as illegal and ineffectual.

The respondents oppose the application.

At the hearing of the application, Mr. Burhani Kisenyi and Mr. Khalfan Msumi learned Advocates for the applicant submitted that the respondents were in the process of transferring the title of the properties in their name and if an order of stay of execution of the decree is not issued, the applicant will suffer irreparable loss because if he succeeds on appeal, it might be difficult to recover the property as it may already have been alienated by the respondents. Relying on **Joramu Biswalo v. Hamis Richard**, MZA Civil Application No. 11 of 2003 and **Integrated Property Investments (T) Ltd. and Two others v. The Company for Habitat and Housing in Africa Shelter Afrique**, Civil Application NO. 162 of 2015 (All, COA unreported) he submitted that the applicant has made a firm undertaking to provide security for the due performance of the decree as might prove sufficient to the Court. He invited the Court to grant the order for stay of execution of the decree.

On his part, Mr. Mashaka Ngole, learned Advocate for the respondents submitted that no serious irreparable loss would be suffered by the applicant because the record of the transfer of the suit property could be rectified by the applicant anytime, even after twenty years should he be successful on appeal. He contended that the application has also been overtaken by events as the title of the suit property was changed on 13/07/2016, after the institution of the applicants' notice of appeal on 23/05/2016. He added that as the reliefs granted under the decree were only declarations that the title of the property was that of the respondents, it cannot be the subject of an order for stay of execution. The transfer of the property in the name of the respondents is not an execution process.

We have given close consideration to the parties' submissions and their opposing affidavits. It is common ground that the application before the Court is for a stay of execution of the decree impugned in the applicant's notice of appeal. The word "execution" is neither defined on the Civil Procedure Code, Cap. 33, R.E. 2002 nor the Interpretation of Laws Act, Cap 1. In **Re Overseas Aviation Engineering Limited** [1963]1 Ch.24, pp.39-40, Lord Denning, MR explained it this way:

"The word "execution" is not defined in the Act. It is, of course, a word familiar to lawyers. "Execution" means, quite simply, the process for enforcing or giving effect to the judgment of the court: and it is "completed" when the judgment creditor gets the money or other thing awarded to him by the judgment".

The **Halsbury's Laws of England**, 4th Ed., Vol 17, para. 401 gives as its meaning:

"The word "execution" in its widest sense signifies the enforcement of or giving effect to the judgment of orders of courts of justice".

Black's Law Dictionary, 9thEd.has as its meaning:

"The act of carrying out or putting into effect (as a court order)"

The same word in Justice L.P. Singh and P.K. Majumbar, **Judicial Dictionary**, 2nd Ed., 2003, is described as meaning:

"Execution, and signifieth in law the obtaining of actual possession of anything acquired by judgment of law".

In our respectful view, taking the totality of the reliefs granted in the decree, which apart from declarations on the title and transfer of the suit property, includes vacant possession, which may involve the issuance of eviction orders by the executing Court under the Civil Procedure Code and a sum of Tz Shs 2,000,000/= from 5th November, 2008 to the date of the judgment as mesne profit and the definition of a decree under section 3 of the Civil Procedure Code, Cap. 33 R.E. 2002, the impugned decree is executable and can be the subject of an order of stay of execution. Moreover, we agree with Mr. Kisenyi and Mr. Msumi that a transfer and alienation of the suit property by way of a change of the title to its rightful owner could also engage an execution process through the executing Court. It is not out of nowhere that the "Notice of Transmission by Operation of Law", issued by the Registrar of the Titles to the applicant on 13/06/2016 is grounded on the very Judgment and Decree now sought to be stayed.

Mr. Ngole submitted that the decree could also not be stayed because the respondents had not filed in the High Court an application for execution of the decree. With respect, in our view this is not a precondition for the grant of an order for stay of execution under Rule 11(2) (b). What that rule requires is a notice of appeal and the applicants filed one timely, on 23/05/2016. There was also debate

between learned Counsel on whether or not the application has been overtaken by events as execution had been completed. There was no reliable material to that effect in the parties competing affidavits and with respect, mere representations from the bar by learned counsel are insufficient to replace the requirement of satisfactory proof on that issue.

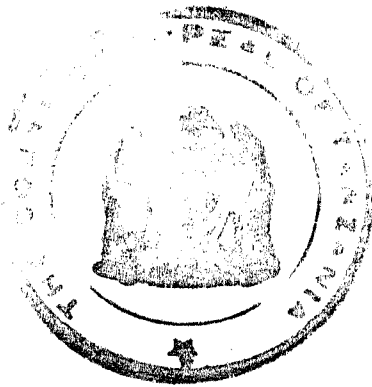
The law is now well settled that the grant of an order for stay of execution is dependent on the fulfilment of the three conditions conjunctively spelt out under Rule 11(2)(d)(i)-(iii) of the Rules (See, **Therod Fredrick v. Abdulsamudu Salim**, Civil Application No. 7 of 2012; **Geita Gold Mining Company v. Twaib Ally**, Civil Application No. 14 of 2012; **Mantrac Tanzania Ltd. v. Raymond Costa**, Civil Application No. 11 of 2010 (All COA, unreported)).

That said, considering the blood and family relationship between the parties, the nature of the dispute principally involving a declaration of the rightful title holder to the suit property said to have been inherited from or distributed by Salum Ally Yusuf, and the applicant's compliance with the conditions stipulated in Rule 11(2)(d)(i)-(iii) of the Court of Appeal Rules, including the applicant's binding and firm undertaking under affirmation to provide security for the due performance of the decree in paragraph 6 of his affidavit dated 27/06/2016, we are satisfied that good cause has been demonstrated for the Court to exercise its

discretion in favour of the stay of execution order sought. We note the absence before the Court of any valid valuation of the disputed suit properly, or the extent of any of the parties' contribution to its development.

In the result and for the foregoing reasons we hereby grant a stay of execution of the decree pending the hearing and determination of the intended appeal. Each party is to bear its own costs. Ordered accordingly.

DATED at **DAR ES SALAAM** this 13th day of October, 2016.



M. C. OTHMAN
CHIEF JUSTICE

I. H. JUMA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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

B.R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL