

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

(CORAM: MBAROUK, J. A., MUGASHA, J. A. And MWANGESI, J. A.)

CIVIL APPLICATION NO. 156 OF 2013

GODEBERTHA RUKANGA APPLICANT

VERSUS

1. CRD BANK LIMITED
2. YONO AUCTION MART
3. PROSPER PETER SIRIWA
4. ANGEL PROSPER PETER

}RESPONDENTS

(Application for Stay of Execution of the Decree from the judgment of the High Court of Tanzania (Land Division) at Dar es Salaam.)

(Mwambegele, J.)

Dated the 11th day of July, 2013

in

Land Case No. 73 of 2006

.....

RULING OF THE COURT

21st June 3rd July, 2017.

MUGASHA, J.A.:

The applicant (**GODEBERTHA RUKANGA,**) filed in the High Court (Land Division), Land Case No. 73 of 2006 against the respondents challenging the sale of the suit property on Plot No. 654 Block B at Sinza. The property was owned by her late husband who is alleged to have mortgaged the property to the 1st respondent. Since her late husband was

was the registered owner of the property in question and given that the administrator of estate was not yet appointed, she contested the legality of the sale of the property through the 2nd respondent to the 3rd respondent who was guardian of the 4th respondent. Besides, it was alleged that, prior to the sale adequate notice was not given and the house was sold at a throw away or pre-arranged price. The High Court determined the land suit in favour of the 4th respondent who was declared the rightful owner with orders that: the applicant should pay: a sum of Tshs. 100,000/= per month from the date she resisted eviction until when she gives vacant possession and Tshs. 50,000,000/= as general damages by the applicant to the 4th respondent and costs to 1st, 3rd and 4th respondents.

Aggrieved, the applicant lodged notice of appeal on 25th July, 2013. Subsequently, on 28th August, 2013 she lodged the present application seeking stay of execution of the decree of the High Court of Tanzania (Land Division) dated on 11th July, 2013.

The application is by notice of motion brought under Rule 11 (2) (b), (c) and (d) (i) and (ii) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The affidavit of the applicant is in support of the application.

To buttress the motion, the applicant has filed written submissions. The application has been challenged by the respondents through the affidavits in reply of **WILBROD MWAKIPESILE AND PROSPER PETER SIRIWA**, the respondent. In addition; the 1st, 3rd and 4th respondents have lodged written submissions in response to the applicant's written contentions.

At the hearing of the application, the applicant was represented by Mr. Adronicus Byamungu learned counsel, while the 1st and 2nd respondents were represented by Mr. Florence Tesha and the 3rd and 4th respondents were represented by Mr. Samson Mbamba learned counsel.

Going by the notice of motion, the main ground canvassed by the applicant is that she stands to suffer undue hardship, financial and emotional loss if the respondents will execute the judgment and decree of the trial court.

Arguing in support of the application, Mr. Adronicus Byamungu submitted that, this application was filed without undue delay seeking to stay the decree of the trial court to prevent irreparable loss and injury to the widowed applicant who resides with her family in the house in question as they have no other residence. Mr. Byamungu added that, since execution is not yet effected, the applicant is prepared to furnish

security as the Court may direct. To support his propositions he cited the cases of **JORAMU BISWALO VS HAMIS RICHARD** Civil Application. No 11 of 2013 and **MANTRAC TANZANIA LTD VS RAYMOND COSTA**, Civil Application No. 11 of 2010 (both unreported).

On the other hand, the respondents opposed the application on basically two fronts: **One**, the applicant will not suffer substantial or irreparable loss and instead, the 3rd respondent being a bona fide purchaser, stands to suffer most and cannot enjoy the fruits of the decree pursuant to which he was registered as owner of the property in question. **Two**, the applicant has not furnished security for the due performance of the decree whereby, apart from merely showing willingness to do so she has not indicated the mode of security. In this regard, it was argued that, the application does not comply with Rule 11(2) (d) (i) to (ii) of the Rules and it is rendered incompetent. To support their propositions the respondents relied on the case of **JORAMU BISWALO VS HAMIS RICHARD** (supra) contending that it is not in favour of the application.

In rejoinder, the applicant's counsel submitted that, the stay of execution is sought to enable the applicant to remain in the respective house pending the determination of ownership on appeal. He added

that, in the Notice of Motion, the applicant has undertaken to give security which is in accordance with Rule 11(2) (d) (i) and (iii) of the Rules.

The mandate of the Court to grant stay of execution of a decree or order upon good cause being shown, is articulated under Rule 11 of the Rules which provides:

11 (1) ... (not relevant)

11 (2) Subject to the provisions of sub-rule 1 the institution of an appeal shall not operate to suspend any sentence or to stay execution but may-

(a) ... (Not relevant)

(b) In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 83, an appeal shall not operate as a stay of execution of the decree or order appealed from except so far as the High Court or tribunal may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree or order; but the Court, may upon good cause

shown, order stay of execution of such decree or order.

(c) ... (Not relevant)

(d) 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 unreasonable delay; and

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

In the case of **MTAKUJA KONDO AND OTHERS VS WENDO MALIKI**,
Civil Application No. 74 of 2013 (unreported) we said:

" ... The conditions which applicants have to satisfy so as to be granted the order for stay of the execution are laid out in Rule 11(2) (b) (c) and (d). All conditions must be

*satisfied. The applicant must show the following: **a notice of appeal was given; they have sufficient cause for praying for the order for stay, the application was filed within time; they will suffer substantial loss if the order is not granted; and they have furnished security.*** (See also **THEROD FREDRIC VS ABDUSAMUDU SALIM**, Civil Application No. 7 of 2012, (unreported).

[Emphasis supplied]

The modality of furnishing security was addressed by the Court in **MANTRAC TANZANIA LTD VS RAYMOND COSTA**, Civil Application No. 11 of 2010 (unreported). This Court said

"That, the other condition is that the applicant for stay order must give security for due performance of the decree against him. To meet this condition, the law does not strictly demand the said security must be given prior to the grant of 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."

Where security is not furnished and in the absence of any such firm undertaking, the Court in **JORAMU BISWALO VS HAMIS RICHARD** (supra) said:

"The applicant having not furnished security or made firm undertaking in his sworn affidavit or in the submission made on his behalf by Mr. Magoiga, settled law requires us not to grant the order sought. Accordingly we dismiss the application."

We shall be guided by the stated principles in determining this application.

The rivalling contentions hinge on whether or not, the applicant has substantiated loss to be suffered and if she has furnished any mode of security for the performance of the decree.

In the motion at hand, it is not in dispute that the notice of appeal was timely filed on 25th July, 2013 and this application was filed without unreasonable delay on 28th August, 2013. In paragraphs 6 and 8 of the affidavit, the applicant has deposed among other things, if stay of execution is not granted, the respondents will execute the decree of trial court and she will suffer undue hardship, financial and emotional loss having resided in the premises in question for thirty one (31) years.

Besides, she is desirous of inquiring into the legality or otherwise of the sale of the house in question on appeal. Moreover, in the Notice of Motion the applicant undertakes to furnish security as the Court may deem fit to order.

On the basis of grounds stated in the notice of motion, her affidavit and submissions made on her behalf, we are satisfied that the applicant has availed good cause due to: **One**, having shown that she will suffer substantial loss since she has no other house where she can reside with her family. **Two**, having fulfilled three conditions cumulatively including that of making a firm undertaking to furnish security which is sufficient. In this regard, in the present application the case of **JORAMU BISWALO** (supra) is distinguishable wherein, the applicant neither furnished security nor made respective firm undertaking be it in the notice of motion, affidavit or submissions at the hearing. **Three**, considering that the subject in question is immovable property compounded with what the applicant believes to be irregular sale in the impugned judgment, the interests of justice require that *status quo* be maintained pending the determination of the appeal. In addition, to ensure that the applicant does not suffer loss should the appeal succeed.

In view of the aforesaid, we therefore, order stay of execution of the decree of Hon. Mwambegele, J. as he then was dated 11th July, 2013 in Land Case No 73 of 2006 on condition that, the applicant provides security by depositing in Court a sum of Tshs. 10,000,000 (ten million) within thirty (30) days from the date of this order so as to assure the satisfaction of the judgment in the event the appeal fails. Costs are in the cause.

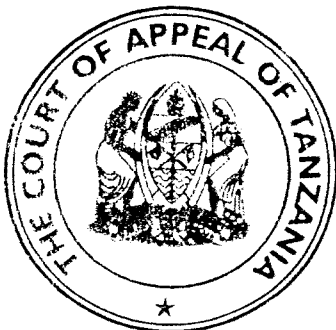
DATED at DAR ES SALAAM this day 29th day of June, 2017

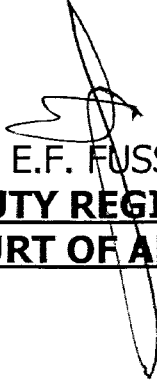
M. S. MBAROUK
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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




E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL