IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(CORAM: MBAROUK, J.A., MKUYE, J.A., And WAMBALI, J.A.)

CIVIL APPLICATION NO. 385/15 OF 2018

THE ATTORNEY GENERAL ZANZIBAR.........APPLICANT

VERSUS

1. JAKU HASHIM AYOUB
2. ZANZIBAR PETROGAS LIMITED }.....RESPONDENTS

(Application for stay of execution of the Decree of the
High Court of Zanzibar at Vuga)

(Sepetu, J.)

dated 23rd day of February, 2017
in
Civil Suit No. 03 of 2016

RULING OF THE COURT

30th November & 13th December, 2018

MBAROUK, J.A.:

In this application, the applicant, the Attorney

General Zanzibar, is seeking an order of this Court for

stay of execution of the decree of the High Court in

Civil Suit No. 03 of 2016 delivered on 23rd February, 2017. The application was made under Rules 11 (3), (4), (5), (d) and (6) and 48 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) as amended. The notice of motion was supported by the affidavit of Juma Msafiri Karibona sworn on 8th May, 2018.

Briefly stated, the historical background of this application is that, in relation to plot of Land No. 16 LO Z-53/S.178/2007/16; P.C.R Z 5093/2007 situated at Mtoni Zanzibar, the respondents prayed before the High Court of Zanzibar to enter judgment on admission under Order VIII Rule 3, 4 and 5 as well as Order XIV Rule 6 of the Civil Procedure Decree, Cap. 8 of the Laws of Zanzibar. The trial court issued permanent prohibitory injunction and mandatory injunction and restraining the applicant from stopping

the authorized development of the plot of land. The Court ordered the applicant to pay general damages for financial loss, mental psychological torture to the respondents which is to be assessed by the Court of not less than Tshs. 500,000.000/= (TZS. Five Hundred Millions).

Aggrieved by the decision of the trial High Court, the applicant intends to appeal to this Court. He filed a notice of appeal and then preferred this application for stay of execution pending the hearing and disposal on merit of the intended appeal.

The applicant has cited in its notice of motion four grounds as follows: -

> i. *The proceedings, judgment and*
> *decree are problematic.*

ii. The applicant will suffer irreparable loss and great hardship if the decree is executed.

iii. The balance of convenience dictates for stay of execution

iv. If the said Decree is executed the intended appeal will be rendered nugatory to the detriment of the applicant.

When the application was called on for hearing before us, the applicant was represented by Mr. Juma Msafiri, learned State Attorney, whereas the respondent had the services of Mr. Salim Mnkonje, learned advocate.

Mr. Msafiri prayed to adopt what has been stated in his Notice of Motion supported by what he has stated in his affidavit and prayed for stay of execution order. After the intervention of the Court concerning the issue of lack of security for cost as per Rule 11(5)(c) of the Rules, Mr. Msafiri agreed that, they have not undertaken to provide security for cost neither in his notice of motion nor in his affidavit in support thereof. He then urged us to strike out the application for its failure to comply with the mandatory requirement under Rule 11 (5)(c) of the Rules.

On his part, Mr. Mnkonje agreed with the defect raised by the Court, and prayed for the Court to strike it out.

It is now trite law that no order for stay of execution shall be made under Rule 11(5) of the Rules unless the Court is satisfied that the following conditions precedent have been fulfilled. Rule 11(5)(c) of the Rules states as follows: -

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

In the case of **Joseph Soares @ Goha v. Hussein Omary**, Civil Application No. 6 of 2012 (unreported), 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 conditions 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."

(See also the cases of **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 (all unreported).

One of the condition for stay of execution is that, the applicant must give security for the due performance of the decree against him.

Looking at the affidavit in support of the notice of motion, we have failed to see whether the conditions under Rule 11(5)(c) of the Rules have been complied with. This condition is that the

applicant for a stay order must give security for the due performance of the decree against him. In the case of **Seleman Zahoro and 2 Others versus Ahmed Abdul** (Legal Representative of deceased Ahmed Abdul) Civil Application No. 1 of 2008 (unreported) this Court held:-

> "*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*".

The cited Rule above is similar to Rule 11 (5) (c) of the Tanzania Court of Appeal Rules, as amended by GN 362 of 2017.

For the above stated reasons, we are constrained to strike out this application as we hereby do with no order as to costs, as it was the Court which raised the matter *suo motu*. It is so ordered.

DATED at **ZANZIBAR** this 11th day of December, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL