IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUSSA, J.A, MUGASHA, J.A And MKUYE, J.A)

CIVIL APPLICATION NO. 15/08 OF 2016

ABEL DOTTO ..... APPLICANT
VERSUS
MODESTA J. MAGONJI ..... RESPONDENT

(Application from the decision of the High Court of Tanzania At Mwanza)

(Mlacha, J.)

dated the 25th day of July, 2016
in
Land Appeal No. 44 of 2016

RULING OF THE COURT

17th & 23rd April, 2018
MUGASHA, J.A.:

In the District Land and Housing Tribunal, Mwanza (DLHT), the respondent successfully sued the applicant over ownership of registered land within Ilemela District in the City of Mwanza. Aggrieved, the applicant appealed to the High Court whereby the respondent emerged successful in a verdict pronounced on 25th July 2016, and the first appellate court decreed as follows:-

1. *The amendment of the map which were to divide plot No. 45 Block, B, Ilemela is declared illegal, null and void.*
2. *The offer issued to Mr. Daniel Nyanda is declared illegal, null and void.*
3. *The respondent, Modesta, J. Magonji is declared the lawful owner of plot No. 45 (currently described as plots Nos. 42 and 42 Block B Ilemela, Mwanza and the relevant authorities directed to issue title deeds to her.*
4. *The appeal is dismissed with costs.*

Still discontented, on 9th August, 2016 the applicant lodged a Notice of Appeal to the Court. In the present application, by way of Notice of Motion the applicant is seeking for an order to stay the execution of the decree of the High Court. The grounds upon which the Notice of Motion is based are as follows:

(a)The execution of the decree of the trial and appellate courts be stayed pending and determination of an intended appeal.

(b) That, the applicant will suffer substantial irreparable loss unless stay is granted.

(c) The respondent is in the process to transfer offer from the right owner.

The application is accompanied by the applicant's affidavit. The respondent challenged the application through her affidavit in reply sworn on 6thSeptember, 2016. To buttress their arguments for and against the application,parties filed written submissions as per dictates of Rule 106(1) of the Tanzania Court of Appeal Rules, 2009(the Rules).

At the hearing of the application, parties fended for themselves unrepresented. The applicant adopted the Notice of Motion, the accompanying affidavit and the written submission which basically hinge on fourmajor grounds namely: **One,** the applicant has already lodged the Notice of Appeal to this Court; **Two,** the intended appeal has overwhelming chances of success. **Three,** the applicant offers the land in dispute which is currently registered in his name as sufficient security for the due performance of the decree as may be ultimately binding upon him.

As gathered from the documents supporting this application, one of the grounds relied by the applicant is to the effect that, his intended appeal

has overwhelming chances of success. At the outset, we wish to state that, with the coming into operation of the new Rules, the likelihood of a successful appeal is no longer a requirement for granting stay of execution. In this regard, we wish to reiterate what the Court said in the case of **JOSEPH SOARES @ GOHA VS HUSSEIN OMARY;** Civil Application No. 12 of 2012 (unreported) that:

> *"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 case of **JUMA HAMISI VS MWANAMKASI RAMADHANI,** Civil Application No. 34 of 2014 (unreported)].

To discern from the referred item (d) of sub rule 2, it is categorically provided therein that no order for stay of execution shall be granted unless the Court is satisfied that:-

(i) substantial loss may result to the party applying for stay of execution unless the order is made;

(ii) the application is made without delay; and

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

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

"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 the 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***

application for stay is granted (See, **FRIDA KAHULE MWIJAGE Vs. TANZANIA BUILDING AGENCY,**Civil Application No. 3 of 2011 (unreported)).

When the applicant was required to address the Court on the question of security as required under Rule 11 (2) (d) (iii), echoed what he deposed in paragraph 6 of the affidavit contending that, the land in dispute is sufficient security. The applicant relied on the case of **MANTRAC** (supra) despite not having made any firm undertaking to furnish security within reasonable time limit as the Court would direct. This was disputed by the respondent in paragraph 4 of the affidavit in reply. We found applicant's argument wanting because under Rule 11 (2) (d) (iii), the obligation to furnish security is on the applicant and not the respondent. Moreover, the High Court, in Land Appeal No. 44 of 2006 and the DLHT in Land Case No. 142 of 2012, all made concurrent findings on the respondent being lawful owner of the registered parcel of land in question. In the circumstances, for the time being, it is not desirable for the applicant to claim ownership of such property and proceed to offer it as security for the due performance of the decree under Rule 11 (2) (d) (iii) of the Rules. Besides, the **MANTRAC's** case cited by the applicant cannot salvage his predicament in

the absence of any firm undertaking to provide security be it in the documents accompanying the motion and at the hearing of the application.

In a nutshell, the applicant has neither furnished security, nor has he given a guarantee of security as held in the **MANTRAC's** case.

In view of the aforesaid, the application is not merited and is hereby dismissed with costs.

DATED at **MWANZA** this 23rd day of April, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL