

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 160/17 OF 2017

DAVID MAHENDE.....APPLICANT

VERSUS

1. SALUM NASSOR MATTAR  
2. FOSTERS AUCTIONEERS  
AND GENERAL TRADERS }

.....RESPONDENTS

(Application from the decision of the High Court of Tanzania  
at Dar es Salaam)

(Mgeta, J.)

dated the 30<sup>th</sup> day of July, 2015

in

Land Case No. 143 of 2009

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**RULING**

29<sup>th</sup> May & 6<sup>th</sup> June, 2018

**MUSSA, J.A.:**

The applicant seeks to move the Court thus:-

**"NOTICE OF MOTION**

*(Under Rule 11(3) (4) (5) (a) (b) and (c) and Rule  
11(6) of the Tanzania Court of Appeal Rules, 2009  
GN 368 of 2009 as amended by the Tanzania Court  
of Appeal (Amendments) Rules 2017)*

**TAKE NOTICE** that in the .....day of  
.....2018 at .....O'clock in the  
morning/afternoon or soon thereafter as he can be

*heard Mr. Richard K. Rweyongeza Advocate for the above named Applicant will move the Court to stay of execution of the Judgment and Decree of the High Court of Tanzania Land Division, dated 30<sup>th</sup> July, 2015 in Land Case No. 143 of 2009 (**Hon. Mgetta, Judge**) pending the determination of the intended appeal to this Hon. Court pursuant to the Notice of Appeal lodged by the Applicant, a copy of which is annexed herein upon the grounds that;-*

- 1) Undue hardship and irreparable, financial, and emotional loss will result to the Applicant unless the Order for stay of execution is made.*
- 2) That there exist serious errors and illegalities in the proceedings, judgment and decree of the High Court of Tanzania Land Division sought to be challenged and to be examined by this Honourable Court in the intended appeal to this Court.*
- 3) The 1<sup>st</sup> respondent has filed an application for execution and the applicant has been served with a 14 days' notice to evict from plot No. 22 Block 31F3 situated at Kasana Street Manyanya Area Kinondoni District*
- 4) The Applicant is willing to furnish such security as may be ordered by the Court for the due performance of the Decree sought to be stayed."*

If I may observe at once, apart from a citation, *inter alia*, of the provisions of Rule 11(6) of the Court of Appeal Rules, 2009 (the Rules), the Notice of Motion does not, in any way, distinctly constitute itself as an *ex-parte* application contemplated by Rule 11(6) of the Rules which stipulates:-

*"Notwithstanding anything contained under sub-rule (5) and rule 60(2) (b), this rule, a single judge of the Court, may make an ex-part order for stay of execution pending hearing of the appeal or application."*

All what the applicant does to contrive the application to qualify to the terms of Rules 11(6) is by alleging, in paragraph 8 of the supporting affidavit, thus:-

*" **THAT**, I decided to lodge this application as the Tanzania Court of Appeal Rules were amended to give jurisdiction to a single judge to entertain an application for stay of execution exparte pending the hearing of an application for stay by the Court."*

Granted that there is such an amendment to that effect in the Rules, but the Notice of Motion at hand does not tell itself to have been preferred "*ex-parte*" and, much worse, the Notice commanded that it be served on the

respondents. I should suppose, if the applicant had desired his to be an *ex parte* quest, he should have inserted the word "*ex parte*" either abreast or beneath the words "*Notice of Motion.*" What is more, the applicant need not have served the Notice of Motion on the respondents.

Upon the service of the Notice of Motion on the respondents, the first respondent, in particular, lodged an affidavit in reply through which he resisted the application which he, incidentally, assumed it to be a fully fledged application for a stay as distinguished from an *ex parte* application for a stay.

Now, when the matter was placed before me for hearing, the applicant was represented by Ms. Jacqueline Rweyongeza, learned Advocate, whereas the first respondent had the services of Mr. Sylvester Shayo, also learned Advocate. As regards the second respondent, he entered appearance through her Principal Officer, namely, Mr. Hamisi Ismail.

When asked to clarify the applicants quest before the Court Ms. Rweyongeza submitted that the applicant intendment was to seek an *ex parte* order before a single judge pending the hearing, *inter partes*, of the application before a panel of judges. On the adversary side, Mr. Shayo

contended that they construed the application to be for a stay of execution to which the respondents were braced to resist.

On my part, looking at the application at hand, I should express at once that it is, so to speak, a fully fledged application for stay to which I have no mandate, as a single judge, to hear and determine. That being so, I restrain from proceeding any further and, in terms of Rules 60(1) of the Rules, I will adjourn the application for the determination of a panel of three judges on a date to be fixed by the Registrar.

**DATED** at **DAR ES SALAAM** this 30<sup>th</sup> day of May, 2018.

K. M. MUSSA  
**JUSTICE OF APPEAL**

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

  
A. H. MSUMI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**