

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

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

CIVIL APPLICATION NO. 19/08 OF 2016

**PAULINA THOMAS APPLICANT
VERSUS
PROSPER JOSEPH MUTAYOBA..... RESPONDENT**

**(Application from the decision of the High Court of Tanzania
at Mwanza)**

(Gwae, J.)

**Dated the 31st day of July, 2015
in
Land Appeal No. 100 of 2014**

RULING OF THE COURT

23rd & 25th April, 2018

MUGASHA, J.A.:

Before this Court, is an application for stay of execution of the decree of the High Court dated 31st July, 2015. The application is accompanied by the affidavit of Paulina Thomas, the applicant. It was alleged that, the respondent had purchased house situated on Plot No. 142 Block 'F' Nyamanoro area from one Francis Gratian, one of the applicants in the trial before the District Land and Housing Tribunal at Mwanza (DLHT). The sale was pursuant to the execution a sale agreement however, Francis Gratian declined to give vacant possession of the said house (suit

premises). In the decision handed down on 31st July, 2015, the DLHT thus, decreed as follows:

1. The applicants and their family to vacate from house in dispute, situated at Plot No. 142 Block 'F' Nyamanoro area.
2. The applicants to pay *mesne* profit to the tune of Tshs. 50,000/= per month for denying the respondent from using the suit house from March, 2006 to a date they vacate.
3. Applicants to pay costs of the suit.

The first appeal before the High Court was dismissed. In a bid to pursue a second appeal, on 11th August, 2015 the applicant lodged a Notice of Appeal to the Court and subsequently filed the present Notice of Motion which is accompanied by the affidavit of Paulina Thomas, the applicant.

The motion is challenged by the respondent through his affidavit in reply sworn on 9th February, 2016. To buttress their arguments for and against the application, parties filed written submissions as required by Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

At the hearing of the application, the applicant appeared in person unrepresented. The respondent was represented by Mr. Geoffrey Kange, learned counsel.

The applicant adopted the Notice of Motion, the accompanying affidavit and the written submission for the grant of stay of execution which basically hinges on five major 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 will suffer irreparable loss if stay of execution is not granted; **four**, the balance of convenience and advantage is in favour of the stay order and as such, the respondent will not suffer in any way. **Five**, in case the stay order is not granted, the respondent will execute the decree of the trial Tribunal which will render the appeal nugatory.

On being probed by the Court in relation to furnishing security for the due performance of the decree, the applicant offered the suit premises believing the same to constitute sufficient guarantee for the due performance of the decree.

On the other hand, Mr. Geoffrey Kange initially, argued that, the application is overtaken by events following applicant's failure to seek extension of time to appeal against the refusal of leave to appeal against the impugned decision. In particular, he attacked the applicant's stance in not taking action after the Court had struck out her application for leave by

way of a second bite. On this point, he urged us to strike out the appeal with costs.

In addition the learned counsel submitted that, the applicant has not furnished security for the due performance of the decree which is not compatible with the statutory conditions to be fulfilled before the grant of stay order. He challenged the applicant's offer of the suit premises as security arguing that, currently it belongs to the respondent pursuant to the decree of the trial court.

We begin with the position of the law governing applications for stay of execution. The mandate of the Court to grant stay of execution of a decree or order upon good cause being shown is stated under Rule 11(2) 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."*

The above stated conditions must all be cumulatively satisfied before the order of stay is granted. This was emphasized by this Court in **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."*

Later, 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.]

Furnishing security for the due performance of the decree is one of the mandatory conditions which must be satisfied to warrant the grant of stay order. Where security is not furnished and in the absence of any such firm undertaking, settled law requires the Court not to grant stay of execution. [See **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))].

We shall be guided by the stated principles to determine the rival contentions which hinge on: whether or not seeking and obtaining leave to appeal is among the prerequisites for the grant of stay order, and if the applicant has cumulatively complied with all the conditions to warrant the grant of the application.

The first limb challenging the application need not detain us because obtaining leave to appeal is not one of the requirements to be fulfilled for the grant of an order for stay of execution of a decree. We say so because, it is settled law that, conditions to be satisfied cumulatively before an

application for stay is granted are those enumerated under Rule 11 (2) (b) (c) and (d) of the Rules. As earlier stated, the conditions include: Lodging a Notice of Appeal in accordance with Rule 83; showing good cause and; complying with the provisions of item (d) of sub- rule 2. (See, **JOSEPH SOARES @ GOHA VS HUSSEIN OMARY** (supra) and **MTAKUJA KONDO AND OTHERS VS WENDO MALIKI** (supra). Therefore, seeking and obtaining leave to appeal is not among the required conditions to qualify for the grant of stay order. In the circumstances, we do not agree with the respondent's counsel view that the applicant is not qualified to apply for stay of execution on account of not having sought and obtained extension of time to appeal against the High Court's refusal to grant leave, .

As to whether the applicant has complied with all the conditions cumulatively, it is not in dispute that the motion at hand was brought without delay having been filed on 29th September, 2015, not beyond sixty days after the notice of appeal was filed on 11th August, 2015. As to the whether the applicant has complied with the remaining conditions, we have gathered from the documents supporting this application that, among the grounds relied by the applicant include: the likelihood of success in the intended appeal and the scales on balance of convenience leaning in favour

of grant of the application because the respondent will not suffer. We wish to point out that, these are no longer the requirements with the coming in operation on the new Rules whereby, it must be established that the cumulative conditions enumerated in Rule 11(2) (b), (c) and (d) exist before granting the stay order. (See the case of **JOSEPH SOARES @ GOHA VS HUSSEIN OMARY**; (*supra*).

Moreover, apart from the applicant narrating that she will suffer irreparable or substantial loss, she did not clarify on the magnitude of loss or how she will suffer loss. We are thus satisfied that, having failed to establish the irreparable loss to be suffered, the applicant has not met the crucial condition and key element under Rule 11(2) (d) (i) of the Rules. Besides, it is settled law that the likelihood to suffer substantial or irreparable loss is not the only requirement which must be fulfilled to entitle the applicant for the grant of stay order.

As to whether the applicant has complied the condition of furnishing security for the due performance of the decree as may ultimately binding upon her, there was no such indication in the documents accompanying the application. When the applicant was required to address the Court on the question of security as required under Rule 11 (2) (d) (iii), she

contended she offered to suit premises believing the same to be sufficient guarantee. She placed reliance on the case of **MANTRAC** (*supra*). This was disputed by the respondent's counsel who argued that, in terms of the verdict of the trial court, the house in question belongs to the respondent and as such, and the applicant cannot offer it as security in the application at hand.

We agree with the respondent's counsel and found applicant's argument wanting. This is because under Rule 11 (2) (d) (iii) of the Rules, the obligation to furnish security is on the applicant and not the respondent. For the time being, pursuant to what was decreed by the DLHT in Application No. 43 of 2007, the applicant and her family were ordered to give vacant possession of the house in question. This decree was not overturned by the High Court, which dismissed the applicant's appeal for time bar in Land Appeal No. 100 of 2014. Given the circumstances, at the present moment, the applicant's prayer is tantamount to claim ownership of the house in question and proceed to offer it as security for the due performance of the decree under Rule 11 (2) (d) (iii) of the Rules. This is not desirable since the trial Tribunal's decree is yet to be overturned. Therefore, the **MANTRAC's** case cited by the

applicant is not in the applicant's favour in the absence of any security or firm undertaking to guarantee the security.

In view of the aforesaid, this application is not merited on account of applicant's failure to establish irreparable loss to be suffered and failure to furnish security for the due performance of the decree in terms of Rule 11(2) (d) (i) and (iii) of the Rules. We thus, accordingly dismiss the application with costs. It is so ordered.


DATED at **MWANZA** this 24th 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