

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., MWANGESI, J.A. And KWARIKO, J.A.)

CIVIL APPLICATION NO. 58/17 OF 2016

1. MOHAMED MASOUD ABDALLAH
2. ATHUMAN SELEMANI
3. SAID KISOMA
4. SHABAN NGURE MTEGWA
5. KISAKA JOHN MNKENI
6. SAID MLINDO
7. SAID M. OMARY
8. JOEL MICHAEL MWANGENDE
9. TULINAGWE BENSON MWAKYOMA
10. YOHAN MBINILE SHULA
11. WALIVYO PETER LUMBANGA
12. AZIZ NASSOR
13. PETER KASSIAN LUMBANGA
14. ALLY M. MLINDO
15. ELIAS BENSON MWAKYOMA
16. LUPAKISYO BURTON MLAGA
17. KESSY JOHN MNKENI

..... APPLICANTS

VERSUS

TANZANIA ROAD HAULAGE (1980) LTD.....RESPONDENT

**(Application for stay of execution of the Judgment and Decree of the High
Court of Tanzania, Land Division
at Dar es Salaam)**

(Mgonya, J.)

**dated the 24th day of December, 2018
in**

Land Case No. 140 of 2014

RULING OF THE COURT

07th & 24th June, 2019

KWARIKO, J.A.:

Before the High Court of Tanzania, Land Division at Dar es Salaam,
the respondent filed Land Case No. 140 of 2014 against the applicants and

- 28 others who are not part to this application praying for, *inter alia* to be declared lawful owner of Plots No. 2000, 2001, 2002, 2003, 2004, 2005 2006, 2007, 2009 and 2006 Block 1 within the City of Dar es Salaam and vacant possession of the suit premises.

The respondent won the suit whereby the High Court, Mgonya, J. in a decision dated 24th December, 2018 declared it to be the lawful owner of the suit premises and ordered the applicants to give vacant possession thereof and to demolish all structures built thereon with immediate effect, failure of which to be evicted there from.

The applicants were aggrieved by that decision and they lodged notice of appeal in this Court on 28/12/2018. While they were in the process of preparing their appeal, the applicants were served with a notice to appear before the High Court on 07/01/2019 to show cause why execution of the decree dated 28/12/2018 should not be carried out.

By way of a notice of motion the applicants have filed this application for stay of execution of the decree pending determination of the appeal against it. The application has been preferred under Rule 11 (3), (4), (5) (a) (b) (c) (7) (b) (c) & (d) and Rule 48 (1) of the Tanzania Court of

Appeal Rules, 2009 GN 368 of 2009 as amended by the Court of Appeal (Amendments) Rules, GN No. 362 of 2017 (the Rules). The relevant grounds in the notice of motion are as follows: -

- (b) That the decision subject of the execution and intended appeal is problematic in law and if execution is carried out the applicants stand to suffer substantial and irreparable loss.*
- (e) That the intended appeal has raised serious issues and has great chances of success.*

In support of the notice of motion is the affidavit sworn by the 5th applicant, Kisaka John Mnkeni and the following are relevant paragraphs: -

- (x) That, unless the application for stay of execution is granted, the purpose of the intended appeal will be rendered nugatory.*
- (xi) That, fairness, equity, natural justice and balance of convenience is in favour of the application being granted.*

*(xix) That, if required the applicants are
ready
to provide guarantee for the due
performance of the decree.*

The respondent did not file any affidavit in reply.

On the day the application was called on for hearing, Messrs. Twaha Taslima and Mashaka Ngole, learned advocates, appeared for the applicants and respondent respectively.

Mr. Taslima started his submissions in respect of the application by adopting the notice of motion and the supporting affidavit. To fortify his argument, he referred us to the decision of the Court in **Clara Kimoka v. Surumbu Axweso** [2002] T.L.R 255. The learned counsel also cited another decision of the Court in **B. R. Shindika t/a Stella Secondary School v. Kihonda Pitsa Makaroni Industries**, Civil Application No. 269 of 2015 (unreported) in respect of the conditions precedent for grant of stay of execution. In the end Mr. Taslima contended that the applicants have complied with all conditions as required by the law for the grant of this application as shown in the notice of motion and the supporting

affidavit. That, the fact that the applicants are occupiers of the suit premises for a long time and who have built houses thereon is good cause for the grant of the application.

In his reply to the foregoing submissions, Mr. Ngole did not essentially oppose this application. He urged the court to order the applicants to provide sufficient security for the due performance of the decree as the respondent is the owner of the suit premises.

In his rejoinder, Mr. Taslima urged the Court to refer to the case of **Shindika** (supra) where it was said that security which is to be given for the due performance of a decree is in the discretion of the Court.

We have considered the notice of motion, the affidavit in support thereof and the submissions by the counsel for the parties. For an application for stay of execution of a decree to succeed, the applicant must comply with conditions listed under the law, cumulatively. Rule 11 (3) (4) (5) (a) (b) of the Rules as amended by GN No. 344 of 2019 provide thus: -

"(3) 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.

(4) An application for stay of execution shall be made within fourteen days of service of the notice of execution on the applicant by the executing officer or from the date he is otherwise made aware of the existence of an application for execution.

(5) No order for stay of execution shall be made under this rule unless the Court is satisfied that:

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

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

This position of the law has been positively applied in a number of decisions of this Court; few of them are; **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application no. 11 of 2010, **Joseph Antony Soares @ Goha V. Hussein s/o Omary**, Civil Application no. 6 of 2012

and **National Bank of Commerce Limited v. Alfred Mwita**, Civil Application No. 172 of 2015 (all unreported).

The question to be addressed at this point is whether the applicants have fulfilled the conditions for the grant of the application for stay of execution. In our considered view the answer to this question is in the affirmative: **One**, the Court agrees with both parties that this application was lodged timely on 12/2/2019 which was within fourteen (14) days as ordered in Civil Application No. 02/17 of 2019 on 01/2/2019 before a single Justice while granting interim *ex- parte* order for stay of execution pending hearing of the application inter parties.

Two, the applicants have also shown that, if execution of the decree is effected, they will suffer substantial loss since they have been in occupation of the disputed premises and have built houses thereon.

Three, the applicants are ready to furnish security for the due performance of such decree as required under Rule 11 (5) (b) of the Rules.

Conclusively, we are satisfied that, the applicants have cumulatively satisfied the conditions for the grant of the application for stay of execution of the decree. We therefore find the application meritorious and grant it by

ordering that the decree in Land Case No. 140 of 2014 of the High Court of Tanzania, Land Division at Dar es Salaam be stayed pending determination of the applicant's appeal before this Court.

With regard to the security for due performance of the decree, while Mr. Ngole urged the Court to order the applicants to provide sufficient security for due performance of the decree as the respondent is the owner of the disputed premises, Mr. Taslima reiterated that the applicants are ready to provide security as will be ordered at the discretion of the Court. We have considered this condition and found that the law under Rule 11 (5) (b) of the Rules is not specific on the type or amount of security to be furnished. Therefore, it is the Court which is left with discretion to determine security to be provided which is dependent on the circumstances of each case. In the case of **Shindika** (supra), the Court said thus: -

"That Rule leaves it open to the Court to exercise its discretion in determining reasonable security to be deposited. We are well aware that the discretion is to be exercised judiciously. The amount to be deposited will therefore very much depend on the circumstances of each case."

After having considered the circumstances of this case where the impugned decree is not monetary, we have in the end found it appropriate to order the applicants to furnish security for due performance of the decree suiting the particular circumstances of the case.

As security for the due performance of the decree we order that each applicant shall execute a bond committing himself/herself to maintain the *status quo* of the premises which are subject of the decree within fourteen (14) days from the date of delivery of this ruling. Costs to be in the cause.

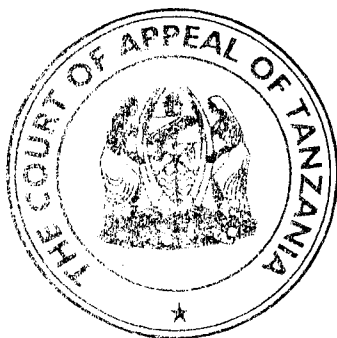
DATED at DAR ES SALAAM this 17th day of June, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

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




A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL