

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., KITUSI, J.A., And KEREFU, J.A)

CIVIL APPLICATION NO. 05/01 OF 2019

JONAS ERNEST MREMA APPLICANT

VERSUS

JANETH ELLY TEMU RESPONDENT

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

(Mtungi, J.)

Dated the 25th day of October, 2018

in

Consolidated Civil Appeal Nos. 98 of 2017 and 143 of 2017

RULING OF THE COURT

12th & 19th July, 2019

KITUSI, J.A.:

The applicant has filed a Notice of Appeal intending to appeal against the decision of the High Court (Mutungi, J) in Consolidated Civil Appeals No. 98 and 143 of 2017. Pending that intended appeal, the said applicant applies for an order of stay of execution of the decree in that case. The application is made by way of Notice of Motion under rule 11(3), 11(4), 11(5), (a) (b) (c), 11(6) 11(7) (b) (c) (d) and rule 48(1) of the Tanzania

Court of Appeal Rules, 2009, GN No. 368 of 2009 as amended in 2017 vide GN. No 362 of 2017 henceforth to be referred to as **the Rules**.

It is supported by an affidavit of the applicant himself, Jonas Ernest Mrema, while the respondent took an affidavit in reply contesting the application. None of the parties filed any written submissions in terms of Rule 106 of the Rules, as amended by GN No. 344 of 2019. Perhaps it is useful to state at this early hour that the proceedings from which this application arises are matrimonial, and mainly at issue is division of matrimonial assets after dissolution of the parties' marriage.

When the application came before us for hearing, the applicant appeared through Mr. Japhet Eliamini Mmuru, learned advocate, whereas the respondent appeared in person without legal representation. The learned counsel prayed to address us orally in terms of Rule 106(10)(b) of the Rules as amended by the Tanzania Court of Appeal (Amendment) Rules, 2019, GN No. 344 of 2019. As there was no objection from the respondent, and since Rule 106 (10) (b) of the Rules as amended permits such a course when no written submissions have been filed, we granted the prayer.

Submitting on the application, Mr. Mmuru adopted the Notice of Motion and supporting affidavit, then invited us to grant it on the ground that Rule 11(7) of the Rules has been complied with. The learned counsel further submitted, in elaboration, that the applicant has filed a Notice of Appeal with this Court. He went on to submit that on 27/12/2018 the respondent served the applicant with Notice of Execution and that within 14 days of that service this application was filed, impressing on us that the same has been filed within time without unreasonable delay. It was his submission that by attaching to this application, the Notice of Appeal, copy of decree and of judgment intended to be appealed against, and the Notice of Execution, the application meets the criterion under rule 11(7) of the Rules. In addition, the learned counsel submitted, there is an undertaking by the applicant stated in the supporting affidavit to furnish security for the due performance of the decree, should the intended appeal be decided in favour of the respondent. When asked to comment on the value of the subject matter for purposes of security, the learned counsel conceded that it has not been valued. Mr. Mmuru concluded by submitting that the intended execution will cause the applicant irreparable loss.

On the other hand, after adopting her affidavit in reply, the respondent fiercely resisted and prayed that the application should not be granted. First, she drew the attention of the Court to the fact that the applicant's application for extension of time to apply for leave to appeal has been denied by the High Court, suggesting therefore, that the intended appeal may never materialize. Then, the respondent submitted that the applicant has all along been in possession and control of the matrimonial assets subject of the decree and he has been realizing financial benefit therefrom, therefore contending that she is the one who suffers from the delayed execution.

In a short rejoinder, Mr. Mmuru conceded that the applicant's application for extension of time to apply for leave to appeal was unsuccessful but submitted that he intends to apply for a second bite under rule 45A of the Rules. He maintained that it is a requirement for an intending appellant to obtain leave to appeal to this Court against a decision of the High Court in matrimonial proceedings. He however repeated the point that the application has complied with the Rules, because there is a notice of appeal to this Court.

After putting the parties' respective affidavits and oral arguments to scrutiny, we think that under the current Rule 11 as amended by GN No. 362 of 2017 and GN No. 344 of 2019 which prescribes the conditions to be met by an applicant who wants to succeed in an application for stay of execution, the only issue for our determination is whether the conditions set out under sub Rule 7 of Rule 11 have been complied with by the applicant and whether the said applicant has done so cumulatively. [See **Jomo Kenyatta Traders Limited and 5 Others V. National Bank of Commerce Limited**, Civil Application No. 259 of 2015 and; **David Mahende V. Salum Nassor Mattar and Foster Auctioneers and General Traders**, Civil Application No. 160/01 of 2018, (both unreported).]

The compliance or otherwise with the conditions for stay of execution is a matter of fact to be established from the record. In this case the application was preferred within the statutory 14 days, and the same is accompanied with; the copy of notice of appeal, copy of the judgment and decree of the High Court, and copy of the notice of the intended execution. Nowhere in the Rules is the applicant required to show that he has obtained leave to appeal where the same is needed, therefore the

respondent's contention that the applicant's application for extension of time to apply for leave has not succeeded is, in our view, inconsequential. We are also mindful of the fact, suggested by Mr. Mmuru in his submissions, that should the intended execution be left to proceed and sale of the said assets be done to a third party, that may cause substantial loss to the applicant in that it may be difficult or impossible to restore them. To that end we are satisfied that the application has passed the litmus test, but before we conclude we have to resolve the issue of security.

The applicant has undertaken to furnish security for due performance of the decree. Paragraph 8 of the affidavit states;

*"That the application has been filed within a reasonable time and the applicant is ready to give security as may be **determined by this Court**".*

It is now settled that mere undertaking by the applicant to furnish security is sufficient. In **Prime Catch Exports Limited and 2 Others V. Ongujo Wakibara Nyamarwa**, Civil Application N0. 450/16 of 2018 (unreported) we overruled the counsel for the respondent who insisted on cash deposit as security, arguing that mere promise was not enough. We held;

"While we agree with him that, a mere promise may look insufficient, from the practice of the Court as highlighted in the above holdings, a firm undertaking by the applicant has been taken to be sufficient provided that the applicant complies with the directives made by the Court".

On the basis of the foregoing, we are certain that it is our duty to give directives regarding security, as stated in the supporting affidavit and as required of us under caselaw. Given the fact that the assets involved have not been valued neither are they properly registered, we order stay of execution of Consolidated Civil Appeals No. 98 Of 2017 and No. 143 of 2017 pending hearing and determination of the intended appeal, subject to the following conditions; the applicant to surrender to the Registrar of the Court the documents related to the registration of Mashaka Guest House at Manzese operated on House No. MZS/KLM/85 bearing the names of the parties, and those of the Music Recording Studio at Ubungo Shekilango, operated on House No. UBU/NHC/120 also bearing the names of the parties. This should be done within two weeks from the date of delivery of this ruling.

This application is therefore granted, but it being from matrimonial proceedings, we make no order as to costs.

DATED at DAR ES SALAAM this 16th day of July, 2019

K. M. MUSSA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

R. KEREFU
JUSTICE OF APPEAL

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




E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL