

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MWARIJA, J.A., KOROSSO, J.A. And KEREFU, J.A.)

CIVIL APPLICATION NO. 424/15 OF 2018

RAZAK MAHMOUD HUSSEIN

(Represented by his Attorney

MOHAMED SALUM MOHAMED)APPLICANT

VERSUS

SULTAN ALI ABDULLA GULAMHUSSEIN RESPONDENT

**(Application for Stay of Execution of the Judgment and Decree of the
High Court of Zanzibar, at Zanzibar)**

(Mwampashi, J.)

Dated the 13th Day of August, 2018

in

Civil Case No. 19 of 2009

RULING OF THE COURT

28th August & 9th September, 2019

KEREFU, J.A.:

The applicant has filed this application seeking for an order of this Court staying the execution of the decree of the High Court of Zanzibar at Zanzibar dated 13th August, 2018 (Mwampashi, J) in respect of Civil Case No. 19 of 2009. The application is made by way of Notice of Motion under the provisions of Rules 11 (3), (4), (6) and (7) (a), (b), (c) and (d) of the

Tanzania Court of Appeal Rules, 2009 GN 368 of 2009 as amended by the Tanzania Court of Appeal (Amendments) Rules, 2017 GN No. 362 of 2017 (the Rules). The grounds indicated in the Notice of Motion are as follows:-

“That, the learned judge erred in law by:-

- (a) hearing and determining the suit which is time barred;*
- (b) failing to consider and appreciate the uncontroverted evidence in the Written Statement of Defence of the applicant filed on 8th July, 2009;*
- (c) misdirected himself by finding the disputed house is owned by the respondent while sufficient evidence and testimony (sic) that the said house was confiscated by the Government in the year 1970.”*

The Notice of Motion is supported by an affidavit which was duly sworn by the applicant’s attorney namely, Mohamed Salum Mohamed. The main part of the supporting affidavit has given chronological account of the events on the matter. Thus, the relevant paragraphs for the purposes of

this application are 2, 3, 4, 5, 6, 7 and 8. The issues obtained from the said paragraphs are contained in the summary below.

However, before going to that summary, it is important at this juncture to highlight that initially, the respondent had filed an affidavit in reply opposing the application. On 22nd July, 2019 via a notice of no objection to the application dated 19th July, 2019, the counsel for the respondent indicated that, he has no objection to the applicant's application on the condition that the applicant provides security for the performance of the decree sought to be stayed as required by the law. However, at the hearing of the application, as it will shortly come to light, the counsel for the respondent vehemently disputed the application and prayed for the same to be dismissed or struck out for being premature.

The brief background giving rise to the judgment and decree sought to be stayed, as per the supporting affidavit is to the effect that, on 15th April, 2009, the respondent filed Civil Case No. 19 of 2009 before the High Court of Zanzibar against the applicant and prayed, among others for an order of eviction of the applicant from the disputed house situated at Mlandege in Zanzibar. The said case was determined in favour of the

respondent with an order that the applicant should immediately handover the vacant possession of the disputed house to the respondent.

Aggrieved, on 20th August, 2018 the applicant lodged a notice of appeal against that decision before this Court. Accordingly, the applicant requested for certified copies of the High Court's proceedings, judgement and the decree to process the intended appeal. However, according to the applicant, before he was supplied with the sought copies, he was informed by the officer of the High Court, one Hamza S. Hamza that, on 24th August, 2018 the respondent filed an application for execution of the decree of the High Court. The said application is yet to be determined and the applicant has not been issued with any notice to that effect.

When the application was placed before us for hearing, the applicant had the services of Mr. Omar Said Shaaban, learned counsel, while the respondent was represented by Dr. Masumbuko Lamwai, also learned counsel.

In support of the application, Mr. Shaaban fully adopted the Notice of Motion as well as its accompanying affidavit and informed the Court that he had since received a notice of no objection to the application from the

respondent on condition that the applicant provides security for the due performance of the decree sought to be stayed. In the circumstance, Mr. Shaaban decided to submit only on that issue by stating that, the applicant is ready to provide the said security as will be ordered by the Court.

Upon being probed by the Court, as to whether or not the applicant has complied with Rule 11 (5) (c) of the Rules on the undertaking to furnish security for the due performance of the decree sought to be stayed, Mr. Shaaban conceded that the said Rule has not been complied with, because the issue of security is not provided for in the Notice of Motion or even in the supporting affidavit.

Again, when asked by the Court, as to whether or not the applicant has complied with Rule 11 (7) (d) of the Rules and attach the copy of the notice of the intended execution, Mr. Shaaban responded that, the applicant has as well not complied with that requirement. He contended that, the applicant has not done so, because he is yet to be issued with the said notice, but he said, on 28th August, 2018 the applicant was informed by the officer of the court that the respondent is intending to execute the impugned decree and that is when he lodged this application on 4th

September, 2018. As such, Mr. Shaaban prayed the Court to grant the application pending the hearing and determination of the appeal.

In response, Dr. Lamwai admitted that, indeed, initially the respondent lodged a notice of no objection to the application, but he said, the same was subject to the applicant's compliance with the issue of giving security. He then argued that, since Mr. Shaaban has conceded that in the applicant's Notice of Motion and the supporting affidavit the applicant has not provided for any security or make any undertakings to that effect, it is obvious that he has not complied with Rule 11 (5) (c) of the Rules.

Dr. Lamwai also argued that, the applicant's application is premature before the Court, as Mr. Shaaban had since conceded that, the applicant is yet to be served with notice of the intended execution or even issued with summons to show cause why the execution shall not be carried out. Dr. Lamwai strongly argued that, the applicant lodged this application by only relying on the alleged information given by the officer of the court, the information which he said, is hearsay and not reliable, as the said officer has not taken any affidavit to verify it, as required by the law.

Dr. Lamwai also challenged the form of execution relied upon by the applicant that it is not authentic, as the same has not been endorsed by the court. In line with this argument, Dr. Lamwai said, the applicant has also not complied with Rule 11 (7) (d) of the Rules. Dr. Lamwai emphasized that, an order for stay of execution can only be granted when the applicant complies with mandatory conditions provided for under Rule 11 (5) (a) (b) and (c) of the Rules. It was therefore his strong view that, since in the instant application the applicant has not complied with those mandatory conditions, the application cannot be granted. Finally, Dr. Lamwai prayed for the application to be dismissed or struck out with costs for being premature.

We have dispassionately considered the Notice of Motion, the affidavit in support of the application and the oral submissions made by the counsel for the parties. The main issue for our determination is whether the applicant has cumulatively satisfied the conditions for grant of an order for stay of execution. Rules 11 (3) (4), (6) and (7) (a), (b), (c) and (d) of the Rules provide that:-

"11 (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 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;

(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) the application has been made without unreasonable delay; and

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

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

(7) An application for stay execution shall be accompanied by:-

(a) a copy of a notice of appeal;

(b) a decree or order appealed from;

(c) a judgment; and

(d) a copy of a notice of the intended execution."

The position of the law indicated above has been positively applied in a number of decisions of this Court. Some of these include, **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application No. 11 of 2010; **Mohamed Masoud Abdallah and 16 Others v. Tanzania Road Haulage (1980) LTD**, Civil Application No. 58/17 of 2016 and **Mohamed**

Rajuu Hassan v. Almahri Mohsen Ghaled & 2 Others, Civil Application No. 570/17 of 2017 (all unreported). In all these cases, the Court emphasized that, for an application for stay of execution of a decree to succeed, the applicant must comply with conditions stipulated under the law, cumulatively.

In the application at hand, there is no dispute that the applicant has not cumulatively fulfilled the conditions for grant of the application for stay of execution. To start with Rule 11 (5) (c) of the Rules, as hinted above, Mr. Shabaan had since conceded that the applicant has neither furnished nor made a firm undertaking to furnish security for due performance of decree. Firstly, the issue of security is nowhere indicated in the applicant's notice of motion or even in the supporting affidavit. The Court, in **Mantrac Tanzania Limited** (supra) made it clear that furnishing of security is necessary condition and that even an express undertaking by the applicant would suffice. In this application the applicant has not either furnished or even made a firm undertaking to do so. As for the consequence of failure to either furnish or make a firm undertaking to furnish security, the Court categorically stated in the case of **Efficient Freighters (T) LTD v Cargo**

Management and Logistics, Civil Application No. 145 of 2013 (unreported) that such an application cannot be granted.

Secondly, the applicant has not complied with the condition under Rule 11 (7) (d) of the Rules, as there is no copy of a notice of the intended execution attached to the application. In explaining the said omission, Mr. Shaaban said, the applicant is yet to be issued with the notice of execution and acted only on the information which he allegedly received from the court officer on 28th August, 2018. On his part, Dr. Lamwai challenged this line of argument by blaming the applicant for acting on the hearsay information which was not even verified by the said officer of the court. Based on that point Dr. Lamwai strongly argued that, the applicant's application is premature.

We are in agreement with Dr. Lamwai on this point, as pursuant to Rule 11 (7) (d) of the Rules, an application of this nature can only be lodged before the Court after the applicant is sure that the process of executing the decree has been initiated by the decree holder, and this is after the applicant is issued with the notice of the intended execution and not upon a hearsay information.

In the circumstances, we are satisfied that the applicant's application is premature, hence incompetent and is hereby struck out with costs.

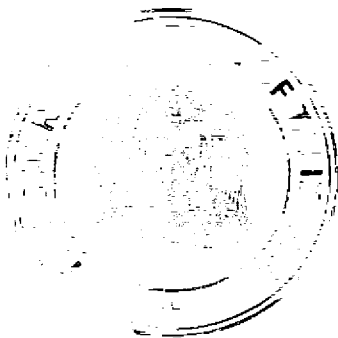
DATED at DAR ES SALAAM this 3rd day of September, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 9th day of September, 2019 in the presence of Mr. Omary Said, Counsel for the Applicant also holding brief for Dr. Masumbuko Lamwai, Counsel for the Respondent, is hereby certified as a true copy of the Original.



S. J. Kainda
S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL