

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

(CORAM: LILA, J.A., MKUYE, J.A., And NDIKA, J.A.)

CIVIL APPLICATION NO. 40/16 OF 2017

PATRICK EDWARD MOSHIAPPLICANT

VERSUS

COMMERCIAL BANK OF AFRICA (T) LTD RESPONDENT

(Application for stay of execution of the Judgment and Decree of the High

Court of Tanzania (Land Division) at Dar es Salaam)

(Mutungi, J.)

Dated the 12th day of May, 2016

in

Land Case No. 49 of 2011

RULING OF THE COURT

25th September & 21st November, 2019

MKUYE, J.A.:

By Notice of Motion filed before this Court pursuant to Rule 11(2) (b) and (c) of the Tanzania Court of Appeal Rules, 2009 (the Rules) the applicant Patrick Edward Moshi moved this Court for an order of stay of execution of the judgment and decree of the High Court (Land Division) in Land Case No. 49 of 2016 (Mutungi, J.) dated 12th May, 2016 pending the outcome of the intended appeal. The High Court found the applicant in

breach of a loan agreement and liable to pay the respondent a total sum of Tshs 1,100,896,328.49/=.

Dissatisfied with that decision, he lodged a notice of appeal and filed this application to this Court on the following grounds:

- 1) That if the trial court executes its decree which is being appealed against, such execution will change the stratum of the subject matter of the intended appeal and infringe the applicants' right of appeal as well as cause irreparable losses before the final verdict of the intended appeal is known.
- 2) That, if hopefully, the appeal finally succeeds, its outcome will be rendered nugatory or a mere academic exercise, especially if execution commences and the title of the property which is the subject matter of the intended appeal, pass to a third party, who is not a party in these proceedings before the outcome of the intended appeal is known.

The application is supported by an affidavit deposed by Patrick Edward Moshi, the applicant. He also filed a written submission in support of the application on 17/3/2017. On the other hand, the respondent filed

an affidavit in reply and written submission in opposition to the application on 20/3/2017 and 21/4/2017, respectively.

When the application was called on for hearing on 25/9/2019 the applicant was represented by Mr. Benedict Bagiliye, learned counsel; whereas the respondent had the services of Mr. Thomas Simpemba also learned counsel.

Submitting in support of the application, Mr. Bagiliye argued that the application has met all the conditions for the grant of application. He pointed out that the application was filed within time on 26/1/2017 after having been given extension of time (Luanda, J.) to file this application on 20/12/2016 and issued with the same on 26/12/2016. Mr. Bagiliye also argued in relation to the issue suffering substantial loss that if the dwelling house is attached and sold by the respondent in execution of the decree, the applicant will suffer irreparable loss as the house being an immovable property will be rested to a third party and that the applicant may not recover it in case his appeal succeeds.

As regards the security for the due performance of the decree, the learned counsel argued that the assets and properties handed over to the

receiver/managers of PATCO Enterprises (T) Ltd appointed by the respondent, after the stock taking and valuation exercise thereof, are sufficient security for granting an order for stay of execution pending determination of the appeal. He further contended that the other properties (mortgaged) Plots at Mbezi Beach in Kinondoni could be added to the dwelling house. Beside that he offered from the bar undeveloped plots situated at Bunju in Kinondoni and Moshi in Kilimanjaro to be securities for the due performance of the decree.

On his part, Mr. Simpemba seemed to have no issue with the condition relating to the time within which the application was filed. (as he was of a view that it was filed without unreasonable delay). However, as regards the issue of suffering substantial loss, he countered that the applicant did not stand to suffer loss unlike the respondent given the fact that the applicant was holding public funds to which the respondent could not disburse to her clients. He added that, should the applicant win in his appeal, he will not suffer.

On the issue of the security for the due performance of the decree, Mr. Simpemba urged the Court to find that the applicant failed to furnish it. He pointed out that it is trite law that the applicant must give security or

give a firm undertaking to furnish security for the due performance of the decree but the applicant did not do so. Apart from that he said the security must be commensurate with the decretal sum but the applicant offered properties which cannot be easily determined as to whether they are commensurate to the decretal amount or not. He ultimately urged the Court to ignore such types of security and decline from granting the application. Alternatively, he argued that should the Court find that the applicant made an undertaking to furnish security for the due performance of the decree, it should order him to deposit a bank guarantee equivalent to the decretal amount.

In rejoinder, the learned counsel for the applicant reiterated his submission in chief. He further stressed that the applicant had satisfied all the three conditions and that the issue of security has been everred in paragraph 31 of the affidavit when construed contextually though, he said, the bank guarantee cannot be met by the applicant.

The issue to be resolved by this Court is whether the applicant has satisfied all the conditions cumulatively for the grant of the application.

An application for stay of execution having been filed prior to recent amendment of the Rules by GN. No. 362 of 2017 and GN No. 344 of 2019, was governed by Rule 11(2) (b) (c) and (d) (i), (ii) and (iii) of the Rules. Sub rule (2) (b) and (c) of the Rules empowers the Court to grant stay of execution if the applicant shows good cause. Paragraph (d) (i) to (iii) of subrule (2) of the Rules sets out the conditions which may be taken to amount to be good cause. The said paragraph provides as follows:

"No order for stay of execution shall be made under this Rule unless the Court is satisfied that:

- (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 decree or order as may ultimately be binding upon him".*

The above provisions were considered in the case of **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application No. 11 of 2010 (unreported) as follows:-

"So, under rule 11(1) (b), the Court may in its absolute discretion order stay of execution of the decree or order appealed from upon these conditions being satisfied or fulfilled by the applicant;-

- (i) After lodging the Notice of Appeal in accordance with Rule 83;*
- (ii) Showing good cause;*
- (iii) Complying with the provisions of item (d) of subrule (2)*

Also, the Court has taken the position that in order for stay of execution to be granted under the said Rule, all the three conditions have to be conjunctively and not disjunctively met. (See **Therod Fredrick v. Abdusamadu Salim**, Civil Application No. 7 of 2017; **Geita Gold Mining Ltd v. Twalib Ally**, Civil Application No. 14 of 2012; and **Joseph Soares @ Goha v. Hussein Omary**, Civil Application No. 516 of 2016 (All unreported)).

(In the matter under consideration it is apparent that the applicant lodged a notice of appeal on 23/5/2016 following the decision sought to be impugned being handed down on 12/5/2016. This application was filed pursuant to an Order of this Court (Luanda, J.A. as he then was) in an

application for extension of time to apply for an order of stay of execution vide Civil Application No. 244 of 2016 in which the applicant was given 30 days within which to file this application from the date of that Order. The said Ruling was delivered on 20/12/2016 and this application was lodged on 26/1/2017. Ordinarily this application ought to have been filed latest by 19/1/2017. By filing it on 26/1/2017 the same was late by 7 days. Hence, the application was not made without unreasonable delay). As indicated earlier on, parties were not at issue regarding timelines of filing the application.

As regards the issue of suffering substantial loss, much as we appreciate the respondent's argument that she cannot disburse money which is held by the applicant to her clients, we are of the view that applicant has been able to establish it. If the house he is residing with his family is sold to the third party by the respondent as was ordered by the court, the applicant is not only likely to suffer substantial loss but also likely to face much hardship in recovering it should his intended appeal succeed.

On the issue of security the applicant offered three types of security ranging from the properties/assets handed over to the receivers/managers;

mortgaged properties; and undeveloped plots situated in Dar es Salaam and Moshi.

Regarding the assets under the possession of the receivers/managers and mortgaged property it suggests that the same are under the possession of the respondent be it directly or through her agent. Likewise the house ordered to be sold is still under litigation. As to the status of such properties this Court has taken a position that the properties which are under the control of others persons or rather properties under litigation cannot be taken as security for the due performance of the decree in the application for stay of execution. There is a chain of authorities on this aspect. For instance, in the case of **Anthony Ngoo and Another v. Kitinda Kimaro**, Civil Application No. 12 of 2012 (unreported), the Court declined to grant stay of execution because the applicant offered a house which was in possession of the respondent. The Court stated as follows:-

"As for the question of furnishing security, Rule 11(2) (d) (iii) of the Rules required the applicants to give security for due performance of the decree or order as may ultimately be binding upon them... Mr. Sang'ka said the suit plot which forms the subject of litigation serves as sufficient security. However, he

did not bother to explain how it would serve as security. With respect, we do not agree with him for one reason. The decree forming the subject of the application says that the mining plot should be sold and proceeds be shared equally between the 1st applicant and the respondent. Under circumstances how can it serve as security for performance of the decree? This is a contradiction on the part of Mr. Sang'ka."

Also in the case of **Africhick Hatchers Ltd vs CRDB Bank PLS**, Civil Application No. 98 of 2016 (Majority) (unreported) the Court observed that the property not exclusively in possession and control of the applicant cannot be taken as security. (See also **Juma Hamisi v. Mwanamkasi Ramadhani**, Civil Application No. 34 of 2014 (unreported)).

Applying the principle propounded in the above cited authorities in the matter at hand, it is obvious that the mortgaged properties which were ordered to be sold and the assets handed over to the receivers/managers having being not in possession and/or control of the applicant cannot stand as good security for the due performance of the decree. Besides that, since their value is not known, it is unsafe to rely on them as securities.

Moreover, we have considered the submission by the learned counsel for the applicant from the bar offering the undeveloped plots located at Bunju area in Dar es Salaam and Moshi in Kilimanjaro to stand as security for the due performance of the decree. This assertion was neither in the notice of motion nor the supporting affidavit. In the case of **Alex Siriamara Machare & 2 Others v. Bryson Nalogwa Kituly**, Civil Application No. 3 of 2016 (unreported) while adopting with approval the case of **Farm Equipment Company Limited v Festo Mkuta Mbuzu**, Civil Application No. 111 of 2014 (unreported) in which the undertaking to furnish security was made in the written submission by the counsel for the applicant, the Court had this to say:-

"To indicate one's readiness to provide security for the due performance of a decree in the submission is to go against the law because written submission consists basically of arguments"

Likewise, even if we were to agree that the applicant had contextually undertaken to furnish security we find that the offer of plots which came from the applicants' advocate from the bar, much as it is not quantified through valuation, it cannot be taken to constitute a firm undertaking which can ultimately bind the applicant.

That said and done, we agree with Mr. Simpemba that the applicant has failed to satisfy all conditions cumulatively. In the event we find the application devoid of merit and we hereby dismiss it with costs.

DATED at DAR ES SALAAM this 19th day of November, 2019.

S. A. LILA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

The ruling delivered this 21st day of November, 2019 in the presence of the applicant who appeared in person and Ms. Angela Paul, holding brief for Mr. Thomas Simpemba, counsel for the Respondent is hereby certified as a true copy of the original.


H.P. Ndesamburo
DEPUTY REGISTRAR
COURT OF APPEAL