

**IN THE COURT OF APPEAL OF TANZANIA**

**AT ARUSHA**

**(CORAM: MUSSA, J.A., MKUYE, J.A., and KOROSSO, J.A.)**

**CIVIL APPLICATION NO. 6/05 OF 2017**

**SALVATORY GIBSON ..... APPELLANT**

**VERSUS**

**WILLIAM LAURENT MALYA ..... 1ST RESPONDENT**

**MARIAM I. MBELWA ..... 2<sup>ND</sup> RESPONDENT**

**(An Application for Stay of Execution pending final determination of an appeal of the Ruling/Order of the District Court of Moshi at Moshi Tanzania at Moshi)**

**( Fikirini, J.)**

**Dated the 14<sup>th</sup> day of September, 2016**

**in**

**Miscellaneous Civil Application No. 7 of 2016**

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**RULING OF THE COURT**

28<sup>th</sup> November & 12<sup>th</sup> December, 2019

**KOROSSO, J.A.:**

Salvatory Gibson (the applicant) filed this application by way of notice of motion pursuant to Rule 11(2)(b) and (c) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and seeks for an order that execution of the Ruling/Order of the District Court in Misc. Civil Application No. 22 of 2005 be stayed pending the final determination of the appeal. The application is supported by an affidavit sworn by the applicant and various documents annexed thereto in support. The applicant also seeks for costs

and incidentals to the application to abide by the result of the intended  
= appeal

What predicates the application is charted out in the supporting affidavit which upon scrutiny we discerned are found in paragraph 23 and 24. The applicant avers that he has been threatened of eviction in the suit premises by the respondents in execution of an order of the District Court in Misc. Civil Application No. 22 of 2005. He stated that if the threats are executed it will result into hardship to him and family and will render the intended appeal nugatory and lead him to suffer inconsiderable loss.

On the part of the respondents, they resisted the application and on the 2<sup>nd</sup> November 2016 filed a joint affidavit in reply signed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

We find it pertinent to start with a brief factual background and legal base for the application. The applicant owned premises on Plot No. 32, Block "G" Section IV, Kanisa Road Majengo in Moshi Municipality (suit premises). In 1997, he assisted a relative to acquire an overdraft bank facility by mortgaging the suit premises and at the time estimated to value between Tanzanian shillings nine and ten million shillings (9.0-10.0 millions) to CRDB Bank. The suit premises were sold by CRDB Bank agent

in September 2000 to the respondents for Tshs. Three million (3.0 millions) and the applicant alleges he did not have prior notice of the sale. Thereafter, after getting the information, the applicant successfully sued CRDB Bank and its agent in Civil Case No. 91 of 2000, District Court of Moshi. The District court nullified the respective sale and the premises were handed back to the applicant by the Court broker on the 5<sup>th</sup> October, 2005. Thereafter, the applicant entered into occupation of the suit premises with his family. Meanwhile, CRDB Bank appealed to the High Court in (DC) Civil Appeal No. 35 of 2002 and the appeal did not succeed.

At the same time, the respondents who had purchased the suit premises in the original sale filed objection proceedings emanating from Civil Case No. 91 of 2000 in the District Court in Misc. Civil Application No. 22 of 2005 praying that the premises be released to them as objectors and that the applicants be barred from entering the suit premises. They were successful and the court ordered for release of the property from attachment (when in reality at the time it was not under attachment). The applicant being aggrieved by the said order filed various applications in the High Court with intention to revise the decision of the District court without success. These were, Misc. Civil Application No. 2 of 2007 and No. 4 of 2013 which were struck out for failing to comply with the relevant

provisions of the law and Misc. Civil Application No. 7 of 2016, for extension of time to apply for revision was also dismissed on the 14<sup>th</sup> September, 2016. Dissatisfied with the decision, the applicant lodged a notice of appeal and also applied for relevant documents to support the appeal and for leave to appeal. The current application has been filed to dissuade execution of the decision of the District Court of Moshi in Misc. Civil Application No. 22 of 2005, dated 3<sup>rd</sup> May, 2007 which was left undisturbed by the High Court of Tanzania in Misc. Civil Application No. 7 of 2016, the subject of intended appeal.

At the hearing of the application, Mr. Salvatory Gibson, the applicant appeared in person, unrepresented and on the other side the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent each appeared in person.

The applicant started by adopting the notice of motion and the affidavit supporting the application filed and submitted that if the relevant execution is effected then his family stood to suffer. He informed the Court that he has filed a notice of appeal against the Order of the High Court which confirmed the decision he prays its execution be stayed. When asked by the Court the security he offers and his response was that he offers the suit premises where he is currently residing, stating it is the only security he can offer having nothing else to put forth.

On the part of the 1<sup>st</sup> respondent he commenced by praying that the reply to affidavit be adopted and adamantly resisted the prayers sought by the applicant. He contended that the security offered is not appropriate being the house in dispute and implored the Court that the application be dismissed being devoid of merit. The 2<sup>nd</sup> appellant from the outset prayed to be withdrawn from the conduct of the proceedings stating she had no idea about the current case and was unclear why she was summoned. She also stated that she had not signed on the affidavit in reply and alleged that she was seeing it for the first time in Court.

We have dispassionately scrutinized the notice of motion, affidavit supporting the notice of motion together and all the attached documents, the affidavit in reply and also the oral submissions by the applicant and the respondents.

The application is brought under Rule 11(2)(b) and (c) of the Rules, before the 2017 and 2019 amendments. We are aware that this application is moving us to consider an application for stay of execution against a decree of the District Court. We are settled in our minds that this issue has been settled by this Court in **Sudi Kipetio and 3 Others vs Bakari Ally**

**Mwera**, Civil Application No. 94 of 2004 (unreported) where a single Justice of Appeal stated that;

*"as long as there is a notice of appeal before the Court and the order to be stayed, though given by a subordinate court, was nevertheless, given in respect of a matter subject of the pending appeal, this Court has jurisdiction to entertain an application for stay of execution"*

Thus we are inclined to agree with the stated observation, and being satisfied that there is a notice of appeal filed before this Court in respect of a matter subject to the intended appeal, we may proceed to consider and determine the current application for stay of execution of a decree pending final determination of the appeal.

The mandate of this Court to grant a stay of execution of the decree is founded under Rule 11(2)(b) of the Rules, and the Court in exercising its discretion, under Rule 11(2)(d)(i)-(iii), must satisfy itself that;

*(i). substantial loss may result to the applicant unless the order is made;*

*(ii).the application for a stay of execution of the decree or order has been made without unreasonable delay; and that*

*(iii).the applicant has given security for the due performance of the decree as may ultimately be binding on him should the intended appeal fail.*

The conditions above are important and must be satisfied for this Court to consider granting of stay of execution. On the first issue, that is, showing that execution of the decree will lead to irreparable loss, this issue was addressed by this Court in the case of **Tanzania Ports Authority vs Pembe Flour Mills Ltd.**, Civil Application No. 78 of 2007 (unreported) and observed that irreparable loss must imply, among other things, loss which is irrecoverable in any form or manner, including damages or other monetary recompense. Another case that addressed the issue is, **Tanzania Cotton Marketing Board vs Cogecot Cotton Co. SA 1997** (TLR) 63 where this Court held that:

*"It is not enough merely to repeat the words of the Code and state that substantial loss will result; the kind of loss must be specified, details must be given, and the*

*conscience of the court must be satisfied that such loss will really ensue".*

Applying the above holding to the present application, in the current application, the affidavit of the applicant supporting the notice of motion is couched in general terms as found in paragraph 24 and 25 and has not clearly shown or specified the kind of loss the applicant will suffer if execution of the impugned drawn order was to be effected, he only stated that execution of the decree will result in hardship and render the intended appeal nugatory and result in considerable loss. Therefore in effect, he has not complied with this condition fully.

With respect to the second condition that the application must be made without unreasonable delay, from the records the impugned drawn order was delivered on the 3<sup>rd</sup> day of May 2007 and from the affidavit, the applicant averred that he filed two applications No. 2 of 2007 and No. 4 of 2007 which were struck out on technicalities and also filed Civil Application No. 7 of 2016 for extension of time to apply for revision which was dismissed. He then resorted to lodge a notice of appeal and leave to appeal. This application was filed on the 25<sup>th</sup> October 2016. In the absence of the relevant Rulings which were not attached, it is difficult to find that this application was filed without delay.



Regarding the third condition, it is clear that the applicant has failed to provide security for due performance of such decree or order as required by Rule 11(2)(d)(iii) of the Rules, 2009 as it then was prior to the 2017 and 2019 amendments. The importance of security in determination of an application for stay of execution was discussed in **Anord L. Matemba vs Tanzania Breweries Ltd**, Civil Application No. 95 of 2012 (unreported) where the Court observed that:

*"security as one of the conditions for the due performance of the decree should an intended appeal fail, security among other reasons is meant to safeguard the interests of the judgment creditor in the event the judgment or decree appealed against is affirmed by the appellate court. It facilitates a post-appeal execution process".*

It is well settled that the three conditions under Rule 11(2)(d)(i)-(iii) are cumulative as held in various decisions of this Court, such as: **Therod Fredrick vs Abdulsamudu Salim**, Civil Application No. 7 of 2012; **Geita Gold Mining Ltd vs Twahib Ally**, Civil Application No. 14 of 2012; **Joramu Biswalo vs Hamis Rashid**, MZA Civil Application No. 11 of 2013 (All unreported) and **Anord L. Matemba vs Tanzania Breweries Ltd**, (supra).

Having considered the circumstances pertaining to this case, we are of the view that the absence of any firm undertaking on security by the applicant of the due performance of the decree should the intended appeal fail, utterly undermines the application viability and leads us to no other conclusion but to find that the applicant failed to fulfill the requisite pre-conditions for this Court to exercise its discretion, consider and determine the prayers sought by the applicant. It should be understood that it is upon the applicant to meet the three conditions as spelt out hereinabove.

In the end, this application lacks merit and it is hereby dismissed. Under the circumstances and especially since the lack of undertaking on security was raised by the Court each party to pay own costs.

**DATED** at **ARUSHA** this 11<sup>th</sup> day of December, 2019.

K. M. MUSSA  
**JUSTICE OF APPEAL**

R. K. MKUYE  
**JUSTICE OF APPEAL**

W. B. KOROSSO  
**JUSTICE OF APPEAL**

The ruling delivered this 12<sup>th</sup> day of December, 2019 in the presence of the Applicant present in person, 1<sup>st</sup> Respondent present in person and 2<sup>nd</sup>

respondent absent is hereby certified as a true copy of the original.

