

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

**(CORAM: MZIRAY, J.A, SEHEL, J.A., And KITUSI, J.A.)**

**CIVIL APPLICATION NO. 174/01 OF 2017**

**PAULA DAVID KIFARU..... APPLICANT**

**VERSUS**

**KARIM SHAHBUDIN ALLY..... RESPONDENT**

**(An Application for stay of execution of the decision of the High Court of  
Tanzania at Dar es Salaam District Registry)**

**(Arufani, J)**

**Dated 22<sup>nd</sup> day of February, 2017  
in**

**Misc. Civil Application No. 245 of 2015**

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**RULING OF THE COURT**

25<sup>th</sup> September & 23<sup>rd</sup> October, 2019

**SEHEL, J.A**

By notice of motion, the applicant is moving the Court for an order of stay of execution of the High Court's decision dated 22<sup>nd</sup> day of February, 2017 that removed the applicant from being an executrix of the will of the late Mehrun Ally Talib (hereinafter referred to as the deceased).

The brief facts relevant to the present application are discernable from the affidavit and affidavit in rely of the parties that: on 3<sup>rd</sup> day of

December, 2013 the applicant was appointed to be the executrix of the estates of the deceased by the High Court in Probate and Administration Cause No. 29 of 2013. Also in the same year, on 24<sup>th</sup> day of December, 2013 the respondent was appointed by the same High Court to be the administrator of the estates of the deceased in Probate and Administration Cause No. 33 of 2013. While in the exercise of administering the deceased estates, the respondent became aware of the existence of the applicant as executrix of the Will of the deceased. Therefore, the respondent approached the High Court and sought for extension of time for revocation or annulment of the grant of probate to the applicant and her removal as executrix of the purported will. The respondent also prayed for a declaratory order that the purported will was null and void. The High Court ruled in favour of the respondent. The applicant was aggrieved by that decision. She applied to be supplied with copies of proceedings, ruling and order for appeal purposes. She also lodged a notice of appeal. After those actions, on 12<sup>th</sup> day of April, 2017 the applicant filed the present application for stay of execution. The grounds for stay enumerated in the notice of motion are that:

- "1. That substantial loss may occur to the estate of the deceased, Mehrun Ally Talib to the detrimental of his lawful heirs;*
- 2. The application has been made within time; and*
- 3. The applicant is willing that the estates of the deceased be taken as security for the due performance of the ruling and drawn order."*

The application is supported by an affidavit sworn by the applicant herself and it is made under Rule 11 (b), (c), (d), (i), (ii), and (iii) of the Tanzania Court of Appeal Rules of 2009 (the Rules). The applicant has also filed written submissions to support the application.

On the other hand, the respondent filed affidavit in reply and a notice of preliminary objection containing two points of law that the application is incompetent for wrong citation and there is no competent application. The respondent also filed written submissions in respect of the preliminary objections and also in opposing the application.

When the application was called for hearing, Ms. Lucy Nambuo, learned advocate appeared for the respondent and prayed to withdraw the notice of preliminary objection which she had earlier on filed. Mr. Armando

Swenya, learned advocate for the applicant did not have any objection to the prayer. We granted the prayer and consequently, the notice of preliminary objection was duly marked withdrawn.

Mr. Swenya adopted the notice of motion, the contents of the affidavit and the written submissions in support of the application without more and urged the Court to grant the application.

In reply, Ms. Nambuo challenged the application by first adopting the affidavit in reply and written submissions. She then wondered as to whether the undertaking made by the applicant that she is willing to provide the estates of the deceased as a security for the due performance of the decree was sufficient. Regarding loss to be suffered by the applicant, Ms. Nambuo argued that the applicant has failed to convince the Court on the substantial loss because the heirs are currently under the care and maintenance of the respondent. Upon being probed by the Court on the consequences if stay order will be granted, Ms. Nambuo was very quick to respond that there will be two administrators thus leading to chaotic on the estates of the deceased. With that brief submission, Ms. Nambuo prayed for stay not to be granted.

Mr. Swenya had nothing to rejoin. He left it to the Court to decide.

Having carefully considered the rival submissions by counsel for the parties, the issue for our determination is whether or not the applicant has fulfilled the conditions warranting the grant of the application. As the application was filed on 12<sup>th</sup> day of April, 2017 before coming into force of the Tanzania Court of Appeal (Amendment) Rules of 2017 and 2019, G.N. No. 362 of 2017 and G.N. No. 344 of 2019, we will consider the application in terms of Rule 11 (2) (b), (c) and (d) (i), (ii) and (iii) of the Rules as then applicable. The Rule provides:

*"11 (1) ... (not relevant)*

*11 (2) Subject to the provisions of sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution but the Court may-*

*(a) ... (Not relevant)*

*(b) 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; but the Court, may upon good cause shown, order stay of execution of such decree or order.*

*(c) ... (Not relevant)*

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

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

It is plain and clear that, a party seeking stay of execution must satisfy cumulatively all the conditions stipulated under rule 11 (2) (b), (c), and (d) (i) to (iii) of the Rules. The duty for the applicant to satisfy all the conditions has been constantly restated by this Court in its several decisions. See **National Housing Corporation v. AC Gomes (1997) Ltd**, Civil Application No. 133 of 2009; **Joseph Soares @ Goha v. Hussein Omary**, Civil Application No. 12 of 2012; **Ahmed Abdallah v.**

**Maulid Athuman**, Civil Application No. 16 of 2012; and **Hai District Council & Another v. Kilempu Kinoka Laizer & 15 Others**, Civil Application No. 10/05 of 2017 (all unreported). For instance in the case of **Joseph Soares @ Goha** (supra) we reiterated that:

*"The Court no longer has the luxury of granting an order of stay of execution on such terms as the Court may think just: but it must find that the cumulative conditions enumerated in Rule 11(2) (b), (c) and (d) exist before granting the order. The conditions are:-*

- (i) Lodging a Notice of Appeal in accordance with Rule 83;*
- (ii) Showing good cause; and*
- (iii) Complying with the provisions of item (d) of sub rule 2."*

It follows then that the applicant must satisfy that a notice of appeal was given; he has sufficient cause for praying for the order for stay, the application was filed within time; he will suffer substantial loss if the order is not granted; and he has furnished security for due performance of the decree.

Having restated the position of the law, the immediate question is whether the applicant in the present matter fulfilled the statutory requirements for the Court to warrant an order of stay of execution.

There is no controversy that the applicant has already lodged the notice of appeal. Similarly, there is no dispute that the application has been made without unreasonable delay.

The contentious issues are on substantial loss and security for due performance. It is argued and we hasten to agree with Ms. Nambuo that the applicant will not suffer any loss if the order of stay is refused for two main reasons. **First**, there is no explanation by the applicant on how she will suffer loss and the magnitude of the loss to be suffered by the applicant, herself, if the order is not granted. **Secondly**, according to the High Court order the estates of the deceased are administered by the respondent. Therefore, it is not true that the estates of the deceased will be wasted as alleged by the applicant. We are thus satisfied that, having failed to establish the irreparable loss to be suffered, the applicant has not met the crucial condition and key element under Rule 11(2) (d) (i) of the Rules.



As to whether the applicant has complied the condition of furnishing security for the due performance of the decree as may ultimately be binding upon her, she had offered the estates of the deceased as security. Ms. Nambuo was not sure as to whether the estates of the deceased were sufficient security for the due performance of the decree by the applicant. We entirely subscribe to the observation made by the respondent's counsel and found applicant's undertaking wanting. We are alive that a firm undertaking by the applicant to provide security may be sufficient. This was stated so in the case of **Mantrac Tanzania Ltd v. Raymond Costa**, Civil Application No. 11 of 2010 (unreported). We wish to stress that the firm undertaking must be in respect of the properties that are within the possession of the applicant, which is not the case in the instant application.

In the case of **Africhick Hatchers Limited v. CRDB Bank Plc**, Civil Application No. 98 of 2016 (unreported) we observed in our majority decision that the form of security to be provided is immaterial, so long as the security to be provided should be sufficient to protect the respondent and the respondent should not find it difficult or impossible to realize the decree in case the intended appeal fails. We said:

*"Of course, most important is the fact that the respondent should not find it difficult or impossible to realize the decree in case the intended appeal fails. This is the cornerstone of the requirement for security. In such circumstances, the Court is principally obligated to figure out whether or not any one particular mode of security vouches risks on the part of the respondent."*

We, thereafter, in **Africhick Hatchers Limited** (supra) summarized the position stated by Parker LJ in **Rosengrens Ltd v. Safe Deposit Centres Ltd** [1984] 3 ALL ER 198 at p. 200 that:

*"The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them...So long as it is adequate, then the form of it is a matter, which is immaterial."*

In the present application, the applicant is willing to commit the estates of the deceased. The estates of the deceased are not the properties of the applicant. In that regard, the applicant has nothing to

commit as security for the due performance of the decree that may ultimately be binding upon her in the event her appeal fails.

In the case of **Hadija Adamu v. Godless Tumbo**, Civil Application No. 27 of 2015 (unreported) we declined to grant an order for stay of execution to the applicant because she offered to commit the disputed property that in essence was not her property as her security. We said:

*"Back to the application before us, the applicant did readily concede to the fact that, she has not committed any property as security for due performance of the decree sought to be stayed. She has indicated in her affidavit that, she is ready to commit the disputed property as her security. On our part, we are in agreement with Mr. Oola that, **the disputed property is not the property of the applicant and as such, it cannot be used as a commitment by the applicant as security.** And the fact that, the applicant did frankly inform the Court that, she was not in possession of other property, which she could commit as security, the*

*implication is that, she did fail to meet the condition."*

(Emphasis added).

Moreover, the estates of the deceased are neither in the applicant's control nor possession. Even if they were in her control or possession as an executor, she could still not commit them as security because the mandate of the administrator or executor, as prescribed under the Probate and Administration of Estates Act, Cap 352 RE 2002, is limited to collection, administration, distribution and disposition of the estate on behalf of and for the benefit of the beneficiaries. It is the position of the law that neither the executor nor the administrator derives any interest in the properties of the deceased that forms the subject matter, unless he is also a beneficiary or heir. As such, committing the deceased estates as security for the due performance would definitely vouch risks not only on part of the respondent from adequately exercising his duties as the administrator of the deceased estates but also to the heirs who will be disadvantaged. Hence, the estates cannot be placed as security for the due performance of the decree.

In view of the aforesaid, this application is not merited on account of applicant's failure to establish irreparable loss to be suffered and failure to furnish security for the due performance of the decree in terms of Rule 11(2) (d) (i) and (iii) of the Rules. We thus, accordingly dismiss the application. Costs shall lie to the outcome of the appeal. It is so ordered.


**DATED** at **DAR ES SALAAM** this 11<sup>th</sup> day of October, 2019.

R. E. S. MZIRAY  
**JUSTICE OF APPEAL**

B. M. A. SEHEL  
**JUSTICE OF APPEAL**

I. P. KITUSI  
**JUSTICE OF APPEAL**

This Ruling delivered this 23<sup>rd</sup> day of October in the presence of the applicant in person and Ms. Lucy Nambuo, learned counsel for the respondent is hereby certify as a true copy of the original.

  
E. F. FUSSI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**