

**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. 421/15 OF 2018

SULEIMAN YUSSUF ALI APPLICANT

VERSUS

SULTANALI ABDALLA GULAMHUSSEIN RESPONDENT

**(Application for an order of stay of execution of the decree of the High
Court of Zanzibar)**

(Mwampashi, J.)

**Dated the 13th day of August, 2018
in**

Civil Case No. 19 of 2009

RULING OF THE COURT

28th August, & 17th October, 2019

MWARIJA, J.A.:

In this application which was brought by way of a notice of motion, the applicant, Suleiman Yussuf Ali is seeking an order of the Court staying execution of the decree of the High Court of Zanzibar dated 13/8/2018. The said decree was passed in Civil Case No. 19 of 2009. In that case, the respondent, Sultanali Abdallah Gulamhussein sued the applicant and other four persons seeking to be declared the

lawful owner of a house, described by its assessment No. 3043/44, situated at Mlandege in Zanzibar Municipality. The respondent claimed that the applicant (who was the 4th defendant in the High Court) and the other four persons, Mahmoud Hussein Parkar, Razak Mahamoud Hussein, Yussuf Ramadhan and Salama Kombo (the 1st – 3rd defendants and the 5th defendant respectively) (hereinafter the appellant's co-defendants) entered into the suit land and occupied it unlawfully. He thus prayed for an order evicting them therefrom.

At the hearing of the suit in the High Court, only the 2nd and 4th defendants were present. They disputed the respondent's claim that they trespassed into the suit house. They contended that they lawfully owned the house described by its assessment No. 3041, and not No. 3043/44 as claimed by the applicant.

Having considered the oral and documentary evidence tendered by the parties at the trial, the learned trial Judge was of the view that the respondent lawfully owned the suit house. The applicant and his co-defendants were consequently ordered to give vacant possession of the house.

The applicant was dissatisfied with the decision of the High Court and as result, on 16/8/2018 he lodged a notice of appeal followed by this application which was filed on 12/9/2018.

At the hearing of the application, the applicant was represented by Mr. Salim Mnkonje, learned counsel whereas the respondent had the services of Dr. Masumbuko Lamwai, also learned counsel. Submitting in support of the application, Mr. Mnkonje who began by adopting the contents of the applicant's affidavit filed in support of the application (the supporting affidavit), urged the Court to grant the application contending that the applicant has duly complied with the requisite conditions for grant of a stay order as stipulated under Rule 11 (5) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

Initially, through a notice filed by his learned counsel on 11/7/2019, the respondent did not oppose the application. The learned counsel expressed that execution of the decree may be stayed provided that the applicant provides a security for the due performance thereof.

When probed by the Court, Dr. Lamwai submitted that the applicant has not shown that he was served with a notice of execution of the decree as required under Rule 11(4) of the Rules. He contended

however that, according to the record of the application and the contents of paragraph 6 of the supporting affidavit, the respondent filed this application after he became aware of existence of an application for execution filed by the respondent. With regard to the requirement of furnishing security for the due performance of the decree, the respondent's counsel reiterated the stance expressed in his notice of no objection, that the application may be granted on condition that the applicant furnishes security. He argued that from the nature of the decree, the fitting and proper mode is by way of monetary deposit which he proposed to be an amount equal to a one year's rent of the house.

In rejoinder, Mr. Mnkonje stressed that the applicant has cumulatively complied with the conditions stated under Rule 11 (5) of the Rules including paragraph (b) of sub-rule (5) of the Rules by undertaking to furnish security for the due performance of the decree. With regard to the mode of furnishing such security, he opposed the proposition made by the respondent's counsel arguing that the applicant's readiness to vacate the house which is the subject of the decree is sufficient compliance with that requirement.

From the submissions of the learned counsel for the parties, it is not disputed that the applicant has complied with the provisions of Rule 11 (5) of the Rules which provides as follows:-

"11 – (4)

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

The arising issues relates however, to the mode of compliance with condition (b) above and the requirement stipulated under sub-rule (4) of Rule 11 of the Rules. With regard to the latter condition, that provision states as follows:-

"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.”

The counsel for the parties agree that the applicant has not been served with a notice of execution. However, in paragraph 6 of his affidavit, he states as follows:-

"That on the 6th September, 2018 we were served with summons which was attached with execution form which was accompanied with a copy of judgment and a decree. That the said summons shows that the case was scheduled for mention on the 10th September, 2018 before honourable Kayange (RM) copies of the said execution form and judgment are hereby annexed as exhibits 'SYA 4' and 'SYA 5' respectively to this affidavit."

That paragraph of the affidavit in which, the applicant states in essence that he became aware of existence of an application for execution on 6/9/2018 was not disputed by the respondent. Indeed, the respondent did not file any affidavit in reply to counter the facts stated by the applicant in his affidavit. Since therefore, the application was filed on 12/9/2018, the applicant complied with the provisions of Rule 11(4)

of the Rules. We thus find that the applicant is entitled to be granted the sought order.

Concerning compliance with paragraph (b) of Rule 11(5) of the Rules, it is trite principle that a person applying for an order of stay of execution may furnish security through an undertaking. -See for example, the case of **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application No. 1 of 2010 (unreported). In that case, the Court observed that:-

"...the applicant for a stay order must give security for the due performance of the decree against him. To meet the condition, the law does not strictly demand that the said security must be given prior to the grant of the stay order. To us, a firm undertaking by the applicant to provide security might prove sufficient to move the Court, all things being equal to grant a stay order, provided the Court sets a reasonable time limit within which the applicant should give the same."

By the contents of paragraph 25 of his affidavit, the applicant complied with the condition of giving security by stating as follows:-

"That I am giving undertaking to perform the decree to be made by the Court of Appeal and I am ready to

put reasonable security for the order of stay as may be ordered under the circumstances.”

Given the fact that the decree giving rise to the application is not a monetary decree, the learned counsel for the parties differed on the mode of the security which should be furnished by the applicant. In our considered view, from the nature of the decree, the execution of which is by eviction of the respondent from the house in the event his appeal fails, the proposition by Dr. Lamwai that the applicant should deposit a one year's rent of the house is, in our view, not appropriate because there is no material upon which such amount of rent can be derived from. It is similarly not appropriate for the applicant to undertake to vacate the house as proposed by Mr. Mnkonje. That will not be sufficient compliance with Rule 11(5) (b) of the Rules because eviction of the applicant from the house is an obvious consequence in the event he does not succeed in his intended appeal.

In the case of **Mohamed Masoud and 16 Others v. Tanzania Road Haulage (1980) Ltd**, Civil Application No. 58/17 of 2019, after having considered a similar situation, the Court decided as follows:-

"After having considered the circumstances of this case where the impugned decree is not monetary, we have in the end found it appropriate to order the applicants to furnish security for the due performance of the decree suiting the particular circumstances of the case.

As security for the due performance of the decree we order that each applicant shall execute a bond committing himself/herself to maintain the status quo of the premises which are subject of the decree within fourteen (14) days from the date of delivery of this ruling."

In the same vein, we think it is proper to grant the application upon the applicant's compliance with paragraph (b) of Rule 11(5) of the Rules by executing a bond committing himself to ensure that the house remains in the same condition as it was at the time when the decree was passed until the hearing and determination of the intended appeal.

In the event, we order that execution of the decree of the High Court in Civil Case No. 19 of 2009 shall be stayed pending determination of the intended appeal on condition that the applicant executes the said bond within fourteen days from the date of delivery of this ruling.

Since the applicant did not pray for costs, we make no order to that effect.


DATED at DAR ES SALAAM this 10th day of October, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered on this 17th day of October, 2019 in the presence of Mr. Salim Mnkonge, counsel for the applicant and Mr. Salim Mnkonge for Mr. Masumbuko Lamwai, counsel for the respondent; is hereby certified as a true copy of the original.


E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL