

**IN THE COURT OF APPEAL OF TANZANIA**

**AT BUKOBA**

**(CORAM: MMILLA, J.A., MZIRAY, J.A., And KWARIKO, J.A.)**

**CIVIL APPLICATION NO. 541/04 OF 2018**

**TWAHA MICHAEL GUJWILE ..... APPLICANT**

**VERSUS**

**KAGERA FARMERS COOPERATIVE BANK LTD ..... RESPONDENT**

**(Application for stay of Execution from the judgment and decree of  
the High Court of Tanzania, at Bukoba)**

**(Bongole, J.)**

**dated the 7<sup>th</sup> day of February, 2017**

**in**

**Land Case Appeal No. 27 of 2015**

**\*\*\*\*\***

**RULING OF THE COURT**

6<sup>th</sup> & 12<sup>th</sup> December, 2019

**MMILLA, J.A.:**

Way back in 2015, Twaha Michael Gujwile (the applicant), was sued by Kagera Farmers' Cooperative Bank Ltd. (the respondent), in the District Land and Housing Tribunal for Kagera at Bukoba (the DLHT), seeking to recover a total of Tzs. 30,000,000/= resulting from the loan that was given to the former by the respondent on 23.10.2008. At the time of obtaining the said loan, the applicant was alleged to have mortgaged his residential house with Title Deed No. 15079 situated in Bukoba Municipality. At the end of the trial,

the DLHT gave judgment in favour of the respondent. That decision aggrieved the applicant who appealed to the High Court of Tanzania at Bukoba, but his appeal was dismissed on 7.2.2017. Desirous to still challenge that decision, the applicant filed a Notice of Appeal in this Court, and in order to achieve that goal he wrote a letter to the Deputy Registrar of the High Court applying for the necessary documents and dutifully served a copy of that letter and the Notice of Appeal to the respondent as demanded by the law.

During the pendency of that intended appeal however, the applicant was allegedly threatened by the respondent's attempt to sell his residential house in the said Plot No. 313, Kyanyi area in Bukoba Municipality, in consequence of which he lodged in the Court the present application. The said application is brought under Rule 11 (2) (b), (c), (d) (i) (sic) and (e) of the Tanzania Court of Appeal Rules, 2009 (the Rules), craving for an order for stay of execution of the judgment and decree of that court pending the hearing and determination of the intended appeal. It is supported by an affidavit affirmed by the applicant himself.

The respondent's advocates, Mr. Hangi Chang'a, learned Senior State Attorney, assisted by Mr. Gerald Njoka and Ms Lightness Msuya, learned

State Attorneys, are resisting the application. They filed an affidavit in reply which was sworn by Mr. Aaron Kabunga, another of the respondent's advocates.

The grounds on which this application depends are stated in the Notice of Motion. He raised five (5), but a close scrutiny shows that they converge on three points; **one** that, the decree sought to be executed is problematic in that it is loaded with serious irregularities which require this Court's intervention; **two** that, the house targeted for attachment and sell is a residential house in which he lives with his family; and **three** that, his intended appeal to the Court has overwhelming chances of success.

The applicant's grounds are clarified in paragraphs 4, 6, 7, 8 and 9 of the affidavit in support of the application. His main contention in those paragraphs is that during the pendency of his intended appeal, the respondent is eying to attach and sell his house in Plot No. 313, Kyanyi area, in Bukoba Municipality in which he lives with his family. He has stressed that should that happen, he and his family will be rendered homeless.

He also filed the written submissions in which he recapped the same averments reflected in his affidavit. Apart from his argument that the

application has been timely filed, he has similarly submitted that since the property targeted for attachment is a residential house in which he lives with his family, he will suffer substantial loss if the Court will not grant the order being sought because they may be rendered homeless. He relied on the cases of **Israel Solomon Kivuyo v. Wayani Langoi and Naishooki Wayani** [1989] T.L.R. 140 and **Athanas Albert and 4 Others v. Tumaini University College Iringa** [2001] T.L.R. 63. In the latter case of **Athanas Albert** (supra), the Court stated that "*a stay of execution can properly be asked for where there is a court order granting a right to the respondent or commanding or directing him to do something that affects the applicant.*" The applicant cautioned that besides, the law does not allow any decree holder to attach a residential house in which the judgment debtor lives with his/her family.

On another point, the applicant has contended that his appeal stands overwhelming chances of success because the judgment which conferred rights to the responded is problematic as it has a lot of irregularities which he trusts the Court cannot leave them to stand. He claimed that after all, the proceedings which gave rise to the intended execution of the decree of the DLHT are a nullity due to the fact that that tribunal entertained Land

Application No 157 of 2011 without having "*territorial and pecuniary jurisdiction*" to do so. Under such circumstances, the applicant asserted that justice will be done if the process of execution may be stopped to wait for the appeal to be heard and determined. He cited to us the cases of **Tanzania Electrical Supply Company v. IPTL Ltd. and 2 Others** [2000] T.L.R. 324 and **Clara Kimoka v. Surumbu Axweso** [2002] T.L.R. 255.

It is requisite to point out here that there are several other points raised in his submission, but are not relevant to the present application as they are matters which refer to the main appeal. Also, his oral submission repeated the same points he covered in his written submissions. In the end, the applicant has urged the Court to allow his application and grant the sought order, restraining the respondent from executing the decree under focus pending the hearing and determination of the intended appeal.

On the other hand however, it is unfortunate that the counsel for the respondent did not file the written submissions. Nonetheless, as earlier on pointed out, they had filed an affidavit in reply which they sought to be adopted vide which they have strongly disputed the applicant's assertions. It is contended that at the time the applicant obtained the said loan, he

mortgaged the house in question with knowledge that it was a matrimonial property, and had the consent of the spouse. They have similarly contended that so far, there is no any threat for execution because they have not made such attempts. Further, they have disputed his claims that there are any irregularities in the judgment and decree being impugned; therefore it is not true that his intended appeal stands overwhelming chances of success.

In his oral submission, Mr. Chang'a submitted that the application is not well defended because the applicant has not fulfilled one of the conditions stipulated under Rule 11 (2) (d) (i), (ii) and (iii) of the Rules. They elaborated that he has not made an undertaking for the security the due performance of such decree as may ultimately be binding upon him. Mr. Chang'a stressed that he expected to find such undertaking in the affidavit in support of the application, but no any paragraph addressed that aspect. Since compliance with Rule 11 (2), (d) (i), (ii) and (iii) of the Rules is mandatory, he said, the mentioned snag renders the application a failure. To fortify his stand, he cited the cases of **The Registered Trustees of the University of Bagamoyo v. Robert Damian**, Criminal Application No. 15/17/2017 and **The Attorney General Zanzibar v. Jaku Hashim Ayub & Another**, Civil Application No. 385/15 of 2018 (both unreported). Mr.

Chang'a emphasized the point that according to the decisions in those cases, those conditions must be complied with cumulatively. Since the third condition has not been complied with as shown above, Mr. Chang'a urged us to dismiss the application with costs.

In a brief rejoinder, the applicant admitted that he did not say anything in his affidavit or anywhere else concerning the question of security for performance of such decree as may ultimately be binding upon him, but promptly added that he was prepared to offer as security a three acre farm he owns within Bukoba Municipality worth of Tzs. 40,000.000/=. He relied on the case of **Geofrey Vedasto Kalala v. National Bank of Commerce**, Land Case No. 7 of 2003 (unreported). He reiterated his prayer for the Court to grant the sought order.

We need to point out at this stage that this application was instituted in the Court in March 2017 and was based on Rule 11 (2) (d) (i) (sic) of the Rules. After the old Rules were replaced by the current Rules in 2009, the application for stay of execution by a party came to be subject to satisfying the conditions under Rule 11 (2) (i), (ii) and (iii) of the Rules. That marked the end of the old practice in which applications of this nature depended on the Court considering the issue whether or not it was just in the given

circumstances to grant it. Before the present amendments, Rule 11 (2) (i), (ii) and (iii) of the Rules provided that:-

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

- (i) substantial loss may result to the party applying for stay of execution unless the order is made;*
- (ii) the application has been made without unreasonable delay; and*
- (iii) security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.*

It is significant to underscore that these conditions had to be complied with cumulatively, meaning that where one of them could have not been satisfied, the Court would decline to grant the order for stay of execution – See the cases of **The Registered Trustees of the University of Bagamoyo, The Attorney General Zanzibar** (supra), **Joseph Anthony Soares @ Goha v. Hussein Omary**, Civil Application No. 6 of 2012 and **Laurent Kavishe v. Enely Hezron**, Civil Application No. 5 of 2012 (both unreported).

In **The Registered Trustees of the University of Bagamoyo** (supra), the Court relied on its earlier case of **Therod Fredrick v.**



**Abdulsamudu Salim**, Civil Application No. 7 of 2012 (unreported) in which it was illustrated that:-

*"On the terms of the present Rules (Rule 11 (2) (d) (i), (ii) and (iii) of the 2009 Rules) the Court no longer has the luxury of granting an order for stay of execution on such terms as the court may think just, rather, the Court must be satisfied, just as the applicant will be required to fulfill the following cumulative requirements:*

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

As earlier on pointed out, the applicant's Notice of Motion raised 5 grounds which we have said boil down to only three of them. Of the three grounds, only the first ground which refers to substantial loss falls under condition (i) of clause (d) of sub-rule (2) of that Rule, the other two grounds are irrelevant. This same ground has been extensively covered in his written and oral submissions. He has also stated in his submissions that the application has been instituted without undue delay. That implies that he has

fulfilled only two out of the three conditions and completely ignored to address the third important condition referring to security for the due performance of such decree as may ultimately be binding upon him. Thus, the application is not meriting because as earlier on pointed out these conditions are required to be fulfilled cumulatively.

We have mentioned that in a rejoinder to the respondent's counsel's oral submission, the applicant admitted this fact, but said that he has a three acre farm valued at Tzs. 40,000,000/= situated in Bukoba Municipality and was prepared to offer it as security. That information however, is not helpful because it does not amount to a firm undertaking as it was not covered in his affidavit in support of the application. As we said in **Tanzania Petroleum Development Corporation v. Mussa Yusuf Namwao & 37 Others**, Civil Application No. 602/07/2018 (unreported), **a firm undertaking** means:-

*"[A] promise or agreement or an unequivocal **declaration or stipulation of intention** addressed to someone who reasonably places reliance on it."*  
[The emphasis is ours].

For reasons we have assigned, because the applicant has not made any undertaking for security of performance, leave alone a firm undertaking, and since the three conditions ought to be fulfilled cumulatively, the application fails and is hereby dismissed with costs.

Order accordingly.

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

B. M. MMILLA  
**JUSTICE OF APPEAL**

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

M. A. KWARIKO  
**JUSTICE OF APPEAL**

The Ruling delivered this 12<sup>th</sup> day of December, 2019 in the presence of the Applicant appeared in person and Mr. Joseph Mwakasege, learned State Attorney appeared for the Respondent is hereby certified as a true copy of the original.



  
B. A. MPEPO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**