

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUSSA, J.A., NDIKA, J.A. And KWARIKO, J.A.)

CIVIL APPLICATION NO. 165/01 OF 2018

DAVID MAHENDE APPLICANT

VERSUS

1.SALUM NASSOR MATTAR1ST RESPONDENT

2.FOSTERS AUCTIONEERS AND GENERAL TRADERS2ND RESPONDENT

(Application for Stay of Execution from the decision of the High Court of
Tanzania at Dar es Salaam

(Mgetta, J.)

dated the 30th day of July, 2015

in

Land Case No. 143 of 2009

.....

RULING OF THE COURT

2nd November, 2018 & 7th February 2019

MUSSA, J.A.:

In the High Court of Tanzania, Land Division the applicant unsuccessfully sued the first respondent and three others with respect to houses situate on Plot No. 22, Block 31F3, Kasana Street, Kinondoni, Dar es Salaam (the suit premises). The decision of the High Court which dismissed the suit was handed down on the 30th July, 2015 (Mgetta, J.)

Dissatisfied, on the 11th August, 2015 the applicant lodged a Notice of Appeal and, subsequently, on the 30th April, 2018 the second respondent, a court broker, served the applicant with a 14th days' notice to vacate the suit premises. In response, on the 4th May, 2018 the applicant lodged the present application seeking a stay of the execution of the High Court decree pending the hearing and determination of the intended appeal.

The application is by way of a Notice of Motion which was taken out under the provisions of Rule 11 (3) (4) (5) (a) (b) and (c) as well as Rule 11(6) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The Notice of Motion is supported by an affidavit which was duly sworn by the applicant on the 2nd May, 2018. In addition, the applicant has lodged written submissions in support of his quest for stay of execution.

The application is, however, resisted through an affidavit in reply which was affirmed by the first respondent on the 23rd May, 2018. In addition, the first respondent has lodged written submissions in reply to the applicant's written submissions. It is noteworthy that the second respondent did not lodge any affidavit in reply and neither did she prefer any written submissions.

When the application was placed before us for hearing, the applicant had the services of two learned Advocates, namely, Ms. Anna Marealle and

Ms. Jacqueline Rweyongeza. The first respondent was represented by Mr. Sylevester Shayo, learned Advocate, whereas the second respondent was advocated for by Mr. Hamis Ismail.

On behalf of the applicant, Ms. Marealle fully adopted the Notice of Motion as well as its accompanying affidavit and the written submissions. The learned counsel for the applicant also made good the applicant's undertaking to furnish security by availing two certificates of occupancy over land comprised in, respectively, Plot No. 569, Mikocheni, Dar es Salaam and Plot No. 136 Ada estate, Dar es salaam.

As regards the first respondent, Mr. Shayo resisted the application by fully adopting the affidavit in reply and the written submissions in reply. On his part, Mr. Ismail for the second respondent had nothing to say and left the matter for the just determination of the Court.

Before we embark on the determination of the issues involved in this application we deem it apposite to extract in full the new conditions for the grant of a stay of execution under Rule 11 of the Rules which were promulgated by the Government Notice No. 362 which was published on the 22nd September, 2017:-

"11.-(1) *A sentence of death or corporal punishment shall not be carried out until the time for giving notice of appeal has expired or, where notice of appeal has been given, until the appeal has been determined.*

(2) *Subject to the provisions of sub-rule (1), the institution of an appeal, shall not operate to suspend any sentence but the Court may in any criminal proceedings, where notice of appeal has been given in accordance with rule 68, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal.*

(3) *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 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.*

(4) *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.*

(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) the application has been made without unreasonable delay; and

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

(6) Notwithstanding any contained under sub-rule (5) and rule 60(2)(b), this rule, a single judge of the Court, may make an ex parte order for stay of execution pending hearing of the appeal or application.

(7) An application for stay of execution shall be accompanied by:-

(a) a copy of a notice of appeal;

(b) a decree or order appealed from;

(c) a judgment; and

(d) a copy of a notice of the intended execution."

In the Notice of Motion at hand, the applicant has appended all the documents referred to in the extracted Rule 11(7) of the Rules. He has

also, positively expressed that substantial loss may result to him unless the order for a stay is made. From the factual setting, it is common ground that the present application was preferred within fourteen days of the service of the notice of execution and, accordingly, meets the requirements of Rule 11 (4) and (5) (b) of the Rules. Finally, in the Notice of Motion, the applicant undertook to furnish security for the due performance of the decree as may ultimately be binding upon him. Speaking of security, in the unreported Civil Application No. 11 of 2010 – **Mantrac Tanzania Ltd V.**

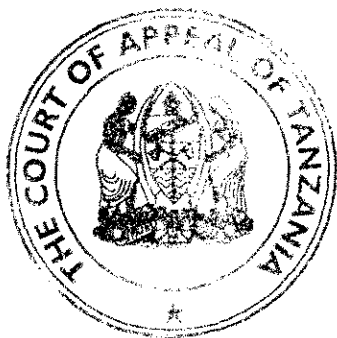
Raymond Costa, the court gave the following guidance:-

"One other condition is that the applicant for a stay order must give security for the due performance of the decree against him. To meet this 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."

As hinted upon, in the situation under our consideration, the applicant took an additional step by availing two certificates of title to furnish security for the due performance of the decree.

All factors considered, we are satisfied that the applicant has met all the conditions for the grant of a stay and accordingly the application is granted as prayed. The costs should abide by the result of the intended appeal. We should hasten to caution that the Registrar should take due custody of the two certificates of title which are comprised herein. It is so ordered.

DATED at DAR ES SALAAM this 4th day of February, 2019.



K. M. MUSSA
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL