

IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MUSSA, J.A., LILA, J.A. And MKUYE, J.A.)

CIVIL APPLICATION NO. 35/17 OF 2018

HATIBU OMARI..... APPLICANT

VERSUS

BELWISY KUAMBAZA.....RESPONDENT

**(Application for stay of execution of judgment and decree of the High Court
of Tanzania at Tanga)**

(Aboud, J.)

dated the 2nd day of September, 2016

in

Land Appeal No. 4 of 2016

RULING OF THE COURT

27th February & 1st March, 2019

MKUYE, J.A.:

Before us is an application for stay of execution filed by way of a notice of motion under Rule 11(2) (b) and (c) of the Tanzania Court of Appeal Rules, 2009, (the Rules). It seeks to stay execution of the judgment and decree of the High Court of Tanzania at Tanga in Land Appeal No. 4 of 2016 (Aboud, J.) dated 2nd September, 2016. It is filed by one Hatibu Omari and

supported by an affidavit deponed by the said applicant. The "purported" ground for the application is as follows:

"1) That, the applicant intends to appeal against the whole decision of the High Court of Tanzania dated 2nd September, 2016 in Land Case Appeal No. 04 of 2016 therefore, a notice of Appeal against the said decision dated 2nd September, 2016 has been lodged."

According to paragraph 7 of the affidavit in support of the application, the applicant has averred that, the respondent has invaded the suit land who is most likely to waste or alienate the suit land and cause him to suffer loss and injury.

On the other hand, the respondent in paragraph 5 of his affidavit in reply, disputed to have invaded the suit plot except that he had occasionally visited his graves for the purpose of cleaning them. He also averred that the applicant did not state any ground in either the notice of motion or affidavit to substantiate the application.

When the application was called on for hearing the applicant was represented by one Halima Hatibu under a power of attorney issue to her by the applicant; whereas the respondent appeared in person and unrepresented. They both sought the indulgence of the Court to determine the application on the basis of their respective affidavits filed in Court earlier on.

The issue for this Court's determination is whether the applicant has satisfied the three cumulative conditions for the grant of an order of stay of execution.

Applications for stay of execution are governed by among other provisions, Rule 11(2) (d) (i), (ii) and (iii) which provides as follows:

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

(a) 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) the application has been made without unreasonable delay;
and*
- (iii) that security has been given by the applicant for the due performance of such decree or order as ultimately be binding upon him."*

The construction of sub rule (2) (d) of Rule 11 is that all the conditions laid down are to be mandatorily complied with. Also, this Court has established a settled position that in order for stay of execution to be granted under Rule 11(2) (d) (i) – (iii) all the three conditions stipulated under that Rule sub-rule conjunctively and not disjunctively must be satisfied. (see **Joseph Anthony Soares @ Goha v. Hussein s/o Omary**, Civil Application No. 6 of 2012; **Geita Gold Mining Ltd v. Twalib Ally**, Civil Application No. 14 of 2012 (Both unreported))

Going by the notice of motion and the averrements in the affidavit, we are satisfied that the applicant has fulfilled the condition under Rule 11(2)

(d) (i) of the Rules. This is so because in paragraph 7 of his affidavit he has shown that the respondent has been invading in the suit land which is likely to waste and alienate it and cause the applicant to suffer loss. This fact has been to a certain extent admitted by the respondent in that he has been occasionally visiting the land but for purposes of cleaning his graves.

On the issue of whether the application has been made without unreasonable delay, we are of the view that, it was not. We shall explain.

According to Rule 11(2) (c) of the Rules, an application for stay of execution must be filed within sixty (60) days from the date the notice of appeal was filed. In this case, the judgment and decree sought to be stayed were handed down on 2/9/2016. The notice of appeal was filed on 15/9/2016 which was well within time. However, the application for stay of execution was filed through a notice of motion on 18/4/2017 which, by simple calculation was after seven months from when the notice of appeal was filed. It is without question that the application for stay of execution was filed inordinately late. It follows, therefore that, the applicant has not fulfilled the condition under Rule 11(2) (d) (ii) of the Rules.

As regards the requirement of security, we are equally of the view that the applicant has not fulfilled it. This is so because the applicant has not given or firmly undertaken to furnish the security for the due performance of the decree intended to be stayed. Both the notice of motion and the affidavit in its support are silent on the issue. In the case of **Rehema Emmanuel and Another v. Alois Boniface**, Civil Application No. 5 of 2015 (unreported), the Court dismissed the application for stay of execution after the applicant failed to furnish security for cost. In that case the Court stated as follows:-

*" The applicants have failed to furnish security. Since the applicants have failed to furnish security or make a firm undertaking for giving security as provided under Rule 11(2) (d) (iii) of the Rules among other conditions, the application is liable to be dismissed. (See **Mantrac Tanzania Ltd v. Raymond Costa**, Civil Application No. 11 of 2010; **Joram Biswalo v. Hamisi Richard**, Civil Application no. 11 of 2013; and **Anthony Ngoo and***

Another v. Kitinda Kimaro, Civil Application No.

12 of 2012 (all unreported)."

Even in this case, failure to furnish security for the due performance of the decree is sufficient to render the application liable for dismissal.

To cull it up, since the applicant has failed to file his application within a reasonable time and to furnish security for the due performance of the decree, we find that the applicant has failed to fulfil the three cumulative conditions for the grant of stay of execution.

Hence, the application is hereby, accordingly dismissed with costs.

DATED at TANGA this 1st day of March, 2019.

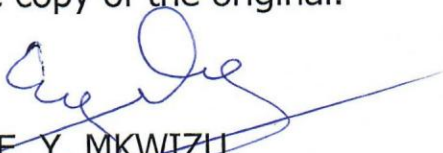
K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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




E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL