IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 84 OF 2017

(CORAM: MKUYE, J.A., MWANDAMBO, J.A. And KITUSI, J.A.)

JUTO ALLY ..... APPLICANT

VERSUS

1. **LUCAS KOMBA**
2. **ALOYCE MSAFIRI MUSIKA ..... RESPONDENTS**

(Application for Stay of Execution of a decree from the decision of the High Court of Tanzania (Land Division) at Dar es Salaam)

(Mziray, J.)

dated 30th day of June, 2015
in
Land Case No. 98 of 2009
.....

RULING OF THE COURT

20th October & 2nd November, 2020

KITUSI, J.A.:

This is an application for stay of execution of a decree pending hearing and finalization of an intended appeal. A landed property sitting on Plot No. 781/13 at Mwananyamala area Kinondoni District, Dar es Salaam Region, is the subject matter of these proceedings that originate from Land Case No. 98 of 2009, High Court, Land Division.

Juto Ally, an elderdly lady who is now the applicant, was aggrieved by the decision of the trial High Court (Mziray, J. as he then

was) declaring the second respondent the rightful owner of that property. She lodged a Notice of Appeal to the Court, and in the meantime she has made the present application under Rule 11(2)(b) of the Court of Appeal Rules, 2009, seeking, as already stated, an order for stay of execution of the impugned decree.

The application is supported by the applicant's affidavit as well as a supplementary affidavit she filed upon leave being granted to her by the Court. There are also written submissions filed by the applicant in terms of Rule 106(1) of the Rules. These written submissions proved to be very handy because at the hearing, the applicant appeared in person without legal representation which made communication with her to be somehow impeded. She adopted the Notice of Motion, the affidavits and the written submissions, and rested her case.

In the written submissions, the applicant appreciated the requirement for the applicant to demonstrate that substantial loss may result on her part if the order sought is withheld, and that she has to make a firm undertaking to furnish security for the due performance of the decree as it may ultimately become binding upon her.

In both the affidavit and submissions, a lot is stated about the applicant's sentimental attachment to the house in which she grew up to the current old age of 94 years. A scenario is drawn of the suffering she will go through if the respondents, who have obtained an eviction order, are not stopped by the order sought. The applicant suspects that the respondents have an ill motive to dispose of the house to a third party who may also sell it to another person and that in the end, the loss to her may never be atoned by any money.

As for security, there are two versions. In the written submissions, the applicant states that she is making a firm undertaking to furnish security. However, in the supplementary affidavit specifically paragraph 4(e), it is stated that the security intended to be used is the disputed house on Plot No. 781/13 Mwananyamala area, which allegedly belongs to the applicant.

The respondents enjoyed the services of Mr. Thomas Brash, learned advocate, who also took an affidavit in reply. The learned advocate did not file written submissions in reply but proceeded to argue the application orally which is permitted under the Rules. We must make it clear from the beginning, that we shall not bother to

consider the relevance of facts deposed from paragraphs 1 – 11 of the affidavit in reply as they consist of matters that are rather mundane. The said affidavit in reply raises one fact of significance that the applicant was evicted and she no longer occupies the disputed house. In the course of his oral submissions, Mr. Brash stated that this application has been overtaken by the events since execution has been carried out. On the issue of security, Mr. Brash submitted that the applicant's undertaking falls short of substantiation because it does not disclose ownership and whether the property is free from incumbrances.

Those are the arguments for us to consider, and we wish to state right away that we shall avoid sentiments, and focus on the law. In view of the unopposed contention that execution of the impugned decree has been carried out, we are going to have to interrogate ourselves whether we can meaningfully issue the order of stay sought. Secondly, in the alternative we shall have to determine whether the house that forms the subject matter of the case may be placed as security for the due performance of the decree.

First of all, the law as it stood at the time of lodging this application required the applicant not only to attach to the application the notice of appeal and the impugned decree but also to fulfill three conditions falling under sub rule (2) (d) of Rule 11 of the Rules. These are that the application must be made without undue delay, the applicant must show that he will suffer substantial loss and lastly, he must furnish security for the due performance of the decree. In our case we have no problem with all, except the last two conditions which we are going to deliberate on. With respect we, therefore, agree with the applicant that what she needs to establish are the two factors whether she will suffer substantial loss and whether she has furnished security for the due performance of the decree. We need to add though, that it is established law that the conditions must be cumulatively met as we have repeatedly held. See for instance in **Salvatory Gibson v. William Laurent Malya and Mariam I. Mbelwa,** Civil Application No. 6/05 of 2017 (unreported).

We shall first discuss the factor of substantial loss. Counsel for the respondent has submitted that execution has already been carried out and the applicant is not in occupation of the house. We revert to

the question we raised earlier, whether the order of stay will serve any practical purpose. We are firmly of the view that since execution has been carried out, we cannot make an order to stay it and that if it caused substantial loss to the applicant, there is no order that can undo that.

We took a similar approach in an earlier case of **Seleman Zahoro and 2 Others v. Faisal Ahmed Abdul,** as Legal Representative of the deceased **Ahmed S. Abdul**, (BK) Civil Application No.1 of 2008, and in a recent decision in **Felix Emmanuel Mkongwa v. Andrew Kimwaga,** Civil Application No. 249 of 2016 (both unreported). We reiterate and emphasize that stay of execution as a remedy may not issue when execution has been carried out.

We turn to the factor of security. The applicant is offering the subject matter, that is, the house on Plot No 781/13 Mwananyamala area, as security for the due performance of the decree as may ultimately be made against her. Here we address the second question we raised earlier, whether that property in dispute may suffice to be security.

The position on this area is also settled, therefore we do not intend to belabour on that issue more than it is necessary. We have indicated in the preceding pages that the impugned decision declared the second respondent the lawful owner of the house; the very house the applicant is now offering for security. We think that is ironic and we cannot accept that offer. We were of the same view in **Juma Hamisi v. Mwanamkasi Ramadhani,** Civil Application No. 34 of 2014 (unreported) where we stated the following:

> *"As already intimated, the decree forming the subject of the application categorically adjudged that the respondent (plaintiff) is the lawful owner of the suit land and that the same should be returned to her. The decree is, so to speak, not in favour of the applicant. Under the circumstances, it will be against reason for the applicant to be allowed to offer the land in dispute as security for the due performance of the decree."*

The applicant has, in the end, failed to fulfill the two factors that may justify the grant of an order of stay of execution. She had to fulfill

them cumulatively but she succeeded in none, for which reason this application has no merits and it is dismissed. Mr. Brash had generously made it clear that he would not be demanding costs should we decide in his favour. In the peculiar circumstances of this case, counsel's position is quite understandable and commended. We make no order for costs.

DATED at **DAR ES SALAAM** this 27th day of October, 2020.

R. K. MKUYE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Ruling delivered this 2nd day of November, 2020 in the presence of Mr. Said Mzee, Grandson of the Applicant and Mr. Thomas Brash, learned Counsel for the Respondents, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL