IN THE COURT OF APPEAL OF TANZANIA
AT DAR-ES-SALAAM

(CORAM: MUGASHA, J.A, WAMBALI, J.A And KWARIKO, J.A)

CIVIL APPLICATION NO. 237/17 OF 2016

AIDAN GEORGE NYONGO..... APPLICANT

VERSUS

1. **MAGESE MACHENJA**
2. **COMMISSIONER FOR LANDS**
3. **REGISTRAR OF TITLES ..... RESPONDENTS**
4. **ATTORNEY GENERAL**

(Application for Stay of Execution from the decision of the High Court of Tanzania at Dar-es-salaam)

(Mgetta, J.)

Dated the 18th day of July, 2016
in
Land Case No 141 of 2007

RULING OF THE COURT

20th & 30th October, 2020

MUGASHA, J.A.:

Before this Court, is an application for stay of execution of the decree of the High Court dated 18/7/2016. Prior to this application, way back in 2007, the first respondent jointly sued the applicant and the second to fourth respondents. He sought among others, a declaration that he is lawful owner of Plot No. 184 held under Certificate of Title No. 44379,

Mbezi Beach Area within the Municipality of Kinondoni in Dar-es-salaam Region. In the decision handed down on 18/7/2016, the High Court thus, decreed as follows:

1. *The plaintiff is declared as lawful owner of Plot No 184, Mbezi Beach area, with CT No.44379 situated in Kinondoni Municipality, Dar-es-salaam.*
2. *The defendants, their servants, workmen, agents and or other person (s) acting on their behalf are restrained from trespassing, harassing and interfering with peaceful possession and development of the suit plot by the plaintiff. Applicants to pay costs of the suit.*
3. *The 3rd defendant is ordered to pay Tshs. 100,000,000/= as general damages to the plaintiff.*
4. *Costs be paid to the plaintiffs by the defendants.*

In a bid to pursue an appeal, on 26/7/2016 the applicant lodged a Notice of Appeal to the Court and subsequently, on 14/9/2016 by way of Notice of Motion he filed the present application seeking to stay the execution of the said decree of the High Court. The application is accompanied by the affidavit sworn by **GENOVEVA NAMATOVU KATO** who was duly instructed by the applicant.

The motion is challenged by the respondents through the affidavits in reply of Magese Machenja, first respondent and David Kakwaya, learned Principal State Attorney on behalf of the second, third and fourth respondents. To buttress their arguments for and against the application, parties filed written submissions as required by Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

At the hearing of the application, the applicant had the services of Mr. Kelvin Kwagilwa, learned counsel whereas the first respondent was represented by Ms. Magreth Ngasani, learned counsel and Ms. Grace Lupondo together with Mr. Charles Mtae, learned State Attorneys represented the second, third and fourth respondents.

The applicant adopted the Notice of Motion, the accompanying affidavit and the written submissions in support of the application which basically hinges on a major ground which is two limbed namely: that the applicant will suffer substantial loss if stay of execution is not granted because **one,** the decree issued by the High Court has ordered the applicant to pay the first respondent TZS. 100,000,000/= as general damages; **two,** the applicant has a valid certificate of title issued by the second respondent and if forced to be surrendered, it will be removed from

the Registrar of Titles thus causing great inconvenience and loss to him in the event the appeal is allowed. Moreover, in paragraph 5 of the affidavit, it is deposed that the applicant is ready to give security for the due performance of the decree.

We probed the applicant's counsel in relation to compliance with the prescribed conditions, on the substantial loss to be suffered if the stay order is not granted and a firm undertaking to furnish security for the due performance of the decree as may ultimately be binding on the applicant. On this, Mr. Kwagilwa's response was to the effect that, the decretal amount is colossal and loss may result if stay order is not granted. He added that, the applicant will furnish security as may be ordered by the Court. To support his proposition, he cited to us the case of **AIRTEL TANZANIA LIMITED VS OSE POWER SOLUTIONS,** Civil Application No 366/01 of 2017 (unreported).

On the other hand, it was submitted for the respondents that, substantial loss to be suffered by the applicant has not been sufficiently canvassed apart from mere restating the sum of general damages to be paid by the applicant which falls short of demonstrating substantial loss to be suffered by the applicant. In addition, it was contended that, in the

affidavit accompanying the application, the applicant has not made a firm undertaking to furnish security for the due performance of the decree. On this, it was the respondents' argument that the applicant fell short of indicating even the nature of security to be furnished and as such, that cannot be safely vouched to be a firm undertaking. To back up the propositions, the respondents relied on the case of **TWAHA MICHAEL GUJWILE VS KAGERA FRAMERS COOPERATIVE BANK,** Civil Application No. 541/04 of 2018 (unreported). In this regard, it was argued that the present application for stay of execution has not complied with the prescribed cumulative conditions warranting the grant of stay and on that account, it deserves to be dismissed.

In rejoinder, Mr. Kwagilwa reiterated his earlier submission and urged the Court to grant stay of execution of the High Court.

Having carefully considered the arguments for and against this application, at the outset, we need to point out that this application was instituted in the Court on 14/9/2016 predicated under Rule 11 (2) (b) and (c) of the Rules. Before the present amendment of Rule 11 vide Government Notice No. 362 of 2017, Rule 11 (2) of the Rules stipulated that:

" 11 (1) ... (not relevant)

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

(a) ... (Not relevant)

(b) 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 except so far as the High Court or tribunal may order, 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.

(c) ... (Not relevant)

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

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

The stated prescribed conditions had to be complied with cumulatively and failure to do so would warrant the Court to decline to grant the order for stay of execution. This was emphasized by this Court in the case of **JOSEPH SOARES @ GOHA VS HUSSEIN OMARY;** Civil Application No. 12 of 2012 (unreported) that:

"The Court no longer has the luxury of granting an order of stay of execution on such terms as the Court may think just; but it must find that the cumulative conditions enumerated in Rule 11(2)(b), (c) and (d) exist before granting the order. The conditions are:

(i) Lodging a Notice of Appeal in accordance with Rule 83;
(ii) Showing good cause and;
(iii) Complying with the provisions of item (d) of sub-rule 2."

[See also the cases of **MTAKUJA KONDO AND OTHERS VS WENDO MALIKI,** Civil Application No. 74 of 2013 and **THEROD FREDRIC VS ABDUSAMUDU SALIM,** Civil Application No. 7 of 2012, (both unreported).

Moreover, furnishing security for the due performance of the decree as may ultimately be binding on the applicant continues to be among the basic and mandatory conditions which must be fulfilled to warrant the grant of stay order. Where security is not furnished and in the absence of any such firm undertaking, settled law requires the Court not to grant stay of execution. [See **JORAMU BISWALO VS HAMIS RICHARD,** Civil Application No. 11 of 2013 and **MANTRAC TANZANIA LTD VS RAYMOND COSTA,** Civil Application No. 11 of 2010 (both unreported)].

We shall be guided by the stated principles to determine as to whether or not the applicant cumulatively complied with all the conditions to warrant the grant of the application.

As to whether the applicant complied with all the conditions cumulatively, it is not in dispute that the notice of motion at hand was brought without delay having been filed on 14/9/2016 not beyond sixty days after the notice of appeal was filed on 21/7/2016. In respect of the compliance with the remaining conditions, we have gathered from the documents supporting this application that, among the grounds relied upon by the applicant include the applicant's deposition in paragraph 4 of the affidavit that he will suffer substantial loss in case stay order is not granted. However, apart from such narration, the applicant did not clarify on the magnitude of loss or how he will suffer loss. Mere narration of an order requiring the applicant to pay damages at the tune of TZS. 100,000,000/= and that the certificate of title will be transferred to the first respondent as articulated in the decree is in itself not enough to demonstrate the substantial loss to be suffered by the applicant. We say so because the applicant ought to have gone a step ahead to articulate and demonstrate as to how he will suffer substantial loss. In the circumstances,

we agree with the respondents that, having failed to establish the substantial loss to be suffered, the applicant has not met the crucial condition and key element under Rule 11(2) (d) (i) of the Rules.

Apart from the aforesaid, the other issue for consideration is whether the applicant has complied with the condition of furnishing security for the due performance of the decree as may ultimately binding upon him. In paragraph 5 of the affidavit; the applicant has deposed as follows: -

> *"That the applicant is ready to give security for the due performance of the decree."*

When the Mr. Kwagilwa was required to address the Court on the aspect of depositing of security as required under Rule 11 (2) (d) (iii), he contended to be willing to comply with the conditions given by the Court. This was disputed by the respondents' counsel who argued that, there is no firm undertaking whatsoever by the applicant to furnish security for the due performance of the decree as may ultimately be binding on him. The Court was confronted with an application of a similar nature in the case of **TANZANIA PETROLEUM DEVELOPMENT CORPORATION VS MUSSA YUSUPH NAMWAO AND 30 OTHERS,** Civil Application No. 602/07 of 2018 (unreported). Thus, the Court defined a firm undertaking as a

promise or agreement or an unequivocal declaration or stipulation of intention addressed to someone who reasonably places reliance on it. This rhymes with Rule 11 (2) (d) (iii) of the Rules, which shoulders on the applicant the obligation to furnish security. In this regard, the question to be addressed is whether the applicant discharged the obligation. Our answer is in the negative because what is deposed in paragraph 5 of the applicant's affidavit does not at any rate constitute a firm undertaking to deposit security for the due performance of the decree as may ultimately be binding on the applicant.

Moreover, the case of **AIRTEL TANZANIA LIMITED VS OSE POWER SOLUTIONS (supra)** cited by Mr. Kwagilwa is distinguishable with the case at hand and it cannot salvage the applicant's predicament. We are fortified in that account because in **AIRTEL TANZANIA** (supra) the applicant in the accompanying affidavit made a firm undertaking to deposit security in the form of bank guarantee or any other form of security as may be ordered by the Court to guarantee due performance of the decree which was sought to be stayed. This is not the case here.

In view of the aforesaid, this application is not merited on account of the applicant's failure to establish substantial loss to be suffered and failure

to furnish security for the due performance of the decree as may ultimately be binding on the applicant as required by Rule 11(2) (d) (i) and (iii) of the Rules. We thus, accordingly dismiss the application with costs.

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

S. E. A. MUGASHA
JUSTICE OF APPEAL

F.L.K WAMBALI
JUSTICE OF APPEAL

M.A. KWARIKO
JUSTICE OF APPEAL

This Ruling delivered on 30th day of October, 2020 in the presence of Mr. Kelvin Kwagilwa, learned counsel for the applicant, the 1st respondent present in person and Ms. Debora Richard learned State Attorney for the 2nd ,3rd, and 4th respondents, is hereby certified as a true copy of the original.

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL