

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWANGESI, J.A., NDIKA, J.A., And SEHEL, J.A.)

CIVIL APPLICATION NO. 254/01/2019

**GERIOD FRANCIS TAIRO (As Administrator of the
Estate of the Late FRANCIS KARUWESA TAIRO) APPLICANT
VERSUS**

- 1. JUMANNE S. KITILA (As Administrator of the Estate
of the Late FATUMA PUZA @ FATUMA PYUZA) 1ST RESPONDENT**
- 2. HAMISI IDDI 2ND RESPONDENT**

**(Application for stay of execution from the Judgment and Decree of the High
Court of Tanzania, Dar es Salaam District Registry)**

(Muruke, J.)

dated the 21st day of November, 2016

in

Civil Appeal No. 51 of 2016

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RULING OF THE COURT

20th October & 11th November, 2020

NDIKA, J.A.:

This is an application by Gerion Francis Tairo, acting as the administrator of the estate of the late Francis Karuwesa Tairo (“the applicant”) for stay of execution of decree arising from the judgment of the High Court of Tanzania dated 21st November, 2016 in Civil Appeal No. 51 of 2016.

Briefly, this matter arises as follows: the applicant was the losing party in the aforementioned Civil Appeal No. 51 of 2016. By its judgment, the High

Court (Muruke, J.) dismissed the applicant's appeal in its entirety thereby affirming the judgment of the District Court of Kinondoni dated 10th February, 2016 in Civil Case No. 23 of 1998. In essence, the trial District Court had adjudged Jumanne S. Kitila, the administrator of the estate of the late Fatuma Puza @ Fatuma Pyuza, ("the first respondent"), the lawful owner of landed property described as Plot No. 264, Old Kinondoni, Sekenke Street, Dar es Salaam comprised in Certificate of Title No. 38714 and consequently ordered the applicant and his then co-defendant, Hamisi Idd ("the second respondent") to yield up vacant possession of the aforesaid property.

Feeling hard done by the High Court's decision, the applicant averred that he manifested his intention to appeal to this Court by lodging a notice of appeal on 23rd November, 2016. Pending the hearing and determination of the intended appeal, the applicant now seeks an order staying the execution of the impugned decree in terms of Rule 11 (3) – (7) of the Tanzania Court of Appeal Rules, 2009 ("the Rules") as amended by Government Notices No. 362 of 2017 and No. 344 of 2019. The application is justified by the grounds stated on the notice of motion and elaborated in the applicant's supporting affidavit.

Both respondents oppose the application and each of them lodged an affidavit in reply.

At the hearing of the application, Ms. Mary Masumbuko Lamwai, learned counsel for the applicant, submitted, based on the supporting affidavit, that the applicant was on 1st July, 2019 served with a notice to show cause why execution should not be carried whereupon he learnt that the first respondent had initiated the execution process seeking his eviction from the disputed property. That in response, the applicant lodged the present application on 9th July, 2019, which was within the prescribed period of fourteen days. The learned counsel contended that the application has met all threshold requirements including the prerequisite that if the stay order was withheld the applicant would suffer irreparable loss. She added that the applicant had undertaken to furnish security for the satisfaction of the decree as may ultimately be binding on him. To buttress her submission, she referred to our decision in **Ibrahim Ally Yusuf Mpore (Administrator of the Estate of the Late Salum Ally Yusuf Mpore) v. Nalgis Ally Yusuf Mrope & Rahmat Ahmad Juma**, Civil Application No. 193 of 2016 (unreported).

The first respondent was self-represented. Based upon his affidavit in reply, he strongly opposed the application. At the forefront, it was his contention that the applicant neither lodged any notice of appeal nor did he serve a copy of it on him. Secondly, he claimed that the applicant failed to

institute his intended appeal in time. Thirdly, he denied that the applicant would suffer any substantial loss if stay was withheld but that it was the beneficiaries of the estate of the late Fatuma Puza who have suffered substantial loss and hardship from the applicant's unjustified and continued possession of the disputed property.

The second respondent, who was also self-represented, essentially echoed the first respondent's contentions.

Having heard the parties, we wish to state that in our determination of this matter, we are obligated to be guided by the requirements of Rule 11 (3), (4), (5) and (7) of the Rules, as amended – see **Dr. Joel Msuya v. Cammila Brian and Maxine Brian suing through their next friend Prudence Brian**, Civil Application No. 135/02/2018 (unreported). While sub-rule (4) of Rule 11 requires that an application of this nature to be filed within fourteen days of service of the notice of execution on the applicant or the applicant becoming otherwise aware of the ongoing execution process, sub-rule (3) conditions the grant of stay upon good cause being shown. Furthermore, sub-rule (5) states that stay of execution should not be granted unless the Court is satisfied that, **one**, substantial loss may result to the applicant unless the order of stay is made; and, **two**, security has been furnished by the applicant for the due performance of the decree or order

as may ultimately be binding upon him. Finally, sub-rule (7) stipulates the documents that must accompany an application for stay of execution, as follows: **one**, a copy of the notice of appeal; **two**, a copy of decree or order appealed from; **three**, a copy of the judgment intended to be challenged; and **four**, a copy of the notice of the intended execution.

We have scrutinized the application in the light of the requirements we have enumerated above. At first, we deal with two issues raised in respect of the notice of appeal. Although the applicant averred that he duly lodged his notice of appeal on 23rd November, 2016, the respondents denied that claim. We note that the applicant attached to his supporting affidavit a copy of the notice of appeal which he lodged. This is Annexure A to the supporting affidavit. On its face, the copy appears to be a genuine document as it is embossed with the stamp of the High Court and it is signed by the Registrar of the High Court. The respondents did not suggest to us that the said document was unauthentic. They simply made an unembellished claim that no such notice was lodged. We reject that claim as we find it plainly unsubstantiated. As to the assertion that the notice was not served on the respondents, we would observe that while service of such notice on the opposite party is an essential step in furtherance of an intended appeal in

terms of Rule 84 (1) of the Rules, a grant of stay of execution is not conditioned upon such service having been made.

As to the timeliness of the application, it is undisputed that the matter was duly lodged on 9th July, 2019, which was within the prescribed fourteen days' period after the applicant was served with the notice of the ongoing execution process on 1st July, 2019. We note further that the application meets the requirement of sub-rule (7) of Rule 11 as it is attached with copies of the notice of appeal, the decree, the judgment and the notice of intended execution.

It has strongly been disputed that the applicant would suffer substantial loss and hardship if execution was allowed to proceed. The first respondent claimed that it was the beneficiaries of the estate of the late Fatuma Puza who have suffered substantial loss and hardship from the applicant's unjustified and continued possession of the disputed property. On the contrary, it is averred by the applicant in Paragraph 14 of the supporting affidavit that the property in dispute has been in his possession since 1992 as the administrator of the deceased's estate and that the said property has all along been utilized as business premises for the benefit of the deceased's surviving children and mother. It is deposed in the same paragraph further that:

"Evicting us before there is final determination on the rights of the estate of the deceased will greatly destabilize the deceased's family including the widow and will cause irreparable injury to the estate of the deceased because the first respondent will now be at liberty to do anything in relation to the property including disposing of it."

It is our respectful view that since the applicant has been in long possession of the disputed property on which the deceased's family members depend for livelihood and sustenance, the interruption of such long possession would only be justified after the intended appeal is finalized. Here, we think the holding by a single Justice of the Court in **Clara Kimoka v. Surumbu Axweso** [2002] TLR 255 at 257 on comparable facts merits reference. In that matter, Kisanga, J.A. granted stay of execution reasoning thus:

"The applicant is in possession of the suit land now and has all along been in possession of it. The interruption of her long occupation of the suit land would, in my view, be justified only after the case is finally determined in the respondent's favour. But in the event the appeal is allowed, it would not make much sense to temporarily interrupt the applicant's long possession now only to restore it to her after the success of her appeal."

The foregoing leads us to the question of security for the due performance of the decree. Certainly, we should, at first, remark that in the case of **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application No. 11 of 2010 (unreported) the Court discussed the manner of giving security in the following terms:

*"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 the stay order provided the Court sets a reasonable time limit within which the applicant should give the same."*

[Emphasis added]

In the instant matter, as hinted earlier, the applicant has undertaken in the supporting affidavit to furnish security as shall be determined by the Court. In our considered view, this undertaking is legally sufficient.

In the upshot, we are minded to grant this application, as we hereby do, as we hold that the application has met all the requirements in terms of Rule 11 (3), (4), (5) and (7) of the Rules. In consequence, we order that the execution of the impugned decree of the High Court be stayed pending the hearing and determination of the applicant's intended appeal to this Court.

This order is made on condition that the applicant deposits in the Court a bank guarantee in the sum of TZS. 20,000,000.00 within thirty (30) days from the date of the delivery of this ruling. Costs incidental to this application shall abide by the result of the intended appeal.

It is so ordered.

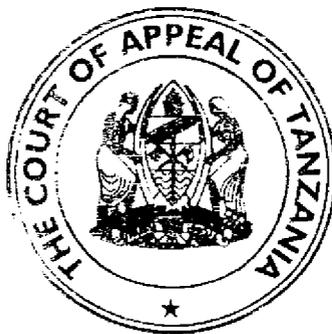
DATED at DAR ES SALAAM this 19th day of November, 2020.

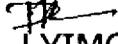
S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Ruling delivered on this 11th day of November, 2020, in the presence of Ms. Mary Lamwai Counsel for the Applicant and 1st & 2nd respondents both present in person, is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL