IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MZIRAY, J.A., MWAMBEGELE, J.A. And KEREFU, J.A.)

CIVIL APPLICATION NO. 505/12 OF 2017

HASSANI KAPERA MTUMBA *(Administrator of the estate of the late KAPERA MTUMBA)*..... **APPLICANT**

VERSUS

SALIM SULEIMAN HAMDU..... **RESPONDENT**

(Application for Stay of Execution of the Judgment and Decree of the District Land and Housing Tribunal for Tanga, at Tanga dated 24th September, 2013 and the decision of the High Court of Tanzania at Tanga)

(Aboud, J.)

Dated the 9th Day of June, 2017
in
Misc. Civil Application No. 80 of 2009

RULING OF THE COURT

27th Feb. & 8th April, 2020

KEREFU, J.A.:

Way back in 2010, Salim Suleiman Hamdu, the respondent herein, instituted a land suit via Land Application No. 53 of 2010 before the District Land and Housing Tribunal (DLHT) for Tanga at Tanga against the applicant and 7 others who are not party to this application for trespass into his property (the suit property); Plot No. 1 Block 208 situated at Ngamiani area in Tanga Region seeking, among others (i) a declaration

that he is the lawful owner of the suit property and (ii) vacant possession. At the end of the trial, the DLHT decided the suit in the favour of the respondent. Aggrieved, the applicant lodged Land Appeal No. 21 of 2013 before the High Court, which was dismissed for want of prosecution in August, 2014. On 21st September, 2016, after lapse of about two years the applicant filed a Misc. Land Application No. 80 of 2016 praying for extension of time within which to apply for re-admission of the Land Appeal No. 21 of 2013. The said application was dismissed on 9th June, 2017 for failure by the applicant to adduce good cause and account for the inordinate delay of more than two years.

Subsequently, on 14th June, 2017, the applicant lodged a Notice of Appeal in this Court against that decision of the High Court. It is alleged that during the pendency of the intended appeal, the applicant was threatened by the respondent's attempt to execute the decision of the DLHT, hence he lodged this current application. The said application is brought under Rule 4 (2) (a) and (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules) GN No. 368 of 2009 craving for an order for stay of execution of judgement and decree of the DLHT in Application No. 53 of

2010 dated 24th September, 2013. The grounds indicated in the Notice of Motion are as follows:-

> *"(a) The applicant will occasion (sic) substantial loss unless the order sought is made;*
> *(b) The applicant has given undertaking to provide security for the due performance of decree of the DLHT as may ultimately be binding upon her; and*
> *(c) The application has been lodged within time."*

The Notice of Motion is supported by an affidavit of one Mwanaisha Kapera, the former Administratrix of the estate of the late Kapera Mtumba who was replaced by Hassani Kapera Mtumba on 7th March, 2018 through an application made by family members before Korogwe Primary Court vide Probate Cause No. 02 of 2006.

The main part of the affidavit has given a chronological account of the events on the matter. Thus, the only relevant paragraphs for the purposes of this application are 2, 9, 18, 19, 21, 22, 23, 24, 25, 26, 27 and 28. The applicant's main contentions in those paragraphs are to the effect that, the respondent is intending to execute the decree of the DLHT by evicting the applicant and the tenants from the suit property and demolish it. The applicant also stated that, the execution of the decree of the DLHT

will occasion substantial loss to the applicant and will render the intended appeal to this Court nugatory. As for the security for the due performance of decree the applicant has indicated under paragraph 27 and 28 of the supporting affidavit that the house which is the subject matter of the dispute is sufficient security.

In opposition, the respondent has filed an affidavit in reply contending that the applicant has wrongly described the suit property as plot No 4 instead of Plot No. 1 Block 208, Ngamiani Area, Tanga which is not the property of the late Kapera Mtumba, but the respondent. He further stated that the application has not cumulatively fulfilled conditions for grant of an order for stay of execution. He further disputed the security offered by the applicant for the due performance of the decree intended to be stayed.

When the application was placed before us for hearing on 27th February, 2020 Messrs Daimu Halfani and Mashaka Ngole, learned counsel represented the applicant, whereas Mr. Obediodom S. Chanjarika, also learned counsel represented the respondent.

In support of the application, Mr. Halfani fully adopted the contents of the notice of motion, the accompanying affidavit and written submissions lodged on 11th September, 2017 to form part of his oral submissions. In justifying the application Mr. Halfani argued that, the application is made under Rule 4 (2) (a) and (b) of the Rules because the decree sought to be stayed was made by the DLHT and not the High Court as envisaged under Rule 11 of the Rules. He argued further that, the Court is being moved to invoke its inherent powers to stay the decree of an inferior court or tribunal as it was decided in the case of and **National Housing Corporation v. Hamisi Luswaga & 3 Others,** Civil Application No. 82 of 2008 (all unreported).

Submitting on the substantial loss, Mr. Halfani referred to paragraphs 25 and 26 of the supporting affidavit and argued that if the decree is executed the applicant will be subjected to substantial loss as the property involved is where the applicant resides with the tenants. To buttress his assertion he referred us to the cases of **Linus Furaha Shao v. National Bank of Commerce,** Civil Application No. 9 of 1999 **Sylvester Lwegira Bandio and Another v. National Bank of Commerce Ltd,** Civil Application No. 113 of 2003 and **Deusdedit**

Kisisiwe v. Protaz B. Bilauri, Civil Appeal No. 13 of 2001 (all unreported).

As for the security for the due performance of the decree sought to be stayed, Mr. Halfani referred us to paragraph 27 of the supporting affidavit.

Upon being probed by the Court, as whether the notice of appeal lodged before the Court is on the appeal of the judgement and decree sought to be stayed, Mr. Halfani submitted that, the notice of appeal before the Court is on the decision of the High Court which is connected to the decision of the DLHT, as after the dismissal of the Land Appeal No. 21 of 2013, the applicant was required to apply for the re-admission of the same.

Again, when probed by the Court, as to whether or not the respondent has lodged application for execution of the decree of the DLHT and the applicant has been served with the notice to that effect, Mr. Halfani said, the applicant is yet to be served with notice to that effect and he lodged the application after being threatened by the respondent that he is going to evict him and demolish the disputed property. However, Mr.

Halfani urged the Court to consider substantive justice as he stated that, not all the time execution is carried out with a notice. He thus prayed for the application to be granted with costs.

In reply, Mr. Chanjarika vehemently resisted the application. He argued that the applicant has not complied with all the conditions to enable this Court to grant an order for stay of execution of the decree of the DLHT. Mr. Chanjarika faulted Mr. Halfani for pegging this application under the provisions of Rule 4 (2) (a) and (b) of the Rules, while the Court's power to grant stay of execution in respect of the notice of appeal lodged to support the application is under Rule 11 of the Rules. Mr. Chanjarika also faulted Mr. Halfani for lodging the current application in the Court by relying on apprehension of fears and assumptions. He said, the respondent has not lodged any application in the DLHT to execute the said decree and there are no any execution proceedings before the DLHT.

Mr. Chanjarika also challenged the submissions by Mr. Halfani on the substantial loss to be incurred by the applicant. He said, the same was submitted in general terms without stating material facts and extent of the loss to be suffered by the applicant if the decree of the DLHT is executed. He argued that the disputed property is a business premises and since 2nd

September, 2013 to date it is the applicant who is collecting rents from tenants and benefiting therein, while denying the respondent the opportunity of enjoying the fruits of his decree. According to him, it is the respondent who is suffering substantial loss and not the applicant. He thus, disputed all authorities cited by Mr. Halfani in his submissions that they are not applicable in the current application. Based on his arguments, Mr. Chanjarika prayed for the application to be dismissed with costs.

In his short rejoinder, Mr. Halfani had nothing much to submit apart from reiterating his earlier submissions and insisted that the application be granted with costs.

We have dispassionately considered the Notice of Motion, the affidavit in support of the application, the written and oral submissions made by the counsel for the parties. The main two issues for our determination are, **one,** whether the Court has inherent powers under Rule 4 (2) (a) and (b) of the Rules to issue an order restraining the respondent from executing the decree of the DLHT and, **second**, if the first issue is answered in the affirmative, whether the applicant has cumulatively fulfilled the conditions warranting grant of the prayers sought in the Notice of Motion.

Starting with the first issue, it is common ground that this application is brought under Rule 4 (2) (a) and (b) of the Rules. The said Rules provide that:-

> *"4 (2) Where it is necessary to make an order for the purposes of –*
>
> *(a) dealing with any matter for which no provision is made by these Rules or any other written law;*
>
> *(b) better meeting the ends of justice; ..."*

It is on record that, Mr. Halfani urged us to invoke our inherent powers provided in the above provisions based on the decision of the single Justice of the Court (Kileo, J.A) in **National Housing Corporation v. Hamisi Luswaga and 3 Others** (supra) where, among others, the Court considered the question whether the Court had jurisdiction to restrain the respondent from executing an eviction order issued by a District Land and Housing Tribunal pursuant to a decision of Ward Tribunal. The application in that case was pegged on Rule 3 (2) (a) and (b) of the Tanzania Court of Appeal Rules, 1979, which is in *pari materia* with the enabling provisions cited by the applicant in this application. The single Justice cited with approval the decision of another single Justice of the Court (Ramadhani, J.A, as he then was) in **Sudi Kipetio & 3 Others v.**

Bakari Ally Mwera, Civil Application No. 94 of 2004 and she then stated at page 6 of the ruling that:-

> *"I however think that,* ***where the interests of justice demand,*** *as in the present situation,* ***the Court of Appeal has inherent powers under Rule 3 (2) (a) and (b) to give an order restraining a party from executing the decree of a subordinate courts in the hierarchy of land courts and it may be equated to a Primary Court."*** [Emphasis added].

We are alive to the fact that, the above case was challenged by Mr. Chanjarika that is distinguishable and inapplicable in the application at hand. With respect, we are unable to go along with the reasoning of Mr. Chanjarika on this matter. It is our considered view that decisions of the Court in **Sudi Kipetio & 3 Others** (supra) and **National Housing Corporation v. Hamisi Luswaga and 3 Others** (supra) have clearly answered the question as whether this Court has inherent powers to order for stay of execution of a decree issued by an inferior court or tribunal, as it was also observed by the Court in **National Housing Corporation v.**

Peter Kassidi and 4 Others, Civil Application No. 243 of 2016 (unreported) at page 19 of the ruling that, the position on the inherent powers of the Court to order for stay of execution of a decree issued by an inferior court or tribunal is settled. We fully associate ourselves with the stated position and we thus answer the first issue in the affirmative.

Before we embark on the determination of the second issue, we deem it apposite to note that, though this application is brought under Rule 4 (2) (a) and (b) of the Rules still the applicant is required to fulfill certain conditions warranting grant of an order for stay of execution of a decree. We wish to remark further that, since this application was lodged on 3rd August, 2017 before coming into force of the Tanzania Court of Appeal (Amendment) Rules of 2017 and 2019, G.N. No. 362 of 2017 and G.N. No. 344 of 2019, respectively, we are obliged to be guided by and apply *mutatis mutandis* the requirements of Rule 11 (2) of the Rules as they were still applicable in August, 2017. The relevant part of the aforesaid Rule is Rule 11 (2) (d) (i), (ii) and (iii) of the Rules which stated that:-

> *11 (2) (d) No order for stay of execution shall be made under this rule unless the Court is satisfied that:'*
>
> *(i) 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) security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

The above provisions, we think, are self-explanatory and need no further expounding. Suffice only to state that, for an application for stay of execution to be granted under the Rules, the above conditions had to be cumulatively complied with, meaning that where one of them could have not been satisfied, the Court would decline to grant the order for stay of execution. The duty of the applicant to satisfy all the conditions cumulatively has been constantly reiterated by this Court in its several decisions. See for instance cases of **Joseph Anthony Soares @ Goha v. Hussein Omary,** Civil Application No. 6 of 2012 and **Laurent Kavishe v. Enely Hezron,** Civil Application No. 5 of 2012 (both unreported). It follows therefore that the applicant must satisfy that, the application was filed within a reasonable time; he will suffer substantial loss if the order is not granted; and he has furnished security for due performance of the decree sought to be stayed.

It is on record that, the submissions by Mr. Halfani on the first condition was vehemently challenged by Mr. Chanjarika that, Mr. Halfani has not substantiated the same with material facts and extent of loss to be suffered by the applicant. Mr. Chanjarika submitted further that, it was the respondent who will suffer the most, as since 2nd September, 2013 it is the applicant who is collecting rents and benefiting from the disputed property. With respect, we find the submissions by Mr. Chanjarika on this point to be a mere counsel's statement made from the Bar. Mr. Chanjarika ought to have submitted those facts in the affidavit in reply. Unfortunately, that was not done. See our previous decisions in **Fweda Mwanajoma & Another v. Republic,** Criminal Appeal No. 174 of 2004 and **Farm Equipment Company Limited v. Festo Mkuta Mbuzu,** Civil Application No. 111 of 2014 (unreported), where the Court declined to consider a statement made by the counsel from the Bar. Similarly, in the application at hand, the submission by Mr. Chanjarika cannot be considered by this Court. We therefore find the information provided for by the applicant in the Notice of Motion, supporting affidavit and pages 3 to 5 of the written submissions to be in compliance with Rule 11 (2) (d) (i) of the Rules.

As for security for the due performance of the decree sought to be stayed, the applicant under paragraph 28 of the supporting affidavit had offered the disputed property as a security. The said paragraph state that, *"That, the house which is subject matter, is sufficient security for the due performance of the decree."* This averment was vehemently disputed by the respondent in his reply affidavit that the disputed property cannot be taken as a security, as it is not owned by the applicant.

It is settled that properties under dispute or control of other people cannot be taken as good security for the due performance of the decree in the application for stay of execution. There is a chain of authorities on this aspect. For instance, in **Anthony Ngoo and Another v. Kitinda Kimaro,** Civil Application No. 12 of 2012 and **Juma Hamisi v. Mwanamkasi Ramadhani,** Civil Application No. 34 of 2014 and **Hadija Adamu v. Godless Tumbo**, Civil Application No. 27 of 2015 (all unreported), the Court declined to grant stay of execution because the applicant offered a house which was litigated and under his control. Specifically, in **Hadija Adamu** (supra) the Court stated that:-

> *"Back to the application before us, the applicant did readily concede to the fact that, she has not*

committed any property as securlty for due performance of the decree sought to be stayed. She has indicated in her affidavit that, she is ready to commit the disputed property as her security. On our part, we are in agreement with Mr. Oola that, ***the disputed properly is not the property of the applicant and as such, it cannot be used as a commitment by the applicant as security.*** *And the fact that, the applicant did frankly inform the Court that, she was not in possession of implication is that,* ***she did fail to meet the condition."*** (Emphasis added).

Likewise, in this application, since the disputed property is currently, as per the decision of the DLHT, owned by the respondent cannot be offered by the applicant as a security for the due performance of the decree sought to be stayed. It is therefore our considered view that the applicant has not fulfilled the condition stipulated under Rule 11 (2) (d) (iii) of the Rules.

That said and done, we agree with Mr. Chanjarika that the applicant has failed to satisfy all conditions enumerated under the Rules cumulatively. In view of the aforesaid, we find the entire application devoid of merit and it is hereby dismissed with costs.

DATED at **TANGA** this 5th day of March, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The ruling delivered this 8th day of April, 2020 in the presence of Mr. Isack Temu Holding Brief Mr. Mashaka Ngole and D. Khalifan learned Advocate for the Applicant and Mr. Obediodomu Chanjarika learned Advocate for the Respondent is hereby certified as a true copy of the original.

V. M. NONGWA
Ag. DEPUTY REGISTRAR
COURT OF APPEAL