IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CIVIL APPLICATION NO. 249 OF 2016

FELIX EMMANUEL MKONGWA.....APPLICANT

VERSUS

ANDREW KIMWAGA..... RESPONDENT

(Application for Stay of Execution of the Judgment and Decree of the High Court of Tanzania (Land Division) at Dar es Salaam)

(Wambura, J.)

Dated the 24th Day of July, 2015
in
Land Case No. 150 of 2008

RULING OF THE COURT

1st & 9th June, 2020

KEREFU, J.A.:

The applicant has filed this application seeking an order of this Court staying execution of the decree of the High Court of Tanzania (Land Division) at Dar es Salaam (the High Court) dated 24th July, 2015 in respect of Land Case No. 150 of 2008. The application is made by way of Notice of Motion under the provisions of Rule 11 (3) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules). The grounds indicated in the Notice of Motion are as follows:-

(i) The premises in dispute is the sole dwelling house of the applicant, and

(ii) If the order is not granted the whole purpose of the appeal will be defeated.

The Notice of Motion is supported by an affidavit which was duly sworn by the applicant as well as written submissions lodged on 17th October, 2016. The respondent though, duly served did not file an affidavit in reply nor written submissions.

The sequence of events leading to this application as summarized in the affidavit in support of the application indicate that, in 2008 the respondent instituted a suit vide Land Case No. 150 of 2008 in the High Court against the applicant praying, among others, to be declared the lawful owner of, and for an order of eviction of the applicant from the disputed parcel of land *to wit* Plot No. 600 Block 'G' Tegeta, Kinondoni Municipality (the disputed premises). The said case was determined in favour of the respondent with an order that the applicant should immediately handover vacant possession of the disputed premises to the respondent.

Aggrieved, the applicant lodged a notice of appeal in this Court against that decision. Accordingly, the applicant requested for certified copies of the

High Court's proceedings, judgement and the decree to process the intended appeal. On 9th April, 2016 the applicant received a notice of execution of the said decree. He unsuccessful lodged Misc. Civil Application No. 113 of 2016 in the High Court for stay of execution. Subsequently, on 12th August, 2016 he was evicted from the disputed premises, hence this application.

When the application was placed before us for hearing, neither the applicant nor the respondent entered appearance. It transpired that service on the applicant was done through his advocate's offices namely F.E. Mkongwa and Company Advocates. The returned summons indicated that the said advocate has moved his offices to an unknown location and his whereabouts could not be immediately traced. On the other side, the respondent was duly served on 19th May, 2020 through his advocate but opted not to enter appearance. That being the position, being aware that the applicant has already filed his written submissions, we found it prudent to proceed with the matter under Rule 63 (2) of the Rules on the part of the respondent and Rule 112 (4) of the Rules as regards the applicant.

In his written submission, the applicant stated that after being dissatisfied with the decision of the High Court in Land Case No. 150 of 2008

he lodged a notice of appeal in this Court on 30th July, 2015. He further submitted that on 9th April, 2016 a court broker affixed a notice of the applicant's eviction from the disputed premises, thus he filed Misc. Civil Application No. 113 of 2016 in the High Court seeking orders of stay of execution of the impugned decision. He said, in addition, he lodged another application in the same court claiming that the High Court had no jurisdiction to execute its decree because there was already a notice of appeal lodged in this Court. He contended that the two applications were not considered, as the High Court ruled that it had no jurisdiction to entertain the matter due to the notice of appeal that was already lodged in this Court. It was his contention that, despite being aware of the existence of the said notice of appeal, on 12th August, 2016 the High Court instructed the said court broker to forcefully evict him from the disputed premises. As such, the applicant invited this Court to declare that his eviction from the disputed premises was null and void and issue an order restoring him in the disputed premises. He further urged the Court to issue an order restraining the respondent from executing the said decree pending determination of the said appeal.

Having dispassionately considered the applicant's submissions and perusing the record of the application, the main issue for our determination is

whether the applicant has satisfied the conditions for grant of an order for stay of execution. It is noteworthy that this application was lodged on 16th August, 2016 before the amendment of the Rules in 2017 and 2019, respectively. Therefore, we are obliged to be guided by and apply the requirements of Rule 11 (2) of the Rules as they were still applicable in August, 2016. 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 the 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.

However, given the circumstances of the matter at hand, we wish to start by stating that, the rationale behind the process of seeking stay of execution is to enable the unsuccessful party in criminal or civil proceedings, who has lodged a notice of appeal and/or preferred an appeal, to maintain the status quo of the matter obtaining at the time of the application until the hearing and determination of the pending appeal. Therefore, for an application for stay of execution to be granted under the Rules, the applicant must comply cumulatively with the above conditions but there must be a decree to be executed.

In the matter at hand, it is on record that prior to the lodgment of this application, some developments had ensued with regard to the decision of the High Court in Land Case No. 150 of 2008, that relate to the execution of the challenged decree having relevance in determination of this application. That, after being aggrieved by the High Court's decision, the applicant initiated a process of appeal in this Court by lodging his Notice of Appeal on 30th July, 2015. However, on 12th August, 2016 the respondent through a court broker executed the impugned decree and evicted the applicant from the disputed premises. It is therefore clear that, at the time of lodgment of this application on 16th August, 2016 the decree sought to be stayed had already been executed. That being the situation, there is no decree to be stayed by this Court.

It is therefore our considered view that the circumstances in respect of which the stay of execution was sought by the applicant in this application have gone beyond the stage at which a stay order would meaningfully serve any purpose to restrain the respondent. The application has been overtaken by events. Whenever it is shown that the application will no longer serve the purpose it was intended to or that an application has been overtaken by events, the Court has in a number of cases dismissed such application. See

for instance the cases of **Joachim Kalembe v. M.K. Mwamlima,** Civil Application No. 76 of 1998, **Shell and BP Tanzania Limited v. The University of Dar es Salaam,** Civil Application No. 68 of 1999 and **Farida Adam v. Geofrey Kabaka,** Civil Application No. 33 of 2015 (all unreported).

In the circumstances, we are satisfied that the application is misconceived because it has been overtaken by event as it was lodged after execution of the impugned decree. Consequently, the application is hereby struck out. We make no order as to costs.

DATED at **DAR ES SALAAM** this 4th day of June, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 9th day of June, 2020 in the absence of the Applicant and Mr. Samson George Kimwaga, on behalf of the Respondent, is hereby certified as a true copy of the original.

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL