

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

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

CIVIL APPLICATION NO. 122/03 OF 2020

1. ASHA JUMA MANSOOR
2. SEBASTIAN OLOMY
3. ATHUMANI HOTTY
4. JACKSON MAKUNDI
5. JULIUS KOMBE
6. JUMA MAULID
7. HARUNA JUMA
8. LEONIA MTUI @ MAMA BABU
9. GRISFARU MTENGA
10. PHILIPPO R. KIWELU

} APPLICANTS

VERSUS

JOHN ASHERY MBOGONIRESPONDENT

**(Application for stay of execution of the Decree of the High Court of
Tanzania Dodoma District Registry at Dodoma)**

(Kalombola, J.)

dated the 3rd day of May, 2018

in

Land Case No. 16 of 2015

RULING OF THE COURT

8th & 11th June, 2021

MWARIJA, J.A.:

The applicants herein were the defendants in Land Case No. 16 of 2015 heard and determined by the High Court of Tanzania at Dodoma (Kalombola, J.). The respondent was the plaintiff. He had sued the applicants claiming to be declared the rightful owner of a piece of land, Plot No. 41, Block 10 Mwangaza Avenue, Mji Mpya area in Dodoma

Municipality (the suit premises). In its decision dated 3/5/2018, the High Court declared him the lawful owner of the suit premises.

The applicants were aggrieved by the decision of the High Court and as a result, they lodged a notice of appeal on 30/05/2018 expressing their intention to appeal against that decision. While in the process of instituting their appeal, on 6/2/2020 the respondent filed in the High Court, an application for execution of the resultant decree. Consequently, on 23/3/2020, the applicants filed this application for stay of execution.

The application, which is supported by an affidavit sworn by Edward Peter Chuwa, the applicants' advocate, has been brought under Rules 11(3) – (7) and 48(1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules). According to the notice of motion, the grounds upon which the application has been brought are:

- "1. That, the respondent has initiated execution proceedings in the high Court of Tanzania at Dodoma seeking for the delivery of the suit premises to the respondent and eviction of the applicants from the suit premises at Plot No. 41, block '10', Mwangaza Avenue, Mji Mpya, Dodoma and the application is set for hearing on the 14th April, 2020.*

2. *That, the applicants have filed a notice of appeal and are now preparing the Record of Appeal and if the exparte (sic) order is not granted, the applicant will suffer substantial loss and they have nowhere to go.*
3. *The applicants are ready to furnish security for the performance of the Decree."*

At the hearing of the application, the applicants were represented by Mr. Edward Peter Chuwa, learned counsel while the respondent had the services of Mr. Elias Machibya who was being assisted by Ms. Magreth Mbashu, both learned advocates.

In compliance with Rule 106(1) of the Rules, the applicants' counsel had earlier on 23/9/2020, filed his written submission in support of the application. The counsel for the respondent also filed written reply submission as required by Rule 106(7) of the Rules.

It is instructive to state at this stage that, in order to be granted an order staying execution of a decree, the applicant must establish to the satisfaction of the Court, compliance with the conditions stipulated under Rule 11(5) of the Rules; that;

- "(a) substantial loss may result to the party applying for stay of execution unless the order is made;*
- (b) security has been given by the applicant for*

*the due performance of such decree or order
as may ultimately be binding upon him.”*

In his written submission, which he highlighted in his oral arguments before the Court, Mr. Chuwa argued that, according to the affidavit filed in support of the application, the applicant will suffer substantial loss if the sought order is not granted. He contended that, the applicants have been in occupation of the suit premises since 1976, a period of over 44 years and that, if they are evicted, they will suffer substantial loss as they will have nowhere to live. Relying on the case of **Gilbert Zebedayo Mrema v. Mohamed Issa Makongoro**, Civil Application No. 369/17 of 2019 (unreported), the learned counsel argued that the eviction of the applicants most of who are tenants, will result into a multitude of suits.

With regard to the second condition requiring furnishing of security for the due performance of the decree, Mr. Chuwa argued that the applicants have also complied with that requirement. He stressed in his oral submission that, by virtue of paragraph 10 of the supporting affidavit and ground 3 of the notice of motion, the applicants have satisfied that requirement.

Responding to the submission made by the applicant’s counsel, Mr. Machibya started by adopting the respondent’s affidavit in reply and

written submission filed in reply to the applicants' submission. He highlighted his submission in court by stressing that the applicants have not satisfied the requisite conditions for grant of the sought order in terms of the provisions of Rule 11(5) of the Rules. According to the learned counsel, the applicants have not shown that they will suffer any substantial loss if execution of the decree is not stayed. Citing the case of **Tanzania Cotton Marketing Board v. COGECOT Cotton CO. SA** [1997] T.L.R 63 and **Aidan George Nyongo v. Magese Machenja and 3 Others**, Civil Application No. 237/17 of 2016 (unreported), the respondent's counsel contended that it is not sufficient for the applicants to merely state that they will suffer substantial loss. He submitted that the applicants should have given the details of the anticipated loss.

He submitted further that, being the tenants in the suit premises, the applicants will not have any substantial loss to suffer, first, because not all of them are staying in the suit premises and secondly, because even if execution is carried out and the suit premises is disposed of, the appellants' tenancy agreements would be taken over by a new landlord.

Mr. Machibya argued also that the applicants have not complied with the requirement of furnishing security for the due performance of the decree. It was his submission, that in both the notice of motion and the supporting affidavit, the applicants have not made a firm

undertaking to furnish security for the due performance of the decree. Relying on the case of **Aidan George Nyongo** (supra), Mr. Machibya contended that the statement by applicants does not amount to a firm undertaking to furnish security for the due performance of the decree.

From the submissions of the learned counsel for the parties, their main contention is whether or not the applicants have met the requisite conditions for grant of the sought order. To begin with the requirement of establishing that they will suffer substantial loss, we find that, from the nature of the loss complained of by them, they have indicated to the satisfaction of the Court that if the sought order is not granted, they will be affected as claimed.

In our considered view, the cases cited by the respondent's counsel are distinguishable. In the case of **Tanzania Cotton Marketing Board** (supra), the nature of substantial loss which the applicant claimed that it would suffer, was in relation to business operations. The applicant merely asserted, without giving the details of the expected loss from its business if the Court declined to stay execution of the decree. Similarly, in the case of **Aidan George Nyongo** (supra), the applicant did not clarify on the magnitude of loss or on how he would suffer loss if a stay order was not issued.

In the case at hand however, the details of the substantial loss which the applicants claim that they will suffer have been given. As pointed out above, they stated that if execution is not stayed, they will be evicted and the effect is that they will be deprived of accommodation. In our considered view, that will cause substantial loss to them because first, they will lose their present accommodation and be compelled to find alternative one. Secondly, if they succeed in their appeal and find that the premises have been disposed of or demolished, their tenancy may not be revived. Thirdly, the applicant's eviction will possibly invite a multitude of cases.

With regard to the second condition of furnishing security for the due performance of the decree, it is trite position that a firm undertaking to do so is sufficient compliance with that requirement. The principle was aptly stated in the case of **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application No. 11 of 2010 (unreported). In that case, the Court had this to say:

*" To met 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 stay order provided*

the court sets a reasonable time limit within which the applicant should give the same."

[Emphasis added].

The contention by the counsel for the respondent is that the applicants have not made a firm undertaking. With respect, we are unable to agree with him. To start with, we again, find that the case of **Aidan George Nyongo** (supra) relied upon by the learned counsel, that this condition has also not been complied with, is distinguishable. In that case the applicant's undertaking in his affidavit was as follows:

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

The Court found that such averment did not constitute a firm undertaking. In the case at hand however, the applicants have not ended up promising to furnish security but also to abide by the conditions as may be ordered by the Court. That appears in paragraph 10 of the supporting affidavit which states as follows:

" That the applicants are willing and ready to furnish security for the performance of the decree as the Honourable court may order."

Going by the position as stated in the case of **Mantrac Tanzania Limited** (supra), we are satisfied that the contents of paragraph 10 of

the supporting affidavit constitute a firm undertaking. We find therefore that the applicants have also complied with that condition.

Having found that the applicants have commutatively complied with the requisite conditions for grant of the sought order, the remaining issue is on the nature of the security. Bearing into consideration the fact that the decree which is sought to be appealed against is not a monetary decree, the nature of the security should obviously be one suiting the particular circumstances of the case. In the case of **Mohamed Masoud Abdallah and 16 Others v. Tanzania Road Haulage (1980) Ltd**, Civil Application No. 58/17 of 2016 (unreported) in which the decree sought to be appealed against was, like in the present case, not a momentary decree, the Court required the applicants to furnish security in the form of commitment to maintain the *status quo* of the premises from which the respondent intended to evict them. We think that is the nature of the security which is appropriate in the circumstances of this case.

On the basis of the foregoing reasons, we find merit in the application and hereby grant it. We order that execution of the decree should be stayed pending determination of the intended appeal. The stay order is conditional upon execution by each of the applicants, within

thirty days of this order, of a bond committing himself/herself to maintain the *status quo* of the suit premises.

Costs to abide the outcome of the intended appeal.

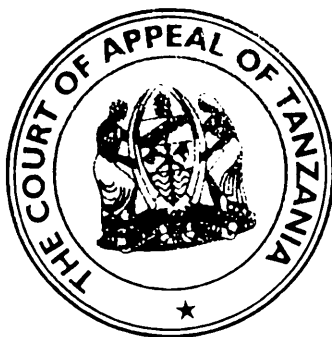
DATED at DODOMA this 11th day of June, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

This Ruling delivered this 11th day of June, 2021 in the presence of Ms. Magreth Mbasha, learned counsel holding brief for Mr. Edward Chuwa, learned counsel for the Applicants and who also represents the Respondent, is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to read "H. P. Ndesamburo".

H. P. Ndesamburo
DEPUTY REGISTRAR
COURT OF APPEAL