

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: JUMA, C.J., MWAMBEGELE, J.A. And LEVIRA, J.A.)**

**CIVIL APPLICATION NO. 261/17 OF 2019**

**SUDI SEIF NGOTA (Administrator of the  
Estate of Seif Mohamed Ngota) ..... APPLICANT**

**VERSUS**

**ALOYCE JOHN KAZIMBAYA ..... RESPONDENT**

**[Application for stay of execution of the decree of the High Court of  
Tanzania (Land Division) at Dar es Salaam]**

**(Kerefu, J.)**

**Dated the 28<sup>th</sup> day of September, 2018**

**in**

**Land Appeal No. 144 of 2016**

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**RULING OF THE COURT**

10<sup>th</sup> & 18<sup>th</sup> February, 2021

**MWAMBEGELE, J.A.:**

The applicant, Sudi Seif Ngota; administrator of the estate of the late Seif Mohamed Ngota, moves the Court for an order of stay of execution of a decree of the High Court of Tanzania (Land Division) dated 28.09.2018 in Land Appeal No. 144 of 2016, pending the determination of an intended appeal; notice of which was lodged in the Court on 10.10.2018. The Court is moved under the provisions of Rule 11 (3), 11 (4) and 11 (5) (a) and (c) and 11 (6), 11 (7) (b), (c) and (d) and Rule 48(1) of the Tanzania Court of

Appeal Rules (henceforth "the Rules"). It is supported by an affidavit deposed by Sudi Seif Ngota; the applicant and resisted by an affidavit in reply deposed by Aloyce John Kazimbaya; the respondent.

At the trial in the District Land and Housing Tribunal for Kinondoni District at Mwananyamala (henceforth "the Tribunal"), the respondent successfully sued the applicant for a declaration that he is a lawful owner of a property comprised in a piece of land described as Plot No. 336 Block "A" Tegeta Wazo in Kinondoni District in Dar es Salaam Region. The applicant's appeal to the High Court (Land Division) was barren of fruit, for, Kerefu, J. (as she then was), on 28.09.2018, upheld the decision of the Tribunal. Dissatisfied, the applicant lodged a notice of appeal on 10.10.2018 and applied from the Deputy Registrar of the High Court (Land Division) for relevant documents for appeal purposes.

This application was lodged in the Court on 12.07.2019 after an application for execution was lodged in the Tribunal on 25.06.2019. Both parties had beforehand lodged written submissions for or against the application, as the case may be.

When the matter was placed for hearing before us on 10.02.2021, Mr. Khalfan Msumi, learned advocate, appeared for the

applicant. The respondent appeared in person; unrepresented. It is worth noting that on 24.07.2019, in terms of rule 11 (6) of the Rules, a single Justice of the Court (Mkuye, J.A.) granted an interim *ex parte* stay order. Before us is the substantive application *inter partes*.

When given the floor to argue in support of the application, Mr. Msumi first adopted the notice of motion, the founding affidavit and the written submissions he filed on 13.08.2019 and reiterated the grounds stated in the said notice of motion, founding affidavit and in the founding written submissions. Mr. Msumi only highlighted that the applicant has met all the three conditions required for a grant of a stay order prayed for. He mentioned those prerequisite conditions as; **one**, that substantial loss may result to the party applying for stay of execution unless the order is made; **two**, that the application has been made without unreasonable delay; and **three**, that the security has been given by the applicant for the due performance of such a decree as may ultimately be binding upon him.

Reinforcing that the applicant has met the three elements in the foregoing paragraph, Mr. Msumi argued that if the decree of the High Court (Land Division) is not stayed, the intended appeal will be rendered nugatory. He added that the application was filed

timeously and that, at para 6 of the founding affidavit, even though the case does not concern a money decree, the applicant has met the third condition by a firm undertaking to provide security for the due performance of the decree in case the intended appeal fails. For this proposition, the learned counsel referred us to our decision in **Joramu Biswalo v. Hamis Richard**, Civil Application No. 11 of 2003 (unreported) in which we observed:

*"One other condition is that the applicant for a stay order must give security for the due performance of the decree against him. 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 a stay order ..."*

The learned counsel also referred us to the decisions in which the above excerpt was recited. These cases are: **Integrated Property Investment (T) Limited & two others v. the Company for Habitat and Housing in Africa Shelterafrique**, Civil Application No. 162 of 2015 and **Ibrahim Ally Yusuf Mpore v. Nalgis Ally Yusuf Mpore and Rahmat Ahmad Juma**, Civil Application No. 193 of 2016 (both unreported).

In view of the above, the learned counsel prayed that the Court exercises its discretionary powers bestowed upon it by the provisions under which the application has been made, to grant the stay order prayed for.

In reply to the submissions by the applicant's counsel, the respondent's counsel also adopted the contents of the affidavit in reply as well as the reply written submissions earlier filed. Highlighting the relevant points, the respondent's counsel strenuously resisted the application branding it as a delaying tactic by the applicant to deny him the fruit of his decree. He reiterated that the applicant has no intention of lodging an appeal because if the intention was there, he should have collected the documents from the Deputy Registrar of the High Court (Land Division) which have been since ready for collection for quite some time now.

Conceding that an applicant must meet the three conditions enumerated above to move the Court to exercise its discretion to grant a stay order, the respondent, with some force, submitted that the applicant will not suffer any loss since he (the respondent) is the owner of the disputed premises and the two courts proved so. Regarding the element of security for the due performance of the decree in case the appeal will not succeed, he submitted that the

applicant intends to put as security the disputed premises which is not legally appropriate. When we prodded him on how much will suffice as securing given the fact that the decree he held was just declaratory and not a money decree, the respondent contended that he has been deprived of the property for twelve years and the applicant earns Tshs. 6,000,000/= monthly out of his property. To him an amount equal to Tshs. 6,000,000/= per month for twelve years will satisfy as security. Otherwise, the respondent prayed that the application for a stay order be refused.

In a short rejoinder, Mr. Msumi submitted that the applicant was ready to provide as security a bank guarantee which will be equal the value of the disputed premises as will be verified by a valuer.

We wish to state at the very outset of our determination of this application that the Court is bestowed with powers to grant or refuse to stay execution pending appeal in terms of rule 11 (5) (a) and (b) of the Rules. For easy reference, we wish to reproduce it here. It reads:

*"(5) No order for stay of execution shall be made under this rule unless the Court is satisfied 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."*

That application, in terms of sub-rule (4) of rule 11 of the Rules, shall be made within fourteen days of service of the notice of execution on the applicant or from the date he is otherwise made aware of the existence of that application for execution.

In terms of Rule 11 (7) of the Rules, an application for stay of execution must be accompanied by copies of; **one**, a notice of appeal; **two**, a decree or order appealed from; **three**, a judgment or ruling appealed from; and **four**, a notice of the intended execution.

Adverting to the present application, we are satisfied that the applicant has satisfied the conditions stipulated by the provisions of rule 11 (7) of the Rules enumerated above. We need to make an anecdote here that from what he called an inadvertency, the applicant did not append the relevant notice of appeal. For the sake of expediency, and given the fact that the respondent did not resist,

we allowed him to avail a copy of the same to the Court during the hearing, which he did, and we proceeded with the hearing.

As to whether the applicant has fulfilled the statutory conditions under Rule 11 (5), we have no hesitation in our mind that he has. First, the application was lodged in the Court within fourteen days of service of the application for execution. As per the notice of hearing appended to the application and the depositions in the founding affidavit, the application for execution was served on the applicant on 01.07.2019 and the present application was lodged on 12.07.2019, well within time. Secondly, the applicant has demonstrated how he will suffer irreparable loss and that the appeal will be rendered nugatory if the stay order is not granted.

Regarding the element comprised in rule 11 (5) (a) of the Rules, the respondent, rather tersely, submitted that the applicant has no substantial loss to suffer in case a stay order is refused. He was of the firm argument that the applicant is reaping what he did not sow for some twelve years down the lane. If anything, the respondent charged, he; the respondent, was the one to suffer substantial loss if a stay order is granted. With profound respect to the respondent, we are not prepared to swim his current. It is common ground that the applicant is in occupation of the disputed



premises from which the respondent sought vacant possession. We find compelling to underline at this stage that, in circumstances as the present where an applicant is in long possession of a suit property, the Court has all along been hesitant to withhold a stay order. In **Dr. Joel Msuya v. Cammila Brian and Maxine Brian**, Civil Application No. 135/02 of 2018 (unreported), we grappled with an akin situation and relied on our previous decision in **Clara Kimoka v. Surumbu Axweso** [2002] T.L.R. 255 to observe:

*"Since the applicant has been in long possession of the suit property, the interruption of such long possession would only be justified after the intended appeal is finalized".*

We are guided by this principle. In the circumstances, everything being equal, in the matter at hand, we will be reluctant to deprive the applicant of the property he has been in occupation for twelve consecutive years before finalization of the intended appeal.

The third element is security for the due performance of the decree in the event the intended appeal fails. The law is as stated by the applicant and conceded by the respondent. The authorities cited are quite in line with the law. They all state that a firm undertaking is sufficient to meet this condition. Both parties are at one that the decree the subject of these proceedings is just

declaratory; it is not a money decree. In the circumstances, it becomes difficult to decipher how much should be given as security for the due performance of the decree that will bind the applicant in case the intended appeal collapses. We must confess that this issue has somewhat exercised our mind. However, the parties to the application gave us some clue in the course of the hearing. As alluded to above, while the applicant pegs it on the value of the disputed property, the respondent reckons that a figure around Tshs. 6,000,000/= per month for twelve years would suffice.

Having deliberated on the matter at some considerable length, we think the figure suggested by the respondent, which is about Tshs. 864,000,000/=, will be on the high side. The figure suggested by the applicant which is the value of the disputed premises is reasonably pragmatic but will have to await valuation of the same and thus will delay the determination of this application. Given that, on the material before us, the respondent's major interest is vacant possession, we think Tshs. 100,000,000/= in the form of bank guarantee will meet the justice of the case.

In view of our discussion above, we are settled in our mind that this is a fit case in which to grant a stay order as prayed. We thus find merit in this application and grant it. Consequently, we

order that the decree of the High Court (Land Division) in Land Appeal No. 144 of 2016 be, and is hereby, stayed pending hearing and determination of the intended appeal. However, this stay order is conditional upon the applicant depositing in the Court a bank guarantee for the sum of Tshs. 100,000,000/= within thirty (30) days of the pronouncement of this ruling.

Costs in this application shall abide by the outcome of the intended appeal.

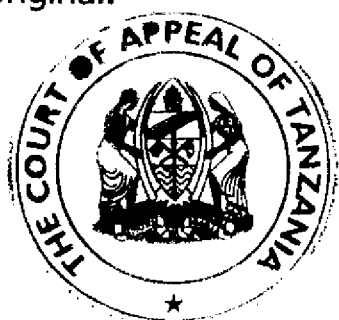
**DATED at DAR ES SALAAM** this 16<sup>th</sup> day of February, 2021.

I. H. JUMA  
**CHIEF JUSTICE**

J. C. M. MWAMBEGELE  
**JUSTICE OF APPEAL**

M. C. LEVIRA  
**JUSTICE OF APPEAL**

The ruling delivered this 18<sup>th</sup> day of February, 2021 in the presence of Mr. Khalfan Msumi, learned counsel for the Applicant and Respondent in person is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to be "B. A. MPEPO", written over a horizontal line.

B. A. MPEPO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**