IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., LEVIRA, J.A., And MWAMPASHI, J.A.)

CIVIL APPLICATION NO. 426/01 OF 2019

NACKY ESTHER NYANGE ..... APPLICANT

VERSUS

1. **MRS. MARIAM MARIJANI WILMORE**
2. **MIHAYO MARIJANI WILMORE** ..... **RESPONDENTS**

(Arising from the Judgment and Decree of the High Court of Tanzania (Dar es Salaam District Registry) at Dar es salaam)

(Magoiga, J.)

Dated the 14th day of June, 2019
in
Civil Case No. 155 of 2015

RULING OF THE COURT

15th July, & August, 2021

LEVIRA, J.A.:

This is an application for stay of execution of the decree of the High Court in Civil Case No. 155 of 2015. It is brought by way of notice of motion made under Rules 11 (3), 11 (4A), 11 (5) (a), (b) and (c), 11 (6), 11 (7) (a), (b) (c) and (d) and 48 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules). The notice of motion is supported by the applicant's affidavit deposed on 2nd October, 2019. The application is opposed by the respondents. The first respondent filed her affidavit in reply on 4th March, 2020, the second respondent did not.

Briefly, the background of this application according to the record is that; vide Civil Case No. 155 of 2015, the 1st respondent instituted a suit against the 2nd respondent and the applicant herein at the High Court of Tanzania. She claimed among others for orders that; the 2nd respondent be ordered to return to her the original Title Deed for plot No. 252 Block B, with Certificate of Title No. 86440, Ras Dege Area, Kigamboni, Temeke Municipality, Dar es Salaam; and that the 1st respondent is the legal and rightful owner of a house situated on plot No. 361, Block G, Hekima Street, Mbezi Beach Area, Kinondoni Municipality in Dar es Salaam (the disputed house) after having successfully bought the same from one John Ruboyana way back in 2004, vide a contract dated 16th day of August, 2004. Thereafter, the 1st respondent allowed the 2nd respondent and his family which included the applicant who was his wife by then to live therein.

Having heard the parties on the above reliefs and others presented before it, on 14th June, 2019 the High Court delivered its decision in favour of the 1st respondent. In the said decision the applicant was ordered to peacefully vacate the disputed house within one month from the date of that decision; otherwise, she would be evicted. The applicant was aggrieved, she filed an appeal (Civil Appeal No. 207 of 2019) to the Court claiming that the disputed house is her matrimonial house. Whilst the said appeal is still pending, the 1st respondent applied vide Execution No. 52 of

2019 for execution of the decree of the High Court which is subject of the applicant's pending appeal before the Court (Civil Appeal No. 207 of 2019). Hence, the current application.

The grounds advanced in the notice of motion are that, **first,** substantial loss may result to the applicant if execution is not stayed as it will deprive the applicant and her children their matrimonial home. **Second,** that the impugned judgment and decree is legally problematic and patently unjust. **Third,** that the application for stay of execution has been filed without delay since the summons for execution was served on the applicant on 26th September, 2019. **Fourth,** that execution will render the intended appeal nugatory and academic and **fifth** that the applicant is able, ready and willing to issue security for the performance of the decree.

At the hearing of this application, the applicant was represented by Ms. Elizabeth John Mlemeta assisted by Mr. Geofrey Geay Paul, both learned advocates, whereas, the 1st respondent was represented by Mrs. Crecensia Rwechungura, learned advocate and the 2nd respondent appeared in person, unrepresented.

It is worth noting at the outset that on 26th February, 2021 the 1st respondent filed a notice of preliminary objection against this application. However, when the application was called on for hearing, Mrs. Rwechungura prayed to withdraw it. Her prayer was not contested by the

counsel for the applicant and the 2nd respondent. The Court granted it and the notice of preliminary objection was marked withdrawn with order of costs to abide the outcome of the application. Therefore, we proceeded to hear the application.

In support of the application, having adopted the notice of motion and applicant's affidavit as part of his oral submission, Mr. Paul submitted that the applicant was aggrieved by the decision of the High Court. She thus intends to challenge it through her pending appeal as stated in her notice of motion. In the meantime, she is applying for stay of execution of the decree of the High Court. He elaborated that if the application will not be granted, the applicant is going to suffer substantial loss because of the mode of execution which is intended to be effected. As such, he said, the applicant and her children have been staying in the said house for 13 years now. If they would be evicted, she will become homeless. In support of his submission, he cited the case of **Melichiades John Mwenda v. Philemon Ndyana,** Civil Application No. 180/01 of 2018.

Mr. Paul submitted further that the applicant has undertaken to furnish security as required under Rule 11 (5)(b) of the Rules. He added that since the house in question is immovable property, the decree is not monetary and since the applicant still resides therein, she can sign bond that she will maintain status quo until the end of appeal. To support this

position, he cited the case of **Suleiman Yussuf Ali v. Sultanali Abdallah Gulamhussein,** Civil Application No. 421 of 2018 (unreported) wherein the Court granted the applicants application for stay of execution upon executing a bond committing himself to ensure that the house remains in the same condition as it was at the time when the decree was passed until the hearing and determination of the intended appeal.

It was Mr. Paul's prayer that since the circumstances in the current application are similar as in the above cited case, the applicant be allowed to execute a bond. According to him the respondent will not be prejudiced as the applicant has been living in the house for 13 years now with her two issues.

Finally, Mr. Paul urged us to grant this application on ground that the applicant has been able to meet the requirements envisaged under Rule 11 (5) (a) and (b) of the Rules.

In reply Mrs. Rwechungura, opposed the application stating that the applicant has not been able to demonstrate how she will suffer substantial loss in case this application is not granted. She went on stating that there is no dispute that the applicant and the second respondent were husband and wife but their marriage was dissolved therefore the applicant is holding onto the children as a shield. Mrs. Rwechungura argued further that the applicant cannot be rendered homeless because she is still young and

energetic, therefore, she can find a place to stay. According to her, the house in dispute is a property of the 1st respondent who is a widow and thus the said house is a source of income. In addition, she said, the 1st respondent is sick and she cannot generate income for her medical treatment because the applicant stays in that house. In the circumstances she said the first condition under Rule 11 (5) (a) of the Rules has not been met by the applicant. She insisted that if this application is granted the 1st respondent will continue to suffer.

Regarding the second condition under Rule 11 (5) (b) of the Rules on security, Ms. Rwechungura argued that the applicant is playing games that is why she did not come to the Court with a bond. According to her, the applicant had a duty to prepare a bond in advance. She emphasized that the 1st respondent needs money to go for treatment. In the alternative she said, if the applicant wants to live in the house in question, she should give the 1st respondent money for her to go for treatment.

As far as the authorities cited by the counsel for the applicant, Mrs. Rwechungura submitted that they are irrelevant in this matter.

She concluded by stating that the applicant has failed to meet the conditions set under Rule 11 (5) (a) and (b) of the Rules. Therefore, she urged us to dismiss this application with costs.

On his part, the 2nd respondent opposed the application and joined hands with the counsel for the 1st respondent. He as well argued that the applicant is trying to use children as a shield.

In rejoinder, Mr. Paul urged us to ignore submissions by the counsel for the 2nd respondent because he did not file any affidavit in reply and he supported his prayer with the decision of the Court in **MIC Tanzania Ltd vs. CXC Africa Ltd,** Civil Application No. 172/01 of 2019 (unreported).

Responding on Ms. Rwechungura's submission, Mr. Paul reiterated his submission in chief. He stated that the applicant has complied with Rule 11 (5) (a) of the Rules as she was able to show in the notice of motion that the applicant and children are staying in the house in question. As for him, this is a clear indication that if they will be evicted they will suffer irreparably as pleaded at paragraphs 11 and 12 of the supporting affidavit, as the applicant and children are living in the disputed house. He contended that the 2nd respondent has not filed any execution to take the children who are still under possession of their mother. He argued that if the applicant will be evicted from that house, it will be a substantial loss.

Regarding security, Mr. Paul admitted that, the applicant neither brought cash nor signed a bond in advance ready to be submitted in Court. However, he said, at paragraph 14 of the supporting affidavit she

undertook to provide a security and that is enough. He insisted that execution of a bond is one of the securities as per the cited authorities.

Mr. Paul went on stating that at paragraph 13 of the affidavit in reply, the 1st respondent attached medical report to prove that she was sick but the said report is of 2019. There is no current medical report, attached to the affidavit in reply, he insisted.

Responding on the argument that the house in dispute is the 1st respondent's source of income, Mr. Paul submitted that there was no evidence attached with the affidavit in reply to the effect that the same is rented for more than 10 years. So, it cannot be said that the 1st respondent will lose income. He thus urged us to grant this application.

We have carefully considered the submissions by the parties and the entire record of this application. We wish to state at the outset that the law is settled that the Court will only grant application for stay of execution of the decree upon applicant's compliance with conditions under Rule 11 (5) (a) and (b) of the Rules. For ease reference the said provision provides as hereunder:-

> *"11-(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."

In the light of the above provision we shall now proceed to determine whether or not the application at hand meets the two requirements.

In respect of the first condition, the counsel for the applicant has stated that the applicant stands to suffer substantial loss if she will be evicted together with her children from the house in dispute which she refers to as matrimonial home, the intended appeal against the judgment and decree will be rendered nugatory - See, **Cotton Marketing Board v. Cogecot Cotton Co. SA** [1997] TLR 63. On the other hand, both respondents are at one that the disputed house is the property of the 1st respondent and that she needs it vacant for income generation. The counsel for the 1st respondent argued that the applicant has failed to meet the requirement under Rule 11 (5) (a). With respect, we are unable to agree with Mrs. Rwechungura that what the applicant has presented to us indicate how she will suffer is not enough. It is our considered opinion that since there is no dispute that the applicant is still residing in the dispute house and the fact that there is still a pending matter before the Court in relation to the status of the said house, we cannot decline the application on ground that the house belongs to the 1st respondent. Likewise, we do not think that it is proper to condemn the applicant to pay the 1st

respondent rent so that she can get money for her treatment much as we do not intend to go into detail as far as her sickness is concerned.

We are satisfied that the application at hand meets the requirements under Rule 11 (5) (a) of the Rules. The applicant has stated categorically that if she will be evicted together with her children, they will become homeless. It should be noted that, despite the stance we take in this case, it is not always the position that if one is evicted from a house, he/she becomes homeless. It depends on the circumstances of each case.

Regarding the second condition on security for the due performance of the decree under Rule 11 (5) (b) of the Rules, the applicant has stated under paragraph 14 of the supporting affidavit that she is ready, able and willing to provide a security compatible to the nature of the impugned decree, in this case, executing a bond. Faulting the applicant in this regard, Mrs. Rwechungura argued that the applicant was supposed to come to the court ready with the said bond. We do not think that this argument is valid because, the applicant cannot be able to prepare the said bond before an order of the Court is made to that effect. Impliedly, Mrs. Rwechungura was not disputing the mode of furnishing security suggested by the applicant only that the applicant ought to have it at hand. We agree with Mr. Paul that this is not a new mode of furnishing security and in this regard, we are guided by our decision in **Suleimani Yussuf Ali** (*supra*) in which we

cited our decision in **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application No. 1 of 2010 (unreported) where the Court observed that:-

> *"..... the applicant for a stay order must give security for the due performance of the decree against him. To meet the condition, the law* ***does not strictly*** *demand that* ***the said security must be given prior to the grant of 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, provided the Court sets a reasonable time limit within which the applicant should give the same."*
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> [Emphasis added]

In the circumstance therefore, having considered that the execution intended to be effected relates to the house in dispute in which its status is yet to be determined, we do not think it will be ideal to order the applicant and her children to vacate. Since the house is immovable property and the applicant commits herself to ensure that the house remains in the same condition as it was at the time when the decree was passed until the final hearing and determination of Civil Appeal No. 207 of 2019 as it was in the

case of **Suleimani Yussuf Ali (supra),** we are satisfied that the second condition stipulated under Rule 11 (5) (b) of the Rules is also met.

For the reasons stated above, we order stay of execution of the decree of the High Court of Tanzania in Civil Case No. 155 of 2015 pending hearing and determination of Civil Appeal No. 207 of 2019 on condition that the applicant executes a bond within 14 days of delivery of this ruling. We order costs to abide the outcome of the intended appeal.

DATED at **DAR ES SALAAM** this 29th day of July, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of August, 2021 in the presence of Ms. Elizabeth John Mlemeta, counsel for the Applicant, Ms. Crescencia Rwechungura, learned counsel for the first Respondent and second Respondent present in person is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL