

**IN THE COURT OF APPEAL OF TANZANIA  
AT ARUSHA**

**(CORAM: MWARIJA, J.A., KITUSI, J.A. And KEREFU, J.A.)**

**CIVIL APPLICATION NO. 452/02 OF 2018**

**LOMAYAN LANGARAMU..... APPLICANT**

**VERSUS**

**CHRISTOPHER PELO..... RESPONDENT**

**(Application for Stay of Execution of the Judgement and Decree of the  
High Court of Tanzania, at Arusha)**

**(Maghimbi, J.)**

**Dated the 7<sup>th</sup> Day of August, 2017**

**in**

**Land Case No. 5 of 2015**

-----

**RULING OF THE COURT**

*23<sup>rd</sup> & 25<sup>th</sup> February, 2021*

**KEREFU, J.A.:**

The applicant, Lomayani Langaramu has by notice of motion lodged on 17<sup>th</sup> March, 2018 moved the Court to issue an order staying execution of the decree of the High Court of Tanzania at Arusha dated 7<sup>th</sup> August, 2017 (Maghimbi, J.) in respect of Land Case No. 5 of 2015. The notice of motion was brought under the provisions of Rule 11 (3), (4), (5) (a) (b) (c) and (7) of the Tanzania Court of Appeal Rules, 2009 as amended by the Court of Appeal (Amendments) Rules, GN No. 362 of 2017 (the Rules). It is

supported by an affidavit dully sworn by the applicant on 16<sup>th</sup> March, 2018 together with an affidavit dully sworn on 16<sup>th</sup> March, 2018 by one Joseph Kitundu Mollel, the person who offered his property, to be used by the applicant as a security in this matter. In addition, the applicant has filed written submissions in support of his quest for stay of execution.

The application is, however, resisted by the respondent through an affidavit in reply lodged in Court on 17<sup>th</sup> April, 2018. In addition, the respondent has also filed written submissions in reply to the applicant's written submissions.

In the case giving rise to the decree which is the subject matter of this application, the respondent sued the applicant for recovering of a piece of land measuring ten acres situated at Likamba Village, Musa Ward, Arumeru District in Arusha Region (the suit property). The respondent, among other things, prayed to be declared the lawful owner of the suit property and an order of eviction of the applicant from the suit property and permanent injunction against the applicant, his agents, servants and any other person from trespassing into the suit property. The applicant disputed the respondent's claim alleging to have bought the suit property from him on 24<sup>th</sup> November, 2005. However, in its decision dated 7<sup>th</sup>

August, 2017, the trial court found that the respondent had proved its claim and it declared him the lawful owner of the suit property and ordered the applicant to vacate it.

Aggrieved, the applicant, on 10<sup>th</sup> August, 2017 lodged a notice of appeal and requested for certified copies of the proceedings, judgment and decree on 9<sup>th</sup> August, 2017 for purposes of processing his appeal. The notice of appeal and the applicant's letter applying for the said documents were both served to the respondent on 11<sup>th</sup> August, 2017. In addition, on 18<sup>th</sup> August, 2017, the applicant lodged in the High Court of Tanzania at Arusha Misc. Civil Application No. 111 of 2017 applying for leave to appeal to this Court.

Subsequently, on 8<sup>th</sup> March, 2018, while the said application was still pending before the High Court, the applicant was served with notice to show cause why execution of decree in Land Case No. 5 of 2015 should not issue. In response, on 19<sup>th</sup> March, 2018, the applicant lodged the present application seeking a stay of execution of the High Court decree pending the hearing and final determination of the intended appeal. In the notice of motion, the applicant has indicated the following grounds: -

- (a) That, the respondent has set in motion the execution machinery by filing application at the High Court in Land Case No. 5 of 2015 moving the court granting the decree to execute it;*
- (b) That, the applicant has given security for the due performance of decree as may ultimately be binding upon him; and*
- (c) That, the applicant who is in possession of the suit property stands to suffer substantial loss if the respondent proceeds to execute the decree of the High Court in Land Case No. 5 of 2015 as the status quo might not be restored even if the intended appeal succeeds if the respondent will dispose of the property to any purchaser.*

When the application was placed before us for hearing, the applicant had the services of Ms. Christina Yona Kimale, learned counsel while the respondent appeared in person, without legal representation.

Ms. Kimale fully adopted the notice of motion as well as its accompanying affidavits and the written submissions. She then, briefly addressed the Court in elaboration of the written submissions pointing out that the application cumulatively meets the conditions for a grant of stay of execution as stipulated under the Rules. She submitted that if the

execution is not stayed, the applicant, who is currently in possession of the suit property will suffer substantial loss as the status quo might not be restored if the intended appeal succeeds because the respondent is intending to dispose of the suit property by sale to a third party. It was her strong argument that, once sold, the purchaser will establish title, hence making it difficult for the applicant to recover it.

As for the security for the due performance of the decree sought to be stayed, Ms. Kimale referred us to paragraph 8 of the supporting affidavit and submitted that the applicant has furnished security by availing a certificate of customary right of occupancy No. 1/ARS/36/32 over a piece of land measuring 21,742 sqm located in Ekenywa Village, Losinoi Sub-Division, Arusha District registered in the name of one Joseph Kitundu Mollel. To support her proposition, she cited the case of **Tanzania Motor Services Ltd v. Tantrack Agencies Ltd**, Civil Application No. 86 of 2004 (unreported). She then prayed that the application be granted with costs.

In reply, the respondent vehemently resisted the application. He argued that the applicant has not complied with all conditions to enable this Court to grant an order for stay of execution of the decree of the High Court. He, specifically challenged the submission made by Ms. Kimale on

the substantial loss to be incurred by the applicant. He said, the same was submitted in general terms without specifying the extent of how the applicant is going to suffer if the decree is executed. To support his proposition, he cited the case of **Tanzania Cotton Marketing Board v. Cogecot Cotton Co. SA** [1997] TLR 63

The respondent also disputed the security offered by the applicant that the same does not belong to him. He thus prayed that the application be dismissed with costs.

In rejoinder submission, Ms. Kimale, on the extent of substantial loss to be suffered by the applicant, she emphasized that if the respondent proceeds to execute the decree, the applicant will suffer not only substantial loss but an irreparable one in the sense that, in the event the intended appeal succeeds, the status quo can never be restored.

On the issue of security, although Ms. Kimale admitted that the property offered for the security is not owned by the applicant, she clarified that, the owner of the same had availed his affidavit indicating his wiliness to offer his property to be used as such. She then reiterated her earlier submissions and insisted that the application be granted with costs.

Having considered the rival submissions made by the parties, our primary duty is to gauge if the application meets the statutory requirements stipulated by the law. It is trite law that, for an application for stay of execution of a decree to succeed, the applicant must comply cumulatively with conditions listed under the law. It is noteworthy that this application was lodged on 16<sup>th</sup> March, 2018 before coming into force of the amendment of the Tanzania Court of Appeal Rules by G.N. No. 344 of 2019. Therefore, we are obliged to be guided by Rule 11 (3), (4), (5) (a) (b) and (c) and (7) of the Rules as it was still applicable in March, 2018.

The said Rule provide thus: -

- "(3) In any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 83, an appeal, shall not operate as a stay of execution of the decree or order appealed from nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree or order, but the Court may upon good cause shown, order stay of execution of such decree or order;*
- (4) An application for stay of execution shall be made within fourteen days of service of the notice of execution on the applicant by the executing officer or*

*from the date he is otherwise made aware of the existence of an application for execution;*

*(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) the application has been made without unreasonable delay; and*

*(c) security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.*

*(7) An application for stay of execution shall be accompanied by –*

*a) a copy of a notice of appeal;*

*b) a decree or order appealed from;*

*c) a judgment; and*

*d) a copy of a notice of the intended execution.”*

Form the above extracted Rule, it is clear that an application for stay of execution of a decree may be granted upon compliance by the applicant with three conditions; **firstly**, that the application has been made within the prescribed time, **secondly**, showing that substantial loss may result if



execution is not stayed and **thirdly**, that the applicant has given security for the due performance of the decree. Therefore, the issue for our determination is whether or not the applicant has cumulatively met these three conditions.

In the application at hand, it is evident that the applicant has appended all the documents referred to under Rule 11(7) of the Rules. From the factual setting, it is common ground that the present application was lodged timeously on 17<sup>th</sup> March, 2018 within the 14 days of the service of the notice of execution as stipulated by Rule 11 (4) of the Rules.

As regards substantial loss, we are alive to the fact that the same has to be determined in a case to case basis depending on the circumstances of each case. See the case of **Zanzibar University v. Abdi A. Mwendambo & 2 Others**, Civil Application No. 92/15 of 2018 (unreported). In the circumstances of this case, there is no dispute that the appellant is in physical occupation of the suit property. We agree with Ms. Kimale that if the suit premise is sold to a third party, the applicant is not only likely to suffer substantial loss but also likely to face much hardship in recovering it should his intended appeal succeed. We have as well noted that in the reply affidavit there is nothing indicated that, if that

happens, the respondent will be in a position to compensate the applicant adequately.

Finally, on the security, it is trite principle that a person applying for an order of stay of execution may furnish security through an undertaking. This position of the law has been positively applied in a number of decisions of this Court, including; **Mantrac Tanzania Ltd v. Raymond Costa**, Civil Application No. 11 of 2010; **Joseph Antony Soares @ Goha v. Hussein Omary**, Civil Application No. 6 of 2012 and **National Bank of Commerce Limited v. Alfred Mwita**, Civil Application No. 172 of 2015 (all unreported). In **Mantrac Tanzania Ltd** (supra) the Court gave the following guidance: -

*"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, provided the Court sets a reasonable time limit within which the applicant should give the same."*

Again, in the case of **Africhick Hatchers Limited v. CRDB Bank Plc**, Civil Application No. 98 of 2016 (unreported) the Court in a majority decision observed that the form of security to be provided is immaterial, so long as the security to be provided should be sufficient to protect the respondent and the respondent should not find it difficult or impossible to realize the decree in case the intended appeal fails. The Court stated that:

*"Of course, most important is the fact that the respondent should not find it difficult or impossible to realize the decree in case the intended appeal fails. This is the cornerstone of the requirement for security. In such circumstances, the Court is principally obligated to figure out whether or not any one particular mode of security vouches risks on the part of the respondent."*

The Court, thereafter, summarized the position stated by Parker L.J in **Rosengrens Ltd v. Safe Deposit Centres Ltd** [1984] 3 ALL ER 198 at p. 200 that: -

*"The process of giving security is one which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of*

*them...So long as it is adequate, then the form of it is a matter, which is immaterial."*

Following the above authorities, it is our considered view that the contents of paragraph 8 of the applicant's affidavit has complied with the above condition of giving security as the applicant, apart from availing the certificate of the customary right of occupancy of one Joseph Kitundu Mollel, has appended a sworn affidavit of the said owner indicating his willingness to offer his property as a security in this case. The said paragraph states as follows: -

*"That, the applicant has furnished security for the due performance of the decree vide land measuring 21.742 sqm located in Ekenywa Village, Losinoi sub-division in Arusha District registered in the name of Joseph Kitundu Mollel. Customary title deed No. 1/ARS/36/32 and sworn affidavit of the registered owner are collectively annexed hereto to form part of the application marked Ls."*

We therefore entertain no doubt that the respondent's interests are secured by the applicant undertaking to furnish the said security.

All factors considered, we are satisfied that the applicant has met all the conditions for the grant of a stay and accordingly the application is

hereby granted as prayed. Consequently, we order that execution of the decree of the High Court in Land Case No. 5 of 2015 be stayed pending hearing and final determination of the intended appeal. The order is conditional upon a deposit, in Court, by the applicant, the original certificate of customary right of occupancy, Title Deed No. 1/ARS/36/32 registered in the name of Joseph Kitundu Mollel within 14 days from the date of delivery of this ruling. The costs should abide the result of the intended appeal.

**DATED at ARUSHA** this 25<sup>th</sup> day of February, 2021.




A. G. MWARIJA  
**JUSTICE OF APPEAL**

I. P. KITUSI  
**JUSTICE OF APPEAL**

R. J. KEREFU  
**JUSTICE OF APPEAL**

The Ruling delivered this 25<sup>th</sup> day of February, 2021 in the presence of Ms. Christina Yona Kimale, learned advocate for the Applicant and Respondent present in person, is hereby certified as a true copy of the original.

  
H. P. NDESAMBURO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**