

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MWARIJA, J.A., KOROSSO, J.A, And FIKIRINI, J.A)

CIVIL APPLICATION NO. 258/18 OF 2019

NATIONAL HOUSING CORPORATION.....APPLICANT

VERSUS

DEEPAN PREMJI DUSARA.....1st RESPONDENT

KISHORE PREMJI DUSARA.....2nd RESPONDENT

MRS. PRABHABEN MOHANLAL BHIKA.....3rd RESPONDENT

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

(Mgonya, J.)

dated the 5th day of April, 2019

in

Land Case No. 86 of 2016

RULING OF THE COURT

3rd & 16th November, 2021

FIKIRINI, J.A.:

The respondents successfully sued the applicant in Land Case No. 86 of 2016 in the High Court of Tanzania, Land Division, at Dar es Salaam. Aggrieved by the decision, the applicant instituted an appeal. Meanwhile, the respondents moved the High Court seeking to execute the decree in their favour. Upon service with the notice to show cause dated 26th June, 2019, the applicant filed this application for the stay of execution.

The application is predicated on the provisions of Rules 11 (3), 11 (4), 11 (5) (a), (b), (c) 11 (6), 11 (7) (a), (b), (c) and (d) and Rule 48 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules), and is supported by an affidavit of Albinus Simba, who is the Allocation and Valuation Manager of the applicant.

As stated in the notice of motion, the justification for the application is that the judgment and decree of the High Court are hugely problematic and tainted with serious irregularities that prejudice the applicant; and that the applicant will suffer irreparable and substantial loss if the execution proceeds. The affidavit in support is on record, with no reply from the respondents.

On the date scheduled for hearing, Mr. Aloyce D. Sekule learned Principal State Attorney assisted by Mr. Urso Luoga appeared on behalf of the applicant, and Mr. Mashaka Mfala learned counsel represented the respondents. Neither Mr. Sekule nor Mr. Mfala filed written submissions in terms of Rule 106 (1) (3) (a), (b), (c) (d), and (7). However, Mr. Sekule, on 29th October, 2021, filed a list of authorities.

Arguing the application orally, Mr. Sekule prefaced his submission by adopting the notice of motion and affidavit in support to form part of his

submission. He stated that the applicant had lodged a notice of appeal timely and submitted a letter requesting the necessary documents. He referred us to annexures "NHC1", "NHC2", "NHC3", and "NHC4", which are part of the affidavit in support.

He further submitted that the filing of this application on 10th July, 2019, was prompted by the service of notice to show cause dated 26th June, 2019 requiring the applicant to appear in court. He contended that the essence of the application is the grant of the stay of execution order; otherwise, the applicant will suffer irreparable loss. In the application for execution of the decree, the respondents are seeking the following orders:

- (a) The eviction of the judgment debtor from Plot No. 813, Mkata Road, CT No. 186175/15, Dar es Salaam.
- (b) Attachment and sale of judgment debtor's property on Plot No. 508 Block 48 Samora Avenue, Dar es Salaam for recovery of TZS. 75,000,000.00 and costs of the case.

Mr. Sekule further submitted that the substantial loss intimated involved two properties. If sold, the respondents will not be able to repay once the appeal is allowed.

Urging us to grant the application, Mr. Sekule averred that the applicant is ready to furnish security as indicated in paragraph 12 of the affidavit in support. He also submitted that the applicant has complied with Rule 11 (5) and 11 (7) of the Rules. Also, he urged us to examine the list of authorities filed on 29th October, 2021, in support of the grant of the application.

Mr. Sekule also filed a list of authorities listing the following cases: **The Registered Trustees of Chama Cha Mapinduzi & 3 Others v Mehboob Ibrahim Alibhai** (As legal Representative of the Late Ibrahim Gulamhussein Alibhai) Civil Application No. 117 of 2018, **Junior Construction Company Limited & 2 Others v Mantrac Tanzania Limited**, Civil Application No. 396/16 of 2019 and **National Bank of Commerce Limited v Alfred Mwita**, Civil Application No. 172 of 2015 (all unreported).

In reply, Mr. Mfala conceded to the filing of the notice of appeal timely. He nonetheless contended that after the expiry of two months, the respondents commenced the execution process. The applicant, in return, applied and was granted an *ex parte* order for a stay of execution, but the respondents were never served with a copy of the order until they

requested it from the applicant. He further submitted that so far, no essential steps has progressed as far as the intended appeal is concerned. And that there is no proof that the applicant is following up on the intended appeal.

We inquired on the conditions before granting an application for stay of execution as provided under Rule 11 (5) of the Rules and if he has read the **Mantrac Tanzania Ltd v Raymond Costa**, Civil Application No. 11 of 2010 (unreported) (**Mantrac** case). Mr. Mfala admitted not to have read the case. On conditions stipulated, he maintained that the applicant, although in paragraph 12 has promised to provide security, so far has not given security; therefore, the averment a mere promise, argued Mr. Mfala.

On substantial loss, Mr. Mfala argued that the respondents are at a loss and not the applicant. The respondents have no place to stay; as a result, the families are separated and compelled to rent a place to stay, whereas the suit property in question is their inheritance property. He further argued that the respondents would wish to return to the suit property and that the action would not cause the applicant any loss. Supporting his stance, he referred us to the case of **Nicholaus Lekule v IPTL and Another**, Civil Appeal No. [1997] T. L. R. 58.

More on substantial loss, Mr. Mfala contended that the necessary conditions are loss and injury to be suffered. He argued that the loss stated is repairable, and if the appeal succeeds, adequate compensation is still available.

Mr. Mfala also informed us that the respondents had moved the Court by a notice of motion to strike the intended appeal for the applicant's failure to take essential steps.

On the overwhelming chance of success averment in paragraph 10 of the affidavit in support, Mr. Mfala challenging the statement submitted that reliance on that argument at this stage is premature. Buttressing his point, he cited the case of **Tanzania Posts & Telecommunications Corporation v M/S B. S Henritta Supplies** [1997] T. L. R 141.

He also submitted disputing the averment in paragraph 8 of the affidavit on serious irregularities without the applicant pointing out any. He thus urged us to decline the application with costs, as there was no compliance to Rule 11 (5) of the Rules. Instead, the applicant is obliged to process the intended appeal.

Maintaining his earlier submission, in rejoinder, Mr. Sekule contended that the applicant had met the conditions under Rule 11 (5) (a)

and (b) of the Rules. He further submitted that the substantial loss to be suffered is apparent. The intended execution is for taking possession of the premises and attachment and sale of the other. That loss would be enormous, even if it is bare land. To ask to attach and sell a property to recover TZS. 75,000,000.00 is a substantial loss. And if the execution takes place, there is no way the respondents can compensate for such loss.

On the submission that the applicant has not show the urgency of processing the intended appeal, Mr. Sekule discounted the submission, contending that after the *ex parte* order, the applicant had to wait for the inter parties hearing and determination. Meanwhile, the applicant has written several reminder letters to the High Court for copies of the proceedings.

Admitting on the contents of paragraph 8 of the affidavit to be referring to a different matter, Mr. Sekule was quick to submit that no prejudice had nonetheless occurred with the error noted. To fortify his position, he referred us to the case of **National Bank of Commerce Limited** (supra).

On the issue of security, Mr. Sekule argued that the applicant could not set conditions themselves but would comply with the conditions to be

given by the Court. Knowing that the applicant has properties all over the country, fulfilling any given should not be an issue, he insisted. As for bank guarantees, he contended that they also have conditions that are not easy as they seem.

Finally, he urged us to consider that the respondents have essentially not contested the application, and based on that, prayed grant of the application.

In determining the merit of this application for stay of execution, we are obliged to examine if there is compliance to Rule 11 (4) and (5) of the Rules. Under the Rule, the application had to be filed within fourteen days of service of notice of execution or from the date the applicant is made aware of such existence. The notice to show cause requiring the applicant to enter appearance and show cause, why execution should not proceed, was served on the applicant on 26th June, 2019. The present application followed on 10th July, 2019, within the time given. We find compliance and condition met.

Another requirement is for the applicant to show the likelihood of suffering a substantial loss if this application is declined. And this has been demonstrated in paragraph 9 of the affidavit. This is not the first time this

Court is dealing with the application of this nature. In the case of **Tanzania Ports Authority v Pembe Flour Mills Ltd**, Civil Application No. 78 of 2007 (unreported), we illustrated how substantial and irreparable loss could be gauged, observing that irreparable loss must imply, among other things, the loss which is irrecoverable in any form or manner including damages or other monetary compensation. The same is the stance in the case of **Tanzania Harbour Authority** (supra) decision, in the case of **Tanzania Cotton Marketing Board v Cogecot Cotton Co. SA** [1997] T. L. R. 63, in which we held:-

"It is not enough merely to repeat the words of the Code and state that substantial loss will result; the kind of loss must be specified, details must be given, and the conscience of the court must be satisfied that such loss will really ensue."

Now examining the present application in light of the statement above, we find that the applicant has demonstrated an irreparable and expected loss which would occur on the applicant's part if we decline to grant the application. Suppose eviction on the suit property on Plot No. 813, located at Mataka Road, Dar es Salaam, is allowed; the applicant's suffering and loss are inescapable. The situation is different if the appeal fails; still, the respondents will be in a position to execute the decree in

their favour. Thus, on the balance of convenience, the applicant will certainly suffer enormous loss compared to the loss to be suffered by the respondents. Moreso, there is an unlikely possibility for the respondents to compensate the applicant if the outcome of the appeal will favor the applicant.

We agree that the respondents have a right and deserve to execute a decree in their favour. However, as averred in paragraph 9, the account which we find speaks volumes, and we take the liberty to reproduce below:-

"That, there are gross errors of law and fact that if execution is carried out before an order of stay is granted, the applicant will suffer irreparably by losing the property on Plot No. 813, Mataka Road, Dar es Salaam, and if eviction will be conducted, the applicant stands to lose its funds amounting to TZS. 75,000,000.00 and further will lose Plot No. 508 Block 48 Samora Avenue, Dar es Salaam and cause substantial embarrassment to its tenants, if attached and sold as requested by the respondents."

Despite the considered respondents' right, rational reasoning should, nevertheless, not escape our minds.

As a requirement, the applicant has to furnish security. The Court expounded the modality of furnishing security in the case of **Mantrac Tanzania Ltd v Raymond Costa**, Civil Application No. 11 of 2010 (unreported), when it held:-

*"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 the 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.**"*[Emphasis added]

It is apparent that in the applicant's affidavit, primarily paragraph 12; the applicant has shown firm commitment and undertaking to provide security for the due performance of the decree as the Court may deem fit to order. Not furnishing security and in the absence of such firm undertaking, the Court is urged not to grant the application for a stay of execution. This settled legal principle is articulated in the case of **Joramu Biswalo v Hamis Richard**, Civil Application No. 11 of 2013 (unreported).

Although the applicant has not stated what kind of security will be furnished, the readiness to comply with the order of the Court to furnish security, we do not doubt it, and we find the commitment and willingness suffices.

In addition, we have equally considered compliance with Rule 11 (7)

(a), (b), (c) and (d) of the Rules. The Rule provides for the following:-

“(7) An application for stay of execution shall be accompanied by copies of the following-

- (a) a notice of appeal;*
- (b) a decree or order appealed from;*
- (c) a judgment or ruling appealed from; and*
- (d) a notice of the intended execution.”*

The present application is supported by all these documents, which are annexed to the affidavit as annexures starting with a copy of judgment and decree -“NHC1,” notice of appeal - “NHC3,” and application for execution - “NHC5.”

Given what we have embarked on discussing based on the notice of motion, affidavit in support of the application, submissions, and the referred cases, we are satisfied that the applicant has fulfilled all the conditions necessary for granting the application.

The application is granted, and we order stay of execution pending hearing and determination of the pending appeal before the Court. This order is conditional upon the applicant depositing a bank guarantee of Tanzania Shillings 75,000,000.00 as security for the due performance of the decree covering general damages awarded to the respondents within thirty days from the date of this ruling. Costs shall abide by the outcome of the intended appeal.

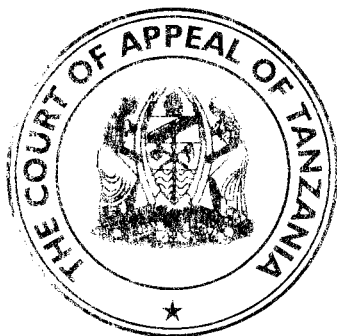
DATED at DAR ES SALAAM this 15th day of November, 2021


A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Ruling delivered this 16th day of November, 2021 in the presence of Mr. Aloyce Sekule, learned Principal State Attorney for the applicant and Mr. Steven Madulu, learned counsel for the respondents is hereby certified as a true copy of the original.




S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL