


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

**(CORAM: MWARIJA, J.A., KOROSSO, J.A., AND LEVIRA, J.A.)**

**CIVIL APPLICATION NO. 491/17 OF 2019**

- |  |   |                        |
|--|---|------------------------|
| <ul style="list-style-type: none"><li><b>1. MEKEFASON MANDALI</b></li><li><b>2. REHEMA R. KANGE</b></li><li><b>3. MARIAM MAGERO</b></li><li><b>4. EZRA J. MATOKE</b></li><li><b>5. MARY KILIAN JOSEPH MCHAU</b> (Legal Representative of KILIAN J. MCHAU)</li><li><b>6. ABDALLAH J. MVUNGI</b></li><li><b>7. ELIHURUMA MREMI</b></li><li><b>8. RUKIA ATHUMAN</b></li><li><b>9. MAJUTO RAJAB MBISA</b> (Administrator of the estate of ABUU M. BASAI)</li></ul> |  | <b>.....APPLICANTS</b> |
|--|---|------------------------|

**VERSUS**

**THE REGISTERED TRUSTEES OF THE  
ARCHDIOCESE OF DAR ES SALAAM .....RESPONDENT**

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

**(Mkuye, J.)**

**Dated the 22<sup>nd</sup> day of July, 2016**

**in**

**Land Case No. 181 of 2009**

.....

**RULING OF THE COURT**

20<sup>th</sup> October, 2020 & 5<sup>th</sup> February, 2021

**MWARIJA, J.A:**

The respondent, Registered Trustees of the Archdiocese of Dar es Salaam, was the defendant in the High Court of Tanzania (Land Division) at Dar es Salaam in Land Case No. 181 of 2009. It was sued

by the applicants and three others who are not parties to the applications; Martha C. Nyaulingo, Harrison Mandali, Mekefason Mandali, Rehema R. Kange, Mariam Magero, Ezra J. Matoke, Kilian J. Mchau, Abdallah J. Mvungi, Elihuruma Mremi, Rukia Athumani, Kesmo A. Mushi and Abuu M. Basai (the plaintiffs).

They sought, among other things, a declaration that Plot No. 31 Block "A" Kimara Matangini area (the Plot) encompasses parcels of land belonging to them (the suit properties). On its part, apart from disputing the plaintiffs' assertion, the respondent filed a counterclaim seeking *inter alia*, a declaration that it is the lawful owner of the whole of the Plot.

Having heard the evidence tendered by both parties, the learned trial Judge (Mkuye, J., as she then was) found that the plaintiffs had failed to establish that they were the lawful occupiers of the suit properties. She was of the view that the respondent had, on the other hand, proved that it owned the whole of the Plot. As a result, the plaintiffs were declared trespassers and were thus ordered to give vacant possession of the suit properties. They were also ordered to demolish all the structures which they had erected on the Plot including the houses in which they resided, followed by a consequential order by

which they were permanently restrained from entering into the Plot.

\ The trial court ordered further, that the plaintiffs should jointly pay the respondent damages of TZS. 20,000,000.00 and costs of the suit.

The applicants, Mekefason Mandalo, Rehema R. Kange, Mariam Magero, Ezra J. Matoke, Mary Kilian Joseph Mchau (legal representative of Kilian J. Mchau), Abdallah J. Mvungi, Elihuruma Mremi, Rukia Athuman and Majuto Rajabu Mbisa (the administrator of the estate of \ Abu M. Basai) were dissatisfied with the decision of the High Court. They thus instituted an application for revision, Civil Application No. 390/17 of 2019 which is still pending before the Court.

Meanwhile, on 3/12/2018, the respondent instituted in the High Court an application for execution of the decree arising from the impugned decision. It is that move which triggered institution by the applicants, of this application for stay of execution. The application which was taken under *inter alia*, Rule 4 (2) (a) and (b) of the Tanzania Court of Appeal Rules, 2009 (as amended) (the Rules), is supported by an affidavit jointly sworn/ affirmed by the applicants.

The grounds on which the application has been based are stated in the notice of motion as follows:

- "(a) [That] undue hardship and substantial financial and emotional loss will result to the applicants unless the order for stay of execution is made.*
- (b) That there exist serious errors and illegalities in the proceedings, judgment and decree of the High Court of Tanzania to be challenged and to be examined by this Hon. Court in the intended appeal (sic) to this Court.*
- (c) The applicants are willing to furnish such security as may be ordered by the Court for the due performance of the Decree sought to be stayed.*
- (d) That application is made within the time extended by a single judge of this Hon. Court in Civil Application No. 397/17 of 2019."*

At the hearing of the application, the applicants were represented by Mr. Samson Mbamba, learned counsel while Mr. Michael Ngalo, learned counsel, appeared for the respondent. Both learned counsel had duly filed their written submissions in support of the application and the reply thereto under Rule 106 (1) and (7) of the Rules respectively.

In his written submission, which he highlighted in his oral submission, Mr. Mbamba started by stating that, although the power of the Court to stay execution of a decree is governed by Rule 11 (3) of

the Rules whose application is conditional upon existence of a notice of appeal, the Court may exercise such power even where, like in this case, no notice of appeal has been filed. He went on to argue that, since in this case, the applicants have sought a stay order pending determination of the pending application for revision, the Court may invoke Rule 4(2) (a) and (b) of the Rules relied upon by the applicants in their notice of motion, to entertain the application. Citing the case of **National Housing Corporation v. Peter Kassidi and 4 Others**, Civil Application No. 213 of 2016 (unreported), Mr. Mbamba submitted that, in order to preserve the substance of the pending application for revision, the applicants have moved the Court under the above stated provisions of the Rules to seek a stay order.

On the substance of the application, the learned counsel argued in essence, that the conditions for grant of an order of stay of execution have been satisfied. He submitted, first, that as deponed by the applicants in paragraph 9 of their joint affidavit, the subject of the execution proceedings initiated by the respondent involve the houses in which they reside and thus if execution is not stayed, they will suffer substantial loss. Relying on the case of **William Shija v. Fortunatus Masha**, MWZ Civil Application No. 1 of 2002 (unreported), Mr. Mbamba

submitted that, where the subject matter of execution involves a residential house, the Court should always lean towards granting a stay order. He cited further, the decisions of the Court in the cases of **Godebertha Rukanga v. CRDB Bank Limited and 3 others**, Civil Application No. 156 of 2013 and **Mohamed Masoud Abdallah and 16 Others v. Tanzania Road Haulage (1980) Ltd**, Civil Application No. 58/17 of 2016 (both unreported). Referring to paragraph 8 of the applicants' joint affidavit, Mr. Mbamba went on to argue that the applicants have undertaken to furnish security for the due performance of the decree thus complying with the requisite conditions for grant of the sought order.

Responding to the submission made by the applicants' counsel, Mr. Ngalo argued in his oral submission that the application is untenable because of the nature of the proceedings from which a stay order has been sought. He stressed that, since the governing provision is Rule 11 of the Rules which makes it a condition that, for execution of a decree to be stayed, a notice of appeal must have been instituted. In the absence of that notice, the learned counsel argued, Rule 4(2) (a) and (b) of the Rules cannot be invoked to issue a stay order.

With regard to the case of **Peter Kassidi** (supra) cited by Mr. Mbamba, the respondent's counsel argued that, in that case, the Court did not decide that an application for stay of execution may be brought under Rule 4(2) (a) and (b) of the Rules. In that case, Mr. Ngalo went on to argue, the Court was moved to stay execution of the decree of the District Land and Housing Tribunal. It was his submission therefore, that since there is no specific provision empowering the Court to issue a stay order pending determination of an application for revision, this application is incompetent.

On the substance of the application, the respondent's counsel argued in the alternative, that the same is devoid of merit. He adopted the contents of his reply affidavit in which he countered the assertion made by the applicants in their joint affidavit, that they have met the requisite conditions for grant of the sought order, including the requirement of furnishing security for the due performance of the decree. It was Mr. Ngalo's submission that the application has been preferred with the intention of delaying execution of the decree. He argued however, that in the event the Court finds it appropriate to grant the application, it should order the applicants to deposit in Court the whole of the decretal amount including the costs as taxed by the

Taxing Officer and to undertake to comply with all the orders contained in the decree.

Having considered the arguments of the learned counsel for the parties, the first issue for our determination is whether Rule 4(2) (a) and (b) of the Rules may be invoked to grant an order staying execution of a decree pending determination of an application for revision. The Court's power to stay execution in Civil proceedings is governed by Rule 11 (3) - (7) of the Rules. Institution of such an application is conditional upon existence of a notice of appeal. Rule 11 (3) states as follows:

" 11- (1) ....N/A

(2) .... N/A

*(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."*

In effect therefore, Rule 11 (3) of the Rules cannot be invoked to apply for stay of execution of a decree pending determination of an



application for revision because in order for that provision to be applied, a notice of appeal must have been lodged. It is for this reason that the applicants have predicated their application under Rule 4 (2) (a) and (b) of the Rules. This is because, filing of an application for revision does not require prior lodgment of a notice of appeal.

Now, to answer the issue raised above, the purpose of staying execution of a decree has to be looked into. Commenting on rule 5 of O.41 of the Indian Code of Civil Procedure, 1908 which empowers an appellate court to stay execution of a decree, in his book, **Civil Procedure**, 6<sup>th</sup> Ed., 2011 Reprint, Eastern Book Company, Lucknow, India, Justice C. K. Thakker (Takwani) states as follow:

*“The object underlying Rule 5 is to safeguard the interests of both, the judgment - holder and the judgment - debtor. It is the right of decree - holder to reap the fruits of his decree. Similarly, it is the right of the judgment - debtor not merely to get barren success in case his appeal is allowed by the appellate court. This rule thus strikes a just and reasonable balance between these apposing rights.”*

Given the rationale behind a stay order as stated in the passage quoted above, to which we subscribe, whereby in the particular

circumstances of this case is to safeguard the judgment – debtor from ending up with barren success in the event he succeeds in his appeal, in our considered view, the same principle should apply to the judgment debtor who challenges a decision by way of an application for revision. The answer to the issue is therefore, in the affirmative; that an order staying execution of a decree pending determination of an application for revision may be issued under Rule 4(2) (a) and (b) of the Rules. Rule 4 (1) and (2) (a) and (b) states as follows:

- "4. – (1) The practice and procedure of the Court in connection with appeal, intended appeals and revisions from the High Court, and the practice and procedure of the Court in relation to review and reference; and the practice and procedure of the High Court and tribunals in connection with appeal to the Court shall be as prescribed in these Rules or any other written law, but the Court may at any time, direct a departure from these Rules in any case in which this is required in the interests of justice.*
- (2) Where it is necessary to make an order for the purposes of –*

- (a) dealing with any matter for which no provision is made by these Rule or any other written law;*
- (b) better meeting the ends of justice;”*

Our finding on the issue is supported by our previous decision in the case of **Stephen Mafimbo Madwary v. Udugu Hamidu Mgeni and Another**, Civil Application No. 71 of 2011 (unreported). In that case where, like in the present matter, the applicant had invoked Rule 4 (2) (a) and (b) to apply for prohibitory order pending determination of an application for revision, the Court held as follows:

*“There is no similar provision in a situation where revision is applied before the Court. We think, such like provision ought to have been included in the Court of Appeal Rules to cover such situation.*

*In the absence of such provision in the Court of Appeal Rules, herein above stated, we are of the considered opinion that the applicant was right to invoke Rule 4 (2) (a) and (b) of the Rules in moving the Court as it appears in his notice of motion. However, we are inclined to use the term stay of execution instead of injunctive order, because we are of the considered opinion that, it is more appropriate to use the term stay*

*of execution similarly used in the Court of Appeal Rules.”*

In another case of **Mrs. Violet Deelip Pandya v. Jayprakash Indrarai Jani**, Civil Application No. 17 of 2006 (unreported), the applicant who had filed an application for revision challenging the order of the High Court giving custody of the parties' child to his father (the respondent), the applicant applied and obtained a stay order under Rule 3(2) (a) of the Tanzania Court of Appeal Rules, 1979 [now Rule 4 (2) (a) of the Rules]. We are thus supported further, by that decision.

The second issue is whether the application has merit. Under Rule 11 (5) of the Rules, an application for stay of execution may only be granted when the Court has been 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.”*

Although the above stated conditions are provided for under Rule 11 of the Rules which apply to applications for stay of execution of a decree pending appeal, we are certain that the conditions should apply

generally thus covering applications made under Rule 4(2) (a) and (b) of the Rules.

To begin with condition (a), we agree with Mr. Mbamba that if execution of the decree is not stayed pending determination of the application for revision, the applicants will suffer substantial loss. From the accompanied copy of the application for execution, the mode of execution of the decree sought by the respondent is not only eviction of the applicants from the suit properties and committing them to prison as civil prisoners to compel them to pay TZS 20,000,000.00 awarded to the respondent as damages but the respondent intends to enforce the order directing demolition of the buildings in which the applicants reside. It is obvious therefore, that if that is done and later the applicants succeed in their application, a substantial loss will be caused to them because, even if they may be compensated, they cannot be placed in the same position they would have been had execution not carried out.

As for condition (b), we find that the applicants have complied with the requirement of furnishing security for the due performance of the decree as may be ordered by the Court. They have stated as follows in paragraph 8 of their joint affidavit:

*"8. That we are ready, willing and prepared to furnish security for the performance of the decree as the Court will determine"*

Such undertaking is sufficient compliance with that requirement. In the case of **Mantrac Tanzania Ltd v. Raymond Costa**, Civil Application No. 11 of 2010 (unreported) cited by Mr. Mbamba, the Court observed as follows as regards compliance with Rule 11 (5) (b) of the Rules:

*"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."*

In the circumstances, we are satisfied that this condition has also been met. It is sufficient for the judgment-debtor to make a firm undertaking to provide security, the nature of which and the time limit within which the same is to be furnished, is then for the Court to determine.

On the basis of the reasons stated above, we hereby grant the application and order that execution of the decree of the High Court in

Land Case No. 181 of 2009 should be stayed pending determination of Civil Application No. 390/17 of 2019.

Mr. Ngalo has urged us to order the applicants to undertake to abide by all that had been decreed by the trial court including to deposit the costs of the suit which was taxed by the Taxing Officer at TZS 60,242,000.00. We are however, with respect, unable to agree with him. First, except for monetary decree to which the applicants must furnish security, we do not find it necessary for them to undertake to give vacant possession of the suit properties and undertake further, to demolish the structures or houses built on the Plot in the event their application for revision fails. We hold that view because the respondent will have nothing to lose since execution of the decree will, as an obvious consequence, follow. Secondly, as for the amount of TZS 60,242,000.00, the same is not included in the application for execution of the decree, the same having not been taxed at the time of filing the application for execution on 3.12.2018. That amount is not therefore, part of the decree sought to be stayed.

In the event, we give a stay order on condition that the applicants should deposit in Court a bank guarantee in the sum of TZS

20,000,000.00 within the period of one month from the date of delivery of this ruling. Each party to bear its own costs.

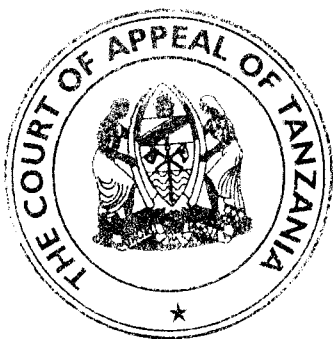
**DATED** at **DAR ES SALAAM** this 28<sup>th</sup> day of January, 2021.

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

W. B. KOROSSO  
**JUSTICE OF APPEAL**

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

The Ruling delivered this 5<sup>th</sup> day of February, 2021 in the presence of Mr. Michael Ngalo, learned counsel for the Respondent and also holding brief of Mr. Samson Mbamba, learned counsel for the applicants is hereby certified as a true copy of the original.



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