

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

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

CIVIL APPLICATION NO. 117/17 OF 2018

**THE REGISTERED TRUSTEES OF THE
CHAMA CHA MAPINDUZI.....1st APPLICANT
ISMAIL IDRISA, THE CHAIRMAN OF THE
CHAMA CHA MAPINDUZI, GEREZANI BRANCH.....2nd APPLICANT
FATUMA ABUBAKAR, THE SECRETARY OF THE
CHAMA CHA MAPINDUZI, GEREZANI BRANCH.....3rd APPLICANT
ADBULRAHMAN TWALIBU.....4th APPLICANT**

VERSUS

**MEHBOOB IBRAHIM ALIBHAI
(As legal Representative of the late IBRAHIM
GULAMHUSSEIN ALIBHAI..... RESPONDENT**

**(An application for stay of execution of the decision of the High Court of
Tanzania (Land Division) at Dar es Salaam)**

(Mutungi, J)

**dated 29th day of June, 2015
in**

Land Case No. 81 of 2008

RULING OF THE COURT

13th & 26th August, 2021

SEHEL, J.A

By notice of motion, the applicants are moving the Court for an order of stay of execution of the decree of the High Court (Land Division) at Dar es Salaam (the High Court) dated 29th June, 2015 in Land Case No. 81 of

2008. The application is predicated on the provisions of Rule 11 (3) (4) (5) (a) (b) (c) and (d) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules). The grounds for stay indicated in the notice of motion are as follows: -

"The intended appeal has very good chances of success, since the decision is problematic and illegal, and that the execution of the decree will render the intended appeal nugatory since the respondent will have the right to develop the land the subject matter of the intended appeal and hence the right to develop to the detriment of the 1st applicant."

The application is supported by an affidavit duly sworn by the late Dr. Masumbuko Roman Mahunga Lamwai, the then applicants' counsel. In that affidavit it was deposed that the 1st applicant made substantial development in house number 107 at Plot 11, Block 53, Sikukuu Street in Ilala District, Dar es Salaam (the disputed property).

Having being served with the application, the respondent filed an affidavit in reply to oppose it. He denied the allegations that the applicants will suffer irreparable loss and that they have made construction on the disputed property.

Before dwelling into the application, we find it apt to give a brief background giving rise to the present application. According to the facts which are discernible from the affidavit and affidavit in reply: the respondent instituted a suit vide Land Case No. 81 of 2008 in the High Court against the applicants praying, among others, to be declared the lawful owner of, and for an order of entitlement for possession of the disputed property. The case was determined in favour of the respondent with an order that the applicants should surrender vacant possession of the disputed property to the respondent.

Aggrieved by that decision, the applicants lodged a notice of appeal and applied to the High Court to be supplied with the certified copies of the proceedings, judgment and decree to process the intended appeal. On 4th April, 2018 they were served with a notice to show cause as to why the judgment and decree of the High Court should not be executed against them. The said notice also required them to appear for hearing of the Execution No. 3 of 2018 on 17th April, 2018. That notice prompted the applicants to file, the present application for stay of execution with a view

to have the execution stayed pending the hearing and determination of their intended appeal.

At the hearing of the application, Messers Roman Selasini Lamwai and Kung'e Wabeya, learned advocates appeared for the applicants and respondent, respectively.

In arguing the application, Mr. Lamwai begun by adopting the notice of motion and affidavit in support of the application for the stay of execution. Pressing for the grant of the stay order, Mr. Lamwai submitted that the applicant fulfilled the mandatory requirements specified under Rule 11 (7) of the Rules. He pointed out that the applicants have attached a copy of the notice of appeal, annexure A2 to paragraph 4 of the affidavit; a copy of the judgment and decree, annexure A1 to paragraph 3 of the affidavit; and a notice of execution, annexure A3 to paragraph 5 of the affidavit.

He further submitted that the applicants have also complied with the two conditions stipulated under Rule 11 (5) of the Rules that the applicants deposed in paragraph 9 of the affidavit that they would suffer substantial loss if the order of stay is not granted because they have made substantial

improvements on the disputed property. He further argued that if stay is not granted there is great danger that the respondent would demolish it to the detriment of the applicants whereas if stay would be granted the respondent would not suffer any loss.

On furnishing security for due performance of the decree, Mr. Lamwai submitted that the applicants have undertaken in paragraph 11 of the affidavit to furnish security as will be ordered by the Court. On these submissions, Mr. Lamwai urged the Court to grant the application for stay of execution.

Mr. Wabeya vigorously opposed the application by arguing that the applicants have failed to convince the Court on substantial loss and provision of security for due performance of the decree for it to grant the order sought by the applicants. Elaborating on his stand on substantial loss to be suffered, he argued that paragraph 9 of the affidavit has no indication of any substantial loss to be suffered by the applicants apart from stating that the applicants started construction of the building. He argued that the applicants ought to have elaborated the nature and extent of the loss that is likely to be suffered. In that regard, Mr. Wabeya argued

that the applicants failed to comply with Rule 11 (5) (a) of the Rules. To buttress his assertion, he referred us to the cases of **Aidan George Nyongo v. Magese Machenja & 3 Others**, Civil Application No. 237/17 of 2016, **Hassani Kapera Mtumba (Administrator of the estate of the late Kapera Mtumba) v. Salim Suleiman Hamdu**, Civil Application No. 505/12 of 2017 and **Insurance Group of Tanzania Limited v. Joeff Group (T) Limited**, Civil Application No. 18/01 of 2020 (all unreported).

Regarding the undertaking made by the applicants, he argued that the applicants did not make any firm undertaking because they simply stated that they are prepared to execute a bond for the performance of any order whereas they were required to furnish security for due performance of the decree of the High Court and not any other order of the court. He therefore urged us to dismiss the application with costs.

Mr. Lamwai briefly rejoined that the applicants would suffer loss if the improvements made on the disputed property would be demolished. For the security for due performance, he submitted that the undertaking given by the applicants was enough since the value and kind of security to

be provided would be determined by the Court. He thus reiterated his prayer that the application be granted.

We have given due consideration to the parties' submissions and after perusing the record of the application, we find that the issue for our determination is whether the applicants have satisfied the conditions for grant of an order for stay of execution. It is the position of the law that the applicants are enjoined to comply with all the conditions set out under Rule 11 (4) (5) (a) –(b) and (7) (a) – (d) of the Rules. The Court would decline to grant the application for stay of execution where an applicant fails to cumulatively meet all the conditions. This position has been constantly restated by this Court in its several decisions (See- **National Housing Corporation v. AC Gomes (1997) Ltd**, Civil Application No. 133 of 2009; **Joseph Soares @ Goha v. Hussein Omary**, Civil Application No. 12 of 2012; **Ahmed Abdallah v. Maulid Athuman**, Civil Application No. 16 of 2012; and **Hai District Council & Another v. Kilempu Kinoka Laizer & 15 Others**, Civil Application No. 10/05 of 2017 (all unreported)).

In this application, we propose to start by ironing out undisputed matters. From the submissions, the counsel for the parties are at one that

the applicants have fully satisfied the demands of sub rule 4 to Rule 11 of the Rules. The application was filed on 13th April, 2018 within the prescribed period of fourteen days from 4th April, 2018, the date when the notice of execution was served upon the current Ward Secretary of the Chama Cha Mapinduzi, Gerezani. In that regard, we find that the applicants satisfied this condition.

Likewise, there is no dispute that the applicants complied with the requirements stipulated under Rule 11 (7) (a), (b), (c), and (d) of the Rules. Our scrutiny of the application revealed that the applicants have attached to the affidavit in support of the application a notice of appeal (annexure A2), a decree and a judgment appealed from (annexure A1) and a notice of the intended execution (annexure A3). In that respect we find that the applicants have fully complied with all conditions enumerated under Rule 11 (7) of the Rules.

The contentious issue is on the two conditions stipulated under Rule 11 (5) of the Rules that provides:

"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."*

For substantial loss, we respectfully disagree with the submission by the learned counsel for the respondent that the applicants failed to meet the condition under Rule 11 (5) (a) of the Rules. Mr. Wabeya asserted that, in paragraph 9 of the affidavit, the applicants provided a general statement while they were required to have articulated the nature of the loss and the extent of it. At this juncture we find it prudent to reproduce paragraph 9 of the affidavit. It reads: -

"9. Further, that in case execution is carried out and the Respondent is given possession of the suit property, irreparable loss will be occasioned to the 1st Applicant since at the time the suit was instituted, the 1st Applicant was developing the plot and had already constructed a substantial part of the ground floor of the proposed commercial building thereon and had started construction of the foam work ready for laying the slab for the 1st floor of the building."

Further, paragraph 10 of the affidavit is also relevant. It reads thus: -

"Further, that the decree involves land which will always be there and the respondent will lose nothing if the order of stay of execution is granted since he will be able to enforce the decree in case the applicants lose the appeal."

The stance of Mr. Wabeya comes from our decision in the cases of **Aidan George Nyongo** (supra), **Hassan Kapera Mtumba** (supra) and **Insurance Group of Tanzania Limited** (supra). However, the cases are distinguishable in facts with the application at hand. For instance, in **Aidan George Nyongo** (supra) and **Hassan Kapera Mtumba** (supra) the applicant made a general statement that he would suffer irreparable loss but there was no mention of the nature and extent of loss to be suffered. Equally, in the case of **Insurance Group of Tanzania Limited** (supra) the applicant submitted from the bar that she would suffer loss and there was no mention of the loss either in the notice of motion or affidavit in support of the application. Whereas, in the present application, the applicants did depose in the affidavit and the notice of motion the nature and extent of loss. They have deposed that they constructed a ground floor

of the proposed commercial building and have started construction on the 1st floor. They have also stated in the notice of motion that if the order of stay is not granted the intended appeal would be nugatory since the respondent would have a right to develop the disputed property to the detriment of the applicants. In the circumstances, from the nature of the anticipated loss, we are satisfied that, as stated by the applicants in the affidavit and notice of motion, has sufficient details and is substantial. We thus find that the applicants satisfied this condition.

In respect of furnishing security for due performance of the decree as may ultimately be binding upon them, the applicants deposed in paragraph 11 of the affidavit thus: -

"Further, that the 1st applicant is prepared to execute a bond for the performance of any order that may be given either by the Court of Appeal or by the High Court in case it is unsuccessful in its intended appeal."

Mr. Wabeya contended that the "*execution of a bond*" does not constitute a firm undertaking. In the case of **Tanzania Petroleum Development Corporation v. Mussa Yusuph Namwao and 30 Others**, Civil Application No. 602 of 2007 (unreported) the Court defined a

firm undertaking to mean a promise or agreement or an unequivocal declaration or stipulation of intention to someone who reasonably places reliance on it. In that regard, we are settled in our mind that the declaration made by the applicants that they are prepared to execute a bond was a sufficient firm undertaking to move the Court to grant the order of stay for execution.

Besides, so long as the security is adequate and the opposite party can be adequately protected, the form and type of security to be provided for due performance is immaterial. It does not matter whether it is a bank guarantee, cash payment into court or bond (see the majority of our decision in the case of **Africhick Hatchers Limited v. CRDB Bank Plc**, Civil Application No. 98 of 2016 (unreported)). In that regard, we are satisfied that the applicants have fulfilled the condition for provision of the security for due performance of the decree.

At the end, we are satisfied that the applicants have shown good cause to warrant the grant of the order for stay of execution. The application is therefore, allowed and it is hereby ordered that execution of the decree in Land Case No. 81 of 2008 dated the 29th day of June, 2015

(Mutungi, J) is stayed pending the hearing and final determination of the appeal. This order is conditional upon the applicants depositing a bank's guarantee of Tanzania Shillings Fifty Million only (TZS. 50,000,000.00) as security for due performance of the decree within a month's time to be reckoned from the date of delivery of this ruling. Costs shall abide the outcome of the intended appeal.

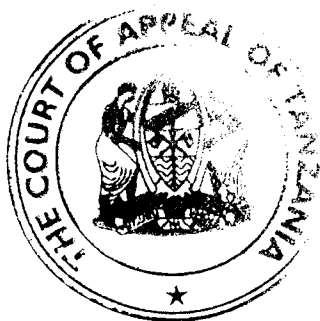
DATED at DAR ES SALAAM this 26th day of August, 2021

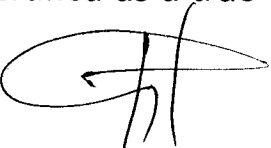
A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Ruling delivered this 26th day of August, 2021 in the presence of Mr. Mr. Roman Lamwai counsel for the applicant and Mr. Wabea Kung'e, counsel for the respondent is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL