

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: MKUYE, J.A., KOROSSO, J.A. And MAIGE, J.A.)

CIVIL APPLICATION NO. 41/17 OF 2020

MOHAMED ALLY RASHID.....APPLICANT

VERSUS

MKEJINA ATHUMAN MABUKU.....1st RESPONDENT

THE DIRECTOR, KINONDONI MUNICIPAL COUNCIL.....2ND RESPONDENT

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

(Opiyo, J.)

dated 20th day of November, 2019

in

Land Case No. 400 of 2015

.....

RULING OF THE COURT

30th August, & 7th September, 2022

MKUYE, J.A.:

This is an application for stay of execution. It is made under Rule 11 (3), (4) (5) (a) (b) (6) and (7) (a) (b) (c) and (d) of the Tanzania Court of Appeal Rules, 2009 (the Rules) in which the applicant seeks for an order that the judgment and decree of the High Court (Land Division) in Land Case No. 400 of 2015 (Hon Opiyo J,) be stayed pending the determination of the intended appeal. The applicant was initially granted an *ex parte* order of stay of execution pending hearing of this application *inter partes* before a full Court.

Before embarking on the merit of the application, we find it appropriate to narrate albeit briefly the background of the same which goes thus:

The applicant, Mohamed Ally Rashid and the first respondent Mkejina Athuman Mabuku had a dispute over ownership of a surveyed Plot located at Mwananyamala area in Kinondoni District. Each party asserted ownership of the suit plot claiming to have been allocated the said plot by the Kinondoni Municipal Council, the second respondent herein. However, it would appear that each party had been allocated a different plot number whereas the applicant was allocated Plot No. 1 Block 28A, the first respondent was allocated Plot No. 31 Block 28A but the respective plots happened to be the same.

Upon realizing the error, the Commissioner for Lands revoked the title held by the applicant while maintaining the one held by the first respondent. Following the said revocation, the applicant was ordered to surrender the documents relating to the title that was issued to him.

Being aggrieved with that move, the applicant commenced civil proceedings before the High Court seeking among others to be declared as a lawful owner of the suit plot. After hearing both parties, the High

Court made a finding in favour of the first respondent that she was a lawful owner of the suit plot.

Aggrieved by the High Court's decision, the applicant lodged a notice of appeal in order to challenge the decision. Meanwhile, before the intended appeal could be scheduled for hearing, he lodged the present application seeking the High Court decree to be stayed basically on the grounds that there are triable issues which need to be adjudicated by the Court; and that unless the execution of the decree is stayed, he will suffer irreparable harm and injury which cannot be atoned by damages.

When the application was called on for hearing, the applicant was represented by Mr. Leornard Manyama, learned advocate; whereas the first respondent had the services of Mr. Laurent Ntanga, learned advocate and the 2nd respondent enjoyed the services of Mr. Masunga Kamihanda, learned Senior State Attorney assisted by Ms. Rose Kashamba, learned State Attorney.

It is noteworthy that, when the matter was called on for hearing on 15th August, 2022, it came to the knowledge of the Court that the first respondent had passed on and since according to Mr. Ntanga the

administrator of the deceased's estate had already been appointed, the hearing was adjourned to 30th August, 2022 to enable him bring the relevant documents and apply for the necessary orders. Hence, at the inception of hearing of the application on 30th August, 2022 with the appearance of the parties as was on 15th August, 2022, Mr. Ntanga sought and leave was granted for one Salehe Rashidi Msagati to be made a party in place of the deceased Mkejina Athumani Mabuku in terms of Rules 57 (3) of the Rules.

Upon being given an opportunity to amplify the application, Mr. Manyama, in the first place sought to adopt the affidavit in support of the application deponed by Mohamed Ally Rashid filed on 14th February, 2020 and the written submissions lodged on 9th April, 2020 to form part of his submission. Having done so, he elaborated the application by submitting that the applicant was living in the disputed plot, and hence, if stay of execution is not granted he is likely to be required to vacate the premises which would occasion substantial loss to him. Apart from that, he contended that, as shown in paragraph 8 of the affidavit, the applicant is willing to furnish security for the due performance of the decree. In this regard, he prayed to the Court to grant the application.

In response, Mr. Ntanga also prayed to adopt the affidavit and written submissions in reply filed on 28th February, 2020 and 15th May, 2020 respectively to form part of their submission. He then added that although the applicant in compliance with Rule 11 (5) (a) and (b) of the Rules has stated in paragraph 9 of the affidavit that he lives in the disputed house as a matrimonial home, it is not true but rather it is a commercial premise as shown in paragraph 10 of the affidavit in reply. For that matter, he was of the view that the applicant has failed to show the loss he will suffer. In relation to the security for the due performance of the decree, he left to the Court to so determine. On that basis, he beseeched the Court to so decline the grant of the application.

On his part, Mr. Kamihanda after having adopted their affidavit and written submissions in reply to the application, stressed that the conditions set out under Rule 11 (5) (a) (b) must be cumulatively met. He pointed out that, in this matter, the issue of substantial loss on the basis of matrimonial home was not true while referring to paragraph 9 of their affidavit in reply. This is because, he said, there was no evidence to that effect in the trial court. Neither was there any affidavit or caveat filed in court to that effect. He went on submitting that even

the averment by the applicant that the substantial loss cannot be atoned by compensation is not founded as even if the execution is done and appeal succeeds, the Court may order compensation in monetary terms. He referred us to the reported case of **Nicholas Lekule v. Independent Power Ltd and Another**, [1997] TLR 58 where the Court stated that:

"One of the essential conditions for granting a stay of execution pending the determination of an intended appeal was the loss or injury that an applicant would be subjected to. The loss had to be of an irreparable nature which could not be adequately compensated by way of damages"

In this regard, Mr. Kamihanda urged the Court to find that the applicant has failed to meet the requisite conditions cumulatively and dismiss the application with costs.

In rejoinder, Mr. Manyama, maintained that the disputed house was a matrimonial home and that removing him from that house would create great torture to the applicant while the appeal is pending. He, therefore, stressed to the Court that the application should be granted.

Having heard from both sides, the issue for this Court's determination is whether the application has merit.

Applications for stay of execution are governed by Rule 11(3), (4), (5) a (b) and (7)(a) to (d) of the Rules. In order for the Court to grant stay of execution, the applicant is required to satisfy all the conditions cumulatively as set out in the said Rule. **See Joseph Anthony Socres @ Goha v. Hussein Omary**, Civil Application No. 6 of 2012, **Mohamed Rajuu Hassan v. Almahri Mohsen Ghaled and 2 Others**, Civil Application No.570/17 of 2017 (both unreported) and **Hydrox Industrial Services Ltd and Another v. CRDB (1996) Ltd and 2 others**, Civil Application No. 87 of 2015, **Mohamed Masoud Abdallah and 16 Others v. Tanzania Road Haulage**, Civil Application No. 58/17 of 2016 and **Gilbert Zebedayo Mrema v. Mohamed Issa Makongoro**, Civil Application No. 369/17 of 2019 (all unreported). For avoidance of doubt, such applicant must show cumulatively that:

- (a) The application is made without undue delay.
- (b) The applicant will suffer substantial loss if the application is not granted.
- (c) The applicant is willing to furnish security for the due performance of the decree.

In relation to the first requirement of time limitation, Rule 11(4) provides that:

"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".

In the instant matter, we entertain no doubt that the application was lodged within the prescribed time. The record bears out that the notice of execution was served on the applicant on 3rd February 2020 and the applicant lodged this application on 14th February 2020 which was after eleven (11) days from the date of service. On top of that, the application has been annexed with the necessary documents such as the copies of a notice of appeal, decree appealed from, judgment appealed from and the notice of the intended execution as provided for under Rule 11(7) (a)-(d) of the Rules.

As regards the second condition relating to substantial loss while the applicant maintains that the substantial loss may be occasioned if he is forced to vacate from the matrimonial home, he is residing, both

respondents have contended that the premise has never been a residential house but rather used as a commercial premise.

Having considered the rival submissions regarding this issue, we are satisfied that the applicant has sufficiently shown that should the application not be granted, he will suffer substantial loss in that he will have to vacate the premises and be rendered homeless. In our view, this may create great hardship on the applicant. But again, be it a matrimonial home or commercial premise, we still think the inconveniences will not be avoided. We are, therefore, satisfied that since the applicant has indicated in the affidavit and written submission and averred on how, he will suffer substantial loss this condition has been complied with.

As regards the issue of furnishing security for the due performance of the decree, we are equally satisfied on his averment in this affidavit . In the case **Gilbert Zebedayo Mrema** (supra), this Court while relying on the case of **Mantrac Tanzania Ltd v. Raymond Costa**, Civil Application No.11 of 2010 (unreported) had this to say:

"One other condition is that the application 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 stay order provided the Court sets a reasonable time limit within which the applicant should give the same”.

[See also **Prime Catch Exports Limited and 2 Others v. Ongujo Wakiara Nyamarwa**, Civil Application No. 450/16 of 2018] (unreported)

As already hinted earlier on, the applicant in this application has stated in paragraph 8 of the affidavit and paragraphs 2 and 3 of page 3 in the written submissions that he is willing to furnish security for the due performance of the decree. Incidentally, this requirement has not been seriously controverted by the respondents’ learned advocates. In particular, the counsel representing the first respondent left it to the Court to determine. In this regard, having given due consideration of the same, we are inclined to hold that the applicant has made a firm undertaking of furnishing the security for the due performance of the decree. We are therefore, settled in our mind that the applicant has also complied with the condition of providing the security required.

Ultimately, we are of the view that the applicant has managed to satisfy all the conditions cumulatively warranting the grant of the order for stay of execution as we hereby do. We, therefore, order that the execution of the decree in Land Case No.400 of 2015 dated 20th November 2019 (Opiyo J.) be stayed pending the hearing and final determination of the intended appeal on condition that the applicant should deposit a bank guarantee in the sum of Tshs.40,000,000/= within the period of thirty (30) days from the date of delivery of this Ruling. Each party should bear his/her own costs.

DATED at DAR ES SALAAM this 2nd day of September, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Ruling delivered this 7th day of September, 2022 in the presence of the Ms. Lightness Msuya, learned State Attorney for the 2nd respondent/Solicitor General and in the absence of the 1st respondent and applicant, is hereby certified as a true copy of original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL