

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KOROSSO, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CIVIL APPLICATION NO. 496/01 OF 2021

MBARALA A. MAHARAGANDE 1ST APPLICANT
MADARAKA A. MAHARAGANDE 2ND APPLICANT
IBARIKI A. MAHARAGANDE 3RD APPLICANT
MTEGAME A. MAHARAGANDE 4TH APPLICANT
SALEHE A. MAHARAGANDE 5TH APPLICANT

VERSUS

MAHIKU A. MAHARAGANDE RESPONDENT

**[Application for Stay of Execution of the Judgment and Decree of the High
Court of Tanzania (Dar es Salaam District Registry)
at Dar es Salaam]**

(Wambura, J.)

dated the 28th day of June, 2012

in

Pc. Civil Appeal No. 7 of 2009

.....

RULING OF THE COURT

9th May & 14th September, 2022

MASHAKA, J.A.:

The applicants are jointly moving the Court by notice of motion for stay of execution of a decree of the High Court of Tanzania at Dar es Salaam in PC Civil Appeal No. 7 of 2009 dated 28th June 2012, pending hearing and determination of an intended appeal. The application is

brought under rule 11 (3), (4), (5) (a) and (c), (6), (7) (a), (b), (c), (d) and 48 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

The applicants and the respondent are tangled in a dispute over the probate and administration of the estate of their deceased father, one Abdallah H. Maharagande, with allegations that as an administrator of the said estate, the respondent has failed to perform his duties properly resulting in displacement of the deceased's properties, particularly a house located on Plot No. 81/2N Block 'B' Uhuru Street near NMB Bank Morogoro Municipality. They allege that the respondent failed to effect distribution of the said estate to the beneficiaries and file the necessary inventory to the court according to law.

The notice of motion is supported by a joint affidavit duly affirmed by the applicants. The respondent filed an affidavit in reply opposing the applicants' affidavit. Also, the respondent filed written submissions on 24th April, 2022, though the applicants did not file theirs.

When the application was called on for hearing before us, the applicants were present in person, with no legal representation, whereas Mr. Richard Mathias Kinawari, learned advocate represented the respondent.

In support of the application, the first applicant upon adopting the notice of motion and the jointly affirmed affidavit, submitted that their application is based on the administration of the estate of their deceased father. Further, the applicants averred at paragraph 7 of the affidavit that on 30th September, 2021 they received a letter from the Registrar of the High Court of Tanzania, Dar es Salaam Registry dated 15th July, 2021 that the respondent was in the process of executing the decision of the High Court by evicting and handing over the house in dispute to a third party. They affirm that if that was to happen, it would cause irreparable loss and hardship to the applicants and other heirs of the deceased's estate.

The applicants state that they have lodged a notice of appeal on 1st October, 2021 and applied to the Registrar to be supplied with certified copies of judgment, decree and proceedings of the impugned decision. As averred at paragraph 1 of the supporting affidavit the documents attached are annexures A1, A2, A3 and A4.

They averred further at paragraph 11 of their affidavit that they are willing to furnish any security for the due performance of the decree, although they add at paragraph 12 of the supporting affidavit that as they are legal heirs of the estate of the deceased and having not taken their

shares of the sold house which is in dispute, then their shares is the security they are providing to support this application.

The 1st applicant contended that this application having been filed on 20th October, 2021 accompanied with the essential documents as per rule 11 (3), (4), (5) and (7) of the Rules, the same is competent and ought to be granted. The 2nd, 3rd, 4th and 5th applicants supported the oral submissions by the 1st applicant and had nothing to add.

In reply to the submissions of the applicants, Mr. Kinawari, at the outset upon adopting the affidavit in reply and the written submissions, opposed the application arguing that the house in dispute had been sold by the order of the Urban Primary Court at Morogoro vide Probate Case No. 114 of 1995 which was delivered fifteen years ago. He claimed that the purchaser bought it in 2009 and completed the transfer of the title deed to his name, referring us to the proof of sale attached as annexures E, F and G to the affidavit in reply.

In rejoinder, the 1st applicant submitted that the said purchaser was not a party to this application. Further, he contended that they have been residing in the disputed house and reiterating his prayer. The other applicants supported his contention.

With the above arguments in mind, we propose to start with the law applicable in terms of the requirements necessary for applications like this one to be granted. We will address our mind on the law in the context of the requirements of rule 11 (4), (5) (b) and (7) (d) of the Rules.

Legally, for this Court to grant the orders sought, as highlighted above, among other requirements, the applicant needs to satisfy the following legal requirements, among others; **one**, the applicant must lodge the application within fourteen days from the date that he was served with the notice of execution or from when he became aware of the execution proceedings. This is in terms of rule 11 (4) of the Rules. **Two**, the applicant must also attach to the application the notice of the intended execution in terms of rule 11 (7) (d) of the Rules. **Three**, the applicant must make a firm undertaking and confirm at the hearing that he shall furnish security for the due performance of the decree. That is the legal requirement of rule 11 (5) (b) of the Rules.

The above three conditions and several others which are not relevant to this application, must be cumulatively met as per this Court's decisions in **Mantrac Tanzania Ltd v. Raymond Costa**, Civil Application No. 11 of 2010 and **Mohamed Masoud Abdallah and Sixteen Others v.**

Tanzania Road Haulage (1980) Limited, Civil Application No. 58/17 of 2016 (both unreported) among others. Where the conditions are not met cumulatively, the application is incompetent and liable to fail, see **Mabruck Mengele v. Vernon David Law and Another**, Civil Application No. 87 of 2004 (unreported).

We will now turn to determine whether in this application the applicants, met the above listed conditions, and we shall start to discuss if the application was filed without undue delay in compliance with rule 11 (4) of the Rules and if it was attached with a notice of execution as required by rule 11 (7) (d) of the Rules. Rule 11 (4) stipulates as follows:

"(4) An application for stay of execution shall be made within fourteen days of service of the notice of execution on the appellant by the executing officer or from the date he is otherwise made aware of the existence of an application for execution."

Whereas rule 11 (7) (d) provides that:

"An application for stay of execution shall be accompanied by copies of the following-

- (a) to (c) N/A*
- (d) A notice of the intended execution."*

In this respect the applicants averred at paragraph 7 of affidavit that on 30th September, 2021 they received a letter from the Registrar of the High Court of Tanzania, Dar es Salaam Registry, that the respondent was in the process of executing the decision of the Urban Primary Court by conducting eviction and handing over of the disputed house to a third party. Other than that assertion, we have carefully perused the application documents particularly the affidavit of the applicants but we have not been able to locate a paragraph stating as to when were the applicants were served with the notice of execution. If we are to take 30th September 2021 as averred at paragraph 7 of the supporting affidavit as the date on which the applicants became aware of the execution proceedings, this application having been filed on 20th October 2021, the same was filed twenty days from the time that they became aware of the execution proceedings they are seeking to stay. This would be in violation of rule 11 (4) of the Rules cited above. The application in the circumstances is time barred.

The other aspect we focused on related to compliance with rule 11 (7) (d) of the Rules, that provision makes it mandatory for the applicant of the order for stay of execution to attach with the application, a notice of execution. In this case, we thoroughly reviewed the documents in this

application, but have not been able to locate such notice. That is in contravention to rule 11 (7) (d) of the Rules.

For the above reasons we cannot exercise this Court's jurisdiction under rule 11 (3) of the Rules to grant the orders sought because the applicants have failed to cumulatively fulfil the conditions stated under rule 11 (4) and (7) (d) of the Rules. That said, this application lacks merit and we hereby dismiss it.

Since the application arises from a probate case between related parties, we make no order as to costs.

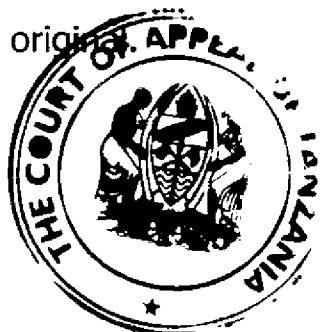
DATED at **DAR ES SALAAM** this 13th day of September, 2022.


W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Ruling delivered this 14th day of September, 2022 in the presence of 1st and 2nd applicants present in person and Mr. Richard Kinawari counsel for the respondent is hereby certified as a true copy of the original.




J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL