IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KIHWELO, J.A., And MAKUNGU, J.A.)

CIVIL APPLICATION NO. 373/01 OF 2021

MOHAMED SALUM NAHDI..... APPLICANT

VERSUS

ELIZABETH JEREMIA.....RESPONDENT

(Application for Stay of Execution of the Decree of the High Court of Tanzania, (Dar es Salaam District Registry) at Dar es Salaam)
(Kibela, J.)

dated the 28th day of October, 2014
in
Civil Case No. 45 of 2007

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RULING OF THE COURT

1st & 21st November, 2022

MKUYE, J.A.:

By notice of motion, the applicant Mohamed Salum Nahdi is moving the Court for an order of stay of execution of the High Court's decision and decree in Civil Case No.45 of 2007 dated 28th October 2014 (Kibela, J. as he then was) which was found in favour of the respondent, Elizabeth Jeremiah and ordered the applicant to pay the respondent Tshs. 10,000,000/= as general damages and USD 24,730.00 being the value of motor vehicle in dispute and costs. In order to appreciate the sequence of events, we find it appropriate to give a brief background of the matter. It goes thus:

The respondent owned a motor vehicle, mini-bus Isuzu type with Reg.No.TZ 5150, 3¼ tons which she bought in 1993 from General Motors-Kenya through the Bank of Tanzania. She bought it at USD 24,730 and brought it in Tanzania where it operated as a passenger service vehicle between Dar es Salaam and Ifakara.

Sometimes in October 2003, the respondent's husband who was a soldier in Nigeria was killed and she had to stop the bus operations so as to attend his funeral. Meanwhile, she entrusted the motor vehicle with the applicant for safe custody whereby it was kept at the applicant's petrol station known as Simba Oil Petrol Station located at Ifakara upon payment of Tshs.350,000/=. Later, the respondent made a follow up to retrieve the said motor vehicle but to her surprise, the applicant told her that she had no such claim with him. She made efforts to have the motor vehicle returned to her amicably but it proved futile and thus she instituted civil proceedings against the applicant in the High Court *("the trial court")* seeking to be paid damages (both specific and general damages) and compensation of the value of the motor vehicle.

The matter proceeded *ex parte* against the applicant under Order IX rule 6 (1) and Order XVII rule 2 of the Civil Procedure Code, [Cap 33 R.E 2002, now R.E 33 R.E 2019]. After hearing the matter, the trial court found in favour of the respondent and awarded her general

damages and the amount that was the value of the motor vehicle as alluded to earlier on.

The applicant's application to set aside the *ex-parte* judgment out of time was unsuccessful as it was dismissed with costs. His two applications for enlargement of time to enable him lodge a notice of appeal were dismissed (Misc. Civil Application No.501 of 2015 (Mzuna J.) and Civil Application No.474/01 of 2016 (Mmilla, JA.)). Fortunately, extension of time was extended by the Court through Civil Reference No.14 of 2017 and the applicant was granted leave to lodge the notice of appeal within thirty (30) days from the date of delivery of the Ruling which was done on 14th June 2019. Still desirous to appeal, on 17th June 2019, the applicant lodged a notice of appeal. However, on 26th July 2021 the respondent lodged an application for Execution No. 47 of 2021 to show cause why the decree should not proceed which was received by the applicant on 16th August 2021. Thus, this application.

The applicant has predicated his application under Rules 11(3),(4), (4A), 5 (a)-(b), (6), (7)(a)-(d) and 48 (1) and (2) of the Tanzania Court of Appeal Rules 2009 (the Rules) and is supported by the affidavit of Mohamed Salum Nahdi, the applicant.

The grounds for the stay of execution as stated in the notice of motion are among others as follows:

1. The applicant is served with a notice to show cause why execution should not proceed on 16th August 2021 and that there is Execution Application No.47 of 2021 before the High Court of Tanzania.
2. The applicant is likely to suffer substantial and irreparable loss if stay is not granted as he will end up paying a colossal sum of Tshs.10,000,000/= and USD 24,730 to the respondent which its recovery is questionable.
3. The applicant is willing to furnish security by way of depositing two Certificates of Title Nos. 128310 and 124661 both located in Ifakara District, Morogoro Region whose value is above the decretal sum for the due performance of the decree.

The respondent has not filed any affidavit in reply as required by Rule 56(1) of the Rules.

When the application was called on for hearing, Mr. Daniel Ngudungi who teamed up with Ms. Jacqueline Kulwa, learned advocates appeared for the applicant whereas the respondent appeared in person without any representation.

In his submission, Mr. Ngudungi began by adopting the notice of motion, affidavit and written submissions in support of the application. In elaboration, Mr. Ngudungi contended that the applicant has satisfied all the conditions since, he filed this application within fourteen days

after being served with the notice of execution; and that, he is willing to furnish as security for the due performance of the decree two Certificates of Title for Plots located at Ifakara which according to the Valuation Report their value is Tshs.170,000,000/= beyond Tshs.70,000,000 the decretal amount. He submitted further that, the applicant in paragraph 7 of the affidavit has shown that he is likely to suffer substantial loss if the money is paid as the respondent's address is unknown and even her financial position is not known.

In this regard, he prayed to the Court to find that the application is merited and grant it upon conditions as it may determine.

In response, the respondent resisted the application. She emotionally argued that the applicant is applying delaying tactics so that she could not enjoy the fruits of the High Court's decree issued almost four years back. She disputed the contention that her address is unknown stating that how could she be served with notice of hearing of the matter at hand.

In this regard, she urged the Court to find that this is a delaying tactic and dismiss the application with costs.

In rejoinder, Mr. Ngudungi reiterated his submission in chief and urged the Court to grant the application.

We have considered the rival submissions from both parties and, we think, the main issue for this Courts' determination is whether or otherwise the applicant has cumulatively fulfilled the conditions set out in Rule 11(4), (5)(a)(b) and (7)(a)-(d) of the Rules.

Although the respondent's submission is not of much of assistance to the matter at hand, looking at the notice of motion, affidavit and written submissions in support of the application as well as Mr. Ngudungi's submission we are of the view that the applicant has fulfilled them.

As regards the time limitation as provided for under Rule 11(4) of the Rules, the applicant has indicated in item (ii) of the notice of motion that a notice to show cause why execution should not proceed was served on him on 16th August 2021 which led him to discover that there was Execution Application No.47 of 2021 and was set for hearing on 26th August 2021. This fact is amplified in both written submissions and oral submission by Mr. Ndugungi. The record of this application shows that this application was lodged on 25th August 2021. This means that, as the applicant became aware of the application of execution on 16th August 2021 and this application was filed on 25th August 2021, it was filed within the period of fourteen (14) days required by Rule 11(4) of

the Rules. In this regard, it is our finding that the applicant has satisfied this condition.

Regarding the other two conditions, Rule 11 (5) (a) and (b) of the Rules is pertinent. It provides as follows:

> *"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."*

In the matter at hand, the applicant stated in item (iii) of the notice of motion that, if stay of execution is not granted it would result into the applicant's suffering substantial and irreparable loss. This fact is reiterated in paragraph 10 of the applicant's affidavit. Moreover, in paragraph 7 of the affidavit the applicant deponed that the respondent's financial position is uncertain as her homestead is not known to the applicant, adding that if the execution is allowed to proceed, he may stand a great chance of loosing all the decreed money if he succeeds in the intended appeal. Although the respondent countered it in that her address is known since he was able to serve her, we think that such contention may not carry weight since it came from the bar as she never

filed an affidavit in reply. It is a cardinal principle that affidavital disposition which is equated to evidence on oath cannot be contradicted by statements from the bar- See **Gilbert Zebadayo Mrema v. Mohamed Issa Makongoro**, Civil Application No.369/17 of 2019 (unreported). As it is, since the respondent did not file any affidavit in reply to contradict the averment by the applicant that her address of her homestead was not known we cannot agree with her. Instead, we are satisfied that should the order of stay of execution not be granted, the applicant is likely to suffer substantial and irreparable loss more so when taking into account that the respondent's address of abode is not known and her financial capacity is not known either.

Again, looking at the decretal amount which is Tshs. 10,000,000/= as general damages and USD 24,730,00 as payment of the value of the motor vehicle, there is no doubt that it is a colossal amount which, in our view, justifies the applicant's fear. In the circumstances, we are satisfied that the applicant has also fulfilled this condition.

As regards the condition of furnishing security for the due performance of the decree, again the applicant has stated in item (iv) of the notice of motion that he is ready to furnish it by depositing two Certificates of Title No.128310 and 124661 on Plots located at Ifakara

District in Morogoro Region. According to paragraphs 8 and 9 of the affidavit the value of the landed properties in question is over Tshs. 80,000,000/= which is above the decretal amount. The same is amplified in the written submissions and oral submission by Mr. Ngudungu.

In the case of **David Mahende v. Salum Nassor Mattar and Another**, Civil Application No.16/01 of 2018 (unreported), we accepted as security certificate of title over property and ordered that the Registrar to take custody of the certificate. Yet, in the case of **Mantrac Tanzania Ltd v. Raymond Costa,** Civil Application No.11 of 2010 (unreported), the Court categorically stated that:

> *"One other condition is that the applicant for stay of execution 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 securlty 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."*** [Emphasis added]

According to the above cited case, a firm undertaking to furnish security is sufficient. In this regard, since the applicant has undertaken to furnish two Certificates of Title on Plots in Ifakara we are satisfied that it amounts to a firm undertaking of furnishing security for the due performance of the decree. Hence, we are satisfied that the applicant has satisfied this condition as well.

We also note that the applicant has fulfilled the conditions set out in sub-rule (7)(a)-(d) of Rule 11 of the Rules. According to the affidavit in support of the application, the applicant has attached the notice of appeal as Annexure MCA 4. He has also attached the judgment and decree appealed from and the notice to show cause collectively as Annexure MCA 1. This being the case, the applicant has also complied with Rule 11 (7)(a) – (d) of the Rules.

In order for the Court to grant the application for stay of execution the applicant is mandatorily required to comply with all the conditions cumulatively - See **Joseph Soares @ Goha v. Hussein Omary,** Civil Application No.12 of 2012. (unreported)

In the matter at hand, as we have endevoured to demonstrate above, we are settled in our mind that the applicant has cumulatively satisfied all the conditions warranting the grant of the application.

Consequently, we grant the application and order that the decree in Civil Case No.45 of 2007 dated 28th October 2014 be stayed pending the hearing and determination of the appeal. We further order that the applicant should deposit to the Court Certificates of Title Nos. 128310 and 124661 both located in Ifakara District within Morogoro to be kept by the Registrar as security for the due performance of the decree within thirty (30) days from the date of the delivery of this Ruling.

It is so ordered.

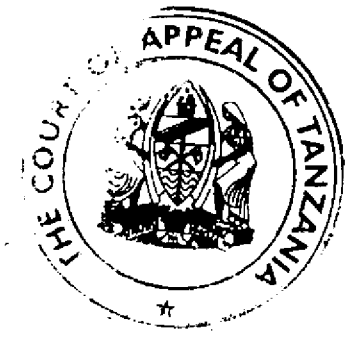
DATED at **DAR ES SALAAM** this 14th day of November, 2022.

R.K. MKUYE
JUSTICE OF APPEAL

P.F. KIHWELO
JUSTICE OF APPEAL

O.O. MAKUNGU
JUSTICE OF APPEAL

The Ruling delivered this 21st day of November, 2022 in the presence of Ms. Jacquiline Kulwa, Counsel for the Applicant and Respondent in person unrepresented is hereby certified as a true copy of the original.



A.L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL