IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., SEHEL, J.A, And KAIRO, J.A.)

CIVIL APPLICATION NO. 329/02 OF 2021

OLORUBARE NGINYU.....APPLICANT

VERSUS

KILEMPU KINOKA LAIZER.....RESPONDENT

(Application for stay of execution of a decree of the High Court of Tanzania at Arusha)

(Masara, J.)

dated the 07th day of May, 2021

in

Land Case No. 10 of 2019

.....

RULING OF THE COURT

08th & 30th November, 2022.

SEHEL, J.A.:

The applicant, Olorubare Nginyu, was the defendant in Land Case No. 10 of 2019. In that case, the respondent sued the applicant before the High Court of Tanzania at Arusha for trespassing into his piece of land measuring 1000 acres located at Longai/Soita Area in Simanjiro District within Manyara Region (the disputed property). At the conclusion of the trial, the High Court entered judgment in favour of the respondent and decreed that the respondent was the rightful owner of the disputed property and the applicant was ordered to vacate the

disputed property. The applicant was also ordered to pay compensation to the respondent of TZS. 70,000,000.00 as special damages and TZS. 50,000,000.00 as general damages for trespass and costs of the suit. Aggrieved, the applicant lodged a notice of appeal that was followed with the filing of the memorandum and the record of appeal on 05th July, 2021. The said record of appeal was also served upon the respondent on 08th July, 2021. On 07th July, 2021 the applicant was served with the copies of the application for execution filed before the executing court on 18th June, 2021. It is from that notice of execution that prompted the applicant to file the present application on 14th July, 2021.

The application is by way of notice of motion made under Rule 11 (3), (4), (4 A), (5), (6) and 7 (a), (b), (c) and (d) of the Tanzania Court of Appeal Rules, 2009, as amended (henceforth the Rules). It is supported by an affidavit deposed by the applicant himself, one, Olorubare Nginyu.

On the other hand, the respondent opposed the application by filing two documents, a notice of preliminary objection and affidavit in reply deponed by Kilempu Kinoka Laizer, the respondent.

At the hearing of the application, Messrs. Median Boastice Mwale and Moses Mahuna, both learned advocates appeared for the applicant, whereas, the respondent had the legal services of Mr. John J. Lundu, also learned advocate.

We decided to hear the arguments on both, the points of law and on the merits of the application. Therefore, we allowed Mr. Lundu to address us first on the points law and thereafter the counsel for the applicant would make a reply submission to the preliminary objection and submit on the merits of the application. Mr. Lundu would rejoin and also make a reply submission on the application and finally, the counsel for the applicant would make the rejoinder to the application.

Mr. Lundu abandoned the two points of law and concentrated on one point that the application is incompetent for failure to comply with the provisions of Rule 55 (1) of the Rules. Essentially, he submitted that the respondent was belatedly served with the motion contrary to the dictates of Rule 55 (1) of the Rules which requires the applicant to serve the respondent with the application within fourteen (14) days from the date it was lodged. He pointed out that the application was lodged on 14th July, 2021 but the respondent was served on 24th October, 2022. He contended that failure to serve the respondent with the notice of

motion within the time prescribed under Rule 55 (1) of the Rules is fatal and cannot be salvaged by the overriding objective. To fortify his submission, he cited the case of **Alex Msama Mwita v. Emmanuel Nasuzwa Kitundu and Another,** Civil Application No. 538/17 of 2020 (unreported). He, therefore, urged the court to strike out the application with costs.

Mr. Mahuna briefly replied that the respondent was duly served with the notice of motion together with the *ex-parte* order for stay of execution on 28th July, 2021. He thus urged us to dismiss the preliminary objection and proceed to hear the application on merit.

Mr. Lundu acknowledged that the respondent was served with the *ex-parte* order but insisted that the respondent was not served within time with the notice of motion.

Having heard the competing arguments, we find ourselves constrained to dismiss the preliminary objection because, based on the record of application placed before us, we failed to find any self-proof that the respondent was belatedly served with the motion.

On the merits of the application, Mr. Mahuna submitted that the applicant fully complied with the procedural and substantive

requirements. That, the application was accompanied with the notice of appeal (Annexure L2); copies of the judgment and decree appealed from (Annexure L1) and a copy of the intended execution (Annexure L3). He pointed out that the applicant deposed in paragraphs 9 and 10 of the affidavit on the loss to be suffered if the order for stay of execution would not be granted and that it had undertaken to provide security for the due performance of the decree by depositing a copy of the certificate of title No. 22727 in respect of Plot No. 225 Block 'DD' Mianzini Area in Arusha City registered in the alias name of the applicant, Lenginyu Yohana Yamat. He therefore prayed to the court that it be pleased to grant the order for stay of execution pending hearing and final determination of the appeal.

Mr. Lundu vigorously opposed the application by arguing that the applicant failed to convince the Court on substantial loss to be suffered if the order for stay of execution is not granted. Regarding the undertaking made by the applicant, he argued that the applicant did not make a firm undertaking because the security pledged related to the matter in dispute. With that submission, he urged the Court to dismiss the application with costs.

Mr. Mahuna had nothing to rejoin. He simply reiterated his earlier submission that the applicant complied with the requirements of Rule 11 of the Rules.

We have given anxious consideration to the parties' submissions and what stands for our determination is whether the applicant complied with the two conditions under Rule 11 (5) of the Rules which provides:

> *"11 (5) 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."*

From the above, the applicant is required to satisfy the Court on the substantial loss to be suffered if the order for stay of execution would not be granted and make a firm undertaking for the due performance of the decree as may ultimately be binding upon him. Mr. Mahuna contended that the applicant had deposed in paragraphs 9 of the affidavit on the loss to be suffered. To appreciate the submission of

the counsel, we take the liberty of reproducing the contents of paragraph 9 of the affidavit that reads:

> *"9. If this application is not granted the respondent stands undeniable chances of being granted with orders to execute the decree of the High Court of Tanzania at Arusha in Land Case No. 10 of 2019 (which has been fixed to come for orders on the 29th day of July, 2021); thus rendering the intended appeal nugatory, as I stand to suffer substantial loss at the tune of well over Tsh. 170,000,000/= (Tanzanian Shillings One Hundred and Seventy Million) together with the loss of income and business following the sought order of attachment and sale of applicant's commercial property, being a house located at Plot 225, Block 'DD' Mianzini Area, Arusha City under C.T No. 22737 on the following grounds;*
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> *(a) The respondent has not disclosed any source of income to repay me in the event the decree of the High Court of Tanzania in Land Case No. 10 of 2019 in reversed on the appeal.*
>
> *(b) The respondent is not in position to reimburse me the decretal sum if the decree*

is reversed after the determination of the intended appeal."

From the above, it is clear that the applicant has shown in its affidavit the kind of loss to be suffered. He has shown that he will suffer not only the colossal sum of money but also loss of income and business due to the nature and mode of execution sought by the respondent before the executing court. We are therefore convinced that, if no order for stay of execution will be issued, the likelihood of substantial loss is real since if the amount of TZS. 170,000,000.00 is paid out and the appeal succeeds the respondent would not be in a position to reimburse the applicant.

On the security for the due performance of the decree, the applicant deposed the following:

10. That, I am ready and willing to issue security in a form of property, being the house located at Plot No.225 Block 'DD' Mianzini Area, Arusha City bearing C.T. No. 22737 which is registered under my alias name of Lenginyu Yohana Yamat for the due performance of the decree as it may ultimately be binding upon me. A copy of the said certificate of title bearing C.T. No. 22727 is herein attached and marked as Exhibit L5, which forms part of this affidavit".

Principally, Mr. Lundu recognised that the applicant had undertaken (an undertaking to) to provide security for the due performance but his concern was on the type of security offered by the applicant which he claimed not to be firm undertaking. On this we wish to reiterate what we said in the case of **Mantrac Tanzania Ltd v. Raymond Costa**, Civil Application No. 11 of 2010 (unreported) that:

> *"One other condition is that the applicant 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."*

Given that the applicant is willing and ready to give security for the due performance of the decree that may ultimately be binding upon him, we therefore find that the undertaking is firm.

At the end, we are satisfied that the applicant has shown good cause to warrant the grant of the order for stay of execution. The application is allowed and it is hereby ordered that the decree in Land

Case No. 10 of 2019 dated the 7th day of May, 2021 (Masara, J.) be and is hereby stayed pending the hearing and final determination of the appeal. Nonetheless, this order is conditional upon the applicant depositing either a title deed of a commercial house on Plot No. 225 Block DD, Mianzini Area City which the applicant sought to attach in order to realize the decretal amount of TZS. 170,000,000.00 or upon depositing a bank guarantee of TZS. 170,000,000.00 as security for the due performance of the decree. The said security shall be deposited within forty-five (45) days to be reckoned from the date of delivery of this ruling. Costs shall abide the outcome of the intended appeal.

DATED at **MWANZA** this 28th day of November, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Ruling delivered on 30th day of November, 2022 in the presence of the Mr. Moses Mahuna, learned counsel for the applicant and Mr. Pratrick Paul, learned counsel for the respondent both parties appeared via video link from Arusha and Moshi respectively, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

C. M. MAGESA
DEPUTY REGISTRAR
COUTY OF APPEAL