

IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: MWAMBEGELE, J.A., FIKIRINI, J.A., And MASOUD, J.A.)

CIVIL APPLICATION No. 335/05 OF 2022

EFATHA MINISTRY.....APPLICANT

VERSUS

J. S. KHAMBAITA LIMITED.....RESPONDENT

(Application for Stay of Execution from the decision of the High Court of Tanzania at Moshi)

(Mwingwa, J.)

dated the 18th day of January, 2018

in

Land Case No. 18 of 2015

.....

RULING OF THE COURT

30th August & 12th September, 2023

MASOUD, J.A.

In the High Court of Tanzania, at Moshi, the respondent in Land Case No.18 of 2015 successfully sued the applicant (second defendant), Moshi Municipal Council (first defendant) and one, Hamis Abdallah Juma (third defendant) for a piece of land measuring 13 acres situated at Lukaranga, Soweto area within Moshi Municipality known as Block HHH "A" Section III (the suit land).

In the said suit, the respondent claimed to be a lawful owner of the suit land. The gist of his complaint was that his suit land had been divided into numerous plots by Moshi Municipal Council, and one of the plots was subsequently allocated to the applicant herein.

The decision of the High Court which declared the respondent herein as the lawful owner of the suit land was handed down on the 18th January, 2018 (Mwingwa, J.). On the 11th April, 2022, the respondent, served the applicant with a notice of execution proceedings. In response, the applicant lodged the present application on the 25th April, 2022 seeking to stay the execution of the High Court decree pending hearing and determination of her intended appeal. The applicant had already lodged a notice of appeal way back on 12th February, 2018 in her bid to challenge the decision of the High Court.

The application is by way of a Notice of Motion which was taken out under the provisions of Rule 11 (3), (4), 4A, (5), (a), (b) and (c), 11(6),11(7) (a), (b), (c) and (c) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The Notice of Motion is supported by an affidavit which was duly sworn by the applicant on the 22nd April,2022. The application is, however, resisted through an affidavit in reply which was affirmed by the first respondent on

the 12th July, 2023, accompanied by a Notice of preliminary objection filed on 24th August 2023.

When the matter was called on for hearing, the parties through their learned advocates, Mr. Kephas Mayenje and Mr. Elikunda Kipoko for the applicant and respondent, respectively, were concurrently heard on the preliminary objection and the merits of the application. It was agreed that the Court would go into the determination of the merits of the application only upon failure of the preliminary objection to dispose of the application. That is, if the preliminary objection succeeds, it will be the end of the matter and the Court would make appropriate orders. Both parties adopted their affidavits to form part of their oral submissions.

When we prompted Mr. Kipoko to address us on the propriety of the preliminary point of objection, he highlighted to us that the application is for stay of execution of the decree and that the decree sought to be executed by the respondent is against three parties. They include the applicant (the second respondent in the execution application), and Moshi Municipal Council (the first respondent in the execution application).

Mr. Kipoko contended that the instant application is not properly before the Court for non-joinder of Moshi Municipal Council who was included as a respondent in the intended appeal if the Court were to go by

the notice of appeal lodged on this Court by the applicant. He argued that it was better for the application to be either withdrawn by the applicant or struck out with leave to refile another application that would join the other parties for the consistence of the record.

In his reply, Mr. Mayenje submitted that the application before the Court is competent since it seeks to stay the execution proceedings commenced by the respondent in the High Court vide Execution Application No. 5 of 2022. He went on to argue that in the said execution proceedings, the respondent is seeking to evict the applicant from the suit land. Since the application has to do with the respondent as the decree-holder and not the judgment debtors in the decree sought to be executed, it cannot be held to be incompetent for non-joinder of Moshi Municipal Council who is one of the judgment debtors.

In his further submission, Mr. Mayenje argued that even if the application proceeds to be heard on its merit in the absence of Moshi Municipal Council, there would be no injustice to the said Council and none was after all shown by Mr. Kipoko. In addition, Mr. Mayenje argued that, the preliminary issue taken by Mr. Kipoko was not supported by any law. He finalized his submission by saying that the application is competent before

the Court and prayed the objection to be dismissed. Mr. Kipoko rejoined the submission in reply by mainly reiterating his submission in chief.

On our part, we considered the rival submissions. In doing so, we underlined that we were neither referred by Mr. Kipoko to any law which prohibited non-joinder of a party like Moshi Municipal Council in a situation like the one we are facing at the moment, nor were we shown that the effect of the preliminary issue taken if upheld would lead to dismissal of the application. With such observation which dented Mr. Kipoko's line of objection, we could not similarly see any injustice that Moshi Municipal Council would suffer if the sought order of stay is granted.

Being guided by the above findings, it is our settled view that, Moshi Municipal Council was not a necessary party who ought to have been joined in the instant proceedings. We say so because, Moshi Municipal Council is not an indispensable party to the application for stay of execution of the decree in Land Case No. 18 of 2015. It therefore means that the absence of the Council could neither hinder granting of an effective order of stay of execution by this Court nor occasion injustice to the Council. Consequently, the preliminary objection raised by the respondent is herein overruled for lack of merits.

As we have overruled the preliminary objection raised by the respondent, we now turn to determine the merits of the main application for stay of execution. Having adopted the notice of motion and applicant's affidavit as part of his oral submission, Mr. Mayenje submitted in support of the application that the applicant is aggrieved by the decision of the High Court. She thus intends to challenge it through her pending appeal having already taken the necessary steps including lodging the notice of appeal, as stated in her notice of motion. In the meantime, she is applying for stay of execution of the decree of the High Court.

He submitted that if the application is not granted, the applicant will suffer substantial loss because of the mode of execution which is intended to be affected, whilst the respondent stands to suffer nothing if the execution is stayed. Mr. Mayenje submitted further that the applicant has undertaken to furnish security for the due performance of the decree in case the appeal fails as required under Rule 11 (5)(b) of the Rules. In support of his submission, he cited the case of **Pristine Properties Ltd and Others v Eco bank Tanzania Ltd**, Civil Application No. 580/16 of 2021) [2023] TZCA 17267(22 May 2023) where the Court emphasized the position of the law that in order for the Court to grant the application for stay of execution, the two conditions provided for under rule 11(5)(a) and (b) of the Rules

must be cumulatively fulfilled. In doing so, the learned advocate relied on the affidavit in support of the application to show that the two conditions have been cumulatively fulfilled by the applicant. He thus prayed that the application be granted with no order as to costs.

In his submission in reply, Mr. Kipoko adopted the respondent's affidavit in reply. He thereafter strived in so many words to counter the submission by the applicant, which however took him back to his submission on the preliminary issue he took. In the end, Mr. Kipoko made up his mind not to oppose the application if it is in compliance with the law.

In view of the submissions by both learned advocates, the issue for our determination is whether the applicant has complied with the conditions set out under rule 11(5) (a) and (b) of the Rules. In order to deliberate on the issue, we are mindful that the respondent does not oppose granting of the application if it is found to be in compliance with the law.

To satisfy ourselves that the applicant has shown good cause to warrant granting the sought order or otherwise, we closely looked at the notice of motion, the depositions in the affidavit in support and particularly paragraph 9 on substantial loss and undertaking to furnish security for the due performance of the decree in case the appeal fails. We had no doubt

that the materials availed to us entitled us to consider the application in favour of the applicant.

Given the mode of execution sought as exhibited in paragraphs 5 and 9 of the affidavit, we are not in doubt that if the sought order of stay of the execution of the decree is not granted, the applicant would be evicted and suffer substantial loss involving shutting down of her religious activities which she conducts on the suit land. It is clear to us that despite such substantial loss likely to be suffered by the applicant, the respondent would suffer none. We accordingly hold that the first condition under rule 11(5)(a) of the Rules has been fulfilled by the applicant.

As to the second condition, we have already pointed out that paragraph 9 of the affidavit in support underlines the applicant's undertaking to furnish security for the due performance of the decree if the order is granted. Certainly, the undertaking is also vivid in paragraph 7 of the affidavit where the applicant is deposing that she is ready to give security for such performance by executing a bank guarantee or providing any other sufficient form of security as this Court shall direct. Bearing in mind such depositions, we are satisfied that the applicant has made a firm undertaking to furnish security for the due performance of the decree in case the appeal

fails as is required by rule 11(5)(b) of the Rules if the sought order is granted.

Since the two conditions have been cumulatively fulfilled, we are inclined to grant the sought order. We however took note that the applicant indicated that she undertakes to furnish a bank guarantee or any other sufficient form of security as shall be directed by the Court.

As the impugned decree involves an immovable property currently occupied by the applicant and is not monetary by its nature, we are guided by the case of **Suleiman Yussuf Ali v. Suitanali Abdalla Gulamhussein**, Civil Application No. 421/15 of 2018 [2019] TZCA 452 (17th October, 2019). In that case, we granted the application for stay of execution upon the applicant therein executing a bond committing himself to ensuring that the house remained in the same condition as was at the time when the decree was passed until the hearing and determination of the intended appeal. See also **Mohamed Masoud Abdallah and 16 Others v. Tanzania Road Haulage (1980) Ltd**, Civil Application No. 58/17 of 2016 [2019] TZCA 198 (17th June, 2019). In the same way, we think it is proper to grant the application upon the applicant's compliance with Rule 11(5)(b) of the Rules by executing a bond committing herself to ensure that

the suit land remains in the same condition as it was at the time when the decree was passed until hearing and determination of the intended appeal.

For the reasons stated above, we order stay of execution of the decree of the High Court of Tanzania in Land Case No. No. 18 of 2015 dated the 18th January, 2018 as per Mwingwa, J. pending hearing and determination of the intended appeal on condition that the applicant executes the said bond within thirty (30) days of delivery of this ruling. We do not in the circumstances make any order as to costs.

It is so ordered.

DATED at DAR ES SALAAM this 8th day of September, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The ruling delivered this 12th day of September, 2023 in the presence of Mr. Kephass Mayenje, learned counsel for the Applicant also holding brief for Mr. Eliakunda Kipoko, learned counsel for the Respondent, is hereby certified as a true copy of the original.



F. A. Mtaranja
F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL