

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

(CORAM: MWARIJA, J.A., KENTE, J.A. And MASOUD, J.A.)

CIVIL APPLICATION No. 623/08 OF 2021

JOHN WAMBURA NYAMOSA.....1st APPLICANT
RAYANG'ANG'ARA JOHN WAMBURA.....2nd APPLICANT
WEREMA JOHN WAMBURA.....3rd APPLICANT
PIUS MAGANYA.....4th APPLICANT
OMANYA MATIKU.....5th APPLICANT
NSHAMA ITILIGO.....6th APPLICANT
MTATIRO MARIAM.....7th APPLICANT

VERSUS

CHINA CHACHA MARWA.....RESPONDENT

**(Application for Stay of Execution of the decree of the High Court of
Tanzania at Mwanza)**

(Matupa, J.)

dated the 26th day of January, 2015

in

Land Case No. 43 of 2014

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RULING OF THE COURT

7th & 9th November, 2023

MASOUD, J.A,

In the High Court of Tanzania, at Mwanza, the respondent in Land Case No.43 of 2014 successfully sued the applicants for a 22 acres piece of land situated at Kirumi village, in Butimba District, Mara Region. In the said suit, the respondent claimed to be a lawful owner of the said

suit land. The gist of his complaint was that his suit land was unlawfully acquired and distributed by the village council to the applicants.

The decision of the High Court which declared the respondent herein as the lawful owner of the suit land was handed down on the 26th January, 2018 by Matupa, J. (as he then was). On the 4th August, 2021, the respondent, served the applicants with a notice of execution of the decree of the High Court of Tanzania at Mwanza in Land Case No. 43 of 2014. As a result, the applicant lodged the present application on the 15th August, 2021 seeking to stay the execution pending determination of the intended appeal. By then, a notice of appeal had already been lodged on 7th February, 2018 by the applicant.

The application 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 (d) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by an affidavit which was duly sworn by the applicant on the 13th August, 2021. The respondent filed an affidavit in reply which was sworn by the respondent on the 10th November, 2021.

When the matter was called on for hearing, Mr. Julius Mushobozi, learned advocate, appeared for the applicants, while Mr. Emmanuel Michael John, learned advocate, represented the respondent. At the outset, Mr. John informed us that the respondent does not contest the

application. On his part, Mr. Mushobozi urged us to grant the sought order as the respondent does not contest the granting of the application.

We prompted the learned advocates to address us on the nature of the subject matter of the decree sought to be executed and whether there was, indeed, a firm undertaking by the applicants to furnish security for the due performance of the decree if the sought order is granted. In reply, Mr. Mushobozi submitted that the applicants undertake to furnish their 22 acres of land situate at Kirumi village, which piece of land is different from the disputed land, as a security for due performance of the decree. In relation to the security to be furnished, Mr. Mushobozi, insisted that the same is different from and not the same as the decreed 22 acres of the land which is also situated at Kirumi village. Mr. John had no qualms about the form of the security which the applicants undertook to furnish for due performance of the decree as submitted by Mr. Mushobozi.

We considered the uncontested application. In doing so, we scrutinized the affidavit supporting the application in the light of the threshold requirements stipulated under rule 11 of the Rules. We are, in the results, satisfied that there is a clear indication by the applicants of the substantial loss likely to be suffered by them if the execution is not stayed, and a firm undertaking by them to provide their 22 acres of land

situated at Kirumi village as a security for due performance of the decree as required by rule 11 (5) (a) and (b) of the Rules. There are also relevant documents, namely, a notice of execution, a notice of appeal, copies of the impugned judgment and decree, which accompanied the application as required by rule 11 (7) of the Rules. In addition, we are clear that the application was filed within 14 days of the service of the notice of execution to the applicants. On the above account, we are settled that the application is within the purview of rule 11 of the Rules.

Given the execution sought to be stayed as exhibited in paragraphs 5 and 7 of the affidavit in support, 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 from the disputed piece of land, and would as a result suffer substantial loss. It is in that regard that we are satisfied that the first condition under rule 11(5)(a) of the Rules has been fulfilled by the applicant.

As to the second condition, paragraph 6 of the affidavit in support underlined the applicants' undertaking to furnish security for the due performance of the decree in the favour of the respondent as it may ultimately be binding on them if the order is granted. Certainly, the undertaking in the affidavit verifies the third ground in the notice of

motion in respect of which the application is hinged. We are for such reason satisfied that there is indeed a firm undertaking by the applicants under rule 11(5)(b) of the Rules to furnish security in the form of 22 acres of land situated at Kirumi Village which are, as intimated by Mr. Mushobozi, not the same as the disputed 22 acres of the land which are the subject matter of the decree sought to be executed.

Since the two conditions under rule 11 (5) of the Rules have been cumulatively fulfilled, we are inclined to grant the sought order. See, **Pristine Properties Ltd and Others v. Eco bank Tanzania Ltd**, (Civil Application No. 580/16 of 2021) [2023] TZCA 17267 (22 May 2023).

Consequently, we think it is proper to grant the application upon the applicants' compliance with Rule 11 (5) (b) of the Rules by executing a bond committing themselves to ensuring that, the undisputed 22 acres of land belonging to them and furnished as security, shall remain as such until determination of the intended appeal. We hold, however, that the said 22 acres of land furnished as a security should under no circumstances be part of or the subject of the decree whose execution is sought to be stayed.

For the reasons stated above, we order stay of execution of the decree of the High Court of Tanzania in Land Case No. No. 43 of 2014

dated the 26th January, 2015 as per Matupa, J. (as he then was) 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.

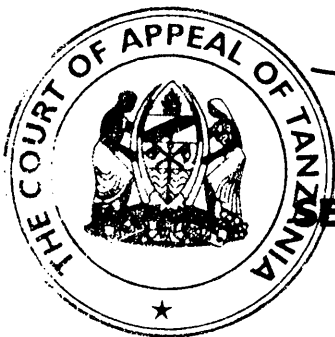
DATED at MWANZA this 8th day of November, 2023.

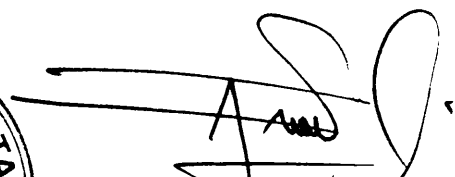
A. G. MWARIJA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Ruling delivered this 9th day of November, 2023 in the presence of Mr. Sekundi Bathoromeo Sekundi, learned counsel for the applicants and Mr. Emmanuel Michael John, learned counsel for the Respondent; is hereby certified as a true copy of the original.




E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL