

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION No. 33/17 OF 2023

HASSAN SEIF MTUNGAKOA..... 1ST APPLICANT

SALEHE SEIF MTUNGAKOA2ND APPLICANT

ALLY SEIF MTUNGAKOA3RD APPLICANT

VERSUS

KURUTHUM YUSUF (As administratrix of the estate

of the Late Sugra JaffaryRESPONDENT

**(Application for Stay of Execution of the decree of the High Court of Tanzania,
Land Division at Dar es Salaam)**

(Makani, J),

Dated 7th day of October, 2022

in

Land case No. 170 of 2018

.....

RULING

16th February & 3^d March, 2023

RUMANYIKA, J.A.:

Hassan Seif Mtungakoa, Salehe Seif Mtungakoa and Ally Seif Mtungakoa, the applicants, seek to move the Court to make an ex parte order staying execution of the decree of the High Court in Land Case No. 170 of 2018 pending hearing and determination of the application *inter partes*. It has been brought by way of Notice of Motion predicated under rules 13(3) (4), (4A), (5)-(7) and 55(2) of the Tanzania Court of Appeal Rules, 2019 (the Rules) supported with a joint affidavit sworn by the

applicants. The grounds of application as per the Notice of Motion are reproduced as follows:

- 1) *The applicants have been aggrieved with the said decision thus intend to appeal to this Honourable Court and have issued notice of intention to appeal. They are waiting to be supplied by further documents for appeal purposes.*
- 2) *The Respondent has applied to Dar es Salaam City Council to be registered as owner and on 10th January 2023, the Dar es Salaam City Council supplied upon the Applicants a 30 days' notice to the effect that, unless they produce a court order to the contrary, the City Authority will proceed to register the Respondent as owner of the suit premises in execution of the decree of the High Court dated 07th October 2022.*
- 3) *The Respondent is poised to alienate the suit premises to the detriment of the Applicants.*

Appended to the application are, among others copies of the notice of appeal dated 12/10/2022, impugned judgment and decree and notice issued by Dar es Salam City Council to the applicants titled: *Notisi ya kusudio la kummilikisha Kuruthum Yusuf Kiwanja Namba 2 Kitalu 11 Kariakoo.*

Brief background of the matter is that, before the High Court, Land Division, at Dar es Salaam, the respondent (as administratrix of the

estate of the late Sugra Jaffary) successfully sued the applicants vide Land Case No. 170 of 2018 seeking among other things, a declaration order that, House No. 86- Plot No. 2, Block 11, Congo-Street at Kariakoo (the suit property) was part of the estate of her deceased mother, one Sugra Jaffary. As a result, the applicants were ordered to give vacant possession of the suit property. Aggrieved with the decision and yearning to appeal against it, the applicants filed a notice of appeal on 12/10/2022 and for such purpose applied for the respective certified copies of documents. That, the applicants' efforts to appeal aside, the respondent knocked at the door of the City Council seeking to have the title being transferred to her. A notice for change of the land register dated 14/12/ 2022 was served upon the applicants on 10/01/2023. It is the applicants' averment further that, should the impugned decree be executed and the respondent registered as the owner, the applicants would suffer irreparable loss, the suit property being alienated. They also averred that, since the suit property is immovable then, security for the due performance of the decree is guaranteed and that was their undertaking.

It is instructive that, in order to be granted an order for stay of execution of a decree, applicant must satisfy the Court full compliance of

the conditions stipulated under Rule 11(4) and (5)(a) and (b) of the Rules which provide as follows:

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

11 (5) (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."

With regard to the condition on substantial loss, looking at their averments made under paragraph 14 of the supporting affidavit, most likely once title is transferred to the respondent, the applicants will suffer loss because the suit property would be disposed freely. Holding so, I am guided by our decision in the case of **Tanzania Cotton Marketing Board v. Cogecot Cotton Co. SA** [1997] TLR 63 where we stated that:

"It is not enough merely to repeat the words of the Code and state that substantial loss will result; the kind of loss must be specified, details must be given, and the conscience of the court must be satisfied that such loss will really ensue."

Applying the above legal principle to the present application, the applicants in their joint-affidavit have established that, if the suit property is left to be registered in the name of the respondent, then, the respondent may easily alienate it to a third party, hence the loss. That said, as a Single Justice of the Court I am convinced that, the applicants stand to suffer a substantial loss should the intended execution not be stayed.

Moreover, the applicants have pegged the suit property as the security for the due performance of the decree, as deposed under paragraph 15 of their joint affidavit. The requirement, mode and timing of furnishing security for the due performance of the decree has been reiterated by the Court in a number of cases including **Asha Juma Mansoor and 9 Others v. John Ashery Mbogoni**, Civil Application No. 122/03 of 2020 (unreported) in which we cited with approval the case of **Mantrac Tanzania Ltd v. Raymond Costa**, Civil Application No. 11 of 2010 where we stated:

"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."

Looking at the matter at hand, under paragraph 15 of the applicants' joint affidavit they undertook to furnish the suit property as security for the due performance of the decree because, for execution it is not a monetary decree. It involves an eviction order of the applicants from those premises which is allowable. See- our decision in **Asha Juma Mansoor & 9 Others v. John Ashery Mbogoni**, Civil Application No. 122/03 of 2020 (unreported). In view of the foregoing, I have no doubt that the requirement of furnishing security has been fulfilled.

However, this application lacks equally crucial notice of the intended execution required under rule 11 (7) (a) (b) (c) and (d) of the Rules. That rule provides that:

(7) An application for stay of execution shall be accompanied by copies of the following-

(a) a notice of appeal;

(b) a decree or order appealed from;

(c) a judgment or ruling appealed from; and

*(d) a **notice of the intended execution.***

Looking at the present application, all the documents required were appended, except a notice of the intended execution. As indicated earlier, attached to the application was just a notice to effect transfer of title on the suit property to the applicants which was issued by Dar es Salaam City Council, a stranger to the case. This was in contravention of rule 11 (4) of the Rules which provide thus:

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

The above cited rule applied to the present case, with respect to the suit property, with all intents and purposes on this, the said City Council was not an executing officer referred under rule 11(4) of the Rules nor was the respondent's request to the City Council to transfer

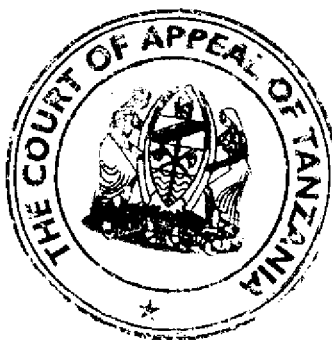
the title to her an application for execution of the decree, however strongly the applicants might felt threatened. It follows therefore, that, with respect, this application was prematurely and incompetently filed for want of a proper notice of eviction.

Consequently, I hereby adjourn the application to the convenient date to be fixed by the Registrar for hearing *inter partes* by the full Court.

DATED at DAR ES SALAAM this 2nd day of March, 2023.

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Ruling delivered this 3rd day of March, 2023 in the presence of Mr. Job Kerario, learned counsel for the Applicant.




F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL