

IN THE COURT OF APPEAL OF TANZANIA
AT MUSOMA

CIVIL APPLICATION NO. 462/8 OF 2023

JOSEPH CHACHA MAGABE.....APPLICANT

VERSUS

BOARD OF TRUSTEES OF CCM..... RESPONDENT

**(Application for stay of execution from the Decree of the High Court
of Tanzania at Musoma)**

(Mkasimongwa, J.)

dated the 27th day of July, 2021

in

Land Appeal No. 11 of 2021

RULING

3rd & 7th May, 2024

SEHEL, J.A.:

The applicant filed a notice of motion seeking to stay execution of the decree of the High Court of Tanzania at Musoma dated 27th day of July, 2021 in Land Appeal No. 11 of 2021 that dismissed the applicant's appeal with costs. The appeal was against the decision of the District Land and Housing Tribunal (the DLHT) for Tarime at Tarime that declared the respondent the lawful owner of Plot No. 120 measuring 30 meters long and 8.5 meters width situate at Buhemba area within Tarime Township. The application is made under Rules 11 (3), (4), (5) (a), (b), (c), (6), (7) (b), (c), (d) and 48 (1) of the Tanzania Court of Appeal Rules ("the Rules") and supported by an

affidavit sworn by the applicant, himself. On the other hand, the respondent did not file any affidavit in reply.

When the application was first called for hearing on 25th April, 2024, the Court wanted to satisfy itself on the propriety or otherwise of the application regard being that the notice of execution is lacking and it is not reflected in the affidavit as to whether there was any application for execution made by the respondent. The applicant who appeared in person, unrepresented sought an adjournment to consult with his counsel. The prayer was not opposed to by Mr. Onyango Otieno, learned counsel for the respondent. Therefore, hearing of the application was adjourned to 3rd May, 2024.

On the fixed date, parties' appearance was the same as the applicant was present in person, whereas, Mr. Onyango Otieno, learned advocate appeared for the respondent.

Arguing the application, the applicant contended that, after he was dissatisfied with the decision of the High Court, he lodged his notice of appeal. While he was waiting for his Civil Appeal No. 554 of 2023 to be cause listed for hearing, the respondent started the process of executing the decree by cutting down the plants in the disputed area. Responding on the issue whether there is any notice of execution, the applicant presented to me a notice of execution in respect of the Miscellaneous Civil Application No. 62 of

2020 which was filed before the DLHT and received by him on 13th March, 2020. With that submission, he prayed for his application to be granted.

Mr. Otien replied to the application on issues of law by arguing that the application is prematurely filed and incompetent before the Court as it is lacking a notice of the intended execution. He pointed out that the notice which the applicant presented to the Court was not attached to the application. It was his submission that, in terms of Rule 11 (7) (d) of the Rules, the notice of the intended execution is a vital document in an application for stay of execution and failure to attach it renders the application incompetent. He further submitted that the notice of the intended execution which the applicant presented was in respect of the Miscellaneous Civil Application No. 62 of 2020 filed in the DLHT after it had delivered its judgment and prior to the applicant's appeal before the High Court. He pointed out that, after the High Court had issued its decision on 27th July, 2021, the respondent has not taken any steps in executing the decree. Further, he argued that the applicant has not provided any security for the due performance of the decree. For that reason, he urged the Court to strike out the application with costs for being prematurely filed.

In his reply, the applicant contended that he filed the present application after fearing that the respondent might proceed with the execution of the decree since, in the past, he attempted to demolish his

dwelling house by removing part of the wall boundary. He, therefore, reiterated his earlier prayer that the application be granted.

From the parties' submissions, the issue for my determination is whether the application for stay of execution is competent for the Court to grant an order for stay of execution of the decree of the High Court and the DLHT.

Under Rule 11 (3) of the Rules, where a notice of appeal has been lodged in accordance with rule 83 of the Rules, the Single Justice may in his absolute discretion order a stay of execution of the decree or order appealed from upon the applicant fulfilling the following conditions: **one**, the applicant must show that he/she will suffer substantial loss; **two**, the applicant must provide security for the due performance of the decree or order as may ultimately be binding upon him; **three**, the application for stay of execution must be filed within fourteen days of service of the notice of execution or from the date the applicant became aware of the existence of such application and **four**, the application must be accompanied by copies of the necessary documents, namely, a notice of appeal, a decree or order appealed from, a judgment or ruling appealed from and a notice of the intended execution.

In the present application, there is no doubt that the applicant has duly lodged his notice of appeal to this Court on 3rd August, 2021 and it is attached in the application. He pleaded in paragraph 6 of his affidavit that he will suffer substantial loss if the respondent will proceed with the execution of the decree. Nonetheless, he has not attached a copy of the notice of the intended execution for the Court to be satisfied that the respondent is really intending to execute the decree of the High Court which the applicant is appealing from. He has only attached copies of the judgment and decree appealed from.

In the case of **Stanslaus Nganyagwa v. Seif Hamoud & Another** (Civil Appeal 110 of 2017) [2018] TZCA 248 (20 April 2018), the applicant omitted to attach in the application for stay of execution copies of the notice of appeal and decree. In striking out the application, the Court said:

"...a notice of appeal is a vital document which ought to be attached in the record of the application for stay of the execution, because the Court cannot know whether the applicant has already filed his notice of appeal to show his intention to appeal.... Apart from the notice of appeal, the applicant has also failed to attach a copy of decree subject to be stayed which is also a vital document in an application for stay of execution. Where a decree subject to be stayed is not accompanied in the application for stay of execution,

the Court is left with no other option but to find the application incompetent and hence strike it out."

See also: **Seleman Zahoro & Two Others v. Faisal Ahmed Abdul (Legal Representative of the deceased Ahmed S. Abdul** (Civil Application 1 of 2008) [2015] TZCA 299 (19 February 2015) and **Niko Insurance (Tanzania) Ltd & 5 Others v. Gulf Bulk Petroleum** [2020] 1 T.L.R. 554.

As alluded earlier, a copy of the notice of the intended execution, being one of the four vital documents, was not attached in the application for stay of execution. Not only that, the applicant has also not given any security for the due performance of the decree as may ultimately be binding upon him. In other words, no firm undertaking has been given by the applicant for the due performance of the decree.

In the case of **Mantrac Tanzania Ltd v. Raymond Costa**, Civil Application No. 11 of 2010 (unreported) the Court said:

"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."

Failure by the applicant to give a firm undertaking for the due performance of the decree renders the application for stay of execution incompetent before the Court and the overriding objective cannot apply to salvage such an omission. Since the applicant has not attached any notice of execution and has not provided any security for the due performance of the decree, I find the present application incompetent.

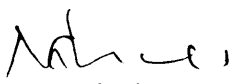
Accordingly, I find merit in Mr. Otieno's submission. I, therefore, proceed to strike out the application with costs.

DATED at MUSOMA this 6th day of May, 2024.

B. M. A. SEHEL
JUSTICE OF APPEAL

The Ruling delivered this 7th day of May, 2024 in the presence of the applicant present in person and Mr. Onyango Otieno, learned counsel for the respondent; is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL