

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI SUB-REGISTRY

AT MOSHI

MISCELLANEOUS LAND CASE APPLICATION NO. 37 OF 2023

(C/F Land Appeal Case No. 35 of 2023 in the High Court Tanzania)

ADINANI ISMAIL SHOO..... APPLICANT

VERSUS

ZAHIRI HASSAN MWANGA.....RESPONDENT

RULING

Date of Last Order: 31.01.2024
Date of Ruling : 26.03.2024

MONGELLA, J.

The applicant herein preferred this application under **Order XXXIX Rule 5(1), (3) and (4) of the Civil Procedure Code** [Cap 33 RE 2019]. He is seeking for this court to issue an order for stay of execution of a decree issued in Land Application No. 62 of 2016 by the District Land and Housing Tribunal for Moshi at Moshi (DLHT or the Tribunal, hereinafter), pending determination of Land Appeal No. 35 of 2023 before this court. He also prays for costs for this application and any relief this court deems fit to grant.

In support of this application, the applicant filed his duly sworn affidavit. The respondent contested the application in his own affirmed counter affidavit. The application proceeded by way of written submissions, whereby both parties were represented by



learned advocates. The applicant by Mr. Chiduo Zayumba and the respondent by Mr. Erasto Kamani.

According to the facts deposed by the applicant in his affidavit, which was adopted by his counsel in submissions, this matter originates from the DLHT. In the Tribunal, the respondent sued the applicant for trespass on 17 acres of land which he alleged to be part of the estate of his father, the late Hassan Mtambo Mwanga. The Tribunal found the respondent's claim proved, declared the applicant a trespasser, ordered him to vacate the suit land and to pay costs for the application.

Mr. Zayumba advanced 4 grounds in moving this court to grant the application. On the 1st ground, he alleged that the applicant has filed an appeal against the decision of the DLHT, that is, Land Appeal No. 35 of 2023 before this court. He referred the court to the memorandum of appeal annexed on the applicant's affidavit in proof of existence of the alleged appeal. Explaining the essence of stay of execution, he averred that it is to maintain the status quo pending determination of an appeal. In relation to the appeal application at hand, he alleged that the status quo is for the applicant to proceed using the suit land pending determination of the appeal as he has been possessing and using the same since 2007. In support of his argument, he referred the case of **Joakim Kalembwe vs. M. N. Mwamlima** Civil Application No. 76 of 1998, (CAT at Dar es Salaam, unreported)



The 2nd ground is on balance of convenience. Addressing the ground, Mr. Zayumba briefly contended that it was on balance of convenience that the respondent, who he alleged to have not been in possession of the suit land for over 16 years since 2007, to await determination of the appeal rather than evicting the applicant.

The 3rd ground is on irreparable loss. On this, Mr. Zayumba alleged that, as deposed under paragraph 7 of the applicant's affidavit, the applicant stands to suffer irreparable loss as his family depends on the suit land for food and income. He alleged that, on the other hand, there is no proof indicating that the respondent depends on the suit land. He supported his stance with the case of **Lesusu Lesilale Saiduraki vs. Sanai Lekimboyipoi** (Civil Application No.85/02 of 2021) [2023] TZCA 17529 (23 August 2023) TANZLII, alleging that the respondent seeks to evict the applicant vide execution.

The 4th ground is on chances of success whereby Mr. Zayumba alleged that the pending appeal before this court has overwhelming chances of success. He made reference to the memorandum of appeal averring that the appeal has *prima facie* likelihood of succeeding. He finalized by praying for the application for stay of execution to be granted and for the suit land to be furnished as security for the order.



The application was vehemently opposed by the respondent through submission by his counsel, Mr. Kamani. He started by challenging the applicant on the ground that he failed to comply with the requirement of **Order XXXIX Rule 5 (3), (1) of the Civil Procedure Code**. Explaining further, he contended that the conditions under the provision are to be conjunctively and not disjunctively satisfied by the applicant prior to the order for stay being issued. He supported his argument with the case **Ahmed Abdallah vs. Maulid Athuman** (Civil Application 16 of 2012) [2013] TZCA 184 (11 December 2013) TANZLII and **Tanzania Bureau of Standards vs. Anita Kaveva Maro**, Civil Application No. 54 /18 of 2017 (unreported) whereby the Court of Appeal interpreted **Rule 11 (2) (d)** currently **11 (5) (b) of the Court of Appeal Rules, 2009** which is in *pari materia* with **Order XXXIX Rule (5) (3) of the Civil Procedure Code**.

Mr. Kamani contended that the applicant failed to comply cumulatively with the said conditions as there is nowhere within his affidavit or submission shown that he gave security for due performance of the decree which he prays not to be executed. That, he also did not show that his application was made without unreasonable delay. He alleged that the presence of pending appeal, a chance of success and balance of convenience submitted on by the applicant are not conditions for grant of stay of execution, but rather for injunction.



Mr. Kamani further stated that the only condition expounded on was on irreparable loss whereby in both, paragraph 7 of his affidavit and in his submission, the applicant advanced the said reason. He alleged however that the applicant failed to explain how he stands to suffer substantial loss if the order for stay is not granted. That, he only stated that he and his family depend on the suit land for food and income.

Further, he challenged the case of **Lesusu Lesilale Saiduraki vs Sanai Lekimboyipoi** (supra) contending that it was misconceived by Mr. Zayumba. That, the court in the said case did not grant stay of execution merely due to the family depending on the disputed land for their livelihood, but because the applicants fulfilled all mandatory conditions for grant of stay of execution. He alleged that even presuming that the applicant was able to prove he was likely to suffer substantial loss, still, the other two conditions were not proved and thus he cannot be granted stay of execution. Mr. Kamani finalized his submission by praying for the application to be dismissed.

Rejoining, Mr. Zayumba maintained that the applicant advanced sufficient grounds for his application to be granted. He insisted that the application is geared towards maintaining the status quo pending determination of the appeal. He added that the status quo is for the applicant to proceed in using the suit land as he had done for 16 years since 2007. He alleged that the respondent could



not suffer for waiting a short while and that if he cannot wait for even a month, then there is danger that he would sell the suit land.

As for security, he alleged that it was not true that no security was furnished. He alleged that the applicant clearly stated that the suit land which had been in his possession or 36 years would be security for performance of the decree. Cementing that the suit land is proper security, he supported his stance with the case of **Lesusu Lesilale Saiduraki vs. Sanai Lekimboyipoi** (supra). He averred that contrary to the case of **Ahmed Abdallah vs. Maulid Athuman** (supra) and **Tanzania Bureau of Standards vs. Anita Maro** (supra), where the property was movable, in the current case the property is immovable.

As to the argument that he made reference to conditions of injunction, he alleged that the conditions in both injunction and stay of execution were similar in the sense that they are both meant to maintain status quo pending determination of a case. He cited the case of **Mrs. Wajibu Mangungu and Others vs. NBC Ltd.** Civil Application No. 8/01 (Court of Appeal at Dar es Salaam) to support his argument.

As to whether the application was filed without unreasonable delay, he alleged that the counsel was making reference to **Rule 11(4) of the Court of Appeal Rules** which are not applicable in this court. He contended that the rules have set the requirement that the application should be filed within 14 days of service of notice of



execution, but this application has been filed before notice of execution being issued. Mr. Zayumba concluded by maintaining his prayers for the application to be granted.

I have considered the rival submissions of both parties' counsels in this application. It is undisputed that, applications for stay of execution are governed by **Order XXXIX Rule 5 of the Civil Procedure Code**. The conditions for grant of application for stay of execution are well set under **Rule 5 (3)** which states:

- “(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the High Court or the court making it is satisfied —
- (a) that substantial loss may result to the party applying for stay of execution unless the order is made;
 - (b) that the application has been made without unreasonable delay; and
 - (c) that 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 foregoing provision, there are three conditions that ought to be satisfied. One, the applicant must prove he is likely to suffer substantial loss; two, the application must be made without unreasonable delay and; three, the applicant must furnish security for due performance of the decree or order binding upon him. As argued by Mr. Kamani, the provision requires cumulative



satisfaction of all conditions. In **Lomayan Langaramu vs. Christopher Pelo** (Civil Application No. 452 of 2018) [2021] TZCA 35 (25 February 2021) TANZLII the Court of Appeal, addressing the conditions set under **Rule 11(2) (d) of the Court of Appeal Rules, 2009** which is *pari materia* to **Order XXXIX Rule 5 (3) of Civil Procedure Code** stated:

"It is trite law that, for an application for stay of execution of a decree to succeed, the applicant must comply cumulatively with conditions listed under the law."

See also; **Mtakuja Kondo & Others vs. Wendo Maliki** (Civil Application 74 of 2013) [2013] TZCA 354 (29 July 2013) TANZLII; **Lesusu Lesilale Saiduraki vs. Sanai Lekimboyipoi** (*supra*); **Tanzania Bureau of Standards vs. Anita Kaveva Maro** (*supra*) and; **Ahmed Abdallah vs. Maulid Athuman** (*supra*)

There are other factors that may be taken into consideration when determining an application for stay of execution. These include existence of a *prima facie* likelihood of success and balance of convenience. These were stated in **Tanzania Electric Supplies Company (TANESCO) vs. Independent Power Tanzania Ltd (IPTL) and Two Others** [2000] T.L.R. 324 that:

"In Tanzania it is now well settled that the principal factors a court should consider whether or not to grant a stay of execution are the following:

- (a) Whether the appeal has, *prima facie*, a likelihood of success.



- (b) Whether its refusal is likely to cause substantial and irreparable injury to the applicant.
- (c) Balance of convenience."

While such additional factors can be taken into consideration, the same does not mean exclusion of other factors. The factors provided in the statutory provision are still mandatory and require cumulative satisfaction. I will herein address the three factors in the provision.

Commencing with whether the applicant would suffer substantial loss, I am of the view that this condition requires weighing of balance of convenience. The applicant alleged to have been in continued use of the suit land for over 16 years. He also deponed under paragraph 8 of his affidavit that he depended on the suit land for food and income, thus his livelihood will be violated.

Contrary to the arguments by Mr. Kamani, I find that the applicant has well stated that his livelihood would suffer as he depends on the suit land for both for food and income. Mr. Kamani did not advance any details to refute the applicant's allegation that he would suffer substantial loss. In fact, the respondent never challenged paragraph 8 of the applicant's affidavit whereby elaboration on loss was deponed. In that regard, the applicant has proved that he stands to suffer substantial loss if execution is carried out.



Concerning the 2nd factor, that the application ought to be made without undue delay, the applicant did not depone such fact nor was there any submission advanced reflecting such details. However, in his submission, Mr. Zayumba noted that there was an application for execution filed at the trial Tribunal. I have observed the records of the trial Tribunal and indeed found there is Application No. 142 of 2023 filed on 28.06.2023. However, there is no proof of service of the same to the applicant. The summons in the file is also unsigned rendering it with no effect.

On the other hand, Land Appeal No. 35 of 2023 was filed by the applicant in this court on 25.05.2023. This application was filed on 16.08.2023 under certificate of urgency. Strangely, the execution never proceeded past issuing of the summons which was not served. In the premises, I find it safe to rule that the application was not filed on unreasonable delay. This is in further consideration that even the respondent has also filed a cross appeal, that is, Land Appeal No. 39 of 2023.

As for security, it is well stated that it is enough to undertake to furnish security. This was well elaborated in **Asha Juma Mansoor and Others vs. John Ashery Mbogoni** (Civil Application 122 of 2020) 2021 TZCA 252 (11 June 2021) TANZLII, that:

"With regard to the second condition of furnishing security for the due performance of the decree, it is trite position that a firm undertaking to do so is sufficient compliance with that requirement."



The Court of Appeal further made reference to its decision in **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application No. 11 of 2010 (unreported) where it stated:

"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."

In this application, the applicant did not state in his affidavit that he commits himself to furnish security. There is merely a statement in his submission in chief in which he requested the suit land to be used as security. Being not pleaded, the same is merely a statement from the bar. In that regard, the applicant clearly failed to comply with the 3rd mandatory condition.

In consideration of the fact that the applicant has failed to cumulatively comply with the mandatory conditions, this application fails accordingly. It is dismissed with costs.

Dated and delivered at Moshi on this 26th day of March 2024.


L. M. MONGELLA

JUDGE

