IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MMILLA, J.A, MKUYE, J.A., And SEHEL, J.A.)

CIVIL APPLICATION NO. 369/17 OF 2019

GILBERT ZEBADAYO MREMA..... APPLICANT

VERSUS

MOHAMED ISSA MAKONGORO..... RESPONDENT

(An Application for stay of execution of the decree of the High Court of Tanzania (Land Division) at Dar es Salaam)

(Mzuna, J)

Dated 22nd day of February, 2018
in

Land Case No. 107 of 2015

RULING OF THE COURT

21st February & 16th March, 2020

SEHEL, J.A

By notice of motion, the applicant is moving the Court for an order of stay of execution of the High Court's decision dated 22nd day of February, 2018 that dismissed the respondent's suit filed against the applicant but declared a witness called by the respondent, PW2, as the lawful owner of the disputed house situate on Plot No. 89, Block B, Makuyuni Street, Mikocheni B Area, Kinondoni District in Dar es Salaam Region (hereinafter referred to as 'the disputed house').

In order to appreciate the merits or otherwise of the application, we find it prudent to give a brief background. The respondent sued the applicant before the High Court of Tanzania (Land Division) at Dar es Salaam seeking, amongst other things, for a declaratory order that he be declared as the lawful owner and occupier of the disputed house. To prove its case, the respondent called a total of three witnesses. They were Mohamed Issa Makongoro himself (PW1), his biological father Issa Mohamed Makongoro @ Gibwege (PW2), and Jamilah Berthy Makongoro (PW3). It is important to state here that after recording the evidence of PW1, the applicant and his advocate defaulted appearances, hence, the suit was ordered to proceed *ex-parte* against him. Therefore, the applicant lost his chance to call witnesses. However, he was allowed to make final submission whereby Mr. Mashauri Charles, learned advocate for the applicant filed final written submissions on behalf of the applicant.

Having considered the evidence and final submissions made by the parties, the High Court dismissed the suit and found that the disputed house is the property of PW2. Consequently, it declared PW2 as the

lawful owner and granted the family of PW2 an absolute right to own and stay therein. Aggrieved with that decision, on 27th day of February, 2018 the applicant lodged a notice of appeal. On 2nd day of August, 2019 the applicant was served with a notice to show cause as to why the judgment and decree should not be executed against him. That notice prompted the applicant to file, under certificate of urgency, the present application for stay of execution.

The grounds for stay of execution stated in the notice of motion are that:

> *"1. Undue hardship and substantial inconvenience will result to the applicant unless the order for stay of execution is made;*
>
> *2. there exists serious errors and illegalities amounting to total injustices and breakdown of law in proceedings, judgment and decree of the High Court of Tanzania (Land Division) sought to be challenged and to be examined by this Court in the intended appeal; and*

3. The applicant is willing to furnish such security as may be ordered by the Court for the due performance of the Decree sought to be stayed."

The notice of motion made under Rules 11 (3), 11 (4), 11 (5) (a), (b) & (c), 11 (6), 11 (7) (a), (b), (c) & (d), and 48 (1) of the Tanzania Court of Appeal Rules of 2009 as amended by GN No. 368 of 2017 (the Rules) is supported by an affidavit sworn by the applicant himself.

There is no affidavit in reply in terms of Rule 56 (1) of the Rules, lodged by the respondent in rebuttal of the contents of facts deposed by the applicant.

When the application was called on for hearing, Mr. Ashiru Hussein Lugwisa, learned advocate appeared for the applicant and Mr. Melkior Sanga, learned advocate represented the respondent.

Initially, Mr. Sanga tried to seek adjournment with a reason that he was recently engaged by his client hence did not have time to prepare for the hearing and that he noticed there is no affidavit in reply filed by his client. After being adverted by the Court to the contents of the notice of hearing to which his client was served a month ago on 24th day of

January, 2020, he abandoned his prayer and opted to proceed with the hearing.

In his submission, Mr. Lugwisa begun by adopting the notice of motion and affidavit in support of the application for the stay of execution. Pressing for the grant of the stay order, Mr. Lugwisa submitted that the applicant fulfilled the mandatory requirement stipulated under Rule 11 (7) of the Rules. He argued that the applicant has attached a copy of the notice of appeal as annexure 2 to Paragraph 4 of the affidavit; a copy of the decree as annexure 3 to Paragraph 3 of the affidavit; and a notice of execution as annexure 3 to Paragraph 3 of the affidavit.

It was also his submission that the applicant complied with the two conditions stipulated under rule 11 (5) of the Rules. On substantial loss, he submitted that the applicant has deposed in Paragraph 7 of the affidavit that he will suffer substantial loss if the order of stay is not granted, since the disputed house is rented to tenants with their families, if execution is made the tenants will lose homes and the applicant will face civil suits.

On furnishing security for the due performance of the decree, he submitted that according to the findings of the High Court both parties herein were declared not to be lawful owners over the disputed house and that instead it was a stranger (PW2), who was declared as a lawful owner. As such, it was Mr. Lugwisa's submission that the respondent had no legal right to execute a decree to which he is a stranger. He further submitted that the applicant has undertaken in his notice of motion and in Paragraph 8 of his affidavit that he is willing to furnish security as will be ordered by the Court. Upon being probed by the Court on the mode of security that his client is willing to furnish, Mr. Lugwisa responded that his client is ready to furnish a bank guarantee equal to the value of the disputed house which is TZS 300,000,000.00.

Mr. Sanga vigorously opposed the application by arguing that the applicant failed to convince the Court on substantial loss and provision of security for due performance of the decree for it to grant the order sought by the applicant. Elaborating on his stand, he argued that the term of the lease agreements attached in the affidavit ended way back before the filing of the present application and that the rental amount

involved in the lease agreements is very minimal for it to be termed as substantial. As such, it was his submission that there was no loss at all to be suffered by the applicant.

Regarding the undertaking made by the applicant, he argued that the applicant did not make a firm undertaking because he simply stated that he is willing to furnish security without elaborating the kind of security to be furnished. He therefore urged us to dismiss the application with costs.

Mr. Lugwisa had nothing to rejoin apart from reiterating his earlier submission.

We have given anxious consideration to the parties' submissions. The issue before us, is simple, namely whether or not the applicant has cumulatively fulfilled the conditions enumerated in Rule 11 (4); (5), (a) and (b) and (7) (a), (b), (c), and (d) of the Rules for the grant of the application for stay of execution.

From the arguments of counsel for the parties, there is no dispute that the applicant has fully satisfied the demands of sub rule 4 to Rule 11 of the Rules that the application was filed within the prescribed period of

fourteen days. The applicant deposed in Paragraph 5 of his affidavit that he became aware of execution proceedings from his lawyer on 21st day of August, 2019. According to the notice to show cause, attached to the affidavit, shows that it was issued by the High Court on 2nd August, 2019 and the record shows that the present application was filed on 29th day of August, 2019. Since the fourteen days start to count from the date when the applicant became aware, that is, on 21st day of August, 2019 then the filing of the present application was well within the prescribed fourteen days period. We thus find the applicant satisfied this condition.

Likewise, there is no dispute that the applicant complied with the requirements under Rule 11 (7) (a), (b), (c), and (d) of the Rules. To satisfy ourselves, we have carefully securitized the applicant's application, most particularly, paragraphs 3, 4, and 5 of the affidavit and we are satisfied that the applicant attached to his application a notice of appeal as annexure 2; a decree and a judgment appealed from that have been collectively attached as annexure 1; and a notice of the intended execution attached as annexure 3. As such, the applicant has fully complied with all conditions enumerated under Rule 11 (7) of the Rules.

The contentious issue is on the two conditions under Rule 11 (5) of the Rules which the learned counsel for the respondent forcefully contended that they have not been met by the applicant. That Rule provides:

> *"No order for stay of execution shall be made under this rule unless the Court is satisfied that-*
>
> (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."*

It is perhaps important to reiterate here that the applicant has a duty to satisfy all the conditions under Rule 11 (4), (5) (a) and (b), and (7) (a), (b), (c), and (d) of the Rules. Failure of which renders the application incompetent and the Court will decline to grant the application for stay of execution. This position has been constantly restated by this Court in its several decisions. See- **National Housing Corporation v. AC Gomes (1997) Ltd**, Civil Application No. 133 of

2009; **Joseph Soares @ Goha v. Hussein Omary**, Civil Application No. 12 of 2012; **Ahmed Abdallah v. Maulid Athuman**, Civil Application No. 16 of 2012; and **Hai District Council & Another v. Kilempu Kinoka Laizer & 15 Others**, Civil Application No. 10/05 of 2017 (all unreported).

It is from that position of the law where Mr. Sanga impressed upon us not to grant the application because he said the substantial loss have not been substantiated by the applicant. As it may be recalled, Mr. Sanga attacked from the bar the applicant's affidavit that the lease agreements expired and the rental charges are too minimal for the loss to be substantial. In the case of **Mandavin Company Limited Vs General Tyre (E.A) Limited**, Civil Application No. 47 of 1998 (unreported) we declined to entertain an application for review after being satisfied that the applicant failed to contradict by affidavit the deposition made by the respondent. We said:

> *"We agree with Mr. Ngalo that affidavitial deposition is evidence on oath which cannot be contradicted by statements from the bar. Such evidence like any other type of evidence given under oath*

can only be controverted by evidence on oath. In the instant case, apart from the statements from the bar by Mr. Lugua, learned advocate, denying service, there was no evidence to contradict the respondent's evidence."

Similarly, in the present application the applicant deposed in Paragraph 7 of the affidavit that the disputed house is rented. He has attached thereto the said leased agreements. And that, if eviction order is granted, not only the tenants will lose their homes but also the applicant will be exposed to multitude of law suits. That evidence made under oath can only be negated by affidavit in reply. As already pointed out, the respondent did not file any affidavit in reply to refute the applicant's evidence given under oath. In the circumstances, we discard that submission coming from the bar and in any event we are satisfied that the loss to be suffered by the applicant is substantial because of the imminent law suits to be preferred by the tenants against the applicant. Further, given the diverse walks of people in our community, to some, the loss of TZS 250,000.00 might seem minimal but to others it is

substantial. We are thus satisfied that the loss stated by the applicant in his affidavit is substantial loss, hence, he satisfied the condition.

As to whether the applicant fulfilled the condition of furnishing security for the due performance of the decree as may ultimately be binding upon him, Mr. Sanga vigorously argued that the undertaking made by the applicant was not a firm undertaking since he failed to declare the form of security to be provided. On this we wish to reiterate what we said in the case of **Mantrac Tanzania Ltd v. Raymond Costa**, Civil Application No. 11 of 2010 (unreported) that:

> *"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."*

In the present application, the applicant in his notice of motion and in paragraph 8 of the affidavit undertook to "furnish security, as will be ordered by the Court for the due performance of the decree". As alluded to before, this firm commitment made by the applicant under oath was not controverted by the respondent and also the learned counsel in his submission did not dispute it, we shall accordingly give it due consideration it deserves. We accordingly hold that the undertaking made by the applicant is a firm undertaking, thus he has fulfilled the condition for provision of the security for the due performance of the decree.

At the end, we are satisfied that the applicant has shown good cause to warrant the grant of the order for stay of execution. The application is therefore, allowed and it is hereby ordered that the decree in Land Case No. 107 of 2015 dated the 22nd day of February, 2018 (Mzuna, J.) is stayed pending the hearing and final determination of the appeal. This order is conditional upon the applicant depositing a Bank's Guarantee covering the entire value of the disputed house, that is, TZS.

300,000,000.00 as security for the due performance of the decree within a month's time to be reckoned from the date of delivery of this ruling.

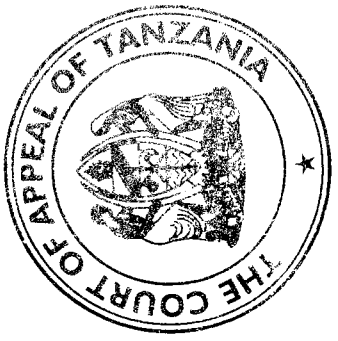
DATED at **DAR ES SALAAM** this 10th day of March, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Ruling delivered this 16th day of March, 2020 in the presence of Mr. Mengi Mkera Kigombe, learned Counsel for the Applicant and Mr. Bakari Juma, learned Counsel for the Respondent is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL