IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: KIMARO, J.A., MBAROUK, J.A., And MWARIJA, J.A.)

CIVIL APPLICATION NO. 2 OF 2016

1. GEDDA FRANCO PAULO
2. ANTONIETO MAURA...APPLICANTS

VERSUS

MOHAMMED RASHID JUMA ....RESPONDENT

(Application for stay of execution of decree of the High Court of
Zanzibar at Vuga)

(Sepetu, J.)

dated 12th November, 2015
in
Civil Case No. 49 of 2001
....

RULING OF THE COURT

6th & 7th December, 2016.

MWARIJA, J.A.:

In this application, the applicants are seeking for stay of execution of

the decree of the High Court of Zanzibar at Vuga arising from Civil Case

No. 49 of 2001. The application which is supported by the affidavit of Mr.

Nassor Khamis Mohamed is shown to have been brought under Rule 11 (2)

(b) and (c) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The

respondent has filed an affidavit in reply opposing the application.

At the hearing, the applicants were represented by Mr. Suleiman Salim, learned counsel while Mr. Stephano Chamriho, learned counsel appeared for the respondent.

In his submission in support of the application, Mr. Salim relied on the grounds stated in the notice of motion and the averments made in the supporting affidavit. He argued that the conditions stated under Rule 11(2) (b) and (c) of the Rules have been satisfied in that, the applicant has established sufficient cause for being granted the prayed order. He said that the applicant has greater chances of success in the appeal and that, on the balance of probability, it stands to suffer irreparable loss if execution of the decree is not stayed. This, he said, is because the decree involves a huge amount of money of about Shs. 2.5 billion. He contended that if the application is not granted, the appeal will be rendered nugatory.

According to the notice of motion, in bringing the application, the applicants did not cite item (d) of Rule 11(2) of the Rules. When asked about the requirement of furnishing security for due performance of the decree as provided for under sub-rule (2) (d) (iii) of that Rule, the learned counsel admitted that the applicant has not given security or an

undertaking to provide the same. He prayed to the Court to exercise its discretion and order the applicants to give the requisite security.

In response, Mr. Chamriho opposed the application arguing that the applicants have not shown sufficient cause for granting of the prayer for stay of execution. He submitted that, since the applicants have not complied with the requirements of furnishing security as provided under Rule 11(2) (d) (iii) of the Rules, the application should be dismissed.

We have duly considered the arguments made by the learned counsel for the parties. Although the learned counsel for the applicants has argued that the grounds relied upon by the applicants in the application such as chances of success of the intended appeal have established sufficient cause for granting of the application, under the Rules, there are now specific conditions which must be complied with. Those conditions are stated under Rule 11(2) (d) of the Rules which provides as follows:

> *"No order for stay of execution shall be made under this*
>
> *rule unless the Court is satisfied-*
>
> *(i) that substantial loss may result to the party applying*
>
> *for stay of execution unless the order is made.*

(ii) that the application has been made without unreasonable delay.

(iii) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him."

In the case of **Therod Fredrick v. Abdusamadu Salim,** Civil Application No. 7 of 2012 (unreported), the Court stated as follows on that aspect:

"On the terms of the present Rules, the Court no longer has the luxury of grating an order of stay of execution "on such terms as the Court may think just." Rather, the Court must be satisfied, just as the applicant will be required to fulfill the following cumulative requirements:-

1. lodging a Notice of Appeal in accordance with Rule 83;

2. showing good cause and;

3. complying with the provision of item (d) (i), (ii) and(iii)."

It is not in dispute that the applicants have not complied with the condition stated under item (iii) of Rule 11 (2) (d) of the Rules which requires them to furnish security for   due

performance of the decree. Mr. Salim had tried to impress upon us that the applicants are prepared to undertake to furnish the security, but he failed to specify the nature of that security. Compliance with the above stated provision is mandatory for grant of an application for stay of execution.

Underscoring that requirement in the case of **Anthony Ngoo & Another v. Kinda Kimaro,** Civil Application No. 12 of 2012 (unreported), the Court had this to say:

> "*As for the question of furnishing security, Rule 11(2) (d) (iii) required the applicants to give security for due performance of the decree or order as may ultimately be binding upon them. In other words the applicants had to make an undertaking to ensure that the respondent will not be deprived fruits of his litigation without justification in the event the intended appeal ends in favour of the respondent.*"

The effect of non-compliance with the condition of furnishing security is to render the application untenable. This is because all the conditions stated under Rule 11(2) (d) of the Rules must cumulatively be complied

with. See for example the Court's decisions in the cases of **Juma Hamisi v. Mwanamkasi Ramdhani,** Civil Application No. 34 of 2014 and **Joseph Anthony Soares @Goha v. Hussein Omary,** Civil Application No. 6 of 2012 (both unreported).

In sum therefore, since the applicants have failed to give security or undertaking for due performance of the decree, they are not entitled to be granted the order of stay of execution of the decree. The application is accordingly hereby dismissed with costs.
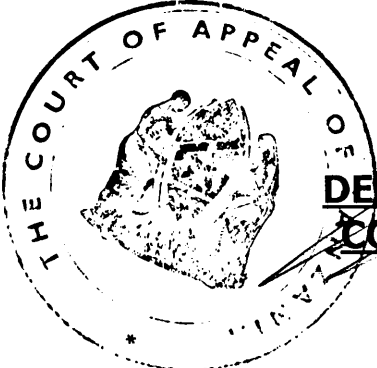
DATED at ZANZIBAR this 7th day of December, 2016.

N. P. KIMARO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E. Y. MKWIZU
**DEPUTY REGISTRAR
COURT OF APPEAL**