IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 529/17 OF 2016

(CORAM: WAMBALI, J.A., SEHEL, J.A. And KIHWELO, J.A.)

UTHMAAN MADATI (Administrator of

the Estate of the Late **JUMA POSANYI MADATI) ..... APPLICANT**

VERSUS

HAMBASIA N'KELLA MAEDA..... ... RESPONDENT

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

(Mgaya, J.)

dated the 4th day of May, 2016
in
Land Case No. 18 OF 2013

.....

RULING OF THE COURT

30th March & 25th April, 2022

KIHWELO, JA.:

This is an application brought under Rule 11 (2) (b) (c) (d) (i) (ii) and (iii) of the Tanzania Court of Appeal Rules, 2009 (henceforth "the Rules"), for stay of execution of a decree passed in Land Case No. 18 of 2013 in the High Court of Tanzania (Land Division) at Dar es Salaam, pending the determination of an appeal from the said decree the applicant intends to lodge before the Court.

In the High Court the applicant instituted Land Case No. 18 of 2013 against the respondent over ownership of Plot No. 2153 Block "H" which is situated at Mbezi Beach area, Kinondoni Municipality within Dar es Salaam City ("the suit plot"). At the height of the trial, the respondent emerged successful in a judgment and decree which were handed down on 04.05.2016 by Mgaya, J. ("trial Judge").

The applicant, by way of notice of motion on 27.12.2016 lodged the instant application which is supported by an affidavit of **Juma Posanyi Madati** now deceased. The applicant also filed written submissions and list of authorities to fortify his quest. On the adversary side, the respondent also filed an affidavit in reply as well as written submissions in reply and list of authorities in contesting the application.

The notice of motion discloses three grounds upon which the application is predicated. For reasons to be apparent later and for ease of reference, we take pain to recite the three grounds and the relevant parts of the supporting affidavit.

The grounds upon which the application is based are:

"1. *That, substantial loss and undue hardship will result to the applicant unless the order is made.*

2. *That, there exists serious errors and illegality in the decision of the High Court of Tanzania Land Division sought to be appealed against which has to be examined by the Court; and*

3. *That, the applicant is willing to furnish security as may be ordered by the Court for the due performance of the decree sought to be stayed."*

The averments in the relevant parts of the affidavit in support of the application are:

> *"11. That, the applicant is willing to, and makes a firm undertaking to furnish security in the manner and to the extent as will be ordered by the Court for the due performance of the decree.*
>
> *12. That, undue hardship, substantial and emotional loss will result to the applicant if the decision sought to be stayed is implemented and executed."*

On the other hand, the averments in the relevant parts of the respondent's affidavit in reply that challenges the application are:

> *"14. That the contents of paragraph 12 is denied and the applicant is put to strict proof thereof. The respondent states that nothing in terms*

of details of irreparable or substantial loss or hardship has been adduced. Further, as the alleged construction is said to have been demolished and that the applicant has no development therein, there is nothing for which to stay.

15. *That further, the respondent states that it has been in ownership, possession and use of the land all the time till to date, enjoying the decree on her own right and that there is no execution process pending in any court as it would be indeed superfluous."*

We have deliberately reproduced the averments in the relevant parts of the affidavit in support of the notice of motion as well as the affidavit in reply for reasons that we will demonstrate in due course.

Before us, at the hearing of the application, were Messrs. Yahya Njama and Daimu Halfan, both learned advocates, who appeared for the applicant and Mr. Amin Mshana, the learned advocate, who appeared for the respondent.

Prior to the commencement of hearing, and following a brief dialogue between the Bar and the Bench, Mr. Mshana prayed to withdraw the preliminary point of objection which was earlier on lodged

in Court on 16.10.2020. We interpose here to remark that, Mr. Njama did not object to that prayer and consequently, the preliminary objection was forthwith marked withdrawn.

Mr. Daimu was the first to address us on the application. He prefaced his submission by arguing that the present application was filed in the name of Juma Posanyi Madati, the applicant who is now deceased, and therefore, he implored us in terms of Rule 57 (3) of the Rules to substitute the name of Uthmaan Madati, the legal representative in place of the deceased appellant, and further, prayed that the affidavit and written submissions should remain intact. Taking into-account that Uthmaan Madati has been granted letters of administration of the deceased estate by Kawe Primary Court in Dar es Salaam in Probate Cause No. 85 of 2019 and this Court had on 24· 08. 2021 in Civil Application No. 287/17 of 2020 granted leave to him to amend the notice of appeal and insert his name as a legal representative, and as Mr. Mshana did not object to those prayers, we accordingly, pursuant to Rule 57 (3) of the Rules, substituted the name of Uthmaan Madati, the legal representative in place of Juma Posanyi Madati the deceased applicant as prayed.

Mr. Daimu then, in his brief address, fully adopted the notice of motion, the accompanying affidavit and the written submission in support of the application without more and urged the Court to grant the application with costs on the basis of the contents therein.

In both the adopted affidavit and written submission, the applicant contended that he was allocated the suit plot by the relevant authorities way back in 1999 and that throughout he has been duly paying land rent and the Letter of Offer has never been revoked or withdrawn and that he developed the suit plot which was previously underdeveloped and that this fact was not considered by the learned trial Judge who otherwise would have found that the respondent was a trespasser who invaded the suit plot and demolished properties erected by the applicant. The applicant also contended that there exists serious errors and illegality in the impugned decision of the High Court and referred to the legal points that challenged the jurisdiction of the court and the competence of the counterclaim which according to him were not heard and determined. That, in his view, did not only vitiated the entire proceedings of the High Court but also denied the applicant the right to own, possess and use the suit land. To support his point, reliance was

placed in the case of **Venonica Fubile v. National Insurance Corporation and Others**, Civil Application No. 168 of 2008 and **Fanuel Mantiri Ng'unda v. Herman Mantiri Ng'unda & 20 Others**, Civil Appeal No. 8 of 1995 (both unreported). The applicant also contended that he is willing and has made firm undertaking to furnish security in the manner and to the extent as will be ordered by the Court for the due performance of the decree. The applicant further contended that, undue hardship, substantial and emotional loss will result to the applicant if execution is not granted. If we may pause here for a moment, it is instructive to state that, rather surprising, and for an obscure cause the applicant did not state at considerable length this fact in the affidavit in support of the notice of motion.

Mr. Daimu rounded up by spiritedly arguing that, the applicant has complied with all the conditions stated under Rule 11 (2) (d) (i) (ii) and (iii) of the Rules and to fortify his argument, he referred us to the case of **Ibrahim Ally Yusuf Mrope** (Administrator of the Estate of **Salum Ally Yusuf Mrope) v. Nalgis Ally Yusuf Mrope & Another**, Civil Application No. 193 of 2016 (unreported).

In opposition, Mr. Mshana was brief and focused. He, at first, adopted both the affidavit in reply and the reply written submission and then proceeded to argue against the grant of an order of stay of execution. He particularly implored the Court to take note of paragraphs 12, 14 and 15 of the affidavit in reply and emphatically find that the applicant has not satisfied the mandatory requirement for grant of an order for stay of execution cumulatively as provided under Rule 11 (5) of the Rules. He further, argued that, substantial loss to be suffered by the applicant and preparedness to furnish security have not been sufficiently canvassed apart from a bare allegation at paragraphs 11 and 12 of the affidavit in support of the notice of motion which falls short of demonstrating substantial loss to be suffered by the applicant. Mr. Mshana, forcefully submitted that, it is elementary law and authorities are bound that substantial or irreparable loss must be detailed. To this proposition, he cited the case of **Nicholas Nere Lekule v. Independent Power (T) Ltd and Another** [1997] T.L.R. 58 and **Tanzania Cotton Marketing Board v. Cogecot Cotton Co. SA** [1997] T.L.R 63.

In a brief rejoinder, Mr. Daimu reiterated his earlier submission and urged the Court to grant stay of execution of the High Court decree.

We have given due consideration to the rival arguments of the parties and their respective affidavits in support and opposition to the application. At the outset, we wish to express that, the present application was lodged on 27.12.2016, which was before the Rules of the Court were amended by Government Notice No. 362 of 2017. Before the amendment of Rule 11 of the Rules in 2017 vide GN No. 362, an application for stay of execution could be granted when conditions provided under Rule 11 (2) (d) (i) and (iii) of the Rules were met.

That Rule provided that:

> *"11 (2) (d) 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.*
>
> *(ii) that the application has been made without unreasonable delay; and*
>
> *(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."

Quite clearly, the conditions stated above has to be complied with cumulatively and short of which the Court will be compelled to decline granting the order for stay of execution. There is a considerable body of case laws on this, see for instance, the case of **Joseph Soares @ Goha v. Hussein Omary**, Civil Application No. 12 of 2012 (unreported) in which the Court religiously stated that:

> *"The Court no longer has the luxury of granting an order of stay of execution on such terms as the Court may think just; but it must find that the cumulative conditions enumerated in Rule 11 (2) (b), (c) and (d) exists before granting the order. The conditions are:*
>
> *(i) Lodging a Notice of Appeal in accordance with Rule 83;*
> *(ii) Showing good cause and;*
> *(iii) Complying with the provisions of item (d) of sub-rule 2."*

Corresponding observations were made in the case of **National Housing Corporation v. A. C. Gomes (1997) Ltd**, Civil Application No. 133 of 2009, **Mantrac Tanzania Limited v. Raymond Costa**,

Civil Application No. 11 of 2010, **Mtakuja Kondo and Others v. Wendo Maliki**, Civil Application No. 74 of 2013 and **Therod Fredric v. Abdusamudu Salim**, Civil Application No. 7 of 2012 (all unreported).

In the light of the above position of the law, we are now remained with the question on whether in the instant application the applicant has complied with the cumulative conditions set out under Rule 11 (2) (d) of the Rules. We shall be guided by the principles stated above in determining as to whether or not the applicant cumulatively complied with all the conditions to warrant the grant of the application.

We will start with the issue on whether the application was made without unreasonable delay. Records bear out that the impugned judgment and decree were handed down on 04.05.2016 and on 18.05. 2016 the applicant lodged the notice of appeal and because the applicant did not receive the requested documents in time, on 30.07.2016 he instituted the application for enlargement of time to lodge an application for stay of execution in which he was granted 21 days from 06.12.2016 when the ruling was delivered and the instant application was lodged on 27.12.2016 which is well within the time prescribed by the Court. Time without number, we have emphasized

that, a party who wishes to have the execution of a decree stayed must therefore do so within a reasonable time, see- for instance, **Loswaki Village Council and Another v. Shibesh Abebe** [2000] T.L.R. 204. It is therefore, not in dispute that the notice of motion in the present application was brought without delay.

We will next examine whether or not the applicant has successfully demonstrated that he stands to suffer substantial loss if an order for stay of execution is not granted.

The applicant at paragraph 12 of the affidavit enumerates what he thinks are worth consideration by the Court and in particular he averred that, if stay is not granted undue hardship, substantial and emotional loss will result to the applicant. As alluded to before, the applicant, rather surprising, and for an obscure cause did not state in details the particulars of substantial loss other than making mere assertion which is not enough. Mr. Mshana, quite understandably, averred in his affidavit in reply at paragraph 14 that, the respondent states nothing in terms of details of irreparable loss. The Court has on numerous occasions, been reluctant to issue an order for stay where the applicant does not sufficiently demonstrate in the affidavit in support of the notice of

motion that they stand to suffer substantial loss if stay order is not granted. In the case of **Tanzania Cotton Marketing Board** (supra), in which the applicant like in the present application merely asserted in the affidavit in support of the notice of motion that, if the amount awarded is to be executed, the applicant will suffer such great loss that the business of the applicant would be brought to a standstill, it was observed at page 67 that:

> *"In this case from the deposition in the affidavit and the submission by the applicant's counsel at the hearing of this application, I am not convinced that the applicant has shown that in fact he would be subjected to substantial loss if stay order is not granted.* ***The matter has not, with respect, been taken beyond the stage of vague assertion that great ioss would be incurred and that business would be brought to a standstill if stay order is not issued. That is not enough."*** [Emphasis added]

Back to the application before us, it is on record, and undisputed for that matter, that the affidavit in support of the notice of motion only provides scanty information if not skeletal averments by way of assertion that if stay is not granted undue hardship, substantial and

emotional loss will result to the applicant. With respect, we are of the considered opinion that, that by itself was not enough.

It is during the submission where in arguing that aspect, the applicant contended that undue hardship, substantial and emotional loss will result to the applicant if the decision sought to be stayed is implemented. Elaborating further, at pages 2 and 3 in particular paragraph 2.1 of the written submission in support of the application, the applicant contended that, there is an imminent likelihood that the respondent may dispose of the suit property, unless the order for stay of execution is made. In response to this Mr. Mshana argued that the suit property was long sold.

In our considered opinion, the argument by the applicant is sounding impressive, but sadly this was not borne out by the affidavit as clearly indicated in the paragraphs of the affidavit we took pain to reproduce above. Even if we argued for the sake of arguments, that the reasoning by the applicant in this respect was valid and helpful to the applicant which we don't think so, this was a point which was canvassed by counsel in their submission. It is now settled that as a matter of general principle, submissions by counsel, as opposed to an affidavit,

are not evidence. Luckily, this Court has had occasion to pronounce itself on a similar issue in the case of **The Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman of Bunju Village Government and Others**, Civil Appeal No. 147 of 2006 (unreported), when faced with analogous situation we stated that:

> *"With respect however, submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."*

The above being the circumstances, in our view, prudence and common sense would demand that we shall not make a painstaking inquiry into the other aspect of furnishing security for the due performance of the decree. While we acknowledge the fact that the applicant has both in the notice of motion and paragraph 11 of the affidavit undertaken to furnish security, and that the court has the discretion to direct on the security to be furnished, in the circumstances of this application, we think in the light of our deliberation above, not all conditions have been met. On the whole, a person seeking to stay a decree of the court under Rule 11 (2) (d) of the Rules had to

Cumulatively demonstrate all conditions stated under that Rule which is not the case in the application before us for the reasons stated.

In these circumstances, we are satisfied that the applicant has failed to demonstrate that he stands to suffer substantial loss and consequently, the application, therefore, lacks merit. It is accordingly dismissed with costs.

DATED at **DAR ES SALAAM** this 21st day of April, 2022.

F.L.K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P.F. KIHWELO
JUSTICE OF APPEAL

The Ruling delivered this 25th day of April, 2022 in the presence of Mr. Halfani Daimu, learned counsel for the applicant, and Mr. Halfani Daimu, holding brief for Mr. Amini Mshana, learned counsel for the respondent, is hereby certified as a true copy of original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL

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