

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MWARIJA, J.A., SEHEL, J.A. And MASHAKA, J.A.)**

**CIVIL APPLICATION NO. 456/17 OF 2019**

**GRACE OLOTU MARTIN ..... APPLICANT**

**VERSUS**

**AMI RAMADHANI MPUNGWE ..... RESPONDENT**

**[Application from the Judgment and Decree of the High Court of Tanzania  
(Land Division) at Dar es Salaam]**

**(Wambura, J.)**

**dated the 27<sup>th</sup> day of September, 2017**

**in**

**Land Case No. 359 of 2014**

**.....**

**RULING OF THE COURT**

*26<sup>th</sup> September, 2022 & 2<sup>nd</sup> December, 2022*

**MASHAKA, J.A.:**

By notice of motion lodged on 16<sup>th</sup> October, 2019, the applicant Grace Olotu Martin moved the Court seeking an order staying execution of the decree of the High Court of Tanzania (Land Division) dated 22<sup>nd</sup> September, 2017 in respect of Land Case No. 359 of 2014. Notably the decree of the High Court emanating from the judgment in which the respondent had instituted a suit against the applicant and was declared

the lawful owner of the suit property Plot No. 133, Block C, Tegeta, Kinondoni Municipality, Dar es Salaam, that the applicant was a trespasser to the suit property and required vacant possession irrespective of the developments made therein. Also, the applicant, her relatives, her assignees and her agents were permanently restrained from trespassing the suit property. The respondent was awarded general damages of TZS. 100,000,000/= with interest at the court rate from the date of the Order to the date of full payment and costs of the suit. The applicant was dissatisfied and lodged a notice of appeal followed by this present application before us.

The application is made under rules 4 (2) (b), 11 (3), (4), (5), (6) and (7) of the Tanzania Court of Appeal Rules (the Rules). The grounds upon which the stay order is sought are as follows:

*"(a) There are good and satisfactory reasons for staying execution of the said judgment and decree to prevent ends of justice from being defeated especially when the judgment itself is tainted with material errors on the face of the record.*

*(b) On the balance of convenience, the applicant is likely to suffer irreparable loss in the event the execution proceeds without being heard on appeal, as the subject matter concerns her home of 13 years."*

The notice of motion is supported by affidavit of the applicant. In addition, the applicant lodged written submission in support of the application in terms of rule 106 (1) of the Rules. On 13<sup>th</sup> May, 2022 Mr. Emmanuel Augustino, advocate for the applicant filed a supplementary affidavit under rule 49 (2) of the Rules. On the other hand, the application is contested by the respondent upon lodging affidavit in reply and a reply to the submission by the applicant under rule 106 (8) of the Rules.

At the hearing of the application Mr. Emmanuel Augustino, learned counsel represented the applicant. On the adversary side, the respondent had the services of Mr. Lusajo Willy, learned counsel.

In his brief oral arguments supporting the application, Mr. Augustino adopted the notice of motion, the affidavit and supplementary affidavit. Learned counsel argued that the applicant has fully complied with the conditions stipulated under rule 11 (4), (5) (a) and (b) and (7) (a), (b), (c)

and (d) of the Rules. He submitted that the application was lodged within the prescribed period after service upon the applicant of the intended notice of execution by the executing party, that the applicant and her family will suffer substantial loss if the stay order is not granted and a firm undertaking and willingness by the applicant to furnish a bank guarantee as security for the due performance of the decree, if the intended appeal is unsuccessful. Mr. Augustino implored the Court to grant the stay order.

In his response, Mr. Willy strongly opposed Mr. Augustino's submission that the applicant has complied with rule 11 5(a) and (b) of the Rules. The basis of his arguments was that the applicant has not shown any substantial loss that she will suffer if the stay order is not granted. Further, he argued that the respondent wants the applicant to pay a monthly rent and has no intention to demolish the house or evict her, as the respondent was declared the lawful owner and the applicant a trespasser. Arguing further, Mr. Willy underscored that the applicant has not paid the general damages and still occupying the suit property. Upon a brief dialogue with the Court on the wishes of the respondent that the

applicant pays a monthly rent, he admittedly submitted that though the decree does not provide for that, he maintained that she pays rent.

On the condition set under rule 11 (5)(b) of the Rules, Mr. Willy submitted that the applicant has not made a firm undertaking to provide security for the due performance of the decree. Therefore, the applicant has not cumulatively complied with it.

Concluding, Mr. Willy urged the Court to dismiss the application with costs.

Rejoining, Mr. Augustino reiterated his earlier submission and explained that the notice of execution by the respondent is requesting for the applicant to pay a monthly rent or her eviction from the suit property. Thus, he prayed for ample time to secure a bank guarantee as security for due performance of the decree by the applicant as she is working in Sweden.

The issue for our determination is whether the application is meritorious.

The application is made under rule 11 of the Rules, governing stay of execution. The record of the application shows that the applicant has met the conditions of rule 11 (4) and (7)(a), (b), (c) and (d) of the Rules. It is apparent that the application was lodged on 16<sup>th</sup> October, 2019 within fourteen days of the service of the notice of execution by the executing officer on 15<sup>th</sup> October, 2019 accompanied by the relevant copies of the documents stated by rule 11 (7)(a), (b), (c) and (d) of the Rules.

An order for stay of execution of a decree may be issued by the Court upon compliance by the applicant of rule 11 (5)(a) and (b) of the Rules, which states as follows: -

*"11 (5) 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."*

The first condition is that the applicant applying for the order has to establish that she will suffer substantial loss if a stay order is not granted.

The applicant claimed in paragraph 13 of her affidavit that : -

*"That, I stand to suffer irreparable loss in the event the execution proceeds to the end."*

Mr. Augustino averred in paragraph 6 of supplementary affidavit that: -

*"6. That, the said house is the only dwelling house for the applicant's family, having built it way back in 2004 and the family has continued to live there on ever since."*

Regarding the second condition that the applicant furnishes security for the due performance of the decree, Mr. Augustino stated at paragraph 8 of supplementary affidavit that: -

*"8. The applicant firmly undertakes to furnish security in the form of bank guarantee as will be binding upon her for the application to be granted."*

Earlier Mr. Willy disputed the contentions of paragraph 13 of supporting affidavit that, the applicant has not shown that she will suffer any loss, arguing that the respondent wants the applicant to pay a monthly rent because he is the lawful owner and the applicant trespasser is still occupying the suit property. Yet, he conceded that the decree did not order the applicant to pay a monthly rent. He maintained that the applicant has not complied with rule 11 (5) (b) of the Rules and urged the Court to dismiss the application with costs.

On our part having examined the record of the application, we are convinced the applicant has demonstrated that since 2004 the suit property has been a dwelling house for her and family and has continued to live there ever since. We agree that she would suffer loss if the execution is carried out by the respondent before the hearing and determination of the intended appeal by this Court.

On the contention by Mr. Willy that the applicant ought to pay a monthly rent to the respondent, we respectfully disagree. The decree which is to be stayed did not order so.

The applicant has shown willingness to furnish security for the due performance of the decree. Thus, we respectfully take leave to differ with Mr. Willy's contention that the applicant has not shown any loss that she would suffer and the non-compliance of rule 11 (5) (b) of the Rules. We hold that despite applicant's firm undertaking and willingness to furnish security, it is upon the Court to impose the conditions on the intended security to be furnished by the applicant as we held in **Shirika la Usafiri DSM Ltd v. Flamingo Auction Mart Co. Ltd**, Civil Application No. 555/16 of 2018 (unreported).

We are satisfied that the applicant has met the requisite conditions cumulatively under rule 11 (5) (a) and (b) of the Rules. In the circumstances, we grant it and order that execution of the decree of the High Court (Land Division) in Land Case No. 359 of 2014 be stayed pending the hearing and determination of the intended appeal.

The grant is conditional upon a deposit by the applicant in the form of a bank guarantee in the sum of TZS. 100,000,000/= as security for the due performance of the decree within ninety (90) days from the date of this ruling.

Costs of the application shall abide the outcome of the intended appeal. We so order.

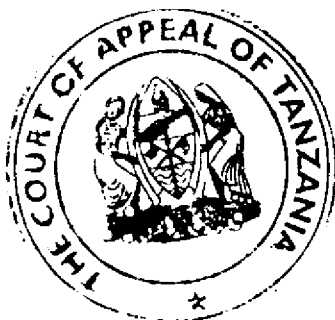
**DATED at DAR ES SALAAM, 22<sup>th</sup> this day of November, 2022.**

A. G. MWARIJA  
**JUSTICE OF APPEAL**

B. M. A. SEHEL  
**JUSTICE OF APPEAL**

L. L. MASHAKA  
**JUSTICE OF APPEAL**

The Ruling delivered this 2<sup>th</sup> day of December, 2022 in the presence of Mr. Lusajo Willy, learned Counsel for the Respondent and also holding brief for Mr. Emmanuel Muga learned Counsel for the Applicant is hereby certified as a true copy of the original.



A handwritten signature in black ink, consisting of a large, stylized loop followed by a horizontal stroke.

J. E. FOVO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**