IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: RUTAKANGWA, J.A., KAIJAGE, J.A., And MUSSA, J.A.)

CIVIL APPLICATION NO. 16 OF 2012

AHMED ABDALLAH ..... APPLICANT

VERSUS

MAULID ATHUMAN ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mwanza)

(Sumari, J.)

dated the 23rd day of May, 2012
in
Land Appeal No. 26 of 2010
.....
RULING OF THE COURT

4th & 11th December, 2013

KAIJAGE, JA.:

The applicant was a losing party in Land case No. 242 of 2009 instituted in Mwanza District Land and Housing Tribunal. In that case, the respondent was a successful party. Dissatisfied with the decision of the trial Tribunal, the applicant unsuccessfully appealed to the High Court in Land Appeal Case No. 26 of 2010. The said first appellate court in its judgment dated 13/7/2012 dismissed applicant's appeal with costs. Dissatisfied, the applicant lodged a notice of appeal with the Registrar of the High Court on 25/7/2012.

In order to thwart any attempt by the respondent (decree holder) to execute the decree in his favour before the institution and/or conclusive determination of the intended appeal, the applicant lodged the present

application on 29/8/2012. By the Notice of Motion under Rule 11(2) (b) and (c) of the Tanzania Court of Appeal Rules (the Rules), the applicant is moving this court for an order staying the execution of the High court decree in appeal on the following grounds:-

> *"(i) The applicant is aggrieved by the judgement and decree of the High Court and intends to appeal to the Court of Appeal.*
>
> *(ii) The decree holder has no Locus stand to file a suit against the applicant herein.*
>
> *(iii) The respondent herein is not a lawful owner or landlord of the estate land property.*
>
> *(iv) If the decree will be executed, the intended appeal will be rendered nugatory."*

Applicant's affidavit filed in support of the application contains some significant averments in paragraph 7 which read:-

> *"That, if the Court will not grant this application and decree in appeal executed, the applicant will suffer an irreparable loss because I have already paid a full house rent and the respondent is in preparation to execute the High Court decree and my intended appeal have overwhelming chances of success."*

In his affidavit in reply, the respondent vehemently denies the averments in paragraph 7 of the affidavit filed in support of the application and has put the applicant to strict proof thereof.

Before us, Mr. Jerome Muna, learned advocate, appeared for the applicant and the respondent appeared in person, fending for himself.

When the application was called on for hearing, Mr. Muna in his oral submission belatedly made attempts to bring the applicant's application within the scope and spirit of Rule 11(2) (d) of the Rules by, **firstly,** adopting the averments in paragraph 7 of the supporting affidavit and, **secondly,** by ignoring and abandoning both the supporting written submissions and grounds (i) to (iii) supportive of his Notice of Motion. **Thirdly,** he introduced one new ground namely:- that the application has been made without unreasonable delay.

Notwithstanding the attempts made to bring the applicant's application in conformity with the dictates of the law, we are of the firm view that the applicant has not satisfied the cumulative preconditions which attend the grant, by this Court, of stay of execution orders. These preconditions are found under Rule 11(2) (d) of the Rules which provides:-

> *"Subject to the provisions of sub-rule 1, the institution of an appeal shall not operate to suspend any sentence or to stay execution but may:-*
> *(a) – (c) (not relevant)*

(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 unless the order is made;

(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 a decree or order as may ultimately be bending upon him."

[Emphasis is ours.]

This Court in its recent decisions has taken a stance that the foregoing three preconditions stipulated under Rule 11(2)(d) of the Rules, must be conjunctively and not disjunctively satisfied by the applicant before a stay of execution order can be granted. (See, for instance, **JOSEPH ANTONY SOARES @ GOHA V. HUSSEIN S/O OMARY,** Civil application No. 6 of 2012, **THEROD FREDRICK V. ABDUSAMADU SALIMU** Civil Application No. 7 of 2012 and **GEITA GOLD MINING LIMITED V. TWALIB ALLY,** Civil Application No. 14 of 2012, CAT (all unreported).

In this case, neither in the supporting affidavital evidence nor in his both written and oral submissions has the applicant alluded to precondition (iii) of

item (d) of Rule 11 (2) of the Rules. In other words, no security has been given by the applicant for the due performance of the decree or order as may ultimately be binding upon him. For purposes of satisfying the said precondition, a firm undertaking by the applicant to provide security might prove sufficient to move the Court to grant a stay order. Consistent with the foregoing, we held thus in **MANTRAC TANZANIA LTD V. RAYMOND COSTA,** Civil Application No. 11 of 2010 (unreported):-

> *"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 a stay order, provided the Court sets a reasonable time limit within which the applicant should give the same."*

We have already demonstrated that the cumulative preconditions in item (d) (i) (ii) and (iii) of Rule 11(2) must be satisfied conjunctively. It is, therefore, not enough for the applicant to establish, as in this case, that substantial loss may result if a stay order is not made and that the application has been made without unreasonable delay. On the authority of decided cases referred to hereinabove, it is also imperative that security should have been given by the applicant for the due performance of a decree as may ultimately be binding upon him.

The applicant having failed to satisfy a precondition touching on the security for the due performance of a decree as might ultimately be binding upon him, we decline to grant the order sought in the application. Accordingly, we dismiss this application with costs.

It is so ordered.

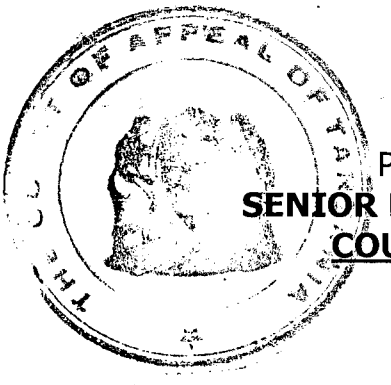
DATED at MWANZA this 10th day of December, 2013.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

K. MUSSA
JUSTICE OF APPEAL

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



P.W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL