

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

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

CIVIL APPLICATION NO. 96 OF 2014

JUMA KASSIM KIMVULI APPLICANT

VERSUS

SHABAN SWALEH SULTAN RESPONDENT

**(Appeal from the Judgment and decree of the High Court of Tanzania
at Dar es Salaam)**

(Mziray, J.)

Dated 24th day of April, 2014

in

Land Case No. 161 of 2011

RULING OF THE COURT

10th & 19th July, 2017

MMILLA, JA.:

The applicant in this matter, Juma Kassim Kimvuli, who enjoys the services of Mr. Francis Mgare, learned advocate, is applying for an order for stay of the execution of the judgment and decree of the High Court of Tanzania (Land Division) at Dar es Salaam in Land Case No. 161 of 2011. The application is filed under Rule 11 (2) (b) and (c) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by the affidavit sworn by the applicant himself.

The respondent, Shaban Swaleh Sultan, who appeared in person and undefended, is resisting this application. It is note-worthy however, that he did not file an affidavit in reply. Of course, that fact alone does not deny him the right to defend the application.

At the outset, Mr. Mgare prayed to adopt the written submissions he filed on 21.7.2014, and hastened to add that he had nothing to add.

In his written submission, Mr. Mgare was brief that they complied with all the conditions provided under Rule 11 (2) (d) (i), (ii), and (iii) of the Rules. He amplified that because the decision of the High Court was delivered on 24.4.2014, and since the present application was filed on 4.6.2014, it is certain that the application was lodged without unreasonable delay.

On another point, Mr. Mgare submitted that if the order for stay of execution will not be granted, the applicant stands to suffer substantial loss which cannot be atoned by way of damages. He relied on the case of **Bansidhar v. Pribhu Dayal** [1954] AIR 41 Ray, cited at page 67 in the case of **Tanzania Cotton Marketing Board v. COGECOT Company S.A.** [1997] T.L.R. 63. He added that if execution will be effected resulting into the applicant's eviction from the 40 acres of fully developed land, the

subject matter in the pending appeal, the latter will suffer substantial loss. This is especially so, Mr. Mgare submitted further, when it is considered that the respondent's age is very advanced, therefore the latter will not be able to compensate the applicant for the unexhausted improvements so far made on the said land, if he wins the appeal. He reinforced his argument by citing the case of **Nicholas Nere Lekule v. Independent Power (T) Ltd & Another** [1997] T.L.R. 58.

As regards the condition for security for the performance of the decree in case the appeal will ultimately be dismissed, Mr. Mgare contended that this condition does not apply in the circumstances of this case because if the appeal will be decided in favour of the respondent, he will take possession of the land which is the subject matter. When probed as to who is currently possession of that land, Mr. Mgare responded that it was in the applicant's possession. He insisted that there was no need to make any undertaking in the notice of motion or the affidavit in support of the application in the circumstances of this case.

The respondent made a short submission that he was asking the Court to dismiss the application because that the applicant did not advance good grounds to support the grant of the order for stay of execution.

We wish to briefly state the obvious that in an application under Rule 11 (2) (b) (c) and (d) of the Rules, an order for stay of execution will not be granted unless the cumulative conditions itemized in sub rule (2) (d) (i) to (iii) of Rule 11 of that Rules are complied with. Those conditions are:-

- 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 undue 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.

See also the cases of **Ahmed Abdalla v. Maulid Athuman**, Civil Application No. 16 of 2012, CAT, and **Joseph Soares @ Goha v. Hussein Omary**, Civil Application No. 6 of 2012, CAT (all unreported).

There is no controversy that since the application was lodged within a period of 40 days counted from 24.4.2014 when the decision which is central in this matter was delivered, to 4.6.2014 when it was lodged; the present application was lodged without unreasonable delay. Thus, we are satisfied that this condition was complied with.

Equally, the applicant has complied with the condition touching on the question of whether or not substantial loss may result to the applicant if an order for stay of execution will not be made. Once again, we are satisfied that the applicant has demonstrably shown in paragraphs 6 to 9 of his affidavit in support of this application, as well as in his written submission that he stands to suffer substantial loss, the like of which is stated in the case of Tanzania **Cotton Marketing Board v. COGECOT Company S.A.** (supra), if such order is not granted.

Finally is the condition concerning the aspect of security for the due performance of such decree or order as may ultimately be binding upon the applicant in case the appeal will eventually be dismissed.

As already pointed out, Mr. Mgare contended that this condition does not apply in the circumstances of this case. He reasoned that if the appeal will eventually be decided in favour of the respondent, he will take possession of the land which is the subject matter. He also admitted that no undertaking was made in the notice of motion or the affidavit in support of the application.

On our part, we find that Mr. Mgare's contention that this condition is not applicable in the circumstances of this case is flawed and misconceived.

This is particularly so when it is considered that the applicant is the one who is currently in possession of the said landed property. We emphasize two things; **one** that, the applicant ought to have made an undertaking in his pleadings as regards security of performance; and **two** that, in an application under Rule 11 (2) (b) (c) and (d) of the Rules, an order for stay of execution will not be granted unless the **cumulative conditions** itemized in sub rule (2) (d) (i) to (iii) of Rule 11 of that Rules are complied with. See the cases of **Ahmed Abdalla v. Maulid Athuman** and **Joseph Soares @ Goha v, Hussein Omary** (supra), among others. It was held in the case of **Ahmed Abdalla v. Maulid Athuman** that:-

*" 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. Twaib Ally**, Civil Application No. 14 of 2012 , CAT" (all unreported). (Emphasis added).*

Where therefore, the applicant may not have complied with all the three conditions cumulatively under Rule 11 (2) (d) of the Rules in an application for stay, the Court will not exercise its discretionary powers to grant the order sought.

In the upshot, since the condition for security of performance has not been complied with in the present matter, we decline to grant the order for stay of execution. Thus, the application is dismissed with costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 14th day of July, 2017.

K. M. MUSSA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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


E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL