

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., KEREFU, J.A. And MAIGE, J.A.)

CIVIL APPLICATION NO. 309/01 OF 2022

STEPHEN NDIRANGWA MZIRAY APPLICANT

VERSUS

ANGELINA STEVEN CHACHARESPONDENT

**(Application for an order of stay of execution of the decree of the
High Court of Tanzania at Dar es Salaam)**

(Mwaseba, J.)

dated the 30th day of December, 2021

in

Civil Appeal No. 34 of 2021

RULING OF THE COURT

14th & 17th November, 2023

MAIGE, J.A.

The applicant petitioned to the District Court of Kigamboni (the trial court) against the respondent for dissolution of the marriage, division of matrimonial assets and custody of the three issues of the marriage. While the first two reliefs were granted to the satisfaction of the applicant, the last relief was only successful to the extent of the first two issues of the marriage. As against the last issue, the trial court ordered that she should remain under the custody of the respondent. Perhaps as a consequential relief, the trial court awarded maintenance order in favour of the respondent in respect of the last issue for her food and upkeep at the rate of TZS 250,000 per

month. It further directed that education expenses for all children be borne by the applicant.

Aggrieved, the respondent appealed to the High Court questioning the correctness of the decision of the trial court in determining distribution of the matrimonial assets as well as the custody and maintenance of the issues of the marriage. The High Court while upholding the decision of the trial court on custody and maintenance of the issues of the marriage, it reversed the decision to the extent of distribution of matrimonial assets and replaced it with a decree that; with the exception of those properties which were acquired after 2017, all properties acquired during the subsistence of the marriage were matrimonial assets and should be equally divided between the parties.

Unhappy with the decision, the applicant lodged a notice of appeal signifying his desire to appeal against the decision of the High Court. Subsequent upon lodging of the notice of appeal, it would appear, the applicant commenced execution proceeding at the trial court by way of attachment and sale of disputed matrimonial houses. It is on that background that, the applicant initiated the current application for stay of execution of the decree pending hearing and determination of the intended appeal. The application is founded on the affidavit of the applicant which has not been contested by any affidavit in reply by the respondent.

At the hearing of the application, the applicant was represented by Messers. Godlove Godwin and Geofrey Mushumbusi, both learned advocates. On the other hand, the respondent was represented by Mr. Winston Mosha, also learned advocate. Right from the outset, Mr. Mosha informed the Court that, the respondent was not intending to oppose the application. He prayed, however that, should the stay order be granted, it be without costs. With the concession, Mr. Godwin had nothing much to submit than urging the Court to grant the application with no order as to costs. He submitted, however that, in the nature of this case, the appropriate form of security would be an undertaking to furnish a commitment bond not to disturb the status quo of the properties in dispute as of the date of the pronouncement of the judgment in question.

We have taken time to study the notice of motion, affidavit in support thereof and the accompanying attachments. We are satisfied that the application has been lodged within 14 days from the date of the notice of execution and, therefore, well within time. Besides, we have observed that all conditions for grant of stay of execution have been met. In the first place, the respondent's application for execution at the trial court intends to realize, by way attachment and sale of the matrimonial properties in dispute, the amount of TZS 67,255,000.00 which is neither express nor implied in the decree of the High Court. Obviously, therefore, if stay order is denied and

the execution application granted, the applicant is likely to suffer substantial loss as averred in paragraph 10 the affidavit.

In the second place, the applicant has undertaken in paragraph 13 of his affidavit to furnish security in due performance of the decree should the intended appeal fails. In his submission which was not contested by Mr. Mosha, Mr. Godwin proposed that the security in the circumstances of this case be by way of the applicant committing himself to maintain the status quo of the disputed properties.

The requirement that the applicant should in an application for stay of execution furnish security in due performance of a decree is set out under rule 11(5) (b) of the Rules. As we held in **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application No. 1 of 2010 (unreported), to meet the said condition, it is not necessary that the respective security must be actually furnished before the grant of the application. It would suffice if a firm undertaking to provide such security is given. In this case, the decree involved pertains to payment of maintenance allowance and distribution of matrimonial properties which are the subject of the contention in the intended appeal. Dealing with a case which is more or less similar with this, the Court, in the case of **Suleiman Yusuf Ali v. Sultanali Abdallah Gulamhussein**, Civil Application No. 421/15 of 2018 [2019]TZCA 452 (17 October, 2019, TANZLII) took the view that a firm undertaking to execute a

commitment bond that the suit property would remain in the same condition as it was at the time when the decree was passed, was a sufficient security for the purpose of compliance with the condition under rule 11(5) (b) of the Rules. The same position appeared in the case of **Mohamed Masoud Abdallah and 16 Others v. Tanzania Road Haulage (1980) Ltd**, Civil Application No. 58/17 of 2016 [2019] TZCA 198 (17 June, 2019, TANZLII) which was referred in the authority just mentioned in the following words:

"After having considered the circumstances of this case where the impugned decree is not monetary, we have in the end found it appropriate to order the applicants to furnish security for the due performance of the decree suiting the particular circumstances of the case.

As security for due performance of the decree we order that each applicant shall execute a bond committing himself/herself to maintain the status quo of the premises which are subjects of the decree within fourteen (14) days from the date of delivery of this ruling ."

Applying the above reasoning, therefore, we agree with the concurrent submission by the counsel from both sides that, the applicant can comply with the security requirement by executing a commitment bond to maintain the status quo of the properties in dispute as it was when the decree of the High Court was being passed. We, therefore, grant the application.

In the final result, we order that the execution of the decree of the High Court dated 30th December, 2021 arising from Civil Appeal No. 34 of 2021 be stayed pending hearing and determination of the intended appeal. The order of the stay of execution is conditional upon the applicant executing the said bond within thirty days from the date hereof. As the applicant did not press for costs, we make no order as costs.

DATED at DAR ES SALAAM this 16th day of November, 2023

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Ruling delivered this 17th day of November, 2023 in the presence of Mr. Geoffrey Mushumbusi, learned counsel for the Applicant and Mr. Winston Mosha, learned counsel for the Respondent, is hereby certified as a true copy of the original.




J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL