

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPLICATION NO. 637/17 OF 2022

LAURIAN RWEMBEMBELA.....APPLICANT

VERSUS

ALEX JASPER MAFURU..... RESPONDENT

**(Application for Stay of Execution of the Judgment and Decree of the
High Court of Tanzania, Land Division at Dar es Salaam)**

(Mgeyekwa, J.)

Dated the 19th Day of August, 2022

in

Land Appeal No. 19 of 2022

RULING OF THE COURT

18th & 22nd March, 2024

KEREFU, J.A.:

The applicant, Laurian Rwembembela, on 29th August, 2022 filed a notice of appeal seeking to challenge the decision of the High Court (Mgeyekwa, J. as she then was), in Land Appeal No. 19 of 2022 dated 19th August, 2022. As the intended appeal is still pending, the applicant has approached this Court by way of notice of motion made under Rule 11 (3), (4), (4A), (5) (a), (b), (6), (7) (a), (b), (c), (d) of the Tanzania Court of Appeal Rules, 2009 (the Rules) for stay of execution of the decree passed in that case, pending the final determination of the

appeal. The grounds indicated in the notice of motion can conveniently be paraphrased as follows, that:

- (i) The applicant has received the notice of execution from the District Land and Housing Tribunal at Mwananyamala and summons to show cause why Execution No. 537 of 2022 filed by the respondent should not proceed;*
- (ii) Substantial and irreparable loss may result to the applicant if the execution is granted as the applicant's wall will be demolished and the intended appeal will be rendered nugatory;*
- (iii) There are serious points of law to be dealt with by the Court in the intended appeal, as follows;*
 - (a) That, the first appellate court erred in law and fact in failure to hold that the respondent was not the lawful owner of the suit property;*
 - (b) That, the first appellate court erred in law in failing to declare that the respondent had no locus standi to sue over an open space which he does not own;*
 - (c) That, the first appellate court erred in law and fact in failing to order that the applicant was denied a right to be heard when the Kinondoni Municipal was relocating beacons over the suit property; and*

(d) That, the first appellate court erred in law by failure to analyze evidence properly including exhibit D1 which shows that the suit property is an open space.

The notice of motion is supported by an affidavit duly sworn by one Richard Madibi, the learned counsel for the applicant. The great part of the said affidavit reiterated the above grounds stated in the notice of motion by way of emphasis including attachment of relevant documents thereto.

It is noteworthy at this juncture that, the respondent, though duly served with the copy of the application, did not file an affidavit in reply to contest and/or otherwise support the application.

Before dealing with the merit or demerit of the application, we find it appropriate to state a brief background giving rise to the judgment and decree sought to be stayed, as obtained from the record of application. That, on 5th September, 2014, the respondent instituted a suit before the District Land and Housing Tribunal (the DLHT) against the applicant together with one Anath Ab-Bakari Galalaro, who is not a party to this application, alleging that the applicant has trespassed into his land Plot No. 281 Block 'D' Tegeta area in Dar es Salaam measuring

2840 square meters (suit property). That, the applicant has encroached into the suit property by 10.75 Meters by mounting a fence wall therein. Thus, the respondent prayed for the following reliefs: (i) an order for demolition of the applicant's wall from the suit property; (ii) payment of TZS. 40,000,000.00 being general damages; (iii) an order restraining the applicant from encroaching the suit property; (iv) interests; and (v) costs of the suit.

In his defence, the applicant denied the respondent's claims and challenged the respondent's *locus standi* to institute the said suit over an open space.

Having heard the parties and considered the evidence adduced before it, the DLHT decided the suit in favour of the respondent and the applicant was ordered to demolish his wall and pay TZS. 5,000,000.00 to the respondent as general damages for the said trespass. In addition, the applicant was ordered to pay the costs of the suit.

Aggrieved, the applicant unsuccessfully appealed to the High Court vide Land Appeal No. 19 of 2022 where the said appeal was dismissed with costs on 19th August, 2022.

Dissatisfied, the applicant, on 29th August, 2022, lodged the notice of appeal to challenge the decision of the High Court. Meanwhile, the respondent, on 19th September, 2022 approached the DLHT vide Execution Application No. 537 of 2022 seeking execution of the impugned decree.

Subsequently, on 3rd October, 2022, the applicant was served with the notice to show cause why the impugned decree should not be executed against him. The said notice also required the applicant to appear for hearing of the said application on 17th October, 2022. The notice prompted the applicant to lodge the current application.

When the application was placed before us for hearing, the applicant and the respondent were represented by Messrs. Richard Madibi and Simba Kipengele, both learned advocates respectively.

In support of the application, Mr. Madibi adopted the notice of motion as well as its accompanying affidavit and the written submission. He then submitted that the applicant has fulfilled the mandatory requirements for grant of an application of this nature. To clarify, the learned counsel referred us to Rule 11(4) of the Rules and argued that the application was filed within the prescribed time as the applicant was

served with the notice of execution on 3rd October, 2022 and lodged this application on 17th October, 2022 within fourteen (14) days. He also referred us to paragraphs 4, 6, 7 and 10 of the affidavit in support of the application and stated that the applicant has attached all the necessary documents, such as; copies of impugned judgment and decree; a copy of the notice of appeal and notice of execution as required by Rule 11 (7) of the Rules.

He further referred us to paragraphs 13 and 15 of the same affidavit and submitted that the applicant has also complied with two conditions stipulated under Rule 11 (5) of the Rules as he had indicated the substantial loss which shall result into him if the order of stay is not granted. That, the applicant will be compelled to pay TZS. 172,166,666.00 plus 30% of the decretal amount which is colossal and contrary to TZS. 5,000,000.00 awarded in the impugned decree of the DLHT. That, if the execution is not stayed, the respondent may not be able to refund the same and the applicant will suffer substantial loss.

On the firm undertaking to furnish security for the due performance of the decree, Mr. Madibi referred us to paragraph 17 of the affidavit and submitted that the applicant has undertaken to furnish

bank guarantee of the decretal amount as will be ordered by the Court. That, the same will be deposited in Court within thirty (30) days from the date of the Court's order. To support his submission, he cited the case of **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application No. 11 of 2010 (unreported) and submitted that, since the applicant has complied with all the conditions and had already lodged the notice of appeal, the application should be granted pending the hearing and determination of the appeal.

In response, Mr. Kipengele submitted that the respondent is not opposing the application, but only insist that the security offered should be issued in accordance with the law and within thirty (30) days indicated by the applicant's counsel. As such, he also prayed for the application to be granted.

We have examined the notice of motion, the supporting affidavit and considered the oral arguments advanced by the learned counsel for the parties. Notwithstanding the respondent's concession to the application, we are still enjoined to determine as to whether the applicant has cumulatively complied with the conditions stipulated under Rule 11 of the Rules. For the sake of clarity, Rule 11 provides that:

"11.- (1) to (3) [NA]

(4) An application for stay of execution shall be made within fourteen days of service of the notice of execution on the applicant by the executing officer or from the date he is otherwise made aware of the existence of an application for execution;

(4A) [NA];

(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.

(6) [NA]

(7) An application for stay of execution shall be accompanied by copies of the following-

(a) a notice of appeal;

(b) a decree or order appealed from;

(c) a judgment or ruling appealed from; and

(d) a notice of the intended execution."

It is evident from the record of the application that the applicant lodged this application on 17th October, 2022 well within the prescribed period of fourteen (14) days in terms of sub-rule (4) of Rule 11 above, as it was filed on the fourteenth day after being served with the notice

of execution on 3rd October, 2022. It is also noticeable that sub-rule (7) of Rule 11 above was fully complied with since the application is accompanied by mandatory copies of the notice of appeal, the High Court's judgment and decree appealed against together with the notice of execution.

It is also evident that, to meet the requirement of sub-rule (5) (a) of Rule 11, the applicant had indicated under paragraphs 13 and 15 of the affidavit that, substantial loss shall result to him if the order of stay is not granted as the applicant will be compelled to pay TZS. 172,166,666.00 plus 30% of the decretal amount which is colossal and contrary to TZS. 5,000,000.00 awarded in the impugned decree of the DLHT. In the circumstances, and taking into account that the respondent is not contesting this application, we are inclined to find that the applicant would be exposed to substantial loss should the impugned decree be executed.

As for the requirement to furnish security in terms of sub-rule (5) (b) of Rule 11, we note the applicant's firm undertaking, under paragraph 17 of the said affidavit, to satisfy the impugned decree through bank guarantee which may ultimately be binding upon him. We

take it as a sufficient undertaking to provide security for the due performance of the decree sought to be stayed. See for instance our previous decisions in **Mantrac Tanzania Limited** (supra); **Joseph Antony Soares @ Goha v. Hussein Omary**, Civil Application No. 6 of 2012 [2013] TZCA 328: [8 May 2013: TANZLII]; **Junior Construction Company Limited & 2 Others v. Mantrac Tanzania Limited**, Civil Application No. 24/16 of 2021 [2021] TZCA 417: [26 August 2021: TANZLII] and **The Registered Trustees of the Chama cha Mapinduzi & 3 Others v. Mehboob Ibrahim Alibhai**, Civil Application No. 117/17 of 2018 [2021] TZCA 444: [26 August 2021: TANZLII].

In the final analysis, we are satisfied that the applicant has cumulatively complied with all the statutory conditions warranting the grant of the stay order. Accordingly, we grant the application and order stay of execution of the decree of the High Court in Land Appeal No. 19 of 2022 that confirmed that of the DLHT at Mwananyamala Dar es Salaam in Land Application No. 100 of 2011 dated 16th December, 2021. The order is on condition that the applicant deposit in the Court, within thirty (30) days from the date of delivery of this ruling, a bank guarantee for the decreed sum of TZS 5,000,000.00. The said guarantee

shall remain in force until full hearing and determination of the intended appeal. In default, the order of stay shall lapse automatically. Finally, and considering the circumstances of this application, we make no order as to costs.

DATED at DAR ES SALAAM this 21st day of March, 2024.

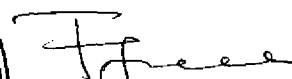
F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. J. NGWEMBE
JUSTICE OF APPEAL

The Ruling delivered this 22nd day of March, 2024 in the presence Ms. Genoveva Kalolo, learned counsel for the applicant, and Mr. Simba Pius Kepengele, learned counsel for the Respondent is hereby certified as a true copy of the original.




F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL