

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

CIVIL APPLICATION NO. 469/01 OF 2021

1. MBARALA A. MAHARAGANDE
2. MADARAKA A. MAHARAGANDE
3. IBARIKI A. MAHARAGANDE
4. MTEGAME A. MAHARAGANDE
5. SALEHE A. MAHARAGANDE

.....APPLICANTS

VERSUS

MAHIKU A. MAHARAGANDE.....RESPONDENT

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

(Wambura, J)

Dated the 28th Day of June, 2012

in

PC Civil Appeal No. 7 of 2009

ORDER

12th October, 2021

KEREFU, J.A.:

This application is brought by way of notice of motion under Rules 11 (3), (4), 5 (a), (c), (6), (7), (b), (c), (d) and 48 (1) of the Court of Appeal Rules, 2009 as amended (the Rules). In essence, the applicants pray for an *ex parte* order for stay of execution of the judgment and decree of the High Court of Tanzania at Dar es Salaam (Wambura, J) dated 28th June, 2012 in PC Civil Appeal No. 12 of 2020 pending determination of this

application *inter partes*. The notice of motion is comprised of seven grounds which were generally indicated for both hearings, *ex parte* and *inter partes*, respectively.

On 12th October, 2021, when the application was called for hearing, the applicants appeared in person without legal representation. However, before I proceeded with the hearing of the matter and grant the *ex parte* prayer sought, I found it apposite to satisfy myself, if the application is properly before me. This was due to the fact that, both the notice of motion and the supporting affidavit are silent on the issue of security for the due performance of the decree sought to be stayed contrary to Rule 11 (5) (b) of the Rules. This being one of the conditions for grant of an application of this nature, I invited the applicants to address me on the said matter.

The first applicant, readily conceded that the issue of security is not captured in the notice of motion and the supporting affidavit, he however argued that they had since discussed the same with their advocate who indicated that in the circumstances of this matter, which emanated from a probate involving blood relatives, the issue of security may not be

necessary. In the alternative, he referred me to ground 7 in the notice of motion, which is captured in the following style –

"That, any other order that this Honourable Court may deem fit and just to grant in the circumstance of this suit"

Based on the above ground, the first applicant urged me to allow them to submit other matters which are not captured in the notice of motion and the supporting affidavit orally. He also submitted that the execution to be stayed is in relation to the deceased estate specifically the house situated on Plot No. 81/2N Block 'B' located at Uhuru Street, Morogoro Municipality (disputed premises) which the respondent purported to sell to a third party. That, if the execution is not stayed the applicants will suffer irreparable loss. He thus prayed the Court to issue a stay order *ex parte* and the safe custody of the money obtained by the respondent in relation to the disputed premises pending the hearing of the application *inter partes*.

The rest of the applicants supported what was submitted by the first applicant without more. In addition, the fifth applicant urged the Court to take note that the matter is long overdue, thus should be finally concluded.

Having considered the oral submissions made by the applicants and perused the record of the application, it is evident that both the notice of motion and the supporting affidavit are silent on the firm undertaking made by the applicants to provide security for the due performance of the decree sought to be stayed as required by Rule 11 (5) (b) of the Rules, thus the application is incompetent. I am mindful of the fact that, in their submissions, the applicants prayed that I allow them to make oral submissions in respect of that matter.

Since, what is at stake herein is the competence of the application and considering the fact that, the powers bestowed upon me under Rule 11(6) of the Rules, is only to consider this application *ex parte* to the extent of refusing or issuing an *ex parte* order staying the execution pending hearing of the application *inter-partes*, therefore, issues related with the competence of this application should be handled by the Court, when hearing the application *inter-partes*.

In the circumstances, I refrain from granting an *ex parte* order staying execution as prayed by the applicants in the notice of motion. Pursuant to Rule 60 (1) of the Rules, I order for the adjournment of the

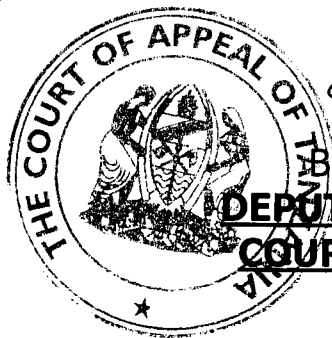
hearing of this application *ex parte* and refer the matter to the Court for determination and guidance at a date to be fixed by the Registrar.

It is so ordered.

DATED at **DAR ES SALAAM** this 12th day of October, 2021.

R. J. KEREFU
JUSTICE OF APPEAL

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

The seal of the Court of Appeal of Tanzania is circular, featuring a central emblem with a scale of justice and a book, surrounded by the text "THE COURT OF APPEAL OF TANZANIA" and a star at the bottom.
B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL