

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

CIVIL APPLICATION NO. 1375 OF 2024

HUSSEIN MMASI.....APPLICANT

VERSUS

PATRICK JOSEPH KIMARO1ST RESPONDENT

TANZANIA ELECTRICAL SUPPLY CO. LTD..... 2ND RESPONDENT

MAKAME SENGULO t/a MAS & ASSOCIATES

COMPANY LIMITED 3RD RESPONDENT

**(Application for stay of execution of an Order of the Resident
Magistrate Court Kisutu at Dar es salaam.)**

(Mbandoo, SRM.)

dated the 29th day of March 2020

in

Miscellaneous Civil Application No.116 /2015

RULING

20th & 24th February 2025

NANGELA, JA.:

This application was by way of a notice of motion filed under a certificate of urgency. The notice of motion was made under rule 11 (3), 11 (4A), 11 (5) (a) & (b), 11 (6), 11 (7) (a), (b), (c), and (d) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It was supported by an affidavit deposed by the applicant.

The applicant is applying for stay of execution of an order of the Court in Civil Application No.116 of 2015 and Execution Application No. 000004645 of 2024, both of Kisutu Magistrate Court, pending

determination of Civil Appeal No. 1060 of 2024. He has advanced five grounds in his notice of motion, which grounds may be paraphrased as follows:

- 1. That, the Resident Magistrate Court has decided to proceed with execution despite there being a notice of appeal and an appeal pending before this Court against the judgement of the High Court in Civil Appeal No.95 of 2020.*
- 2. That, the applicant has been filed with an execution order together with a 14 days' notice from the 3rd respondent ordering him to yield vacant possession.*
- 3. That, if execution is left to proceed the applicant will suffer irreparable loss and suffering as he is using the house for residential purpose.*
- 4. That, chances of the pending appeal succeeding are very high as the judgement of the High Court which is appealable against is very irregular and is likely to be set aside by the Court of Appeal.*
- 5. That, the applicant is ready and willing to execute a commitment bond for due performance of the order upon completion of the appeal process.*

When the parties appeared before me on 11th day of February, 2025, the matter was rescheduled for hearing on the 20th of February, 2025. On

the scheduled hearing date, the applicant enjoyed the services of Mr. Gabriel Simon Mnyele, learned advocate, while Mr. Ambrose Malamsha, learned advocate and Mr. Mkumbo Elias, learned Senior State Attorney, appeared for the first and second respondents, respectively.

The third respondent was absent. The hearing of this application took place through Video Conference as the counsel appearing for the parties did so while at Dar-es-Salaam sub-registry of this Court.

Submitting in support of the application, Mr. Mnyele's adopted the applicant's affidavit and stated that this application has been made under the provision of rules 4 (2) (a) and (b) of the Rules, among other rules, because the execution process is taking place at the Kisumu Resident Magistrates' Court.

He informed this Court that rule 11 (7) (a)-(d) of the Rules as well as rule 11 (5) (a) and (b) of the Rules have been duly fulfilled as the applicant has stated the kind of loss he is about to suffer and that, he is committed to furnish security for due performance.

He relied on the decision of this Court in the case of **Joseph Chacha Magabe vs Board of Trustees of CCM** (Civil Application No. 462/8 of 2023) [2024] TZCA 322 (7 May 2024) and **Evalyne Mbuna vs Joseph Mshana (Administrator of the Estate of the Late Naginder Singh**

Matharu) (Civil Application No. 277/17 of 2023) [2024] TZCA 885 (12 September 2024), to support his submission.

For his part, Mr. Malamsha opposed this application. First, he contended that the parties in the decree sought to be stayed are not the same as the parties in this application. He argued that the 3rd respondent in this application does not feature anywhere in the decree and has nothing to do with this matter.

Second, he contended that, for a notice of motion to be sustained, there must be a notice of appeal which must be served on the applicant within 14 days of the filing of the notice of motion. He contended that nowhere is it shown that the respondent was served well in time, and, for that reason, this application should be declared incompetent as it breached rule 55 (1) of the Rules.

Third, it was his submission that the applicant's affidavit is defective as it was not properly signed and verified. Finally, as regards the loss which the applicant alleges to be about to suffer, Mr. Malamsha contended that such loss is unknown and imaginary since the applicant has been in illegal occupation of the disputed property for 27 years now and has been receiving rent. He contended that, in principle the person who has suffered and continue to suffer most is the respondent since he has lost expected income over the disputed property for the past 27 years. For that matter,

he maintained that, whether there are tenants who are to be evicted or not, that is immaterial and, the requirement set out in rule 11 (5) (a) of the Rules, has not been met.

As for Mr. Mkumbo, he offered nothing substantial other than that he is not opposed to the application.

Mr. Mnyele rejoined briefly that the third respondent is joined as a necessary party. He also stated that, one, Gasper Msaky, who appears in the decree was removed as a party by the High Court as the matter was not against him.

As regards service of the notice of appeal and the notice of motion, he contended that, it was served well in time, but the first respondent refused service and there is an affidavit of proof of service which he can readily make available to the Court. He argued that, based on that refusal by the first respondent, he was forced to the documents to him while here in Court after the Court directed that he be served.

Concerning the signing and thus acceptability of the affidavit filed in support of the notice of motion, it was Mr. Mnyele's rejoinder submission that the affidavit filed in this Court was properly signed and verified otherwise it would not have been accepted for filing. Finally, concerning the substantial loss requirement, he contended that the nature of the

execution applied for is eviction and demolition, all of which constitutes loss.

Having heard the parties' submissions and examined the record of this application, the pertinent issue for determination by this Court is whether this application meets the threshold required for a grant of stay of execution. Before I respond to that issue, however, I find it apposite to briefly comment on some of the issues raised by Mr. Malamsha. I will start by addressing the concern he raised regarding service of the notice of motion and whether rule 55 (1) of the Rules was complied with.

To set the record straight, on the 11th of February, 2025, this Court adjourned this application at the request of the first respondent who appeared in person. The reasons for its adjournment were, essentially, two: **one**, the first respondent had informed the Court that his advocate was bereaved and could not be available to address the Court. **Second**, he informed the Court that he has never been served with the application.

Upon inquiry, Mr. Mnyeale contended that the first respondent had been avoiding or refusing service and, that, there was an affidavit of proof of service to that effect, which if need be, he will make it available to the Court. Since the first respondent was ready to receive the documents which he said he would pass them to his advocate, and based on what Mr. Mnyeale stated regarding the affidavit of proof of service which he was

ready to make available to the Court. I allowed Mr. Mnyeale to pass the documents to the first respondent and I adjourned the matter until the 20th of February, 2025 when the hearing resumed.

That, therefore, is the premise from which Mr. Malamsha seems to be pegging his concern regarding compliance with rule 55 (1) of the Rules since the documents were passed over to him on the 11th of February, 2025.

In responding to that concern, Mr. Mnyeale reiterated what he stated before this Court on the 11th of February, 2025, which was to the effect that, the first respondent had all along been refusing service and, that is the reason why he had to hand over the documents to him on the 11th of February, 2025. Although he repeated his assertion that there was in possession of an affidavit of proof of service which he could make available to the Court, he never furnished any such affidavit to the Court.

I have examined the record of application and the affidavit supporting the notice of motion and find nothing stated therein regarding refusal by the first respondent to be served. In the absence of the affidavit regarding proof of service, which Mr. Mnyeale said was available but never made it available to this Court despite his repeated assertions, whatever he stated on the 11th of February 2025 and on the 20th of February 2025 remain to be a submission from the bar and cannot constitute evidence.

But since the first respondent received the documents in Court on the 11th of February, 2025, can the concern raised by Mr. Malamsha still hold? I think it will, given that no proof was availed to the Court that the first respondent used to refuse service. It is worth nothing that the concern of not being served was first raised by the first respondent who appeared in Court in person on the 11th of February 2025 and not by Mr. Mnyeale.

Consequently, even if this Court had directed that he be served, the direction was given based on Mr. Mnyeale's statement that there was an affidavit regarding proof of service and which he was ready to make available to the Court. As I stated herein, he never did and his statement remained a statement from the bar, with no effect in disproving the first respondent's assertion.

Essentially, it was the duty of Mr. Mnyeale to avail to the Court the affidavit he stated was in his possession. He could have made it available to the Court before the 20th of February, 2025, a date when this application was scheduled for its hearing.

In fact, I note that on the 14th of February, 2025, Mr. Mnyeale filed a list of authorities in this Court. I wonder why he did not, as well, file a supplementary affidavit to which he could have attached the proof regarding the first respondent's refusal to receive the documents

constituting the application, which proof he had alleged was in his possession.

The only conclusion to be derived from the above is that the concern which the first respondent raised on the 11th of February 2025, and which was reiterated by his advocate when this matter came for hearing on the 20th of February, 2025, was valid and, for that matter, he was not served in time.

What then is the consequence of not serving a party timely as required by the law? The requirement to serve a respondent to an application for stay of execution is a requirement of the rules of this Court and need to be strictly observed. The need to strictly observe the time limits set by the rules of the Court was lucidly stated in the case of **Mobrama Gold Corporation Ltd vs. The Minister for Energy and Minerals & Other** (1998) TLR 425, which I fully subscribe to. In that case it was stated that:

*"the prescribed time limits are not targets to be aimed at or expression of pious hope but **requirement to be met**. This principle is reflected in a series of rules giving the court discretion to dismiss on failure to comply with a time limit". (Emphasis added).*

In the case of **Rashid Twalib Makonyora & Others vs. Salim Twalib Makonyora** (Civil Application No. 21 of 2015) [2015] TZCA 406 (9 December 2015), it was held that failure to effect service of the

application and the supporting documents within the prescribed time to the respondent rendered the application incompetent. In that case, the application was struck out for noncompliance with Rule 55 (1) of the Rules.

That rule reads as follows: -

'55.-(1) The notice of motion, affidavit and all supporting documents shall, within fourteen (14) days from the date of filing, be served upon the party or parties affected.'

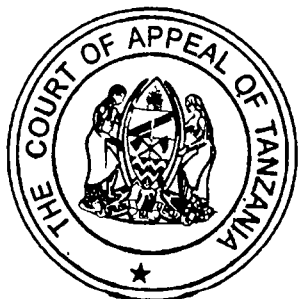
Since Mr. Malamsha contended that the applicant has offended that provision, which fact this Court has established there being no proof that the first respondent was served within such prescribed time, in terms of the above cited case of **Rashid Twalib Makonyora & Others** (supra), the application before me is rendered incompetent. That being the status, this application is hereby struck out with costs.


It is so ordered.

DATED at DODOMA this 24th day of February, 2025.

D. J. NANGELA
JUSTICE OF APPEAL

The Ruling delivered this 19th day of February, 2025, in the presence of Mr. Gabriel Simon Mnyele, learned counsel for the Applicant and Respondent in person, unrepresented via Video Conference from Court of Appeal Dar es salaam, is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL