IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

CIVIL APPLICATION NO. 1604 OF 2024

ANDREW NDAALIO ..... APPLICANT

VERSUS

DAVID GILEAD TENGA .....RESPONDENT

(Application for stay of execution of the Decree of the High Court of Tanzania (Land Division) at Dar-es-Salaam

(Mkuye, J.)

dated 22nd of July 2015

in

Land Case No. 250 of 2010

RULING

13th & 21st February 2025

NANGELA, J.A.:

This application was filed in this Court by way of a notice of motion made under rules 11 (3), 11 (4), 11 (5) (a), (b), and (c), 11 (6), 11 (7) (b), (c) and (d) and 48 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The Applicant is seeking for an order of stay of execution of a decree of the High Court in Land Case No. 250 of 2010. The notice of motion is supported by an affidavit deponed by the applicant.

According to the notice of motion, the stay order sought in this application is premised mainly on the following two grounds:

1. *That, the respondent has filed an application for execution (Misc. Land Application No. 29256 of 2024) which was served on the*

respondent on 18th day of December, 2024, and is due for hearing on 26th day of February, 2025.

2. *That, if this application is not granted the intended appeal to challenge the decision of the High Court of Tanzania (Land Division) at Dar-es-Salaam in Land Case No. 250 of 2010 will be rendered nugatory.*

On the 13th of February, 2025, a date when this application was called on for its hearing, the learned counsel representing the parties appeared through a video conference from the sub-registry of this Court in Dar-es-Salaam. Mr. Cleophas Manyangu, learned advocate, appeared for the applicant, while Mr. Hardison Mchau, also a learned advocate, appeared for the respondent.

With leave of this Court Mr. Manyangu made some few corrections to the notice of motion and urged this Court to grant the application as it fulfils the requirements of the law. Relying on paragraphs 12 and 13 of the applicant's affidavit, he submitted that if the execution process is to be left to continue, the applicant stands to suffer substantial loss and, if the application is to be granted, the applicant is ready to furnish security for due performance of the decree.

To buttress his submission, Mr. Manyangu referred to this Court's decisions in the case of **Dr. Joel Msuya vs. Cammila Brian and Maxine Brian suing through a next friend Prudence Brian**, Civil Application No. 135/02 of 2018, and **Clara Kimoka Sulumbo Amweso** [2002] TLR.

255. He consequently urged this Court to grant the application and stay the execution of the decree in Land Case No. 250 of 2010 pending determination of the intended appeal.

For his part, Mr. Mchau opposed this application. His two main concerns were, firstly, that the applicant has lied regarding the loss he is to suffer and the averments under paragraph 12 of his affidavit being a lie, makes the affidavit defective. He relied on the cases of **Ignazzio Messina vs. Willow Investment SPRL**, Civil Application No. 21 of 2001 and **Bashiri Ally vs. Mwamakula David,** Civil Appeal No. 49 of 2021 (both unreported) to support his assertions.

Secondly, he contended that, although proof of substantial loss is a requirement of rule 11 (5) (a) of the Rules, the applicant has failed to meet that requirement. He relied on the case of **Elia Mwamafupa & Others vs The Board of the Trustees of the Baptist Church of Tanzania** (Civil Application No. 526/06 of 2024) [2024] TZCA 844 (30 August 2024), to bolster this assertion.

Thirdly, he argued that the kind of security the applicant intends to furnish, as stated in paragraph 13 of the applicant's affidavit, is inappropriate. He reasoned that, according to the decree sought to be executed, the applicant was ordered to pay the respondent TZS 10 million apart from giving vacant possession.

He submitted that the value of the two title deeds pledged as security and the ownership of such plots is unknown, that reason, the two title deeds cannot be accepted as security for performance of the decree. He concluded, therefore, that the requirement under rule 11 (5) (b) of the Rules has not been met.

Mr. Manyangu made a brief rejoinder. He rejoined that paragraph 12 of the applicant's affidavit has sufficient details regarding the kind of loss the applicant is to suffer if the decree is not stayed. He rejoined further that, if execution is to proceed the intended appeal will be rendered nugatory. As regard the issue of security for due performance of the decree, he rejoined that paragraph 13 of the applicant's affidavit is, as well, self-explanatory and, his client is also ready to furnish any other form of security as it may be directed by this Court.

I have carefully considered the rival submissions made by the learned counsel for the parties. I have also examined the record of this application, and the authorities relied upon by both learned counsel. The question for determination by this Court, therefore, is whether this application has met all necessary requirements for a grant of stay of execution order.

Essentially, a stay of execution is an exception to the legal process of execution of a decree. That latter process is a lawfully expected event after a decree has been awarded, and seeks to implement or give effect to the order or the judgment passed by a court of justice. In simple words,

therefore, the process of "execution" signifies a legal process of enforcing or giving effect to the decree or judgment of the court, by compelling the judgment-debtor to carry out the mandate of the decree or order and enable the decree-holder to recover the thing granted to him by judgment.

It is worth noting, however, that, the pendulum of justice does not swing towards one end. It swings towards both ends and, for that matter, a balance must be maintained. When that analogy descends to the reality of what happens when one party wins a case and wishes to execute the decree and another who loses it wishes to appeal, the need to maintain a balanced view becomes quite imperative, simply because both parties to the matter have rights which are legally guaranteed. A right to execute a decree is equally an important right just as is the right to appeal against the judgement from which the decree was extracted.

However, since the decree holder was authoritatively declared a winner by a competent court of law, he should not unnecessarily be delayed when he seeks to enjoy the fruits of his decree. If any delay is to happen, there must be cogent grounds. To ensure that the pendulum of justice is rightly balanced when it swings from one end to the other, therefore, the lawmakers, in their wisdom, provided for a margin of flexibility.

In particular, while rule 11 (3) of the Rules of this Court safeguards the right of a decree holder *vis-a-viz* those of an appellant seeking to challenge the decree by way of an appeal, the law provides that where

good cause is established, the Court, in exercise of its discretion, can temporarily order a stay of the execution process to pave way for the hearing and determination of a pending appeal.

In distilling what needs to be on the table as good cause, however, rule 11 (5) (a) and (b) of the Rules comes into play. Essentially, rule 11 (5) (a) and (b) of the Rules requires a demonstration that substantial loss will ensue if no stay of execution is ordered. Besides, there must be a commitment, on the party of the applicant (judgement debtor), to safeguard the due performance of the decree. In principle, therefore, if the applicant is in full compliance with the requirements set out in, among others, rule 11 (5) (a) and (b) of the Rules, this Court will grant a stay of execution.

In the instant application, the applicant has stated, in paragraph 12 of his supporting affidavit, that, he stands to suffer loss more than the respondent. He has asserted that, since he has erected a house on the disputed suit property and his family resides thereon, he will suffer irreparable loss if he is evicted and rendered homeless. Although Mr. Mchau has contended that such averments are false information, he has not rendered cogent evidence to support his allegations of falsehood.

In principle, to demonstrate that the facts adduced in the applicant's affidavit are false and, thus, lack credibility, may not be an easy task given that the affiant is not present in Court for cross-examination. However,

since averments in an affidavit must be countered in the same way by an affidavit, one could have expected an independent affidavit that cements the respondent's alleged falsehood. A mere assertion that what the applicant has stated in paragraph 12 of his affidavit is a lie cannot be satisfactory, in my view. I cannot, therefore, accede to Mr. Mchau's assertions that the applicant's affidavit is tainted with falsehood.

Essentially, it is trite now, following numerous decisions of this Court, that anything leading to execution of the decree may result into undue hardship and such hardship does constitute substantial loss. See, for instance, the cases of **Clara Kimoka vs. Surumbu Axweso** [2002] T.L.R. 257; **Geriod Francis Tairo vs. Jumanne S. Kitila & Another** (Civil Application 254 of 2019) [2020] TZCA 1843 and **Deusdit Kisisiwe vs. Protaz B. Bilauri**, Civil Application No. 13 of 2001 (unreported).

As noted in the applicant's affidavit, if the decree is not stayed, he faces an impending eviction and will be rendered homeless. If that is to happen, it is my considered view based on the authorities cited hereabove, the applicant will suffer irreparable loss and cause the pending appeal to be of mere academic purpose.

As regards the issue of security for due performance of the decree, I need not be detained long by the submissions made by Mr. Mchau. As revealed in paragraph 13 of the applicant's affidavit, the applicant is ready to furnish security in the form of deposit of two Certificates of Title with

No. 157361 MG, L.O. No. 692587 (in respect of PLOT No. 24, Block "R") - and No. 157349 MG, L.O. No.692588 (in respect of PLOT. No. 26 Block "R"), both in Kibaha Township, should the intended appeal fail.

In principle, this Court has pronounced itself in various decisions that the law does not put a stringent requirement when it comes to furnishing security for due performance of a decree. See, for instance, the cases of **Mantrac Tanzania Limited vs. Raymond Costa**, Civil Application No. 11 of 2010 (unreported); and **Ongujo Wakibara Nyamarwa vs. Beatrice Greyson Mmbaga** (Civil Application 200 of 2021) [2022] TZCA 732 (21 November 2022). In the **Mantrac case** (supra), the Court observed that, a mere firm understanding or commitment on the part of the applicant that he/she will furnish security might prove sufficient to move this Court, *ceteris peribus*, to grant a stay order. There is no, therefore, particularization of the kind of security that may be needed.

In the upshot of all that, I am satisfied that the applicant has exhibited sufficient compliance with rule 11 (5) (a) and (b) of the Rules. I, therefore, grant this application, order a stay of execution of a decree emanating from the judgement of the High Court in Land Case No. 250 of 2010 and, in addition, the applicant is hereby directed to deposit in Court, **within 30 days** of the delivery of this ruling, the two Certificates of Title -i.e., Title Deed No.157361 MG, L.O. No. 692587 (in respect of PLOT No. 24, Block "R") -and No. 157349 MG, L.O. No.692588 (in respect of PLOT. No. 26

Block "R") both in Kibaha Township, as security for the due performance of the decree.

Failure to deposit the title deeds within 30 days as directed by this Court will mean that the stay order granted to the applicant will automatically terminate triggering the process of execution without further ado.

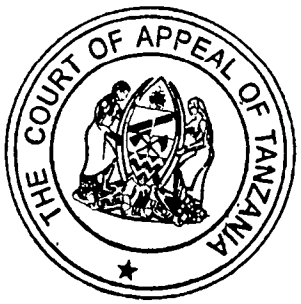
Finally, in the circumstances of this application, each party should bear its own costs.

It is so ordered.

DATED at **DODOMA** this 21st day of February, 2025.

D. J. NANGELA
JUSTICE OF APPEAL

The Ruling delivered this 21st day of February, 2025, in the presence of Mr. Hadson Mchau, learned counsel for the Respondent also holding brief for Mr. Manyangu learned counsel for the Applicant is hereby certified as a true copy of the original.



O. H. KINGWELE
DEPUTY REGISTRAR
COURT OF APPEAL