

**IN THE COURT OF APPEAL OF TANZANIA  
AT ARUSHA**

**CORAM: KILEO, J. A, ORIYO, J.A., And MMILLA, J.A.**

**CIVIL APPLICATION NO. 17 OF 2014**

**JONAS BETHWEL TEMBA .....APPLICANT**

**VERSUS**

**(1) PAULO KISAMO } .....1<sup>ST</sup> RESPONDENT**  
**(2) FRANK B. MANJUU } ..... 2<sup>ND</sup> RESPONDENT**

**(Application for stay of execution from the judgment and Decree of the  
High Court of Tanzania at Arusha)**

**(Sambo, J.)**

**dated the 9<sup>th</sup> day of August, 2011**

**in**

**DC Civil Appeal No. 4 of 2009**

.....

**RULING OF THE COURT**

11<sup>th</sup> & 17<sup>th</sup> September, 2014

**MMILLA, J. A.:**

In this application, Jonas Bethwel Temba (the applicant) is inviting the Court to stay execution in respect of DC Civil Appeal No. 4 of 2009 which he lost to Paulo Kisamo (the first respondent) in the High Court at Arusha. It is brought by way of Notice Motion and is founded under Rules 11 (2) (b) (c) (d) (e) and 48 (i) (2) (4) of the Court of Appeal Rules, 2009 (the Rules). It is supported by an affidavit sworn by the applicant himself. The application is being resisted by Mr. Severine John Lawena, learned advocate on behalf of Paulo Kisamo and Frank Manjuu (the latter to be referred to as the second respondent).

Apart from filing the respondents' affidavits in reply, Mr. Lawena filed also a notice of preliminary objections which he nevertheless withdrew, thus allowing this application to proceed on merit.

The applicant was the appellant in DC Civil Appeal No. 4 of 2009 in the High Court at Arusha. On 9.8.2011, he lost that appeal. Feeling aggrieved, he on 15.8.2011 filed a notice of appeal in this Court intending to contest that decision. He latter on filed the present application pending his said intended appeal.

Going by what is quipped in paragraph 2 of the Notice of Motion and paragraph 7 of his accompanying affidavit, the applicant has advanced one reason that at the centre of the dispute between him and the respondents is a landed property on Plot No. E/KW/0098 situated at Sakina area in the City of Arusha which is in the danger of being disposed of by the respondents, and that should that happen he will "suffer irreparable and substantial loss" if the intended appeal will succeed, and that he is at the moment living in that house but the respondents are determined to evict him from therein.

At the hearing of this application, the applicant appeared in person and was not represented. He prayed the Court to adopt his affidavits and the written submissions he filed. His brief oral submission repeated almost the same thing.

On the other hand, Mr. Lawena pressed the Court to dismiss the application for two reasons; one that the applicant has not explained the substantial loss he will suffer if the order for stay of execution will not be granted, and two that he has not furnished any security as envisaged by Rule 11 (2) (d) (iii) of the Rules.

We wish to re-state the law as provided under Rule 11(2) of the Rules that ordinarily, institution of an appeal is not a bar to the execution of a decree appealed from. That Rule, under which the Court derives the power to grant or refuse to stay execution stipulates that:-

*"2) Subject to the provisions of sub-rule (1), the institution of an appeal, shall not operate to suspend any sentence or to stay execution, but the Court may-*

*(a) i(Not relevant) .*

*(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 83, an appeal, shall not operate as a stay of execution of the decree or order appealed from except so far as the High court or tribunal may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree or order; but the Court, may upon good cause shown, order stay of execution of such decree or order.*

*(c ) Where an application is made for stay of execution of an appealable decree or order before the expiration of the time allowed for appealing there from, the Court, may upon good cause shown, order the execution to be stayed.*

*(d) No order for stay of execution shall be made under this rule unless the Court is satisfied-*

*(i) that substantial loss may result to the party applying for stay of execution unless the order is made;*

*(ii) that the application has been made without unreasonable delay; and*

*(iii) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.*

*(e) Not relevant)."*

It is clear from the above that the Court has discretion to order stay of execution where the conditions indicated under 11 (2) (d) of the Rules may have been satisfied by the applicant – See **Laurent Kavishe v. Enely Hezron**, Civil Application No. 5 of 2012, CAT and **Mantrac Tanzania Ltd v. Raymond Costa**, Civil Application No. 11 of 2010, CAT (both unreported).

The burning issue is whether or not the applicant has fulfilled the statutory conditions set out above.

Firstly, is the requirement to establish that substantial loss may result to the party applying for stay of execution unless the order is made. We take note that the applicant has stated in paragraph 2 of the Notice of motion and paragraph 7 of the accompanying affidavit that he and his family are currently living in the house which is the subject of dispute, and that if stay of execution will not be granted and eviction ensues, they will suffer a lot. However, he told the Court that the house in issue is not his, but belongs to his late brother; but that he is the administrator of the latter's Estate. In our view, he has not succeeded to convince us that he is likely to suffer any terrible loss.

Next is the condition touching on the aspect whether the application has been made without unreasonable delay. We find that there is no problem about fulfillment of this condition; actually this explains why Mr. Lawena has not raised any complaint. As such, we have no query in this regard.

Like the first condition, the third condition too has problems. The applicant was required to give security for the due performance of such decree or order as may ultimately be binding upon him, but has not done so. He intimated that the

house in issue may cater as security, but as we have pointed out above the said house is not his property. We are satisfied that he has failed to fulfill this condition too.

In the upshot, the applicant has failed to attract us to grant the application and we hold that it has no basis and it fails. The same is dismissed with costs.

**DATED** at **ARUSHA** this 15<sup>th</sup> day of September, 2014.

E. A. KILEO  
**JUSTICE OF APPEAL**

K. K. ORIYO  
**JUSTICE OF APPEAL**

B. M. MMILLA  
**JUSTICE OF APPEAL**

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

  
E. Y. MKWIZU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**