

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUANDA J.A., MMILLA, J.A., And MZIRAY, J.A.)

CIVIL APPLICATION NO. 163 OF 2016

GODFREY EMMANUEL MALASSY
CITY CHRISTIAN FELLOWSHIP APPLICANTS
VERSUS
PROSPER RWEYENDERA.....RESPONDENT

(An Application for stay of Execution from the Decision of the
High Court of Tanzania at Dar es Salaam)

(Mgetta, J.)

Dated 28th day of April, 2016

In

Land Case No. 237 of 2004

RULING OF THE COURT

1st & 12th August, 2016

MZIRAY, J.A.:

The application by way of notice of motion is sought under rule 11(2) (b) (c) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The applicant is seeking to stay execution of the decree of the High Court in Land Case No. 237 of 2004 delivered on 28th April, 2016, pending the determination of the intended appeal, the notice of which was lodged on 3rd May, 2016.

The grounds set forth by the applicant in the notice of motion are as follows:

1. *That this honourable Court be pleased to grant the orders for stay of execution and maintenance of the status quo because the suit house which is the subject matter of the execution hereof is the subject of the intended appeal whose process is on track including filing the Notice of Appeal, applying for leave copies of judgment, decree and proceedings and is not time barred.*
2. *That the decree sought to be appealed is appealable because it originated from the High Court, exercising its original jurisdiction and finally disposes of rights of the parties on this matter and thus deprive the applicants of their constitutional right of appeal.*
3. *That the said decree among other things directs evictions of the applicants from the suit premises and payment of mesne profits at the rate of shs one million per months from November, 2004 until vacant possession.*
4. *That an Order for execution was granted by the High Court on 24th May, 2016 which refused to consider the affidavit in objection to the execution although it was on record and served*

on the respondent/applicant. Consequently, a notice of eviction after 14 days has been issued and affixed in the suit premises on 25th May, 2016.

5. *That the intended appeal has good chances of success because the judgment is problematic and there are important questions of law to be determined by this Court thus execution before the determination of the intended appeal will unduly prejudice the rights and interests of the applicant in the matter.*
6. *That if the decree is executed by evicting the applicants/defendants before the determination of the intended appeal which appeal has high chances of success will cause irreparable loss to the applicants and render the appeal process and the decision thereon nugatory and superfluous.*
7. *That the balance of inconvenience weighs in favour of the applicants remaining on the suit premises pending determination of the appeal than respondents.*

The affidavit of Mr. Godfrey Emmanuel Malassy, is annexed in support of the application which on the other hand has been challenged by the respondent through the affidavit in reply of one Prosper Rweyendera.

At the hearing of the application, the applicant was represented by Ms. Magdalena Rwebangira, learned Advocate and the respondent was represented by Mr. Joseph Rutabingwa, learned advocate. Arguing in support of the application, Ms. Rwebangira, learned Advocate submitted that the decree to be executed involves three orders. She submitted that one among those orders was the eviction order which has been already carried out. But, she contended that some of the applicant's assets are still in the suit premises for which, they are now seeking for an order of the Court to protect the same and accord them opportunity to take them out of the suit premises. She further submitted that since eviction is the only order that has been executed, the applicants in the circumstances pray the remaining orders, that is, removal of the items and the monetary award made by the trial court be stayed pending the determination of the intended appeal, otherwise applicants stand to suffer hardship.

When the learned Advocate was required to address the Court on the issue of security for costs, she admitted that the question of security for costs ought to have been covered in the notice of motion and in the affidavit in support thereof, but quite unfortunately she did not make a firm undertaking to that effect. However she argued that the same is not fatal. To substantiate her argument she cited the case of **Indian Ocean Hotels Ltd t/a Golden Tulip Dar es salaam vs Nitesh Suchak t/a Smart Dry cleaners**, Civil Application No. 82 "A" of 2010 in which there was no undertaking for security for costs and the Court ordered certain amount be deposited as security for costs.

On the other hand, Mr. Rutabingwa, learned Advocate in his reply submitted that there is nothing to stay as execution has already taken place. He also pointed out that the prayer by the applicants in the application is for stay of decree and not partial stay of the decree. In addition to that, the learned Advocate denied the assertion that there is still some properties of the applicant remaining in the suit premises as alleged. He contended that even the affidavit in reply does not support such assertion.

As to the issue of security for costs, the learned Advocate strongly argued that there must be a firm undertaking by the applicant on security for costs to comply with the requirements of Rule 11(2) (d) of the Rules. He submitted that since the requirement of the said Rule is paramount and the fact that execution has already taken place, he as such urged the Court to dismiss the application with costs for lack of merit.

We have carefully considered the argument advanced by the learned Advocates both in support and against the application. With great respect, Rule 11(2) (b) (c) and (d) of the Rules is clear on the condition which the applicant must comply with before being granted the order for stay of execution. These conditions are echoed in the case of **Eusto Ntagalinda vs Tanzania Fish process Ltd**, Civil Application No. 8 of 2011 (unreported).

Similarly, in the case of **Therod Fredrick v. Abdusamadu Salim**, Civil Application No. 7 of 2012 [unreported] this Court *inter alia* held:

"As is immediate discernible from the above extract, Rule 11(2) is more restrictive in scope than the former Rule 9(2) of the 1979 Rules. On the terms of

*the present Rules the Court no longer has the luxury of granting an order of stay of execution on **such terms as the court may think just**, rather, the Court must be satisfied, just as the applicant will be required to fulfil the following cumulative requirements.*

- 1. Lodging a Notice of Appeal in accordance with Rule 83,*
- 2. Showing good cause,*
- 3. Complying with the provisions of item d(i), (ii) and (iii)*

That being the current position of the law, it is our firm stance that the three conditions articulated in item (d) must be conjunctively and not disjunctively satisfied by the applicant before stay of execution order can be granted. As rightly conceded by Ms. Rwebangira, learned counsel for applicants that there is no firm undertaking as regard the issue of security for costs both in Notice of Motion and its affidavit in support of, we must say with certainty that the applicants have definitely failed to give assurance or security for the due performance of the decree in case the intended appeal

is against their favour. That, indeed is contrary to the spirit of Rule 11(2) (d) (iii) of the Rules.

Ms. Rwebangira cited **Indian Ocean Hotels Ltd t/a Golden Tulip Dar es Salaam vs Nitech Suchak t/a Smart Dry Cleaners** as authority suggesting that in the absence of firm undertaking, the Court may order certain amount be deposited as security for costs. With due respect to Ms. Rwebangira and taking the matter as a whole, this case is distinguishable from our instant case. As correctly argued by Mr. Rutabingwa, learned counsel and rightly conceded by Ms. Rwebangira, that execution has already taken place, in our humble considered view, even if we are to grant the application assuming that the circumstances of this case is similar to that of **Indian Oceanic Hotels** (*supra*) which is not, still at this stage the same will serve no purpose. The matter in respect of stay of execution sought has gone beyond the stage in which a stay order would meaningfully serve any purpose to restrain the respondent. In a number of cases where it is shown that the application has been overtaken by event, the Court has dismissed such applications. (See **Joachim Kalembe v. M. K. Mwamlima**, Civil Application No. 76 of 1998 and **Shell and BP Tanzania Limited vs The**

University of Dar es Salaam, Civil Application No. 68 of 1999 (both unreported)

That said and for the foregoing reasons, the law enjoins us not to grant the order sought in this application. We are, therefore, constrained to dismiss this application with costs.

DATED at DAR ES SALAAM this 10th day of August, 2016.



B.M. LUANDA
JUSTICE OF APPEAL

B.M. MMILLA
JUSTICE OF APPEAL

R.E.S. MZIRA
JUSTICE OF APPEAL

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

A handwritten signature in black ink, appearing to read 'P.W. Bampihya'.

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL