

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 331/17 OF 2024

MARIA ELITETERAAPPLICANT

VERSUS

ELISARIA ELITETERA LEMA (As Administrator

of the Estate of the Late Olda Elitetera Lema) RESPONDENT

**(Application for stay of execution of the decision of the High Court of
Tanzania at Moshi)**

(Fikirini, J.)

dated the 8th day of June, 2017

in

Land Case No. 10 of 2016

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RULING

21st & 24th May, 2024

RUMANYIKA, J.A.:

Before me, the application is brought at the instance of Maria Elitetera seeking stay of execution of the decree of the High Court of Tanzania at Moshi Fikirini, J. (as she then was) dated 08/06/2017 in Land Case No. 10 of 2016. In that case, the applicant unsuccessfully sued the respondent to recover 64 acres of a parcel of land situated at Biriri Oldonyomuruak Village, Siha Central Ward in the District of Siha, Kilimanjaro Region (the dispute land). Being aggrieved, he lodged a notice of appeal on 12/06/2017 to challenge the said decision. It is further alleged that, the appeal process initiated apart, the respondent

Elisaria Elitetera Lema (as Administrator of the estate of the late Olda elitetera Lema) filed Application No. 6314 of 2024 to execute the decree. That application is scheduled for hearing on 05/06/2024. Equally noted, the present application is predicated on rules 11(3) – (7) (a) – (d) and 48(1) and (2) of the Tanzania Court of Appeal Rules, 2009 as amended by GN 188 of 2024 (the Rules). It is supported by affidavit sworn by Mr. Kapimpiti Ngalula who is the applicant’s advocate herein.

When the application was called on for hearing, Mr. Kapimpiti learned counsel appeared for the applicant. Neither, the respondent nor her representative entered appearance although the respondent was duly served on 29/04/2024 through Mr. Elikunda Kipoko, learned counsel. And that the latter represents the respondent also in the said execution proceedings.

In the foregoing circumstances therefore, and in terms of rule 63(2) of the Rules, Mr. Mgalula successfully beseeched me to determine the application dispensing with the respondent’s appearance. It would have been a different scenario had Mr. Kipoko been mindful to notify the Court about his today’s absence as the courtesy demands which he did not do.

Mr. Mgalula began by adopting the notice of motion and the supporting affidavit. He contended that, the applicant and members of the household solely depend on the disputed land by tilling and growing some food crops for survival. And that, should the applicant be refused a stay order and the respondent's intended appeal succeeds, she would be evicted therefrom, thus suffer irreparable loss much as she is willing to give security for the due performance of the impugned decree. Additionally, Mr. Mgalula asserted that, the applicant became aware of the said execution proceedings on 29/04/2024. And that she filed the instant application timely on 09/05/2024 complying with rule 11(4) of the rules. Just as also, appended to the application are the copies of the notice of appeal, the decree sought to be stayed, judgment and the notice of the respective intended execution, as required under rule 11(7) of the Rules. And that she will give a Certificate of Title over a land whose monetary value is closely equivalent of the disputed land as security.

Considering the notice of motion, the supporting affidavit and Mr. Mgalula's submission, the issue which is now before me for determination is whether the applicant has satisfied all the requirements for the granting of an order to stay execution of the decree. The

requirement to cumulatively satisfy the conditions required cannot be more stated than we have done several times, including in **Chitegeste Monica Migembe v. Akiba Commercial Bank**, Civil Application No. 74 of 2024 (unreported).

With all intents and purposes the list of the requirements may not be exhaustive. However, as the law now stands, it includes: **One**, the timing in filling the application which is fourteen days. Indeed the applicant has complied with rule 11(4) of the Rules. She became aware of the execution proceedings on 29/04/2024 and filed the application on 09/05/2024. **Two**, the applicant has shown that on the balance of advantage he would suffer irreparably should she be refused a stay order. This is stipulated under rule 11(5) (a) of the Rules, **three**, it is about firm undertaking by the applicant to furnish security for the due performance of the decree sought to be stayed, in terms of rule 11(5) (b) of the Rules and **four**, the application being accompanied by copies of a notice of appeal, the impugned decree on order and the respective judgment/ruling. Lastly is copy of a notice of the intended execution in compliance with rule 11(7) (a) – (d) of the Rules. Equally noted is that the respondent did not file an affidavit in reply to oppose the application.

It is worth noting as hinted above that the applicant became aware of the said application for execution on 29/04/2024. He filed the instant application about ten days later on 09/05/2024 which is four days before the lapse of fourteen days limit stipulated under rule 11(4) of the Rules, as averred at paragraph 7 of the supporting affidavit.

Secondly, complying with rule 11(5) (a) of the Rules, the applicant has demonstrated her fears in that she stands to suffer irreparable loss should she be evicted from the disputed land and the respondent loses the intended appeal. It is so because she uses the disputed land as her sole means of income and survival, as stated at paragraphs 8 and 9 of the supporting affidavit. I note that this requirement cannot be stated better than we have done in a number of cases including **Tanzania Posts and Telecommunications Corporations v. Ms Bs Henritaa Supplies** (Civil Application 14 of 1997) [1997] TZCA 69 (1 May 1997).

Thirdly, that the applicant has undertaken to furnish security for due performance of the impugned decree. However, I am cognizant with the legal principle that at this juncture the applicant is not required to give it. It is enough for her to firmly undertake, as done, to furnish security. See **Mantrac Tanzania Ltd v. Rymond Costa**, Civil Application No. 11 of 2010 (unreported).

Lastly, is for the application to be accompanied by such requisite documents. The more so the decree or order sought to be stayed as the Court pronounced itself in **National Housing Corporation v. Etiennes Hotel**, Civil Application No. 175 of 2004 and **The Permanent Secretary of Works and Another v. Twiga Paper Products Ltd**, Civil Appeal No. 18 of 2007 (both unreported). For the instant application, what is discerned from paragraphs 3, 4 and 7 of the founding affidavit is that, all the documents required have been appended. We take note of the applicant's contention that, she depends solely on the disputed land by growing annual food crops thereon for her survival and members of the household. She may or may not necessarily be true. However, the sense of justice and balance of convenience put together, they have tasked my mind as to what would happen to the applicant if her apprehension is real, if the respondent alienates the land and loses the intended appeal. I am optimistic that the applicant's fears would be mitigated by granting the application accordingly which I hereby do. Then she will not become homeless or landless between now and during the pendency of the intended appeal. Consequently, I stay execution of the decree of the High Court of Tanzania at Moshi in Land Case No. 10 of 2016 dated 08/06/2017 on condition that the applicant puts in the Court a Certificate of Title for

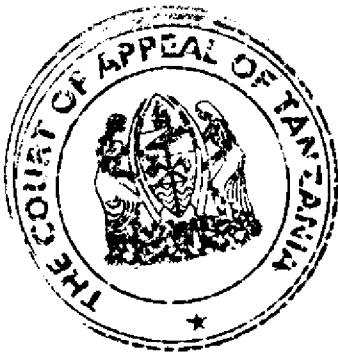
such a plot as promised with at least half value of the disputed land immediately. In default, the order of stay shall lapse automatically. Costs of the application shall abide the outcome of the intended appeal.

Order accordingly.

DATED at DAR ES SALAAM this 22nd May, 2024.

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Ruling delivered this 24th day of May, 2024 in the presence of Mr. Kapimpiti Mgalula, learned advocate for the Applicant through video conference and in the absence of the Respondent, is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to be "W. A. Hamza", written over a circular stamp.

W. A. HAMZA
DEPUTY REGISTRAR
COURT OF APPEAL