

TANZANIA / JUDGMENT

CIVIL APPLICATION NO

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IN THE COURT OF APPEAL OF TANZANIA AT DODOMA CIVIL APPLICATION NO. 1623 OF 2024
AARIF YUSUF SHARIF..... APPLICANT VERSUS SABRI MWADINI
H A JI..... RESPONDENT (Application for an order of staying
execution of the drawn order extracted from the ruling of the High Court of Tanzania (One stop
Judicial Centre) at Temeke) (Sarwatt Kazi, 3.^ dated 28thday of November, 2024 in Probate and
Administration Cause No. 113 of 2023

RULING

13th & 21st February, 2025 AGATHO, 3.A.: When the matter came for hearing on 13th February 2025, by way of video conference from Dar es Salaam Mr. Sabri Saleh and Dimesh Mawji learned counsel appeared for the applicant, and Mr. Reginald Martin and Helena Ignas learned counsel stood for the respondent. Mr. Saleh submitted that on 12th February 2024 they received the notice of preliminary objection around 15:00. It was his view that the preliminary objection be entertained first. He was also concerned that the preliminary objection contravenes rule 107 of the Tanzania Court of Appeal Rules, 2009, G.N. No. 368 of 2009 as amended by G.N. No. 362 of 2017, G.N. No. 344 of 2019, and G.N. No. 188 of 2024 herein cited as the Rules. Having heard Mr. Saleh's submission, Mr. Reginald Martin, for the respondent, prayed to withdraw the preliminary objection. The same was thus withdrawn as Mr. Saleh did not object to the prayer for its withdrawal. Following the withdrawal of the preliminary objection, the hearing of the application proceeded as set. As a takeoff point, Mr. Saleh submitted that the application seeks an order for stay of execution of the drawn order of the High Court of Tanzania, Temeke Sub-registry One Stop Judicial Centre in Probate and Administration Cause No. 113 of 2023. And after adopting the notice of motion with its supporting affidavit, which was affirmed by the applicant, he submitted that they filed the notice of motion timely, they have also undertaken to furnish security as required by the Rules. It was his submission that the applicant and his family reside in the property from which they are sought to be evicted as part of execution of the drawn order. He added that if they are evicted, they will suffer substantial loss. According to rule 11(7)(a) of the Rules, it states that if there is existence of substantial loss, the court may issue an order for stay of execution. The counsel went on submitting that Rule 11(5)(b) of the Rules requires security be given by the applicant. He added that a readiness to furnish security has been averred in paragraph 9 of the supporting affidavit. Mr. Saleh submitted further that the applicant received a notice of eviction from the respondent. That is averred in paragraph 6 of the affidavit in support.

He argued that the notice of eviction is a proof that there will be substantial loss that the applicant stand to suffer. According to me Saleh, on the issue of execution the law is silent in defining what execution means. But there is case law, the case of Ibrahim Ally Yusuf Mpore v Nargis Ally Yusuf Mpore and Rahmat Ahmad Juma, Civil Application No. 193 of 2016 CAT. Continuing with his submission, Mr Saleh referred to page 5 last paragraph of that decision where the respondent's counsel therein submitted that since there was no execution filed in court the stay of execution order should not be granted. However, the Court held that, that is not the pre-condition for stay of execution under rule 11(2)(b) of the Rules. Adding that what it required is the notice of appeal which was filed timely. It is noteworthy that Rule 11(2)(b) was amended by renumbering the rules. That is now rule 11(5) of the Rules. Back to the case at hand, the applicant's counsel also brought to the attention of the Court rule 4(2) of the Rules. This is about practice and 3 procedure of the court, it states that if the court is dealing with the matter for which no rule or order has been made, the court has inherent power to make orders that it considers necessary. Mr. Saleh added that, the existence of notice of appeal, presence of security and the service of notice of eviction issued by counsel for the respondent are enough for granting stay of execution of the decree. On her part, Ms. Ignas for the respondent, adopted the respondent's affidavit in reply affirmed by the respondent, Ms. Sabri Mwadini Haji to form part of her submission. She replied by resisting the application and submission by the counsel for the applicant. It was her submission that the instance application is misconceived and premature before this Court. Therefore, devoid of merit on the grounds that: the applicant has failed to meet all necessary conditions required in applying for stay of execution cumulatively. She argued further that during his submission the counsel for applicant only relied on rule 11(5) instead of showing that they have met all conditions set under rule 11 of the Rules as a whole. According to her, this Court has held on several occasions including in the case of Razak Mahmud Hussein v Sultan Ally Abdulla Gulam Hussein, Civil Application No. 424/15 of 2018 CAT, the case also found in TanzLII at page 10 first paragraph the Court while dealing with an application similar 4 to this one, emphasized that the applicant must comply with conditions set in the law cumulatively. She went arguing that in the present application, the applicant's submission is based on rule 11(5) of the Rules only. Ms Ignas lamented that the applicant has failed to show that he has met other conditions prescribed by rule 11(7)(b) and(d) of the Rules. The said rule provides that an application for stay of execution shall be accompanied by the following:

- (b) A decree or order appealed from; and (d) a notice of intended execution. In opposing the application, Ms. Ignas submitted that in the present application, there was no drawn order attached. In her view, that is contrary to rule 11(7)(b) of the Rules. She also argued that the applicant has not attached the notice of intended execution as required by rule 11(7)(d) of the Rules. She further raised alarm that in the application's supporting affidavit paragraph 6 a letter was attached and they termed it as a notice of execution. Thereafter, Ms. Ignas disputed the existence of notice of execution by referring to the respondent's affidavit in reply at paragraph 7, where the respondent stated that he has not issued any 5 notice of execution, and he has not filed any application for execution before any court of law. Clarifying her stand on the notice of intended execution, the respondent's counsel

submitted that there must be formal notice of intended execution, meaning the application of execution must be pending before the court of law. The purpose of having a formal application for execution in court is to ascertain the time limitation which has been provided for under rule 11(4) of the Rules together with conditions listed under rule 11(7) of the Rules. According to Ms Ignas, that position was stated in the case of Registered Trustees of Baraza Kuu la Jumuiya ya Waislamu Tanzania v Registered Trustees of the National Muslim Counsel of Tanzania (BAKWATA), Civil Application No. 408/08 of 2024. In this case on page 8 the court held that every application of this nature must be made within 14 days. This means that there must be a formal application for execution and the date on which the applicant was served or notified about the existence of that application must be certain for the purposes of ascertaining the 14 days' compliance. At page 10 of the same ruling the court held that if the respondent has not filed any application for execution which is subject of application for stay of execution this application may be termed premature. Consequently, the court proceeded to strike it for being premature. Ms Ignas further revolted against the applicant's counsel citing of Mpore's case (supra) which in her view is distinguished as it was pronounced before the amendment of Tanzania Court of Appeal Rules. In accord with her perspective, now there is a case that provides for the position of execution. Besides that, she objected to Mr. Saleh's persuading the court to invoke rule 4 of the Rules to exercise its inherent powers. As per Ms. Ignas, in the present application the law is certain, and the procedures have been outlined under Rule 11 and there is no need for this court to invoke its powers under rule 4 of the Rules. In the end, she prayed for striking out of the application with costs for being premature and want of merit. Mr. Saleh rejoined by emphasizing the lack of definition of execution. To him that definition has not been provided in any written law, and mostly some of the decisions of the Court have tried to explain what execution is. He opined that the absence of that definition in written law should not limit the Court from granting stay of execution, that is why he invited the Court's attention to the notice of eviction issued by the respondent's counsel. It was his view that the notice of eviction contained the intention of the respondent, that is, trying to evict the applicant. According to him that is the reason why the applicant moved the Court under rules 4 and 11(5)(a) and (b) of the Rules. In rebutting the respondent's counsel submission that the applicant has not complied with rules 11(4) and 11(7) of the Rules, Mr. Saleh submitted that the respondent's counsel has misconceived the said rules, because these rules cannot be read in exclusion of rule 11(5). The latter rule provides that the court has to satisfy itself first that the applicant is likely to suffer substantial loss, and second the applicant has security to furnish. The applicant's counsel emphasized that the applicant has complied with the rules by attaching the notice of appeal, undertaking to furnishing security, and attached notice of eviction from the respondent's advocate which has been averred in paragraph 6 of the supporting affidavit that he was executing the order of the court. In addition, he stressed that the applicant has shown that he and his family reside in the said house, and if evicted he will suffer substantial loss. To extend the rejoinder, Mr. Mawji rejoined that the respondent's counsel relied on BAKWATA's case (supra), but at page 10 of that decision it states that in the application of this nature the applicant must show that there is application for execution. In

this case the applicant was issued with Seven days' notice of eviction which shows that the process of execution has started. He concluded that if a stay of execution is not granted, then the appeal case before this Court will be nugatory. That marked the end of hearing. I have dispassionately considered the application at hand and submissions. I have also perused the supporting affidavit and affidavit in reply. The applicant's affidavit is loud that the respondent's lawyer has issued a notice of eviction. That notice clearly refers to the decree in Probate and Administration Cause No. 113 of 2023. It further mentions the property in dispute and that the lawyers were acting on behalf of the respondent and that he is given seven days' notice to vacate the property. This evidence has not been rebutted or anyhow discredited by the respondent. Nevertheless, what remains contentious is whether the notice of eviction amounts to a notice of intended execution as dictated by rule 11(7)(d) of the Rules. While I take note of the cases cited by the counsel representing the parties, it is my strong conviction that the scope of rule 11(7)(d) of the Rules on the notice of the intended execution is broad enough to cover notice of eviction. Such a rule cannot be interpreted narrowly as to do so will be blessing execution processes that are not initiated through the Courts of law parallel with denying the applicant(s) room to challenge them. I also find it a misreading of BAKWATA's case (*supra*) to regard it as being restricting a notice of intended execution to formal execution application pending in the courts of law. I thus proceed to hold that a notice of eviction including the letter from the respondent's advocate giving the applicant seven days' notice of the eviction is the notice of intended execution. In fact, a notice of intended execution may take different forms. It may be by publication, advertisement, conduct, a letter, verbal, etc. In my view, what matters is evidence of some sort that it may be construed as a notice of intended execution. Thus, each case must be determined based on its peculiar facts. In the case of Industrial Gases and Chemical Ltd and Two Others v Azania Bank Limited and Another, Civil Application No. 886/08 of 2023 CAT at Mwanza, there was no application for execution filed in Court. Hence, there could not be notice of execution to be served upon the applicants., However, the respondents by virtue of their power under mortgage deed advertised in the newspaper dated 4th. November, 2023 a sale of the disputed property. That advertisement informed the respondents of the intended sale. In the court's view, that was a notice of the intended execution. Nevertheless, the application for stay of execution failed because it was time-barred. The applicants filed the application on 27th November 2023. They failed to comply with the 14 days time limit prescribed by rule 11(4) of the Rules from the date of notice of intended execution. That is from the date of the sale advertisement in the newspaper, which is 4th November 2023. They ought to have filed it by 18th November 2023. Another interesting case is that of Joseph Chacha Magabe v Board of Trustees of CCM, Civil Application No. 462/8 of 2023 where this Court declined to grant an order for stay of execution because the applicant failed among other things to attach a notice of intended execution. He, however, submitted that he filed the application fearing that the respondent might proceed with the execution of the decree since in the past she attempted to demolish his dwelling house by removing part of the boundary wall. Unlike the situation in the foregoing case, in the case at hand the applicant has attached the eviction notice, the letter from the respondent's lawyer notifying him about

the eviction. The applicant took note of the date when the eviction letter was issued. That is the time from which 14 days prescribed in rule 11(4) of the Rules start to run. Legally speaking, the said notice of eviction is a notice of intended execution. It is my view that the Rules have been complied with. In the upshot I find the application to have merit, I grant an order for stay of execution of the ruling and drawn orders of the High Court in Probate and Administration Cause No. 113 of 2023 pending determination of the appeal before this Court. The order is subject to the applicant executing a commitment bond as security within 30 days from the date of delivery of this ruling for the due performance of the decree. Given the nature of the case at hand each party shall bear its costs. Order accordingly. DATED at DODOMA this 21st day of February, 2025. U. J. AGATHO JUSTICE OF APPEAL The ruling delivered today this 21st day of February 2021 in the presence of the Mr. Dimesh Mawji, learned counsel for the Applicant and Ms. Vicky Merisheki, learned counsel for the respondent who both appeared via video conference from Dar es Salaam, is hereby certified as a true copy of the original.

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