

TANZANIA / JUDGMENT

ahmad abdallah kinyokwe vs zulfa salumu makuka others 2023 tzca 17609 4 september 2023

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TZCADECIDED
4 September 2023

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IN THE COURT OF APPEAL OF TANZANIA AT PAR ES SALAAM CORAM: MWARIJA. 3.A, KENTE, 3.A.. And MURUKE. J.A. CIVIL APPLICATION NO. 452/17 OF 2021 AHMAD ABDALLAH KIN YO KW E..... APPLICANT VERSUS ZULFA SALUMU MAKUKA (Administratrix of the Estate Of the Late SALUM A. MAKUKA).....1 st RESPONDENT DAMIAN KAKURU2 nd RESPONDENT MBARI M BU SIR O 3 rd RESPONDENT MARY FABIAN M AK O TA..... 4TM RESPONDENT (Application for stay of execution of the Decree of the High Court of Tanzania, Land Division at Dar es Salaam) (Maige, J .) Dated the 17th day of April, 2020 in Land Case No. 349 of 2015 RULING OF THE COURT I4 h August & 4* September, 2023 KENTE. 3.A.: This is an application for stay of execution of the decree of the High Court (Land Division) in respect of Land Case No.349 of 2015. As is the norm, the application is made by way of a notice of motion and it is predicated on Rules 4(2) (a), (b) and (c), 11(3), (4), (5)(a), (b), (6), (7)(b), (c) and (d) as well as Rule 48 of the Tanzania Court of Appeal Rules, 2009 (hereinafter simply referred to as the Rules). Particularly i pertinent to this application, is the fact that, it is made awaiting determination by this Court of Civil Appeal No.127 of 2021 which was preferred by the applicant who felt aggrieved by the decision of the High Court. The said appeal is pending hearing. In support of the application is an affidavit deponed by Mr. Samwel Shedrack Ntabaliba the applicant's counsel. The main plank of the applicant's position in this matter as can be garnered from Mr. Ntabaliba's depositions in the supporting affidavit is that, the applicant will suffer a substantial loss if an order staying execution of the impugned decree is not made and that, in compliance with the requirements of the law, the applicant has undertaken to furnish security for the due performance of the said decree as may ultimately be ordered or decreed against him. When the application was called on for hearing, the respondents appeared in person without any legal representation and therefore fending for themselves. Speaking through the second respondent who appeared to be much more conversant with the facts giving rise to the application, the respondents took issue with the applicant particularly in relation to his alleged hidden motive saying that, he was all out to deny the lawful heirs of the estate of the late Salum Makuka the right to enjoy the fruits of the High Court decree. Given their position

which nonetheless had no back up of any affidavit in reply despite the existence of at least one substantive disputed fact, the respondents implored us to dismiss the application with costs allegedly for lack of merit. In a brief rejoinder, Mr. Ntabaliba had nothing substantial to add as he only reiterated the applicant's position both in the notice of motion and the supporting affidavit. We have carefully considered the sole question arising out of this application. We fully recognize that, in any application of the present nature, the burden placed on the applicant is to satisfy the Court, in the words of Rule 11(5) (a) and (b) of the Rules that, substantial loss will be caused to him unless an order staying execution of the impugned decree is made and that, in compliance with the law, he has undertaken to furnish security for the due performance of the decree sought to be executed or any other order as may ultimately be binding upon him. Mindful of the rights already declared by the lower court in favour of the respondent who is ordinarily the decree holder, the above stated position is what we have fastidiously set as a threshold for stay of execution in a host of our earlier decisions some of which might be needless to cite here. It must only be stressed that, in terms of Rule 11

- (5) (a) and (b) of the Rules, the above-mentioned requirements are mandatory and non-compliance with them by the applicant will invariably render an application for stay of execution unproven. Put in other words, an order for stay of execution will not be made by this Court unless the conditions laid down in Rules 11(5), (a) and (b) of the Rules are met by the applicant. Coming to the instant case, we have the affidavit evidence of the applicant which was not materially controverted as the respondents opted not to file any affidavit in reply to resist the application. For that matter, there is no evidence from any of the respondents showing, albeit on a balance of probabilities that, indeed the applicant's sole intention is to deny the rightful beneficiaries of the estate of the late Salum Makuka the right to enjoy the fruits of the High Court decree. In the circumstances, while rejecting the respondents' bare assertions in their oral submissions, we find and hold that, the applicant has proved to the required standard that indeed, if the application for stay of execution is not granted, he stands to suffer a much more loss than the respondents would suffer if the application is granted. Given the evidence on the record, that appears to be a fact over which the parties need not quarrel long and loud. Equally important and mandatory, the applicant has undertaken to furnish security for the due performance of the High Court decree or any other order as may bind on him, if push comes to shove. All in all, the applicant's supporting affidavit bears out that the two conditions for stay of execution, have been met. Taken together, the foregoing analysis borrow down to one conclusion that, the application has merit and we accordingly grant it. Consequently, as the property in dispute is a piece of land and therefore an immovable property, we order that the applicant should, within a period of thirty (30) days from the date of delivery of this ruling, execute or sign a bond to maintain the status quo until final determination of the pending appeal. We order for the costs of this application to be in the cause. DATED at DAR ES SALAAM this 31st day of August, 2023. A. G. MWARD A JUSTICE OF APPEAL P. M. KENTE JUSTICE OF APPEAL

2. G. MURUKE JUSTICE OF APPEAL The Ruling delivered this 4th day of September, 2023 in the presence of Mr. Paulo Mtui, learned counsel for the applicant, 1st and 4th respondents appeared in person and in the absence of 2nd and 3rd respondents is hereby certified as a true copy of the original.
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