

TANZANIA / JUDGMENT

CIVIL APPLICATION NO

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IN THE COURT OF APPEAL OF TANZANIA AT DODOMA CIVIL APPLICATION NO. 0008 OF 2025
ASMA SHAHA SALEHE..... APPLICANT VERSUS KOMBO SHAHA
SALEHE..... RESPONDENT (Application for stay of execution of the
Order of the High Court of Tanzania (Temeke Sub-registry (One-Stop Judicial Centre) at Temeke)
(Sarwatt. J.^ dated 23rd September 2024 in Probate & Admin. Cause No. 12420 of 2024

RULING

13th & 19th Februar/ 2025 IMANGELA. J.A.: The applicant herein filed this application by way of a notice of motion made under Rules 4 (2), 11 (3), 11 (4A), 11 (5) (a) and (b), 11 (6) and 11 (7) (a), (b), (c) and (d) of the Tanzania Court of Appeal Rules, 2009 (the Rules). She is moving this Court to stay execution of the orders of the High Court of Tanzania, Temeke Sub- Registry (One-Stop Judicial Centre) at Temeke, in Probate and Administration Cause No. 12420 of 2024, pending determination of the applicant's intended appeal to this Court. The notice of motion is supported by an affidavit deponed by Asma Shaha Salehe, the applicant. According to the notice of motion, this application is premised on the following grounds, that:

1. unless the order for stay o f execution is made substantial loss m ay result to the party applying (and a ll other heirs o f the deceased's estate except the respondent).
2. That■ the application has been made w ithout unreasonable delay.
3. That\ the applicant is w illing to furnish security for due perform ance o f such orders as m ay ultim ately be binding upon her.
4. That, there are good and satisfactory reasons fo r staying execution o f the said ruling and drawn order to prevent ends o f ju stice from being defeated.
5. That, on the balance o f convenience, the applicant and a ll other heirs, except the respondent, are like ly to suffer irreparable loss in the event the execution proceeds before the applicant's intended appeal is determined.
6. That, the applicant has shown good cause and,

7. That, granting the order sought will be for the best interests of justice. When this application was called on for hearing on 13th February, 2025, Mr. Lusajo Wille, learned counsel, appeared for the applicant while Mr. Frank Killian, also a learned counsel, appeared for the respondent. Both counsel appeared by way of video conference at the Dar-es-Salaam sub-registry of this Court. When Mr. Lusajo rose to address this Court, he informed the Court that the respondent has not been served with the notice of motion, the affidavit and other supporting documents attached with it. When asked by this Court why there was no service to date while the notice was filed on 3rd January, 2025, he told this Court that it was because of the Court vacation and thus, the copies filed with the sub-registry of the Court could not be obtained from the Registrar till the 13th day of February 2025, a date when this matter was scheduled for its hearing. In view of that, he urged the Court first, to allow the applicant to proceed ex-parte based on the first prayer in the notice of motion and, second, that, the hearing in ter partes be adjourned to allow the applicant to file an application in this Court seeking for extension of time within which the applicant will serve the respondent. For his part, Mr. Frank Killian, was completely opposed to what Mr. Lusajo had submitted and proposed. First, he opposed the idea to proceed ex-parte while all parties are readily before this Court for the hearing of this application and, second, he opposed the prayer for adjournment of the hearing of this matter inter-partes as proposed by Mr. Lusajo. He contended that to do so and yet allow another application to be filed is to permit two applications to run concurrently, a fact which will necessarily invite the issue of re-subjudice. Third, it was Mr. Killian's submission that, already, the applicant has contravened rule 55 (1) of the Rules which mandatorily require that a notice of motion, its supporting affidavit and all other accompanying documents be served upon the respondent within 14 days of the filing. He questioned the soundness of Mr. Lusajo's submission that the applicant failed to serve the respondent because the Court was on vacation. According to Mr. Killian, that defence is weak and should not be allowed to stand simply because, first, the applicant filed the same documents in this Court on the 13th of January 2025, this being a time when the Court was on vacation and, second, this Court's registry and sub-registries are always open, even during Court's vacation. He contended, therefore, that, the applicant could have collected the documents and served the respondent well in time. He surmised that even the prayer by the applicant's counsel to proceed ex parte should also be rejected given that, already the applicant has violated one of the mandatory requirements of the Rules, a fact which entitles this Court to strike out her application with costs. Mr. Lusajo made a very brief rejoinder. He reiterated his main submission and rejoined that the issue of re-subjudice cannot arise simply because, if the applicant will be allowed to file an application for extension of time to enable her to serve the respondent, the two applications will be of different nature and effects. He also argued that a mere failure to comply with rule 55 (1) of the Rules does not warrant a striking out of the application as suggested by Mr. Killian. On the contrary, as per his rejoinder, such a failure only makes the application unripe for an inter-parte hearing and does not restrict the Court from proceeding ex-parte. It was his view that the word "shall", as it appears in rule 55 (1) of the Rules, has no mandatory effect. I have carefully considered the rival submissions made by both counsel

for the parties which are centred on whether the failure on the part of the applicant to serve the respondent in compliance with rule 55 (1) of the Rules is fatal or not, and whether the applicant can proceed with hearing ex-parte as per his prayer in the notice of motion while being allowed as well to file an application for extension of time within which he will serve the respondent. In the first place, the question regarding whether allowing another application to be filed for purposes of extending time within which the respondent may be served will attract the issue of re - subjudice does not arise. Agreeably, the two applications are of distinct nature and, if allowed, will serve different purposes. But is it warrantable that this Court should adjourn the matter simply on account of failure on the part of the applicant to serve the respondent? In the present application, the applicant's counsel has urged this Court to either hear this matter ex-parte or adjourn its inter- partes hearing for another day to allow the applicant time to file application for an extension of time within which the respondent, who is yet to be served, will be served with the application. Two points, therefore, arise from what the applicant is suggesting to this Court. First, whether this court should proceed ex-parte and second, whether the applicant's failure to serve the respondent as required by rules 55 (1) of the Rules can be a good cause for adjournment. As regards the first point, I agree with Mr. Killian's submission that this matter should not be allowed to proceed ex- parte. As a matter of prudence, once it is ascertained that all parties are readily before the Court for the hearing of a matter which was partly sought to proceed ex-parte and afterwards inter-partes, the best approach is for the Court to simply go the extra mile and proceed inter-partes, unless there are most unusual and exigent circumstances that would compel it to proceed ex-parte. In the present application, I see none of such unusual and exigent circumstances. Besides, I do not think that the learned counsel for the applicant has furnished compelling reasons as to why this Court should proceed ex parte while both parties are present in Court. Concerning the second issue, ordinarily, courts all over, do not entertain unjustified or unnecessary adjournments. There must be good cause if that is to happen. The reason is clear; unjustified adjournment contributes to case backlogs and reduces the efficiency of courts. As such, it is a principle, that must be accepted as absolute, that, a case must be taken up on the date fixed by the Court for its hearing. In his submission, however, the applicant's counsel has urged this Court to accede to his prayer of adjournment of this matter because he was late in serving the notice of motion and its accompanying documents to the respondent. He has attributed his failure to serve the notice of motion in time to the fact that the Court was on vacation. Can such a reason attributed to the applicant's failure be cogent enough to warrant an adjournment of this application as prayed? I do not think so and I will state why. First, although the applicant's learned counsel seems to downplay the consequences of the applicant's failure to comply with the requirement of rule 55 (1) of the Rules, as I shall consider such effects shortly afterwards, it is sufficient to note that such omission was a serious violation. Second, even if the application was filed during the Court's vacation, it was incumbent upon the applicant to follow-up the matter and ensure that the respondent was served within time prescribed by the Rules. In fact, it has taken almost a month and a half now considering the time when the application was filed and, to date, no service was

effected to the respondent. If the obstacle was that the Court was on vacation (though I find such to be an afterthought and a lame duck's excuse), it is well known to the applicant's counsel that, as from 3rd of February 2025, Courts business operations resumed in full swing. Even so, it is clear that nobody followed up the matter with the Registrar of the Court till the day when this matter was scheduled for its hearing (i.e., 13th day of February, 2025). It follows, therefore, that, the prayer to have the matter adjourned cannot be accepted. Now, since it has been conceded that the respondent has never been served with the notice of motion and its accompanying documents, what should be the remedy? Fortunately, this is not a first-time scenario. In the case of Rashid Twalib Makonyora & Others vs. Salim Twalib Makonyora (Civil Application No. 21 of 2015)

[2015] TZCA 406 (9 December 2015), it was held that failure to effect service of the application and the supporting documents within the prescribed time to the respondent rendered the application incompetent. In that case, the application was struck out for non-service of the application and the document within the prescribed fourteen days. Rule 55 (1) of the Rules reads as follows: - "55. -(1) The notice of motion, affidavit and a ii supporting documents shall\ within fourteen (14) days from the date of filing, be served upon the party or parties affected." (Emphasis added). This is the provision that the applicant offended, such that in terms of the cited case of Rashid Twalib Makonyora & Others (supra), the application was rendered incompetent. That being the status, this application is hereby struck out with costs. It is so ordered. DATED at DODOMA this 19th day of February, 2025. D. J. NANGELA JUSTICE OF APPEAL The Ruling delivered this 19th day of February, 2025, in the presence of Mr. Lusajo Willy, learned counsel for the Applicant and Mr. Frank Kilian, learned counsel for the Respondent, via Video Conference from Court of Appeal Dar es salaam, is hereby certified as a true copy of the original.

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