

TANZANIA / JUDGMENT

# CIVIL APPLICATION NO 426 17 OF 2024 GRACE MPONJI 2 OTHERS VS MUSTAFA SEIF NGANE

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM CIVIL APPLICATION NO. 426/17  
OF 2024 GRACE MPONJI..... 1st APPLICANT QUEEN  
MBANDO..... 2nd APPLICANT AMANI JOHN  
KIMARO..... 3rd APPLICANT VERSUS MUSTAFA SEIF  
NGANE..... RESPONDENT (Application for stay of execution  
pending the determination of an appeal from the Judgment and Decree of the High Court of  
Tanzania (Land Division) at Dar es Salaam) f Msafiri. J. ^ dated the 7th day of March, 2023 in Land  
Case No. 60 of 2022

## RULING

4h & 9h July, 2024 NGWEMBE, J.A.: This is an application for stay of execution of the Judgment and Decree of the High Court of Tanzania, (Land Division) in Land Case No. 60 of 2022 delivered on 7th March, 2023 (Msafiri, J). Prior to the hearing of this application inter parte, the applicants were on 28th June, 2024 successfully awarded an exparte order pending inter parte hearing for stay of execution. i The application is premised on grounds displayed on the notice of motion supported with an affidavit sworn jointly by the three applicants. Mainly, the applicants allege that the impugned judgment was entered exparte against them while they were not aware of its existence. Also, allege that unsuccessfully, they tried to apply for extension of time to set aside the exparte judgment. In their affidavit, they have attached a memorandum of appeal registered as Civil Appeal No. 800 of 2023 pending in this Court. In paragraph 11 of their joint affidavit, allege that should the execution of the exparte decree be left to proceed, they stand to suffer irreparable loss over their landed property measuring 1,001 square meters, held under certificate of Title No. DSMT 1024885 issued on 18th June,

2022. They further allege that, the already pending Civil Appeal No. 800 of 2023, will be nugatory if the decree of the High Court is not stayed. The brief background of this application emanates from a land dispute between the applicants together with others who are not party to this application, against the respondent, all claiming ownership of seven and a half (7.5) acres of land located at Kulangwa and Tegeta "A" area in Goba Ward within

Ubungo Municipality in Dar es Salaam Region. However, in regard to this application, the applicants are concerned with only 1,001 square meters of land within the seven and a half acres. The dispute landed to the High Court of Tanzania (Land Division) which decision was made *ex parte* against the three applicants. The applicants became aware of the High Court's judgment after it was already delivered on 7th March,

2023. Hence, they lodged an unsuccessful application for extension of time to set aside the *ex parte* decision. Such attempt yielded fruitless as the learned Judge Msafiri on 30th October, 2023 dismissed their application with costs. Being dissatisfied with the ruling, the applicants preferred an appeal to the Court as alluded above. Having lodged their appeal in this Court, the applicants on 13th June, 2024 were served with notice to show cause in Execution Cause No. 9122 of 2024 intending to execute the judgment and decree of the Land Case No. 60 of 2023. In response therein, on 25th June, 2024 they preferred this application for stay of execution. It is on record that the applicants moved this Court under certificate of urgency in terms of rules 11 (3) (4) (5) (a) and (b) (6) and (7) (a) (b)
- (c) (d) Rule 48 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). When the application was set for hearing before me, Mr. John Ignas Laswai, learned advocate, represented the applicants and Mr. Denise S. Tumaini, also learned advocate appeared for the respondent. At the outset, Mr. Tumaini indicated his position of not opposing the application for stay of execution. Thus, Mr. Laswai welcomed that concession and proceeded to adopt the joint affidavit in support of the notice of motion. He briefly repeated the above alluded background, with a prayer that, the stay of execution be granted to restrain the respondent from carrying out the execution of the High Court's decree. On security, Mr. Laswai, left the matter to the discretionary powers of the Court, but assured the Court that, the applicants are prepared to comply with the Court's order for security. Finally, he urged the Court to guide the disputants to refrain from any further development pending final determination of the appeal and did not press for costs. Mr. Tumaini supported the application because the piece of land subject to the application is only 1,001 square meters out of 7.5 acres. Thus, he urged the Court to consider the application and did not press for costs. I have considered the material canvassed in respect of this application. Also, I have dispassionately considered the contents of the supporting affidavit in line with the arguments advanced by the learned advocate for the applicant and supported by the advocate for the respondent. I am satisfied that the critical issue for consideration in the application of this nature is whether the application has complied with the legal requirement under rule 11 of the Rules. Subrule 4 of the said Rule requires the application of this nature to be filed within fourteen days of service of notice of execution or from a date they became aware of the existence of the application for execution. The other conditions for the stay of execution are provided for under Rule 11 (5) of the Rules as follows: Rule 11 (5) "No order for stay of execution shall be made under this rule unless the Court is satisfied that:
- (a) Substantial loss may result to the party applying for stay of execution unless the order is made;

- (b) Security has been given by the applicant for the due performance of such decree", Considering the first condition, it is evident on record that this application was lodged on 25th June, 2024 after the applicants were served with the notice of application for execution on 13th June, 2024. By simple additional mathematics, the application was lodged within 13 days from the date of service which indeed, is within time prescribed by the Rules. Therefore, I am satisfied that the condition on time limitation is fulfilled. 5 On the condition relating to security, the applicants have shown willingness to furnish security for the due performance of the decree. The applicants have categorically stated in item (ii) of the notice of motion and paragraph 12 of the joint affidavit in support of the application that they are willing to furnish such security as may be ordered by the Court for the due performance of the decree sought to be stayed. Apart from that, Mr. Laswai, in his submission emphasized that the applicants are ready to provide adequate security as will be ordered by the Court. In respect to the mode of security, the Court has pronounced itself in many decisions on the mode of giving security as precondition for stay of execution. See *Ongujo Wakibara Nyamarwa vs Beatrice Greyson Mmbaga* (Civil Application 200 of 2021) [2022] TZCA 732 TANZLII (21 November 2022) and *Mantrac Tanzania Limited v. Raymond Costa*, Civil Application No. 11 of 2010 (unreported). In the latter case, the Court discussed the mode of security and stated as follows: "To meet this condition the law does that strictly demand that the said security must be given prior to the grant of stay order. To us, a firm understanding by the applicant to provide security might prove sufficient to move the Court, all things being equal to grant the stay order provided the Court sets a reasonable time limit within which the applicant should give the same" The above decisions indicate that a mere firm commitment to furnish the security suffices. No particulars of security are required. In my view, the applicants have given such firm undertaking to furnish it in the manner and to the extent as the Court may determine. It is their commitment that they are ready to comply with whatever the Court may direct. Therefore, the applicants have sufficiently undertaken to furnish the required security as will be directed by the Court. Regarding the issue of substantial loss, I think this is a simple and straight forward matter because the applicants allege to occupy landed properties measuring 1,001 square meters which land is surveyed with certificate of title No. DSMT 1024885 issued on 18th June, 2022 and the 1st applicant has developed and is staying therein. Thus, upon execution of the decree will cause the 1st applicant be evicted from it causing irreparable loss as reiterated in paragraph 11 of the joint affidavit. I think, this matter is settled in our law following numerous decisions of this Court, that anything leading to execution of the decree may result into undue hardship. See; *Geriod Francis Tairo vs. Jumanne S. Kitila & Another* (Civil Application 254 of 2019) [2020] TZCA 1843 TANZLII (11 November 2020); *Clara Kimoka vs. Surumbu Axweso* [2002] T.L.R. 257; and *Deusdit Kisisiwe vs. Protaz B. Bilauri*, Civil Application No. 13 of 2001 (unreported), in the latter decision, the Court stated that: "The attachment and sale of immovable property will, invariably, cause irreparable injury. Admittedly the compensation could be ordered should the appeal succeed but money substitute is not the same as the physical house. The difference between the physical house and the money equivalent in my opinion; constitute irreparable injury". Thus, based on the above decisions, the sale of the landed property

situated in a land of 1,001 square meters will obviously cause irreparable loss to the applicants and cause the pending appeal nugatory. Be it as it may, on the basis of what I have endeavoured to explain, I am satisfied that the applicants have fulfilled all the conditions set out under Rule 11 (5) (a) and (b) of the Rules. In totality, I grant the application and order that the execution of the Judgment and Decree of the High Court (Land Division) in Land Case No. 60 of 2022 which was delivered on 7th March, 2023, be stayed pending the hearing and determination of Civil Appeal No. 800 of 2023 pending in the Court. I further order that the applicants should deposit a Bank's Guarantee covering the value of the disputed land to the tune of 5 million Shillings as security for the due performance of the decree within thirty days from the date of the delivery of this Ruling. It is so ordered. DATED at DAR ES SALAAM this 8th day of July, 2024. P. J. NGWEMBE JUSTICE OF APPEAL The Ruling delivered this 09th day of July, 2024 in the presence of Mr. Mazoea Africa, learned counsel for the Applicants also holding brief for Mr. Denice S. Tumaini, learned counsel for the Respondent, is hereby certified as a true copy of the original. 9

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