

TANZANIA / JUDGMENT

ongujo wakibara nyamarwa vs beatrice greyson mmbaga 2022 tzca 732 21 november 2022

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM (CORAM: MKUYE, J.A., KIHWELO, J.A., And MAKUNGU, J.A.) CIVIL APPLICATION NO. 200/17 OF 2021 ONGUJO WAKIBARA NYAMARWA A..... APPLICANT VERSUS BEATRICE GREYSON M M BAGA..... 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 Rumanvika, J. dated 11th day of December, 2020 in Land Case No. 43 of 2016 RULING OF THE COURT 31st October & 21st November, 2022 MKUYE, J.A.: This is an application for stay of execution made under Rule 11 (3), (4), (4A), (5) (a) and (b), (6) and (7) of the Tanzania Court of Appeal Rules, 2009 (the Rules) in which the applicant seeks to have the judgment and decree of the High Court (Land Division) in Land Case No. 43 of 2016 (Rumanyika, J. as he then was) stayed pending the determination of an intended appeal. The application is supported by the affidavit deposed by Ongujo Wakibara Nyamarwa, the applicant, explaining the reasons why the application should be granted. The application is resisted by the affidavit in reply deposed by Beatrice Greyson Mmbaga, the respondent. The brief background leading to this application is as follows. The applicant, Ongujo Wakibara Nyamarwa had sued the respondent, Beatrice Greyson Mmbaga, before the High Court (Land Division) over ownership of piece of land identified as Plot No. 93, Block II, located at Mtoni Kijichi, within Temeke Municipality. The applicant claimed to be the lawful owner over the suit land having been allocated by the Ministry for Lands in 2010 upon payment of Tshs. 7,900,000/=. On the other hand, the respondent claimed that she had bought the suit land on 26th June, 2004 from one, Mwinjuma Shabani Maembe prior to the survey of the land comprising the suit plot. In the High Court, (trial court) the applicant sought for a declaratory order that the respondent was a trespasser; an order for vacant possession and general damages. Upon hearing the parties, the trial court observed that the respondent possessed customary rights over the land comprising the suit plot which was subject to compensation prior to any disposition. Consequently, the trial court through its judgment made a finding that the applicant was not a lawful owner of the suit land and was ordered to give vacant possession together with payment of general damages to the respondent to the tune of Tshs 300,000/=. Aggrieved with that decision, the applicant, on 15th December, 2020 lodged a

notice of appeal after the judgment sought to be stayed was delivered on 11th December, 2020, and also filed this application on 5th May, 2021. At the hearing of the application, Mr. Samson Edward Mbamba who teamed up with Mr. Punge Wabaya, both learned counsel entered appearance to represent the applicant whereas the respondent had the services of Mr. Nickson Ludovick, also learned counsel. When invited to amplify the grounds for the application, Mr. Mbamba in the first place sought to adopt the written submissions and the list of authorities filed in Court on 5th July, 2021 and 26th August, 2022, respectively, to form part of his submission. Essentially, in the notice of motion, affidavit as well as the written submissions, the applicant has explained the grounds for this application being one, that the respondent has already filed an application for execution vide Execution No. 19 of 2021 in respect of the High Court (Land Division), Land Case No. 43 of 2016 and that this application was lodged on 5th May, 2021 after having been served with the notice of application for execution on 22nd April, 2021. Two, that unless the order for stay of execution is made, the applicant is likely to suffer undue hardship and substantial loss. While relying on the case of *Dr. William Shija v. Fortunatus Masha*, Civil Application No. 1 of 2002 (unreported), Mr. Mbamba added that since the subject of execution involves a residential house, the Court should relatively relax to grant an order for stay of execution. Apart from that it is stated in paragraph 5 of the applicant's affidavit that the monetary decretal amount of Tshs 500,000/- to be executed is colossal meaning that perhaps it cannot be atoned by any money. Three, that the applicant is willing to furnish such security as may be ordered by the Court for the due performance of the decree. This is also shown in item 5 of the notice of motion and amplified by Mr. Mbamba. In this regard, it is Mr. Mbamba's argument that the applicant has satisfied all the conditions to warrant the grant of this application. On his part, Mr. Ludovick also sought to adopt the affidavit and written submissions in reply to form part of his oral submissions. After having done so, he did not have qualms with time limitation stating that the application was filed within time; and that the applicant has indicated his willingness to furnish security for the due performance of the decree. However, he argued that the applicant has not shown how he will suffer substantial loss. He contended that, as indicated in paragraph 7 of the affidavit in reply, the applicant is not residing in the suit premises. He was of the view that, since all conditions were required to be fulfilled and the applicant has failed to satisfy one of the conditions, this application should not be granted and instead it be dismissed with costs. In rejoinder, Mr. Mbamba insisted that all the three conditions were satisfied. He stressed that, although the respondent claims that the applicant is not residing in the suit land, the applicant has averred in paragraph 6 of the affidavit that he resides there with his family. He added that, according to *Dr. William Shija's* case (*supra*), the fact that the suit property is an immovable property, it is sufficient to show that the applicant will suffer loss. In the end, he reiterated his prayer that the Court should find that all conditions are met and grant the application. 5 We have examined and considered the rival submissions and, we think, the issue for our determination is whether the applicant has satisfied all the conditions for the grant of the application. An application for stay of execution is governed by Rule 11 of the Rules. Sub-rule (4) of the said Rule requires the application of this nature to be filed within fourteen days of service of notice of execution on the applicant or from the date he 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: "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". Regarding the first condition, we wish to state at the outset that it is common ground that this application was lodged on 5th May, 2021 after the applicant was served with the notice of application for execution on 22nd April, 2021. By simple calculation, the application was lodged within 13 days from service which is, indeed, within time as conceded by the respondent. Therefore, we are satisfied that this condition is fulfilled. On the condition relating to security, the parties agree that the applicant has shown willingness to furnish security for the due performance of the decree save that the respondent is of the view that the applicant has not given particulars in respect of the firm undertaking of the security. However, we note that the applicant has categorically stated in item (c) of the notice of motion and paragraph 5 of the affidavit in support of the application that he is 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, in his written submissions, this fact is reiterated in paragraph (e) thereof. In *Mantrac Tanzania Limited v. Raymond Costa*, Civil Application No. 11 of 2010 (unreported), the Court discussed the mode of giving 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 undertaking 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." [Emphasis added]. According to the above cited authority, a mere firm undertaking to furnish the security suffices. No particulars of the security are required. In our view, the applicant has given such a firm undertaking to furnish it in the manner and to the extent as the Court may determine. It means that he is ready to comply with whatever the Court may direct. Therefore, on the basis of the above authority, we are satisfied that the applicant has sufficiently undertaken to furnish the security. Regarding the issue of substantial loss, we think, it is a bit controversial to the parties. The applicant asserted that he will suffer undue hardship and irreparable injury because he is residing in the suit premises. It is notable that in item (a) of the notice of motion the applicant has stated that undue hardship and substantial financial and emotional loss is likely to be resulted to him unless the order for stay of execution is made. This is reiterated in paragraph 6 of the affidavit with an addition that the decree is against the landed property which he is using with his family for accommodation. Also, in paragraph 7 he explained how the decretal amount of Tshs. 500,000/= is colossal⁸ justifying the execution to be stayed. This is amplified in both written and oral submissions in which the learned counsel while relying on the case of *Dr. William Shija* (supra) stressed that, since the subject of the execution involves a residential house, the Court should be relatively relaxed to grant an order for stay of execution. On the other hand, the respondent resisted that the applicant is not residing in

the premises; and that he has not shown how the loss would be occasioned. She is of the view that should the decree be executed the applicant will not suffer any substantial loss. On the issue whether or not the applicant resides in the dispute premises, we agree with Mr. Mbamba's line of argument and take that the applicant is residing in the dispute premises. Anything leading to the execution of the decree may result into undue hardship. In the case of Geriod Francis Tairo (As Administrator of the Estate of the Late Francis Kamwesa Tairo) v. Jumanne S. Kitila (As Administrator of the Estate the Late Fatuma Puza @ Fatuma Pyuza), Civil Application No. 254 of 2019 (unreported), when the Court was faced with almost a similar scenario, it cited with approval the case of Clara Kimoka v. Surumbu Axwesio [2002] TLR 255 at 257 where the Court granted stay of execution on the ground that: 9 "The applicant is in possession of the suit land now and has all along been in possession of it. The interruption of her long occupation of the suit land would in my view, be justified only after the case is finally determined in the respondent's favour. But in the event the appeal is allowed, it would not make much sense to temporarily attempt the applicant's long possession now only to restore it to her after the success of her appeal." Similarly, in the case of Dr. William Shija (supra), the Court took a stance that the irreparable injury may be occasioned where the property attached is immovable property/a house. In that case, while citing the case of Deusdedit Kisisiwe v. Protaz B. Bilauri, Civil Application No. 13 of 2011 (unreported), the Court stated that: "The attachment and sale of immovable property will, invariably, cause irreparable injury. Admittedly 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." 10 Thus, on the basis of the above cited authorities we are prepared to hold that the subject matter, being a residential house used by the applicant and his family, and that being an immovable property, should it be sold, is likely to cause irreparable injury. See also, Godebertha Rukanga v. CRDB Bank and Three Others, Civil Application No. 156 of 2013 (unreported). We also take note that the applicant pleaded that the amount of Tshs 500,000/= (sic), we think, Tshs 300,000/= is colossal. Of course, we do not intend to downplay his claim since, in our considered view, it is subjective depending on the economic or financial position of the individual. The fact that the applicant has stated that it is colossal, we think, he has taken into account the respondent's financial capabilities. Although the respondent has disputed alleging that it is not colossal, she did not substantiate it. We would not gloss over the worry raised by the applicant in the circumstances. Be it as it may, on the basis of what we have endeavoured to explain, we are satisfied that the applicant has fulfilled all the conditions set out under Rule 11 (5) (a) of the Rules. 11 It is trite law that, in order for the Court to grant the application for stay of execution all the three conditions must be cumulatively fulfilled. (See Joseph Soares @ Goha v. Hussein Omary, Civil Application No. 12 of 2012; Hai District Council and Another v. Kilempu Kinoka Laizer and 15 Others, Civil Application No. 10/05 of 2017 and Gilbert Zebedayo Mrema v. Mohamed Issa Makongoro, Civil Application No. 369/17 of 2019 (all unreported). In this case, we have no hesitation to find that the applicant has fulfilled all the conditions to warrant the grant of the application for stay of execution. In the event, we grant the application and order that the execution of

the judgment and decree of the High Court (Land Division) in Land Case No. 43 of 2016, be stayed pending the hearing and determination of the intended appeal to this Court. We further, order that, the applicant should deposit a Bank's Guarantee covering the value of the disputed premises to the tune of Tshs 7,900,000/= plus the decretal sum of Tshs 300,000/= as security for the due performance of the decree within thirty days from the date of the delivery of this Ruling. 12 It is so ordered. DATED at DAR ES SALAAM this 14th day of November, 2022. R. K. MKUYE JUSTICE OF APPEAL P. F, KIHWELO JUSTICE OF APPEAL

0. 0. MAKUNGU JUSTICE OF APPEAL The Ruling delivered this 21st day of November, 2022 in the presence of Mr. Wabeya Kung'e, Counsel for the Applicant and the Respondent in person is hereby certified as a true copy of the original. A.L. KALEGEYA DEPUTY REGISTRAR COURT OF APPEAL 13

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