

TANZANIA / JUDGMENT

CIVIL APPLICATION NO

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TANZLIIDECIDED
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IN THE COURT OF APPEAL OF TANZANIA AT POPOMA CIVIL APPLICATION NO. 450 OF 2025
PATRICK MOSENPA NYAMOHANGA..... APPLICANT VERSUS AMIRI SALEH
MW AMBA..... 1st RESPONPENT ABSA BANK (T)
LIMITED..... 2nd RESPONPENT YONO AUCTION MART LT
D3rd RESPONDENT THE COMMISSIONER FOR
LANDS.....4th RESPONDENT THE ATTORNEY
GENERAL..... 5th RESPONDENT (Application for stay of execution of
the Decree of the High Court of Tanzania at Dares Salaam) (Hemed, 3.} Dated the 14th day of
November, 2023 in Land Case No. 148 of 2014

RULING

13th & 26th March, 2025 RUMANYIKA. 3.A.: The applicant, Patrick Mosenda Nyamohanga has moved this Court, by way of notice of motion predicated under rule 11(3) (4) (4A)

- (5) (a) and (b) and (7) of the Tanzania Court of Appeal Rules, 2009 ("the Rules"). He is seeking for an order staying execution of the decree of the High Court of Tanzania at Dar es Salaam ("the trial court") in 1 Land Case No. 148 of 2014 pending determination of the intended appeal. It is also accompanied with an affidavit sworn by the said Patrick Meshack Nyamohanga under a Certificate of Urgency presented on 25/2/2025. Unlike the 2nd, 3rd, 4th and 5th respondents, the 1st respondent filed an affidavit in reply contesting the application. The background to the application is fairly short and straight forward. All began with the 1st respondent who sued the present 2nd respondent and the applicant. He prayed for, among other things, a decretory order that he is the lawful purchaser of the landed property situated on Plot No. 243, 245 Block 9 Bunju Area, Kinondoni Municipality. It was registered under certificate of Title Nos. 107159 and 107171 respectively ("the disputed property") which was auctioned and sold on 16/2/2023. The record also had it that, previously, the disputed property was registered in the applicant's name which he successfully pledged as security for a bank loan from the 2nd respondent, his employer. However, the applicant defaulted to repay the loan. In consequence, instructed by the 2nd respondent, the 3rd respondent auctioned and sold the disputed property to the 1st respondent, the highest hence the successful bidder. Then the 4th respondent transferred the respective titles to the 1st respondent. However, the 1st respondent's attempts to take full possession of the

property bore no fruit. Therefore, he instituted the suit as highlighted above. In the end, the trial court declared the 1st respondent the victor as the Bonafide Purchaser and owner of the disputed property. Thus, entitled to vacant pre-session. Dissatisfied with the said decision, on 01/09/2023 the applicant lodged a notice of appeal to this Court and, on account of the ground which will follow shortly, the applicant instituted the instant application upon being served with the 1st respondent's notice for execution of the impugned decree. It is worth noting in a nutshell that the notice of motion is premised on three (3) grounds as under: one, undue hardship and substantial loss should the application not be granted. Two, the impugned proceedings, judgment and decree are tainted with serious 3 errors and three, the applicant undertakes to furnish security for the due performance of the decree sought to be challenged. The application was held remotely by way of Video Conference as the parties were linked from Dar es Salaam Court of Appeal sub-registry. The applicant enjoyed the services of Ms. Aziza Omary Msangi, learned Counsel. The 1st respondent was represented by Mr. James Bwana, learned Counsel while Mr. Tarzan Mwaiteleke, also learned counsel appeared for the 2nd and 3rd respondents. The 4th and 5th respondents had the services of Mr. Elias Mwenda, learned State Attorney. Onset, Messrs. Mwaiteleke and Mwenda readily supported application. As such, from the very commencement of the hearing, Mr. Bwana did not resist the application save for the issue of security. With moderate zeal and vigor, therefore, he contended that, unless the applicant deposited security of USD 2000 monthly as rental collections on the disputed property, the scales of justice stood to be remain unbalancing without more. Pressing reliance on the written submission filed and having adopted the supporting affidavit in reply, Ms. Msangi attacked the 4 amount of USD 2000 proposed by Mr. Bwana. She declined to accept it for being on the high side, unreasonable and unrealistic. On the contrary, she proposed TZS. five million (5,000,000.00). Justifying her proposed security, she asserted that, the disputed property was situated in the peripheries of the City of Dar es Salaam from where the applicant gained nothing economically but as a mere family residence. Rounding up the point, she beseeched me to find the application merited and to grant it. On the proposed amounts as security, and having adopted the 1st respondent's affidavit in reply, Mr. Bwana contended that, his proposal of USD 2000 per month was justified meeting justice of the case in the circumstances. He argued that, out of the purchase price of TZS. 190,000,000.00, the applicant only used TZS. 55,138,382.20 to settle the debt. Further, Mr. Bwana argued that, according to the applicant's wife (then DW4) at the trial court, the couple retained TZS. 134,861,616.80 for construction of another house at Kigamboni where they reside as the family. Therefore, on that account the learned Counsel argued that the issue of the applicant suffering irreparable loss is neither here nor there. Moreover, he stressed that, the amount of 5 USD 2000 per month did reflect market value of the suit property which now stood at 77S. 308, 000,000,00. Briefly rejoining, Ms. Msangi contended that, Mr. Bwana's assertions that the applicant and family resided at Kigamboni in their alternative house only came from the bar which she beseeched me to discount. Nonetheless, she implored me to order any amount whichever is reasonable and equitable as security. Upon examining the notice of motion, the supporting affidavit, the counsel's contending arguments and the authorities cited, the issue in controversy is not

whether or not the application is tenable. Rather it is on the deserving security for the due performance of the decree sought to be stayed. It is common knowledge that, the court's power to grant or to refuse to grant an application of this nature is discretionary. As such, it is grantable only upon the applicant fulfilling the conditions set out under rule 11 (4) (5) (a) and (b) and (7) of the Rules cumulatively. See for instance, our decision in *Ecobank Tanzania Ltd v. Double A Co. Ltd and Tree Others* (Civil Application No. 178 of 2021) [2022] TZCA 591 (29 September 2022: TanzLII) and *Duncan Shilly Nleya V. 6 Oysterbay Hospital Co. Ltd and another* (Civil Application No. 62717 of [2023] TZCA 18026 (13 September, 2023: TanzLII). We note, from the enabling provisions of the law referred above that the conditions for granting stay of execution are essentially four: one, the application has to be filed within fourteen days of the service of the notice for execution on the Decree Holder. Two, if stay is refused the applicant stands to suffer irreparable loss. Three, the applicant's firm understanding to furnish security for the due performance of the decree and four, copies of the impugned notice of appeal, decree, judgment and notice of the intended execution have to be appended on the application. For the instant application, it is glaring in that, the applicant was served with notice of execution on 13/02/2025 and he filed this application on 27/02/2025. As such, this was done timely within fourteen days prescribed under rule 11 (4) of the Rules. Moreover, copies of all the requisite documents were attached as annexures PN1, PN2 and PN3 to the supporting affidavit respectively. Further, pursuant to rule 11(5) (a) of the Rules, the applicant averred that, targeted by the intended execution is his family residential. That should the intended execution not be stayed it would culminate into members of the household being homeless thus disturbed emotionally. Therefore, whether or not the applicant had an alternative shelter is immaterial because it needed evidential proof which battle is both improper and uncalled for at this stage. See-*Linus Furaha Shao v. National Bank of Commerce* (Civil Appeal No. 9 of 1999) [2009] TZCA 9 (19 November, 2001; TanzLLII). It so because an application for stay of execution of an impugned decree is a double coincidence of wants affair: one the judgment debtor has to be assured of exhaustion of the appellate vertical hierarchy and two; the Decree Holder has to be guaranteed with rejoicing the fruits of his decree, however long and cumbersome the procedure is. As such, if a combination of the two would bring the same results so much the better. That said, I am satisfied that, finally, this application shall have met the threshold of it all. It is recalled that, with regard to the security to be furnished by the applicant, Ms. Msangi and Mr. Bwana locked horns on the deserving amount. Should it be TZS. 5,000,000.00 once and for all or USD 2000 monthly respectively. Nevertheless, it is trite that what counts is a mere firm undertaking by the applicant to furnish the security, provided that the Court sets out a reasonable time for the applicant to do the needful. 8 See- *Mantrac Tanzania Ltd v. Tymon Costa* [2011] TZCA 519 (10 October, 2011: TanzLII). However, I am unable to accept Ms. Msangi's proposition that, TZS. 5,000,000.00 sufficed for the costs. I note that, unlike in an election petition where, preliminarily, there has to be deposited such an amount of money as security for the costs, in the matter at hand, it is intended to assure the Decree Holder of its fruits, should the intended appellant (Judgment Debtor) lose the war and battle. In this application, therefore, the applicant under para 5 of the supporting affidavit demonstrated

his commitment to furnish security as it may be directed by Court. To sum up, therefore, the applicant has cumulatively met the conditions warranting the granting of stay of execution of the decree. The upshot of it is that the application is hereby granted. Moreover, for avoidance of doubt, it is ordered, thus;

1. Execution of the decree of the High Court of Tanzania Land Division in Land Case No. 148 of 2014 dated 03/08/2023 is hereby stayed pending the hearing and determination of the intended appeal. 9
2. The applicant has to deposit in the Court a bank guarantee for TZS. 142,500,000.00 being 3A of the purchase price of the suit property within sixty days of this Ruling. In default, the order for stay shall lapse automatically.
3. Each party to bear their cost. DATED at DODOMA this 26th day of March, 2025. S. M. RUMANYIKA JUSTICE OF APPEAL The Ruling delivered this 26th day of March, 2025 in the presence of Ms. Aziza Msangi, learned counsel for the applicant and Mr. James Bwana, learned counsel for the 1st Respondent, but also holding brief for Mr. Tazan Mwaiteleke, learned counsel for the 2nd and 3rd respondents, and Mr. Elias Mwendwa, learned Senior State Attorney for the 4th and 5th respondents is hereby certified as a true copy of the original. 10

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