

TANZANIA / JUDGMENT

CIVIL APPLICATION NO 688 17 OF 2024 RICHARD MALISA VS MARRY PILLA LIBABA 2 OTHERS

COURT
TANZLIIDECIDED
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IN THE COURT OF APPEAL OF TANZANIA AT PAR ES SALAAM CIVIL APPLICATION NO. 688/17 OF 2024 RICHARD MALISA APPLICANT VERUS MARRY PILLA LIBABA (Administrator of the Estate of the late GILSAL LIBABA).... 1st RESPONDENT CHARLES LAWUO..... 2nd RESPONDENT DEOGRATXAS THOMAS IVO..... ,3rd RESPONDENT (Application for Stay of Execution of the Decree of the Resident Magistrate's Court of Dar es Salaam, at Kivukoni/Kinondoni with Extended Jurisdiction) fKiswaoa. PRM-Ext. Juris! dated 9thday of November, 2023 in Extended Land Appeal No. 241 of 2022

RULING

17th & 23rd September, 2024. FIKIRINI. J.A.: This application for stay of execution resulted from the decision in the Extended Land Appeal No. 241 of 2022, upholding the District Land and Housing Tribunal (DLHT) decision in Land Application No. 44 of 2017, delivered on 9th November, 2023, which aggrieved the applicant. He was thus prompted to lodge a notice of appeal on 8th December,

2023. Meanwhile, on 21st August, 2024, the applicant learnt that the 1st respondent had employed surveyors to survey the suit land. He thus filed this application for stay of execution in terms of rule 11 (3), (4), (6), (7) (a), (b), (c) and (d) and 48 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The application is supported by the affidavit deposed by the applicant himself. The 1st and 2nd respondents filed affidavits in reply, whereas none was filed by the 3rd respondent, who was aware of the existence of the application and hearing dates fixed but did not show up. The history building up to this application can be summarized as thus: the 1st respondent sued the applicant, the 2nd respondent and the 3rd respondent before the DLHT for Kibaha in Application No. 44 of

2017. In that application, she complained that part of her thirty seven

(37) acres of land purchased from the 3rd respondent's deceased father had been trespassed on by the applicant and the 2nd respondent. The actual acres in dispute are unknown as the two respondents then claim to have bought sixteen (16) acres from which each got eight (8)

acres. Later, the applicant gave half of his eight (8) acres to his relative, so each had four (4) acres. Relying on the evidence adduced and since there was no certainty in the measurements, the Chairman ordered that a qualified land surveyor be appointed to go and verify those sixteen

- (16) acres sold to the applicant and the 2nd respondent and if they have exceeded twenty two (22) acres then the excess should be returned to the owner and if not then each party maintain what they have. The Chairman instructed that parties should all be involved in the exercise and costs should be shared. Discontent with the decision, the applicant appealed to the High Court in Land Appeal No. 317 of 2022, which was later transferred to the Resident Magistrate's court with extended jurisdiction and registered as Extended Land Appeal No. 241 of 2022, assigned to the Principal Resident Magistrate. The Principal Resident Magistrate, with extended jurisdiction, upheld the DLHT's decision, including the order that a qualified land surveyor be picked to survey the land occupied by the applicant and the 2nd respondent if it has exceeded sixteen (16) acres. Still discontent, the applicant preferred an appeal to this Court as indicated above. Likewise, as shown earlier on in this ruling while the appeal is still pending it seems, the land surveyor's work had taken off. This prompted the present application. On the hearing date, Mr. Frank Mwampamba and Nelson Samson learned advocates appeared for the applicant and the 1st respondent. In contrast, the 2nd respondent defended for himself. The 3rd respondent opted not to enter an appearance, and the purported learned advocate he alleged to have been assigned also did not show up, even though he was aware of the hearing date. The hearing, therefore, proceeded in his absence, in terms of rule 63 (2) of the Rules. Spearheading the amplification, Mr. Mwampamba adopted the notice of motion and the affidavit in support. He urged me to grant the application as all the requirements under rules 11 (5) (a) and (b) of the Rules have been satisfied. He notably ran me through paragraph 8 of the affidavit in support of substantiating the loss to be suffered if the application would not be granted and the applicant's willingness to furnish security for the due performance. Additionally, he stressed that the outcome of the appeal, if in favour of the applicant, would be nugatory. Mr. Samson, on his part, adopted the affidavit in reply and contended that the applicant had not satisfactorily shown the substantial loss to be suffered. On a different note, he disputed the claim that the 1st respondent was the one who initiated the survey alleged ongoing. He argued that each party owned their piece of land as ordered by the DLHT; therefore, there was no need to issue the stay of execution order. How could the surveyor enter the suit land for survey purposes if no one has prayed for the execution to be carried out? I asked. His answers were unclear as to who permitted the survey work to proceed. Distantly and unsure, he agreed to the grant of the application. After adopting his affidavit, the 2nd respondent was straight to the point that he supported the application since it would benefit all. He also remarked that the DLHT decision had ordered the participation of all the parties. Therefore, once this stay of execution application is granted, this is the opportune time for that to occur. Mr. Mwampamba, in his brief rejoinder, submitted that reading through paragraph 8 shows the 1st respondent as the one who sought the services, and if she is declining to have requested

the services of the survey, then it means there is a person other than the parties who was interfering with the process, and that should be worrying. Winding up, he urged a grant for an order for stay of execution. Stressing that the grant would be of use as it would allow parties to participate in the survey exercise, and each will get a chance to verify their pieces of land owned. The present application for stay of execution is against the decree of the DLHT in Land Application No. 44 of 2017. I asked myself whether I had jurisdiction to entertain the application. The answer is that I have jurisdiction as discussed and decided in the case of Salvatory Gibson

- v. William Laurent Malya and Mariam I. Mbelwa, Civil Application No. 6/05 of 2017, whereby the Court referred to the case of Sudi Kipetio & 3 Others v. Bakari Ally Mwera, Civil Application No. 94 of 2004 (unreported). In the latter case, the Single Justice had this to say:- "As long as there is a notice of appeal before the Court and the order to be stayed, though given by a subordinate court, was nevertheless, given in respect of a matter subject of the pending appeal, this Court has jurisdiction to entertain an application for stay of execution." Based on the above decision, I am now ready to determine whether the application for stay of execution is merited. The decree-holder must not be deprived of the enjoyment of the judgment in her favour, especially after the appeal has been concluded in that party's favour. Therefore in considering any application of this nature, the Court has to be keen and observe that the following requirements are fulfilled: one, that the application for stay was filed within fourteen (14) days as required under rule 11 (4), two, that there is compliance to the requirements under rule 11 (5) (a) and three, in terms of rule 11 (5) (b) of the Rules, the applicant is ready to furnish security for the due performance, to avert the possibility of the judgment debtor to hinder realization of the decree in the decree holder's favour in case the intended appeal fails. From paragraph 8 of the affidavit, the applicant became aware on 21st August, 2024 that the request for a surveyor had been made. The information led to the filing of the present application, which was within fourteen (14) days. This condition is met. The second condition is satisfaction of the requirement under rule 11 (5) (a) of the Rules, that the applicant would suffer substantial loss if this application is not granted. The applicant has shown in paragraph 10 the substantial loss to be suffered. This is what is stated in the said paragraph "That, the applicant who is a bonafide purchaser of the suit land shall suffer substantial and irreparable loss if stay is not granted because the applicant having lodged notice of appeal to this Court means there is still a dispute as to who is lawful owner of the suit land to date. And if the act of the 1st respondent will not be stayed or stopped, it will be not easy for the applicant to recover his position and rights as a bonafide purchaser of the said suit land in the event the intended appeal succeeds." The paragraph is self-descriptive of the substantial loss the applicant would suffer if the stay of execution order is declined. The 1st respondent has challenged the assertion in paragraph 6 of her affidavit in reply. This is what is stated: "That, the contents of paragraphs 10 of the affidavit is utterly denied, and the strict proof is required there forth. The 1st respondent avers that there won't be any substantial or irreparable loss as the applicant is supposed to legally be owning the 8 acres he bought from the applicants late husband." Besides the above paragraph, the 1st

respondent has also, in paragraph 5, declined to be the one who instigated the surveyor's work subject of the present application. She averred that her application for execution is still pending before the DLHT at Bagamoyo. My perusal of the record led me to a request for a survey form duly filed dated 13th May 2024, indicating the 1st respondent as the one who sought assistance. The Land office authorized the exercise to be carried out by Thomas Alex of AG-SUNILAIMD Consult Ltd. If the 1st respondent refutes seeking for the alleged services, the applicant's concern becomes valid, that there might be unscrupulous activities which, if not stopped, may adversely interfere with the applicant's rights. That is not only worrying but risky, too. The 2nd respondent rightly supported the application, considering it beneficial to the parties as they will all get to take part as ordered by the DLHT and later the Resident Magistrate's Court with extended jurisdiction. Moreover, the 1st respondent has already initiated the execution process, as averred in paragraph 5 of her affidavit in reply. Balance of convenience, common sense and justice dictates that the applicant might suffer substantial and irreparable loss if the application for stay of execution is refused in case the intended appeal succeeds. I know that the notice of appeal alone does not stop the execution process, but once it has been lodged, it paves the way for the application for stay of execution to be filed, as it is the present application. Thus, by filing this application for stay of execution, the applicant's intentions are clear that he wishes the execution be stayed pending the finality of his intended appeal. In the case of *Sudi Seif Ngota (Administrator of the Estate of Seif Mohamed Ngota) v. Aloyce John Kazimbaya*, (Civil Application No. 262/17 of 2019) [2021] T7CA 26 (18th February, 2021; TANZLii), the Court discouraged declining to grant a stay of execution to the applicant who was currently in occupation of the disputed property. Likewise, in *Mapius Otieno v. Machimu Mayara*, (Civil Application No. 279/8 of

2024) [2024] TZCA 515 (2nd July, 2024; TANZLii), again the Court considered being in current possession as of the date of the decree a factor in granting the stay of execution. The applicant undoubtedly has been in occupation ever since, and there is a pending appeal. In that light, I find declining to grant the application illogical. Considering all 10 these together, I find the applicant has shown substantial loss to be suffered. This condition is met. The last condition is a requirement under rule 11 (5) (b) of the Rules, which obligates the applicant to furnish security for the due performance. Under paragraph 11, the applicant committed himself to furnish security for the due performance in any form as may be directed by the Court. In dealing with the issue of security for due performance, the Court has balanced the interests of the applicant, who is seeking the order for stay, and those of the first respondent, who claims her land has been trespassed into. The most important thing is to make sure that the first respondent does not end up getting an empty judgment or enjoyment of a decree in her favour, which becomes another uphill task. Given the foregoing, I thus order a stay of execution of the decree of the DLHT in Land Application No. 44 of 2017, with the condition that first, the applicant shall not dispose of or alienate in any way the disputed property. Second, the applicant is to deposit in Court a bank guarantee for the sum of TZS. 20,000,000/= within sixty (60) days, pending hearing and determination of the intended appeal. ii Costs in the application shall abide by the

outcome of the appeal. It is so ordered. DATED at DAR ES SALAAM this 20th day of September, 2024. P. S. FIKIRINI JUSTICE OF APPEAL The Ruling delivered this 23rd day of September, 2024 in the presence of Mr. Nelson Samson, learned counsel for the 1st respondent also holding brief for Mr. Frank Mwampamba, learned counsel for the applicant, 2nd respondent who appeared in person and 3rd respondent was absent; is hereby certified as a true copy of the original. R. W. CHAUNGU DEPUTY REGISTRAR COURT OF APPEAL 12

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