

TANZANIA / JUDGMENT

MISC CIV APPLICATION NO 311 02 OF 2024 ROSE BENEDICT VS JANET EVARIST NJAU 3 OTHERS

COURT
TANZLIIDECIDED
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IN THE COURT OF APPEAL OF TANZANIA AT PAR ES SALAAM MISCELLANEOUS CIVIL
APPLICATION NO. 311/02 OF 2024 ROSE BENEDICT
APPLICANT VERSUS JANET EVARIST NJAU 1st RESPONDENT
JUDITH EVARIST NJAU I st RESPONDENT JANES EVARIST NJAU
(as attorney of MARE BENEDICT)..... 3rd RESPONDENT JANES EVARIST NJAU
(as attorney of LILY KOMINO).....4th RESPONDENT (Originating from the
decision of the High Court of Tanzania, at Arusha) (Hon. Kiwonde. J.) Dated the 15th Day of
March, 2024 in Land Application No. 114 of 2023

RULING

26th & 27th June, 2024 MAIGE, J.A.: On 15th March, 2024, the High Court of Tanzania, at Arusha as per Kiwonde, J made an order, among others that, a Farm No. 962 at Kiranyi Vikaga in Arumeru District with Certificate of Title No. 158, "the suit property no. 1" and a land on plot No. 92 Block "21" at Kalolezi in Arusha township under the Certificate of Title No. 841, "the suit property no. 2" i (together, "the suit properties") be valued, sold in public auction and the proceeds thereof divided among the applicant and respondents in equal shares or the case might be. Being aggrieved by the decision, the applicant lodged a notice of appeal. Subsequently, it would appear, the respondent commenced an execution proceeding. So as to preserve the status quo until the intended appeal is concluded, the applicant has preferred this application, essentially under rule 11 (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules) seeking to stay the execution of the said order. The application is founded on the affidavit of the applicant. It has been factually opposed by the affidavit in reply of the first respondent in her own individual capacity and as an attorney of the third and fourth respondents as well as the affidavit in reply of the second respondent. In the conduct of the application, Messers. Fidel Peter and John Mushi, learned advocates for the applicant and respondents, respectively, appeared remotely through video conferencing while in Arusha. From their submissions, it would appear, the counsel were in agreement that, an order for stay of execution is grantable if three conditions are cumulatively established. One, the application has been preferred without undue delay. Two, the application is

necessary to prevent substantial loss on the part of the applicant. Three, the applicant has made a firm undertaking to furnish security in due performance of the decree. See for instance, CMA CGM Tanzania Ltd v. Justine Baruti (Civil Application No. 417/18 of 2018) [2019] TZCA 160 (28 February 2019). Equally in agreement between them is the fact that the first condition has been satisfied in the affidavit in that; the application was as the law requires, filed within 14 days from the date when the applicant was served with the notice of execution. The query is on two areas. First, on the form of security proposed. The applicant has undertaken to furnish her shares on the suit properties. Mr. Peter submits that the security offered is sufficient in the circumstances of this case. Conversely, Mr. Mushi contends that the same is not sufficient in as long as it is not certain. On my part, I have considered the rival submissions and with respect, I agree with Mr. Peter that; since the dispute at hand is not on the ownership of the suit properties but rather on whether or not the same should be sold by way of public auction; and there being no dispute that the suit properties, which are immovables, are commonly owned by the applicant and respondents herein; I find that the undertaking on the part of the applicant to furnish her shares on the suit properties as security in due performance of any binding order that may be issued against him by the Court is sufficient I have also taken into account the fact that in the event that the intended appeal fails, there is nothing which shall specifically be required to be performed by the applicant in as long as the status quo of the suit properties shall remain as they were. The risk related to the status quo can, in my humble view, be sufficiently secured by an order requesting the applicant to submit a commitment bond to that effect. In *Mohamecf Masoud and 16 Others v. Tanzania Road Haulage (1980) Ltd.* (Civil Application No. 58/17 of 2019) [2019] TZCA 198 (17th June, 2019) where, as in the instant case, the subject of the intended appeal was a landed property, it was held that the security requirement would be fulfilled by the applicant upon furnishing a commitment bond guaranteeing that the suit property would remain in the same condition as it was at the time of issuance of a decree. This approach was subsequently followed in among others, *Suleimani Yussuf Ali v. Sultanali Abdalla Gulamhussein* (Civil Application No. 421/15 of 2018)

[2029] TZCA 452 (17 October 2019) and *Efetha Ministry v. S. Khambaita Limited* (Civil Application No. 335/05 of 2022) [2029] TZCA 452 (17 October 2019). In the latter authority, it was in particular stated: "As the impugned decree involves an immovable property currently occupied by the applicant and is not monetary by its nature, we are guided by the case of *Suleimani Yussuf AH v. Sultanali Abda/Ia Gulamhussein* (Civil Application No. 421/15 of 2018)

[2029] TZCA 452 (17 October 2019). In that case, we granted the application for stay of execution upon the applicant therein executing a bond committing himself to ensuring that the house remained in the same condition as was at the time when the decree was passed until the hearing and determination o f the intended appeal". Therefore, just as it is for the first condition which has not been disputed, the third condition as to security for costs can be fulfilled by the applicant furnishing a commitment bond in the manner as aforesated. Conditions numbers one and three have, therefore, been satisfied. I proceed with the second condition as to the necessity of the order in preventing substantial loss. The

applicant has deposed in paragraphs 8 and 9 of the affidavit that, apart from hugely investing unto the suit property number one, she had a dwelling house thereon and a grave yard of her beloved mother. If the suit properties are sold, she further averred, she will remain homeless, loose her investment and completely denied access to the graveyard of her beloved mother. Basing on those depositions, it was submitted for the applicant that the second condition has been satisfied. For the respondents much as the stay order in respect of the first suit property was not at issue, the same, to the extent of the second suit property was seriously contested. It was contended that the facts in the affidavit address only the first suit property. After all, it was submitted, the applicant is not in possession of the second suit property. I have given the rival submissions in respect to the issue in question due consideration. Much as it may be true that the factual justification for the application relates to the first suit property, in as long as the order sought to be executed pertains to both the properties, demonstration of substantial loss in respect of part of the suit properties would suffice to comply with the condition. In my opinion, therefore, the application has merit and it is hereby granted. Consequently, the execution of the order of the High Court dated 15th March, 2024 in Land Application No. 114 of 2023 is hereby stayed pending hearing and determination of the intended appeal on the condition that; the applicant executes, within 30 days from the date hereof a commitment bond pledging all her undisputed interests/ shares on the suit properties as security in due performance of any order that k may be issued against her and undertaking that the first suit property which is in her possession shall remain in the same condition as it was on the date of the issuance of the order until the intended appeal is heard and determined. I shall not in the circumstances make any order as to costs. It is so ordered. DATED at DAR ES SALAAM this 27 th day of June, 2024. I. J. MAIGE JUSTICE OF APPEAL The ruling delivered through video mediated interaction this 27th day of June, 2024 in the presence of Mr. Fidel Peter, learned counsel for the applicant and Mr. John Mushi, learned counsel for the respondents both having their location in Arusha. I. J. MAIGE JUSTICE OF APPEAL I certify that this is a true copy of the original. 7

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