

**IN THE COURT OF APPEAL OF TANZANIA**  
**AT ARUSHA**  
**(CORAM: KWARIKO, J.A., SEHEL, J.A. And KHAMIS, J.A)**  
**CIVIL APPLICATION NO. 85/02 OF 2021**

**LESUSU LESILALE SAIDURAKI.....APPLICANT**

**VERSUS**

**SANAI LEKIMBOYIPOI as administrator**  
**of the estate of the late LEKIMBOYIPOI SAIDURAKI ..... RESPONDENT**

**(Application for Stay of Execution of the Judgment and Decree of**  
**the High Court of Tanzania, District Registry at Arusha)**

**(Gwae, J)**

**dated the 28<sup>th</sup> day of February, 2020**

**in**

**Land Case No. 14 of 2016**

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**RULING OF THE COURT**

21<sup>st</sup> & 23<sup>rd</sup> August 2023

**KHAMIS, J.A.:**

Sanai Lekimboyipoi as administrator of the estate of his late father, Lekimboyipoi Saiduraki, instituted a suit against his first cousin, Lesusu Lesilale Saiduraki, in the High Court of Tanzania, Arusha District Registry, for declaratory relief that a parcel of land measuring about seventy-seven (77) acres located at Dukabovu area, Meserani Village, within Monduli District, Arusha Region, was the lawful property of the deceased. He also moved the trial court to declare that his kinfolk was

in unlawful occupation of the said land, hereinafter to be referred to as the disputed land or the land in dispute.

Upon trial, the High Court (Gwae, J) was persuaded that the suit land belonged to the late Lekimboyipoi Saiduraki, and thus declared Sanai Lekimboyipoi as administrator of the estate of the deceased, to be its lawful owner. In so finding, the trial court permanently restrained Lesusu Lesilale Saiduraki, from doing any activity in the disputed land.

Additionally, the High Court ordered Lesusu Lesilale Saiduraki, the applicant herein, to vacate and hand over vacant possession of the disputed land within three (3) months from date of delivery of the Judgment, 28<sup>th</sup> day of February, 2020, or else, face eviction.

Aggrieved by the trial court's judgment and decree, Lesusu Lesilale Saiduraki, initiated the appeal process to this Court. To begin with, he issued a notice of appeal on 6<sup>th</sup> day of March, 2020 and subsequently, wrote a letter to the Deputy Registrar of the High Court for certified copies of the impugned proceedings, judgment and decree.

Whereas the appeal process was ongoing, the decree holder, Sanai Lekimboyipoi as administrator of the estate of the late Lekimboyipoi Saiduraki, the respondent herein, filed an application for execution moving the High Court to evict his kindred brother from the

disputed land and accordingly served him with copy of the relevant summons.

Fearing that he will suffer irreparable loss if the trial court is left to proceed with the execution, Lesusu Lesilale Saiduraki, the applicant herein, filed the present application for stay of execution of the impugned High Court judgment and decree.

The application was filed by way of notice of motion dated 6<sup>th</sup> day of December 2020, which is expressed to be made under rules 11(3), (4), (4A), (5) (a), (b), (6), (7) (a), (b), (c), (d) and 48(1) of the Tanzania Court of Appeal Rules, 2009 (The Rules).

In the notice of motion, the applicant pointed out two grounds upon which the Court is moved, namely: that the notice of appeal has been lodged in the Court since 6<sup>th</sup> day of March 2020, and that the respondent has already filed an application for execution, registered as Execution Case No. 14 of 2016.

The application is supported by the affidavit sworn by Lengai Nelson Merinyo, learned advocate, duly instructed by the applicant to represent him in these proceedings, dated 11<sup>th</sup> day of December 2020, in which he substantially reiterates the grounds shown in the motion.

In addition, Merinyo, deposed that the applicant and his family comprising of two wives, twelve children, and thirteen brothers with their respective wives, children, kith and kin are living in the disputed land and depends on it for their daily social and economic activities.

Further, the deponent stated that the disputed land was comprised in a traditional certificate of occupancy issued to the applicant and his brothers, a document that was tendered and admitted as exhibit in the trial court. Besides, he averred that the applicant is a pastoralist with a herd of cattle consisting of 40 cows, 100 goats and 50 sheep all grazed in the disputed land.

On that account, Merinyo deposed that if execution is let to proceed, the applicant will suffer irreparable loss as the entire family composed of more than thirty people, plus domesticated animals, depends on the disputed land for their livelihood.

The deponent further averred that the intended appeal has overwhelming chances of success allegedly because the respondent who was the plaintiff in the High Court, failed to demonstrate inclusion of the suit land in the estate of the late Lekimboyipoi Saiduraki who died on 25<sup>th</sup> day of May 2002, taking into account that the customary certificate of occupancy over the same property admitted in the High Court

(annexture D1, D2 and D3 collectively), was issued to the applicant and his twelve brothers.

The respondent filed an affidavit in reply affirmed by one Said Amri, learned advocate, on 14<sup>th</sup> day of January 2021, who generally disputed the applicant's allegations and subjected him to strictest proof thereof.

The affiant further deposed that there is no tangible report from a competent authority to suggest the applicant owns the named herd of cattle which can satisfy the decree and warrant this Court to order stay of execution. Further, he deposed that the alleged herd of cattle was insufficient to satisfy the impugned decree.

When the application was set for hearing before us, Messrs. Lengai Nelson Merinyo and Gwakisa Kakusulo Sambo, learned advocates, appeared for the applicant and respondent respectively.

Mr. Merinyo referred us to the notice of motion, its supporting affidavit and adopted their respective contents. He relied on three unreported cases of this Court, namely: **Paul David Kifaru v. Karim Shahbudin Ally & Karim Shahbudin Ally**, Civil Application No. 174/01 Of 2017, **J.W Ladwa (1977) Limited v. Basons Enterprises Limited**, Civil Application No. 566/17 Of 2019 and **Hai**

**District Council & Another v. Kilempu Kinoka Laizer & 15 Others**, Civil Application No. 10/05 Of 2017 which addressed prerequisite conditions for granting of an order for stay of execution.

In the upshot, Mr. Merinyo contended that the application was properly presented and the applicant sufficiently demonstrated compliance with necessary requirements for the grant of an order for stay of execution.

On the other hand, Mr. Sambo readily conceded to the application but drew our attention on the fact that the affidavit in support of the motion did not expressly state that the applicant is ready and willing to deposit security for performance of the impugned decree.

The learned counsel for the respondent was quick to point out that, as opposed to decrees in several decisions of this Court, the impugned decree in the instant matter is not monetary but rather declaratory in nature. He found it hard to suggest an appropriate security to address the decretal terms in accordance to rule 11(5) (b) of the Rules. Ultimately, he left the matter in the hands of the Court.

We have dispassionately heard and considered submissions by the learned counsel for the parties. We have also examined the notice of

motion and its supporting affidavit and spared no contents of the affidavit in reply presented by the respondent's counsel.

In **Mtakuja Kondo and Others v. Wendo Maliki**, Civil Application No. 74 of 2013 (unreported), this Court re - affirmed the law on stay of execution as provided for under rule 11 (4), (5), (6) and (7) of the Rules, thus:

*"...the conditions which applicants have to satisfy so as to be granted the order for stay of the execution are laid out in rule 11(2)(b)(c) and (d). All conditions must be satisfied. The applicant must show the following: a notice of appeal was given, they have sufficient cause for praying for the order for stay, the application was filed within time, they will suffer substantial loss if the order is not granted, and they have furnished security."*

That same position was expressed and amplified in **Paul David Kifaru v. Karim Shahbudin Ally & Karim Shahbudin Ally, J.W Ladwa (1977) Limited v. Basons Enterprises Limited** and **Hai District Council & Another v. Kilempu Kinoka Laizer & 15 Others** (Supra). The only issue before us is whether the applicant fulfilled requirements for the grant of an order for stay of execution.

In our considered view, the application was timely lodged as demonstrated in annexure E to the supporting affidavit. This document indicates the applicant was served with a copy of the application for execution on 3<sup>rd</sup> day of December 2020 and promptly filed this application on 6<sup>th</sup> December 2020 in strict compliance with rule 11(4) of the Rules that requires filing of such application to be made within fourteen days of service of the notice of execution.

In the Notice of Motion and in the supporting affidavit, the applicant displayed that owing to the mammoth size of his family whose livelihood depends on the activities at the disputed property, he will suffer irreparably if the application for execution is not stayed pending determination of the intended appeal.

We have considered the mode of execution sought by the respondent, namely; forceful eviction of the applicant from the disputed land. That means, if an order for stay is not granted, and assuming that the applicant subsequently succeeds in the intended appeal, he and members of his expansive extended family currently occupying the disputed land, stand to suffer substantial loss which cannot be atoned by way of damages.



Further, the applicant also indicated in paragraph 10 of the supporting affidavit that, in case the appeal is not decided in his favour, he is ready and willing to satisfy the decree. Impliedly, this means if the appeal is not successful, the applicant undertakes to vacate from the disputed land as ordered by the trial court. This undertaking is in line with rule 11(5)(b) of the Rules.

Cumulatively, we are satisfied that the applicant presented a competent application which is meritorious as it meets all conditions precedent for the grant of an order for stay of execution. We thus harbour no reservation in granting it.

Since it is in the discretion of this Court to determine an appropriate security to be provided in accordance with rule 11(5)(b) of the Rules whose application depends on the circumstances of each case, we are of the considered view that an order for execution of a bond by the applicant for maintenance of status quo pending determination of the intended appeal is appropriate in the circumstances of this case.

In the event, we give an order for stay of execution of the judgment and decree of the High Court at Arusha in Land Case No. 14 of 2016 pending determination of the intended appeal on condition that

the applicant executes, within fourteen days from the date of delivery of this ruling, a written bond undertaking to maintain status quo of the disputed land. In the circumstances of the present application, each party to bear own costs. It is so ordered.

**DATED** at **ARUSHA** this 22<sup>nd</sup> day of August 2023.


M. A. KWARIKO  
**JUSTICE OF APPEAL**

B. M. A. SEHEL  
**JUSTICE OF APPEAL**

A. S. KHAMIS  
**JUSTICE OF APPEAL**

The Ruling delivered this 23<sup>rd</sup> day of August, 2023 in the presence of the Lengai Nelson Merinyo learned Counsel for the Applicant and Ms. Belinda Alphayo learned Counsel for the Respondent is hereby certified as a true copy of the original.



  
M. C. MAGESA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**