

TANZANIA / JUDGMENT

benjamin p masota vs esther e maneno another 2010 tzca 107 14 may 2010

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IN THE COURT OF APPEAL OF TANZANIA AT MWANZA (CORAM: MSOFFE. J.A. MBAROUK. J.A. And BWANA, J.A.) CIVIL APPLICATION NO. 8 OF 2009 BENJAMIN P.

MASOTA.....APPLICANT VERSUS MRS. ESTHER E. MANENO AND ANOTHER..... RESPONDENTS (Application for stay of execution from the Ruling and order of the High Court of Tanzania at Mwanza) (Rwakibarila, 3.1 dated the 19th day of March, 2009 in MISC Civil Appeal No. 18 of 2008 RULING OF THE COURT 13 & 14th May, 2010 MBAROUK. J.: The applicant, Benjamin P. Masota, has lodged this notice of motion under Rules 9 (2) (b) and 45 of the Court of Appeal Rules, 1979 seeking for an order of this Court to stay the execution of the ruling of the High Court (Rwakibarila, J.) dated 19-3-2009 in Misc. Civil Appeal No. 18 of 2008 pending the hearing and determination of the intended appeal. The grounds upon which the applicant relies in this application are as follow:-

1. That the intended appeal against the ruling and order of the High Court has a high chance of success.
2. The applicant shall suffer irreparable loss if execution of the Decree of the High Court is not stayed.
3. Under the prevailing circumstances, the balance of convenience rests with the applicant. The notice of motion is supported by the affidavit of the applicant. At the hearing of the application, the applicant was represented by Mr. Benard Kabonde, learned advocate, whereas the 1st Respondent had the services of Mr. Mussa Mhingo, learned Advocate and the 2nd Respondent appeared in person. Mr. Kabonde started his submission by requesting to adopt the contents of the applicant's affidavit in support of the notice of motion. He further submitted that, currently, the applicant is in possession of the house in dispute being a bonafide purchaser for value in a market. He added that, the house in occupation by the applicant and his tenants since 11-12-2008. In the circumstances, he claimed that, if stay of execution order is not granted, the applicant will suffer hardship. He added that the 1st Respondent's affidavit in reply shows at paragraph 5 thereof that she does not dispute what is 2 stated in the applicant's affidavit as from paragraph 4 to paragraph

10. For that reason, Mr. Kabonde urged us to grant the application on the basis of the balance of convenience. As for costs, Mr. Kabonde prayed for the order that costs to be in the cause. As for the 2nd Respondent, he totally objected to this application for stay of execution. He contended that the applicant is not staying therein. He claimed that, he is the one suffering at the moment. For that reason, he prayed for the application not to be allowed. On his part, Mr. Mhingo initially forcefully argued against the application, however he later relaxed his stand and conceded that as far as the applicant and the tenants are currently in the house, definitely if a stay order is not issued the applicant and his tenants will suffer hardship. As for the issue of costs, Mr. Mhinga left it to the Court to decide. In his reply, Mr. Kabonde submitted that it is difficult to believe what the 2nd Respondent stated because he did not file an affidavit in reply. He said there is no proof to that effect. In the end, Mr. Kabonde reiterated his earlier prayers. At this juncture, it is our task to assess and examine whether the applicant has shown sufficient cause leading to us to grant the stay order. In the instant application, Mr. Kabonde mainly relied on the aspect of the hardship to be suffered by his clients if the stay order is not granted. He claimed that, currently the applicant is staying in the disputed house with other tenants. Hence an eviction order will definitely affect the applicant. We on our part are of the considered opinion that the applicant has sufficiently convinced us that on the balance of convenience he will suffer greater hardship compared to the respondents. According to the decision of this Court in Tanzania Cotton Marketing Board v Cogecot Cotton Company Limited (1997) TLR 63, which propounded the conditions for granting an application for stay of execution. The issue of the balance of Convenience is one of them. Also See: Mchele Mumwi and Another v. Telesphory Alphonse Kanyweke, Civil Application No. 10 of 2009 (unreported). 4 As the balance of convenience being one of the conditions for granting a stay of execution and as far as in the instant application we are of the view that the applicant is going to suffer greater hardship, we think that the balance of convenience tilts in the applicant's favour in granting the stay order. For that reason, we stay the execution of the ruling and order dated 19-3-2009 in Misc. Civil Appeal No. 18 of 2008 pending the hearing and determination of the intended appeal. Costs to be in the cause. It is so ordered. DATED at MWANZA, this 13th day of May, 2010. J. H. MSOFFE JUSTICE OF APPEAL M. S. MBAROUK JUSTICE OF APPEAL S. J. BWANA JUSTICE OF APPEAL I certify that this is a true copy of the original.

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