

TANZANIA / JUDGMENT

CIVIL APPLICATION NO 209 14 OF 2024

DR LUIS B SHIJA VS KELLU KAMO LUCAS

COURT
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1 January 2024

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IN THE COURT OF APPEAL OF TANZANIA AT SHINYANGA CIVIL APPLICATION NO. 209/14 OF 2024 DR. LUIS B. SHIJA..... APPLICANT VERSUS KELLU KAMO LUCAS.....RESPONDENT (Application for stay of execution pending review of the judgment of the Court of Appeal) (Korosso. JA. Galeba. JA., and Ismail JA.1 dated 12th day of December/2022 in Civil Appeal No. 63 of 2022

RULING

26th June & 1st August, 2024 MAIGE J.A: This is an application for stay of execution of the decree of the Court dated 12th December, 2023 pending hearing and determination of the intended application for review. The application is preferred under among others, the provisions of rule 4 of the Tanzania Court of Appeal Rules, 2009 (the Rules). It was contested by an affidavit in reply deposed by the respondent personally. The hearing of the application was by way of video mediated interaction. Mr. Frank Samwel, learned advocate, represented the applicant while in Shinyanga whereas, Mr. Paul Kipeja represented the respondent while in Mwanza. i The facts of the case briefly stated are as follows. The applicant and respondent were under partnership arrangement, operating a health centre and dispensary located at the Plots No. 247 and 249 Block "Q" Kahama Urban Area with Certificates of Title No. 17860 and 17862, respectively (together, "the suit Property"). In 2016, a dispute as to the ownership of the suit property erupted between them. As a result, the respondent Instituted a suit at the High Court of Tanzania at Shinyanga for among others, vacant possession of the suit properties. In its judgment, the High Court dismissed the respondent's claim and declared the suit property a joint property of them. Aggrieved, the respondent appealed to the Court which reversed the decision of the High Court and decreed as follows: 'Accordingly, the decision of the High Court is hereby reversed, and the appellant is declared the lawful owner of the disputed plots.' Aggrieved, the applicant applied to the Court for review of its judgment. Conversely, the respondent commenced execution proceeding with a view to evicting the applicant from the suit property thus the instant application. In his submissions in support of the application, Mr. Samwel adopted the notice of motion and affidavit and argued, making reference to the affidavit that, the conditions for grant of stay of execution have been complied. He clarified that, the eviction of the applicant from the suit 2 property which is used for provision of health service to the public, will render such service inoperative at

the detriment of the applicant and the public which to him is a substantial loss. To the contrary, he submitted, the respondent will not suffer any loss if the same is not granted as the hospital and the health centre are run in a partnership between them. He submitted further that, the application has been brought without delay and the applicant has undertaken to furnish security in due performance of the decree. He thus urged me to grant the application. In rebuttal, Mr. Kipeja while in agreement that, stay of execution can under rule 4 (2) of the Rules be granted pending review and that, the application has been made without undue delay; he is of the contention that the applicant has not proved existence of substantial loss and an undertaking to furnish security in due performance of the decree. The reason being that, the facts in justification thereof are based on hearsay deposition of the applicant's counsel without there being an affidavit from the applicant while in their nature, the facts are such that they are within the personal knowledge of the applicant. Relying on the authority in *Lalago Cotton Ginnery & Oil Mills Co. Limited vs The Loans & Advances Realization Trust (LART)* (Civil Appeal 51 of 2002) [2004] TZCA 48 (20 January 2004; TANZLII), it was his contention that an advocate can only depose on facts which are within his personal knowledge. 3 Let me agree first with the concurrent submissions by the counsel that, stay of execution pending review can be granted if the conditions for stay of execution pending appeal, as stated in among others, *National Housing Corporation v. Peter Kassid and 4 others*, Civil Application No. 243 of 2016 (unreported) and *Tanzania Motor Service LTD v. Tan track Agencies Ltd* (Civil Application No. 86 of 2004) [2005] TZCA 22 (12 May 2005; TANZLII) are complied. These are: One, the application has to be made without undue delay; Two, the application must be necessary to prevent substantial loss on the part of the applicant; and Three, the applicant has to furnish security in due performance of the decree. See the decision of In accordance with the affidavit, the applicant was served with the notice of execution on 9th March, 2024 while the application at hand was lodged on 22nd March, 2024. It was, therefore, well within the time limit of 14 days from the date of the notice of execution. The first condition, has, therefore, been met. The second condition as to substantial loss is reflected in paragraphs 6 and 14 of the affidavit in which it is deposed that the suit property is used for health services on partnership arrangement between the parties. That alone would suffice to establish the necessity of the grant to prevent substantial loss. Mr. Kipeja submits, however, that, such fact in as long as it is within the personal knowledge of the applicant, could not be deposed by the counsel without offending the rule against hearsay. I have been, to that effect, referred to the case of *Lalago Cotton Ginnery & (supra)* to support the view that, an advocate can swear and file an affidavit in proceedings only on matters which are within his personal knowledge. This Court has dealt with an issue like this in a number of authorities. For instance, in *Adnan Kitwana Kondo and Others v. National Housing Corporation*, Civil Application No. 208 of 2014 (unreported), where the authority in *Lalago Cotton Ginnery (supra)* was considered, a single justice of the Court having observed at page 8 of the ruling that, the advocate has deposed based on information but did not disclosed in the verification close the source of information, held: "In view o f the foregoing, I adjudge the referred paragraphs 2,3,4 and 5 to be offensive for non-disclosure o f source o f Information". Similarly, in *Salima Vuai Foun v. Registrar of Cooperatives and Others* [1995] TLR 75 it was held: " where an affidavit is made on information it should not be acted upon by any court unless the sources o f information are

specified" As observed in Vuai case (supra), the above principle had been in use, by the Court of Appeal for East Africa before the establishment of the Court of Appeal of Tanzania in among others, the case of Bombay Flour Mill v. Chunibhai M. Patel [1962] 1 EA 803 (HCT) based on the Indian Civil Procedure Code and subsequently, the Civil Procedure Code. The relevant provision is Order XIX rule 3(1) which excludes the application of the general rule against hearsay in interlocutory proceedings, It provides as follows: "3(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted" From the foregoing authorities, it would appear to be the law that, what is prohibited in an affidavit in support of an interlocutory application as the instant one, is deposing a fact basing on information without disclosing the source thereof and the ground of belief. In this case, while the facts as they relate to the substantial loss is within the personal knowledge of the applicant, in the verification clause, the deponent clearly disclosed that such deposition was based on information from the applicant, which information he believed to be true. I, therefore, do not agree with Mr. Kipeja that such affidavit cannot be used to grant an order for stay of execution. I would make the same holding in respect to the requirement to furnish security in due performance of the decree which, in my reading, is express in the notice of motion and affidavit. 6 I note, however that, the form of security has been seriously contested in so far as it constitutes the disputed property. A similar issue was raised in Rose Benedict v. Janet Evarist Njau and Others (Misc. Civil Application No. 311/02 of 2024) [2024] T7CA 508 (27 June, 2024; TANZLII) where it was observed, the observations of which shall be followed in this decision as follows: 7 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 Mohamed 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 issuance of the decree," Having said that, I find the application with merit and it is accordingly granted. The execution of the decree of the Court in Civil Appeal No. 63 of 2022 is hereby stayed pending hearing and determination of the intended application for review on condition that, the applicant executes within 30 days from the date hereof, a commitment bond to the effect that the suit property shall remain in the same condition as they were at the date of issuance of the decree by the Court. I make no order as to costs in the circumstances. It is so ordered. DATED at DAR ES SALAAM this 30th day of July, 2024 I. J. MAIGE JUSTICE OF APPEAL The Ruling delivered this 1st day of August, 2024 was by way of video interaction in the presence of the Applicant in person was in Shinyanga and Mr. Paul Kipeja, learned counsel for the Respondent was in Mwanza; is hereby certified as a true copy of the original. J-JI J. E. FOVO r v W # I T Y REGISTRAR n>s' ^ ^COLIRT OF APPEAL 8

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Prepared on 14 October 2026 · Esheria