

TANZANIA / JUDGMENT

19980316 TZCA Dar es Salaam

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'I IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM AR CIVIL APPLICATION NOo 8 OF 1996 BET,1/EEN 1o INSPECTOR SADIKI

2. ASSISTANT INSPECTOR MATHIAS • 0 APPL.ICANTS

3. THE ATTORNEY GENERAL AJ\!D GERALD NKYA. • o 0 .0 0 0 O 0 0 RESPONDENT (Application for Exterision of Time within which to serve the Responrlent with a copy of thi=- Notice of Appeal anr'I a copy of the lettP.r to the R~gistrar requesting record of Proceedings) (Mrosso, J,::_,) dated the 26th ~ay of July, 1996 in Civil Case No.4 of 1993 R UL I N G RAMADHANI, JoAo! The respondc:-nt, Gerald r,ikya, successfully sued· the three applic~nts.for malicious prosecution in the High Court of Tanzanij at Arusha. The judgment was delivered on 26th July, 1996 and or 1st August, 1996 the applicants filed a notice of appeal and wrote a letter requesting copies ot ,the proceedingso The respondent was neither served· with·a copy of the notice of ap~eal nor with a copy of the said letter. Hence, this application to extend time within which to serve the respondent with both of those copies. The applicants were represented by,J"!ro Songoro, learned Senior State ^ttorrey. He reiterated the contents of the affirlavits of Mr. Mlambo, learr.e.rl state Attorney Arusha a~d Mariam Issa Pangani 1 the personal secretary to the Principal State Attorney, Arusha. · It has been explained by the applicants •• /2 ' ii *' r' \ 2 that the notice of appeal and the letter requesting record of proceedings inrlicate~ that copies to be served on the respondent. However+ because t~e law secretary had gone on mat~rnity leave, Mariam ~angani filled the vacancy, but as she was new to the job, she sent the originals and all. the copies to the High Court. No copy was sent to the respon~ent, Mariam Pa~gani herself, sai~ so in her affinavit. The Attorney-General Chambers, Arusha became aware of this omission on the 3rd October, 1996 when the office received a letter from the responcP.nt claiming the execu tio·D of the decree. The respondeDt, on the other hand, in his counter-affidavit, said ,that on 19th September, 1996 that is forty-nine days after the notice of appeal was filed, he presented to the Attorney-Generall s Ch~mbers, Arusha, copies of the proceerlings, judgment and deer.Pe of the case to alert them that he ~as taking steps ! to execute the award. On 30th Septh,mber, he sent to the Treasury his claim for Shs. 29,426~250/= by registPred mail with a copy to the applicants. Hewer.ton to say that there was some further correspon~ence with the Treasury anrl that on 6th November, 1996 he sent the rtetails require~ by the Treasury copied to the I A~G Chambers, Dar es Salaam an~ Arusha. On 18th.Novembe~ the r~sponrlent went to the J~-G

Chambers, Arusha for some other business when a copy of notice of motion for this application was presented to him. He found out that the application had been filed on 13th November. Mr. Songoro maintained that it was on 3rd October, 1996, and not earlier, that the A-G Chambers, Arusha became aware that the respondent had not been served. What the learned Senior State Attorney was saying was refuting the suggestion of the respondent that the A-G Chambers, Arusha ought to have been alerted as far back as 19th September when the respondent delivered to them copies of the proceedings, judgment and decree. There are two matters here: First, Mr. Songoro, as a very senior legal officer, ought to have known better that the proper way to contradict the contents of the counter-affidavit of the respondent was not by making statements from the bar but was by filing a reply to the counter-affidavit. That the A-G Chambers has not done. Secondly, the affidavit of Mr. Mlambo filed in support of the application states in paragraph 13 that upon receipt of the copy of the letter of the respondent claiming the decretal amount on 3rd October, 1996, they realised that the respondent had not received a copy of the notice of appeal. But it is curious that the receipt of the copy of that letter signalled to the applicants only one thing; that was that the respondent had not received his copy of the notice of appeal. Someone in the Chambers should have remembered that filing a notice of appeal does not automatically stay execution. So, the respondent could have received his copies but nevertheless, he could have decided to go ahead with execution. The applicants should have been prompted to another reaction; to file an application for a stay of execution. But what is even more baffling, the reaction of the A-G Chambers, Arusha came after the expiry of forty days from the 3rd October, when they realised the omission, to 13th November, when they filed this application. Mr. Songoro told me that the Chambers, Arusha was trying to find out what had happened. However, the learned Senior State Attorney failed to say whether it was necessary to use forty days to do just that. *ooo/44 In Transport Equipment Ltd. v. Devram Po Valambhia*, Civil Reference No. 7 of 1992, this Court refused to extend time within which to serve the respondent with a copy of the notice of appeal. Admittedly, the application, in that reference was made six months after the omission became known. Here the application has been made after one month and ten days. But in that case the applicant was very quick to serve a copy of the notice of appeal to the respondent the day following the realisation of the omission so, when he filed that application he had already made an attempt to serve the respondent. Despite that we were not persuaded to extend time. In that reference, just as in this application, the reason advanced for seeking the enlargement of time was the error of a law clerk in the chambers of the learned advocate for the applicant. We found that not to constitute "sufficient reason" under Rule 8. Just for purposes of completeness, in *Dalphine Parry v. Murray Alexander Carson*, [1963] EoA 546, the applicant was late for only five days when he applied for extension of time, but the Court of Appeal for East Africa refused to do so and despite the fact that they thought that the appeal had merit. I cannot distinguish this application from the reference in *Transport Equipment Ltd.* There is no sufficient reason advanced to persuade me to exercise the powers under Rule 8. I dismiss the application with costs. It is so ordered. DATED at DAR ES SALAAM this 27th day of October, 1997. AO SOLO RAMADHANI JUSTICE OF APPEAL I certify that this is a true copy of

the original (M.S. s... DEPUTY fEiis7RAR . I I - I I ' • IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAMI (COP..AM: RAMADHANI 2 J .• A. 2 LUBUVAL J .A. 2 And S.AI\JIATTA. 1 J .A.) - CIVIL REFERENCE NO. 9 0:B' 1996 In the I:~B:tter of an Intended Appeal BETWEEN SALIM BAKA.RI MSHANAKALE . e •• I O .• t. e ~ 0 0 ct APPLICANT AND MUSSA SALEHE MDOE •••••••••• , •• o, 1 RESPONDENT (Reference from the Ruling of a single Judge of the Court of Appeal af Tanzania at Dar es Salaam) (Mnzavas 9 •J, A.) dated the 19th day of August 9 1996 in Civil Application No. 1 of 1996 ' --...-..... . . RULING Of THE COURT SAM.ATTA,•J.A. This is a reference made under Ru.le 57(1)(b) of the Tahzania Court of Appeal Ru.lee, 19799 by the applic~t, sa,J.im J3akari M.ahanakale, from the ruling of a single judge of this court (Tu'.fnza.:vas, ~,A,) dated Auguet 19, 1996, ,;oefusing the ~icant's application fo~ stay of exeQ~tion „ If of a decree of the District Court of Lusho~o in Ci.vil Appeal No, 80 of 1990• The background to the application may, we think, be stated o~tefly as follow~ In a suit filed oefore tne Mlpla Primary Court the respondent claimed from the applicant vacant possession of a house he all~ed to b.ave bought from one At.hu.ma.ni Mjai on Dec-em1>er 12 1 1970, .A e • Q /2 V 1: " •:' \ ..: J, ~ . ,,,. -:-:-~::~.. •• \. 2 - !twas his case that 9 after buying the house 7 in 1977 he allowed the applican-li to occupy it. The latter occupied the house and made some repairs to it. In 1990 J the applicant 9 according to the respondent 's story before the trial court 1 wanted to construct another house on the plot 9 but the respondent stopped him from ct.)ing so. The applicant vehemently resisted the claim. He asserted that the house on the plot was his property, Athuman :Mjai having given it to him. Athuman Mjai tried to champion the applicant's case 1 he denied to have sold the house to the respondento The primary court was convinced that the truth in the case lay on the applicant's side; accordingly 9 it .entered judgment for the applicant. 1-'fue re~P~;,,,;ent was aggrieved by that decision; he appea.]ed against the same to the District Court. The appeal was allowed and judgment was entered for the respondent- That decision aggrieved the applicant, who appealed against the same to the High Court (r1sumi 9 J. as he then was). The learned Judge carefull~r considered the evidence laid before the trial court and in the end he upheld the District Court's decision and dismissed the• appeal. After he had given notice of his intention to appeal against that decision to this Court, the applicant e.pplied before WJnzavas 1 J.A. (as he then was) for stay of execution of the a.c~c:~ee in the caseo In the affidavit supporting his application he asse:rted, among other things, that he had been in occupation of the house in question for a continuous :period of 26 years and if stay of execution was not granted he stood to suffer 0 • t • /3 3 - greater loss and hardship th!:~m the l'espondent would. The application 1 which was opposed by the respondent, was dismissed. In the course of his ruling the learned Judge said, among other things: "After my scrutiny of the evidence in the Court of first instance I see that people whose pieces of land are adjacent to the disputed property testified that the property belonged to the respondent." ~lere are two issues before us in this application. First, whether the intended appeal has chances of success 9 and~ secondly, if the first issue is answered ~ the affi:rmative 9 whether the applicant would suffer i:r;reparable loss if the stay of execution applied for is not granted. Msumi J. made what we consider to be a careful analysis of the evidence given at the trial. In the course of his judgement he said: 0 I.t is not true that on the balance of

probability the evidence on record tilts more in favour of the appellant. Admittedly, Athumani Mjai first when the respondent claims to have bought the suit property has denied it but this stage in the case of the respondent is adequately taken care of by other pieces of evidence. For example all the neighbours whose piece of land share boundaries with

- '4 - the suit property have testified that they were aware that the property belongs to the respondent. They saw him occupying the house in question for a number of years before the appellant came in. There is also the evidence of one of the people who witnessed the said sale of the suit property by Athumani Mjai to the respondent. In assessing the veracity of Athumani Mjai it is relevant to note the close relationship between him and the appellant and the fact that at the material time they were staying together. In fact according to appellant's evidence the witness is very old about 100 years of age and he is taking care of him. 11 Prima facie, the reasoning in that passage is very powerful. It seems to us that bearing that in mind as well as the fact that the issue of credibility of witnesses has already been analysed by two appellate courts which reached concurrent findings that the truth lay in the respondent's story in this case, it cannot be said that the intended appeal has chances of success. The affidavit supporting the present application the applicant has also sought to show that the learned Judge's finding on time limitation of the suit is likely to be held on appeal to be lacking validity. We are unable to accept that assertion. The learned Judge held that the cause of action in the case arose in 1990 when for the first time the applicant is said to have challenged the respondent's ownership of the suit house. Prima facie, it must be correct to say, as we do, that the evidence in the scales permitted only that finding on the issue of limitation. For the reasons we have given, we are of the view that the intended appeal has no chances of success. Having reached that opinion, we do not find it necessary to consider the question whether, if the application for stay of execution of the decree is not granted, the applicant will suffer irreparable loss. In the result, we find no merit in the reference and dismiss it with costs. DATED at DAR ES SALAAM this 16th day of March, 1998, A. S. L. RAHIMUDDIN > JUSTICE OF APPEAL B. A. SALVATTA JUSTICE or APPEAL I certify that this is a true copy of the original. (A.G. MUSA) DEPUTY REGISTRAR

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