

juma bakari vs 2013 tzhc
2017 29 november 2013

DECIDED
29 November 2013

IN THE HIGH COURT OF TANZANIA - AT Mtwara. - LAND CASE - APPLICATIO
M; Mg-GF-2013 JUMA ATBAKARI - ~ - - - - ~ - 'APPLICANT' - THE LATE ABD
ILLAHBIKARI) VERSUS MBARAKA A. BAKARI - - - - - RES
PONDENT

11/11/13 & 29/11/13 M Z U N A , 3 :: Jum a A. Bakari, has filed this application against Mbaraka A. Bakari praying for stay of execution of a decree pending determination of Appeal case No. i/2011 before this court. The application is preferred under Order XXI rule 24 (1) of the Civil Procedure Code, Cap 33 R.E 2002, and is accompanied by the affidavit affirmed by the applicant. During the hearing both parties appeared in person to argue the application. The main issue is whether or not there is sufficient cause shown to allow stay of execution? The argument by the applicant was that the reason behind this application for stay of execution is because the disputed house had been sold if it were so. If it were so, the respondent would have no right to occupy it. He also stated some problems or how to trace it. He prayed for his court to stay the execution as prayed for. In reply the respondent (a blood brother of the appellant's father) said far from what is being sought on the estate of the late Abclillah. That, the disputed house belongs to him as Mbaraka A. Bakari—That he was not summoned to attend during the alleged clan meeting which made such division. That, since he won at the District Land and Housing Tribunal at Lindi, he has all the rights to own the disputed house! That the case has taken 3 years before hearing and that what is being seen is a delaying tactics that in why there is a change of administrators. He prayed for the application to be dismissed. I have earnestly followed the arguments from the parties. The governing principles for the issue of stay of execution are provided for under Order XXXV We 5(i)-(4) of the Civil Procedure Code, Cap.33 R.E.

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It reads as j' - ". (3) No on/< 7 lor stay o f execution shall be made under subrule (; -] .Of submit. ■ (. ') link's-; the High court.or the comt making it is satisfied- : .. : ... _ - : r g ; . v : : - r - : _____ ■ _ (a)'th a t substantial lossjiiay result to the party applying for stay o f (b) that the applica tion has been made w ith o u t unreasonable d e la y; and r (c) That security has been given by the applicant for the due performance o f such decree or order as may ultimately be binding ' *■ upon him... " Emphasis mine. It is not disputed as per the applicant's affidavit that there is'tfifc appeal pending in the High Court of Tanzania and that the respondent had obtained ju d g m e n t in his favour. T h e applicant says in paragraph 9 of the affidavit that if the order for stay is not granted there is a likelihood of family conflicts and disaster to arise between issues of the Sate Abdilah- Bakari and their respective mothers, since one group would have nothing inherited from their father. £ * . ' ' V - * Does that constitute substantial loss or an irreparable loss as the law says? T h a t is a condition precedent as it was held by Samatta, J.A (as he then w as) in the case of Ta n z a n ia E l e c t r i c S u p p l y C o m p a n y (T A R J E S C O) v s . I n d e p e n d e n t P o w e r T a n z g n j a t t d , , { I ° T L) j s n d T w o O t h e r s (2 0 0 0) T . L R 324 at page 328', He lasted three prerequisite conditions namely: , r element which must occur in every^xase and since the Code g g s r s ; expressly ptohibits. stay of em m tien as an ordinary rule it is dear — the wo/ ds "s/lbstantiai something in addition to &- and different from that, " 12 January 1993 held that: . "... and that there were strong grounds for an appeal was no reason r,or granting a stay, for no one ought to appeal without strong grounds for doing so". Lastly, in the case of W i n c h e s t e r C i g a r e t t e M a c h i n e r y L t d * v P a y n e and Another (2) T i m e s L a w Reports, 15 December 1993 the court inter alia stated: 'In recent cases it has been said that the practice o f the court had moved on from the principle that the only ground for a stay was the reasonable probability that damages and costs paid would not be repaid if the appeal succeeded. These cases held that the approach o f the court now was a matter o f common sense and a balance of advantage ...B u t i n holding any such balance o f advantage, full and proper weight h a d t o b e g i v e n b y the court to the. ■ '% starting principle that t h e r e h a d t o b e a g o o d reason for depriving a plaintiff from o b t a i n i n g the fruits o f a j u d g m e n t" (Emphasis supplied). - There is a need to show sufficient cause for the one who prays to be granted an order for stay of execution. I have perused use applicant's affidavit as <!<i.iilt'd 'a bove. W h a t h e h a s s a i d i s m e r e f e a r w i t h o u t a n y --• V backirr q ^ I t a - ; - h I k : paid for by com pensa^onjift-eafe __ • t r * t * y w i n o n appeal .i™r .Above :aiL a house is such property w hich::fcajxJrnm ovable property, It is "traceable, in other words, (and W i s ^ W ^ L h e first ground for not): There is no J o s s l f f f c ^ * y ? m s p a r a b l e n a m f m w h i c t L c o u l d n o t b e a d e q u a t e l y C o m p e n s a t e d b y w a y o f damages" as w e i r s f a t e d - i n the case of Nicholas W e r e L e k u l e v s . I n d e p e n d e n t P o w e r - (T) L t d a n d A n o t h e r 1997 T L R 58 (C A), Lubuva, j . A (as he then was). Secondly, the allegation that one group would have nothing inherited "from their father I would say in view of the decision in the above cited case of Bansidhar (s u p r a) substantial loss of property is something far beyond mere "ordinary loss to which every judgment-debtor is necessarily subjected when he loses his case .and is deprived of his property in . consequence." T h e s a m e l o g i c w i l l b e f a l l t h e r e s p o n d e n t i n c a s e t h e a p p e a l

fails. Thirdly, from the above laid down principles, the balance of convenience or balance of advantage should equally cover the respondent. That he has an equal right to benefit from the fruits of the judgment which was decided in his favour. Fourthly, this application was made so belatedly contrary to the spirits of the law allowing its grant under Order XXXIX Rule 5 (3) (b) or the Civil Procedure Code, Cap.33 R.E. 2002 which specifically says "that the application has been made without unreasonable delay, (DGCdUSG, this application was made in lieu of / U LLO D ST ZU j ~> vvi iici i Wcio culGf three years had lapsed as the judgment was passed on 18th November 2013. As the respondent has not shown that the applicant is employing a riefay judgment to pay a fee. For Lhc'ah(T7)"^tcttcf felons, this application is 111'— Vv rir"__' shown since; that the respondent cannot stay for execution as applied in the case. x j g j ^ a t -ft1!"here- js g p f c o t ^ s a ^ c ; ^ ± z execution, it will be recovered by way of compensation or costs in case he wins in the pending appeal. Application stands dismissed with costs. M. G. MZUNA, JUDGE • 29/11/2013 Court: Ruling delivered this 29th day of November, 2013 in the presence of the respondent and absence of the applicant. m . , v M.GftozuNA r~ JU D G E 29/11/2013

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