

TANZANIA / JUDGMENT

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J;;_b· ;• .. ,. 1 ' ,HI . rt ~- IN THE COURT OF APPEAL OF TANZANIA I AT DAR ES SALAAM I CIVIL APPLICATION NO. 2 OF 2006 KISHOR GULAM VARA ... J..... APPLICANTS I VERSUS I KULTHUM ISSA..... RESPONDENT (Appeal from- the Judgment: and decree of the High Court ; i Tanzania Mtwara) I (Lukelewa, J.) dated the 7th day of February, 2006 I I in I HC. Civil Appeal No. 1 of 2005 i !

RULING

6 July, & 9 August, 2007 MBAROUK, J. A This application filed by way of notice of motion under Rule 9(2) (b) of the Court of Appeal Rules, 1979 is seeking for an order of stay of execution of a decree of the High Court - Mtwara dated the 11th February, 2006 (Lukelewa, J.) pending the determination of the Applicants intended appeal. 1 'I' .. The subject matter of this application is the Decree in the High Court Civil Appeal No. 1 of 2005 at Mtwara which ordered that. "the Appellant should pay the Respondent monthly payment of a sum of 35, 000.00 (thirty five thousand shillings) from the date of the birth of the child on 11th August, 1989 to the time of cessation of order which under section 7 of the Application Act, is which the child attains the age of sixteen years, i.e 11th August, 2006" Having lost in the High Court, the Applicant has filed this application for stay order pending his intended appeal to this Court. In support of his application, the Applicant Kishor Gulam Vara affirmed in his affidavit which partly reads as under:- "4. That the Applicant has already lodged a notice of appeal on the 09.02. 2006. He has requested the Honorable . District Registrar for Court records and copied the letter to the Respondent on the 09.02.2006.

5. That in the interest of justice and on the balance of inconvenience between the parties herein, it is pertinent that the Applicant be granted an order of stay of execution of the 2 'I' . I I ' decree sought to be appealed against pending the determination of the Applicants appeal.
6. That the Applicant intends. to prove that the procedure for the institution of the Affiliation proceedings, particular for the grant of an order of maintenance of the illegitimate child in question had not been adhered to and that the Honorable Courts below had been enjoined to the order in question to operate retrospectively as it was so decided in the instant case, the Applicant enjoys wide chances of winning his Appeal.

7. That considering the means of income of the Respondent who is merely an employee in her rank and file cadre. In the Tanzania police Force, should the Appellant win his case, the respondent would not be able to repay the decretal amount the refusal of an order of stay of execution is likely to cause substantial and irreparable loss to the Applicant in the event of his winning his appeal.
8. That the Respondent doesn't have to fear to be paid the decretal amount in question should she win in the Appeal as the Applicant is a business man." 3 At the hearing, Mr. Mlanzo, learned Advocate for the Applicant advanced the reasons for seeking a stay order by contending that the Decree appealed against involves illegality and lack of jurisdiction. He then highlighted the areas to which he saw them as containing illegality in the Decree of the Appellate court as to award T. Shs. 35,000/= as a monthly allowance of an illegitimate child in excess of the amount of Shs.100/= provided by law due to the depreciation of the value of the said statutory amount. The learned advocate also claimed as to whether the award of the monthly maintenance allowance can be made in absence of assessment of the putative father's means and ability to pay in on a case to case basis. Generally the learned advocate for the Applicant tried to convince this Court that the Applicant enjoys wide chances of winning his appeal, hence he prayed for the stay order to be granted as prayed. On the other hand, the respondent, Kulthum Issa in her counter affidavit strongly disputed the contents of the applicant's affidavit by stating that the applicant is doing a waste of time as there is nowhere in the record that he is denying to be the father of the child. The respondent also claimed that according to the intended memorandum of appeal annexed to the applicant's affidavit, there are no matters of law which need this honorable Court to decide upon. In her counter affidavit, the respondent added by 4 '1 I. 1, j l1 stating that, since they are not living together with the applicant for almost 5 years now, the applicant, will, not be able to know the sources of her income apart from her salary, and further stated that 1 the applicants appeal has no chances to succeed. I: i Addressing the Court, the respondent who was unrepresented ' strongly disputed to what has been stated by Mr. Mlanzi, Advocate I for the Applicant by contending that the Applicant has never denied I that he is the father of the child in question. She also submitted that ~ ' the child is now studying at Form IY and since the child was at STD. VII, the applicant never offered a : ' single penny for maintenance of I j the child. She added that, she has , ' used more than what has been I, decided by the Court. · ill I However the respondent gave an option for consideration to this court that, if the applicant requires that his application to be granted, let him deposit in Court T.shs. 2,000,000/= as security for him to be granted a stay order pending his intended appeal. ' As to her response to the issue that the Decree involves illegality and lack of jurisdiction, the respondent pointed out that T.Shs.35,000/= per month is not sufficient even to any ordinary low income earner; and that the Appellate Court Judge has not made any mistake in his decision because . he has gone in depth in. analysis of I his Judgment. 5 For reasons, the respondent prayed for this application to be dismissed with costs. Then in his response, Mr. Mlanzi submitted without giving citation of the cases that many cases for stay of execution the stay order is granted where there is an .issue of illegality in the Decree. He ended by a

request that let them be given a chance to appeal because there is also an issue of jurisdiction which needs to be considered on whether it was right or not as decided by the High Court. It is my considered opinion that most of what have been discussed above are matters which are supposed to be argued at the intended appeal and I will not indulge myself to express my opinion on them. However, the only issue which I am required to consider at this stage is whether sufficient cause has been shown for this Court to use its discretion to grant a stay order as prayed by the applicant. Mainly, I have noted that two main reasons have been given in the affidavit of Mr. Kishor and in the submission of Mr. Mlanzi, Advocate for the applicant as to why stay of execution should be granted. One is that the Applicant enjoys wide chances of winning his Appeal. As on this point, several decisions of this court held to the effect that chances of an appeal succeeding is not a ground for granting stay of execution. In support to that argument, Kisanga, J.A of this Court in *Linus Furaha Shao v. National Bank of Commerce*, Civil Appeal No. of 1999 (unreported) said: "..... this Court has said on many occasions that the allegation that the intended appeal has overwhelming chances of success is no ground for granting stay because, among other things, there is often no material on which the Court can at this stage ascertain that allegation". I remain with the opinion that the decision in *Linus Furaha Shao's* case is sensible enough for the intended appeal at the stage of the application for stay of execution and it will be wrong to express an opinion on whether or not such appeal has chances or overwhelming chances of success at that early stage, because it is not possible to make a meaningful assessment of the chances without having arguments from both sides being heard. I therefore reject the ground based on claim that the intended appeal has wide chances of success. The second main reason advanced by the applicant in his affidavit and in the submission of Mr. Mlanzi, Advocate for the applicant that considering the means of income of the Respondent who is merely an employee in the rank and file of cadre in the Tanzania Police Force, should the Appellant win his case, the respondent would not be able to repay the decretal amount and that the refusal of an order of stay of execution is likely to cause substantial and irreparable loss to the Applicant in the event of his winning his appeal. However neither the applicant in his affidavit nor Mr. Mlanzi, Advocate for the applicant in his submission have disclosed the substantial and irreparable loss claimed. On this point, the case of *Tanzania Cotton Marketing Board v. Cogecot Cotton CO.S.A* [1997] TLR. 63 held inter alia that unless details and particulars of the loss are specified, there would be no basis upon which the Court could satisfy itself that such loss would be incurred. In this application, the applicant has merely asserted that the refusal of an order of stay of execution is likely to cause substantial and irreparable loss to the Applicant in the event of his winning his appeal, but no details and particulars of the loss were specified. Hence, in the absence of those details and particulars of loss, this court remains without any basis upon which to satisfy itself that such loss would be incurred as pointed in this Court's decision in *Cogecot* case. The record shows that the Respondent has given a way to the opinion of granting the stay order by pointing out that if the court is minded to grant the stay of execution, then, there should be an order to be issued for the applicant to deposit in Court T.Shs. 2,000,000/= first. As on this

issue, I remain with the considered opinion that as far as a stay order is within the discretion of the court, and after having considered the balance of convenience, I am guided by the decision of this Court by Mroso, J.A in Civil Application No. 64 of 2006 between Zanzibar Insurance Corporation and Paul Mwita Chacha (unreported) in which stay of execution was sought, where he decided that: " I think in all those circumstances and in order to safeguard the interests of both parties, I grant stay of execution on condition that the decretal amount is deposited into court pending the outcome of the pending appeal" As pointed out earlier the respondent suggested deposit of T.shs.2,000,000.00 out of the decretal amount of Tshs.6,500,000/=, but this court in considering the issue of safeguarding the interests of both parties to this application, I grant the stay of execution on condition that the whole amount of T.shs.6,500,000/= is deposited into Court pending the outcome of the intended appeal. Cost to be in the cause. 9 . ~... 'S i i'f, ' , 4 ' It is so ordered. th DATE at Dar es Salaam this 12 Day of July, 2007 M.S. Mbarouk1 JUSTICE Of APREAL I certify that this is a true copy of the orlnal. ~--- . -~'" ~:~--:.. 0 ~ < ...4\~ .I.'--!'--". I • -.... nUSI .A.VY\ DEPUTY REGISTRAR '\~ J4) / " ' _,,,.,,,,.,,/ «I) ' 10

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