

TANZANIA / JUDGMENT

19981029 TZHC Dar es Salaam 1

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TZHCDECIDED
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..., . . / CIVIL JI.PPEhL NO. 145 OF 1997 '--- . \., OMARI MGENI .. ,. o , o
API?LICANT/i\PELLANT ' \ ... _ versus ", ,,,_ MORA.MED HAMID
.....o.....RESPONDENT '-----./ -----~--~r~ --== RU L I N G. ':>W.~l::a=- ~l._TA, J.!. This is
an application for an order to stay the execution of the decree of the Kivukoni RM 1 s Court in
Civil Case No.62 of 1997 pending the hearing of the appeal. A brief background of the matter is as
follows:- In 1986 Dar es Salaam Education and Office Stationery, in which Omari Mgeni, the
Applicant, was director, ilplied for overdraft facilities at the then National Bank of Commerceo
Mr.Omari Mgeni deposited the title deed of his own house situated at Plot Noo5 Block 3?
Kinondoni as security for an overdraft of shs.2 million granted by the Bank to the Company. In
May 1994 the bank informed the Company tha.t ,thr-: debt had risen to shs. 15,371,538/20 and that
if not settled the house mortgaged as security '\muld be sold. The debt was apparently not aettled
and the house was sold by the bank as mortgagee to Mohamed Hamidt the Respondent, on
29/11/1994. The company resisted the sale of the house by instituting a suit in the High Court
being civil case No. 248 of 1994. The Company sought han order for a permanent injunction to
stop the sale of the property situated on plot no.5 Block 37 Kinondoni, Dar es.Salaam until the
facts indispute are resolved in full." The company also sought temporary injunctive orders. On
30.12.199L~ Bubeshi, J, made an order setting aside the sale and restraining the Bank and the
Registrar of titles from transferring title No.2257 of the house in dispute to any person. The Bank
appealed to the Court .of Appeal in Civil Appeal No 16 of 1995 against Bubeshi,J 1 s order of
30i12.1994. The appoal was successful. 'nle temporary injunction issued to set aside the sale was
set aside by the Court of Appeal on 24/11/1995• On 27.11.1995 the said house was

- /2 "\ f j register~d in the name Of Mohamed Hamid, the Respondent. Hohamed Hamid
than instituted a suit at the RWs Court of Dar es Salaam at Kisutu, b~ing Rl1 Civil Case No.62
of i997 under order 35 of the ' Civil Pro~edure Code against the Applicant seeking an order-
of . / eviction against the ii.pplicant. The l.pplicant applied for leave . to appear ~nd defend
the suit. Leave waB refused and the trial court went on to order eviction. Being dissatisfied,
the Applicant appealed to this court. The Applicant also sought an order for temporary
injunction to restrain the Respondent from evicting him from the property in dispute. Th,1.t
application was struck out by Chipeta, J. on 19.6.1998. Hence this application for stay of
execution. The hearing of this application was by way of written submissions. The
Applicar.t was represented by Mr. M.S. Lebba, learned advocate. The Respondent had the

services of Mr.s.E. Shayo learned advocate. In his affidavit Mr. Omari Mgeni, the Applicants, deposes that should the respondent be evicted from the house in dispute his rights which he may be entitled to in Civil Case No.248 of 1994 would become unenforceable against the Respondent for the recovery of the said house as the Respondent intends to demolish it and construct another house on the parcel of land where the disputed house now stands. In his written submission Mr. Lebba states that the Applicant will suffer substantial loss if an order of stay of execution is not granted as prayed. He argues that the appeal (that is civil appeal no 145 of 1997 has overwhelming chances of success, In his submission, Mr. Lebba states that the property in dispute constitutes security required under order 39 rule 5(3) of the Civil Procedure Code. He submits that the Applicant has shown sufficient cause for the granting of an order of stay of execution. In his written submission Mr. Shayo argues that this application is yet another attempt to prevent or delay the decree holder from enjoying the fruits of his judgment in P.M Civil Case No 62 of 1997. I

1. He argues that the Applicant had applied for an order of stay of execution in the court which passed the decree. That application was refused because the Applicant did not satisfy the conditions prescribed by Order 39 rule 5(3) of the Civil Procedure Code. He went on to argue that conditions which must be fulfilled before an order of stay is granted as required under Order 39 rule 5(3)...., I have not been fulfilled in the instant application. He accordingly prayed that this application be dismissed with costs. Order 39 rule 5(1) of the Civil Procedure Code provides that an appeal shall not operate as a stay of proceedings under a decree or order appealed from nor shall execution of a decree be stayed by the reason only of an appeal having been preferred from the decree; but the court may for sufficient cause order stay of execution of such decree, Rule 5(3) stipulates the conditions which must be fulfilled before an order for stay of execution can be made. That rule is as follows: ... 91 (3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the High Court or the Court making it is satisfied-
 - (a) That substantial loss may result to the party applying for stay of execution unless the order is made;
 - (b) That the application has been made without unreasonable delay;
 - (c) That security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him." With regard to condition (a) that is the issue of substantial loss to the Applicant unless the application is granted, it appears that the loss must be such loss as cannot be made good by mere monetary compensation. In *ASIM POOLIES LTD V ARUN PALEJA and Another*, Dar es Salaam Civil Application No 8 of 1998, Lubuva J.A. said: it is common knowledge that sufficient ground is laid for consideration for granting stay of execution if it is shown, inter alia, that the intended appeal would, if successful, be rendered nugatory. In *SWAIBU SHJIMDOLWA Ys FRIEDMAN MCHUMA*, DSM Civil Application No 47 of 1997, Lubuva J.A. Iteld that in regard to the property, in the event an order for stay of execution is not granted and the .. 40/4 r-

- 4- decree holder constructs a building on the disputed plot, the applicant would suffer substantial loss if the appeal were to succeed because the land has intrinsic value and not monetary value because there may not be another plot at the same situation as the disputed plot. In the instant application there is a real possibility that if application is not granted the Respondent will demolish the disputed house and erect another building in its place. Should this happen and the Applicant goes into the appeal and the case, he would suffer substantial loss. The application appears to have been made without unreasonable delay, as the Applicant first applied for an order of stay of execution in the court that entered judgment. The Applicant applied to this Court on dismissal of his application by the trial court. The requirement that the applicant should give security for the due performance of such decree or order as may ultimately be binding upon him is mandatory, In this regard the Applicant does not appear to be serious. Mr. Lebba appears to imply that the property in dispute constitutes security required under order 39 rule 5(3) of the Civil Procedure Code. I do not think that property the subject matter of the suit can be regarded as security especially where the said property has already been sold to a third party. I of the considered opinion that the Applicant has not fully complied with the mandatory requirements of Order 39 rule 5 (3). The application is dismissed with costs. -JUDGE Delivered in chambers in the presence of Mr. Lebba, advocate for the Applicant and Mr. Mohamed Hamid the Respondent this 29th day of October 1998.
- ItJPqE 29/10/98

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