

TANZANIA / JUDGMENT

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1 IN THE COURT OF APPEAL OF TANZANIA

- -- ____ AT ARUSHA CIVIL APPLICATION NO. 3 OF 2008 RAMADHANI ALLY & 2 OTHERS•..... APPLICANTS VERSUS SHABAN! ALLY RESPONDENT (Application for stay of execution from the decision of the High Court of Tanzania at Arusha) (Bwana, J.) dated the 23 rd day of October, 2007 in Civil Appeal No. 39 of 2006

RULING

11th & 18 th February, 2010 NSEKELA, J.A. On the 7/3/2008 the applicants (i) Ramadhan Ally; (ii) Daima Ally (iii) Hadija Ally filed a notice of motion under Rule 9(2)(b); Rule 45(1) and Rule 46(1) of the then Court of Appeal Rules 1979 seeking an order for stay execution of the decree and orders made in the High Court in Civil Appeal No. 39 of 2006. The applicants were aggrieved by the decision of the High Court (Dr. Bwana, J.) as he then was and so lodged a notice of appeal against that decision on the 29/10/2007. The notice of motion was supported by an affidavit affirmed by the third applicant Hadija Ally. The said affidavit reads in 2 part as follows:-

3. That I have personally been involved in the proceedings of this matter which ended up in the High Court as Civil Appeal N.o. 39 of 2006. Thereafter we preferred Misc. Civil Application No. 120 of 2007 for leave to appeal to the Court of Appeal of Tanzania against the decision of the High Court and therefore what I am deponing here is true to the best of -my personally knowledge
4. That after delivering of judgment in Civil Appeal No. 39 of 2006 we filed a notice of appeal to appeal to the Court of Appeal of Tanzania on 29th October, 2007 and applied for certified copies of proceedings in the High Court. On 5th November, 2007 the applicants did file Misc. Civil Application No. 120 of 2007 for leave to appeal to Court of Appeal of Tanzania. 3 . _Toe a~plication for leave is still pending in the High Court and it has not been determined yet. ..
5. That the applicants are aware that the respondent/decreed holder intend to execute the decree of the High Court in Civil Appeal No. 39 of 2006. If that happens the intended appeal proceedings will be pre-empted or rendered nugatory to the detriment of the applicants

6. That if an order for stay of execution is granted but the applicants loses in the intended appeal proceedings the applicants/judgment debtors are willing, ready and able to satisfy the ultimate decree and orders in Civil Appeal No. 39 of 2006 by giving vacant possession of plot No. 8 Block "X" Area "F" Levulosi Area in Arusha Municipality to satisfy the decree. 4 Mr John Materu, learned advocate, appeared on behalf of the applicants. He submitted that the parties to the dispute are relatives · and the third applicant is the one occupying the house. The main · contention is that if the decree is executed the applicant's will suffer irreparable loss. In support of his submission, the learned advocate referred to (i) Civil Application No.18 of 2003, Tatu Manyoka v · Charles Kaberuka (unreported) and Pita Kempap Ltd v Mohamed I.A Abdulhussein Civil Application No. 128 of 2004 (unreported) Mr. John Umbulla, learned advocate, appeared on behalf of the respondent Shaban Ally. He resisted the application and filed an affidavit in reply. , In his oral submission, he contended that the appeal cannot go to the Court of Appeal in terms of Rule 43(b) of the Court of Appeal Rules. He added that the 3rd applicant had not been authorized to swear the affidavit. In his affidavit in reply, the learned advocate for the respondent was under the impression that leave to appeal must be sought and obtained in an application for stay of execution. In paragraph 4, he stated:- . 5 .. 1 ~s there is_ n_o pending application and/or appeal before the High Court or Court of Appeal the application for stay of execution has no legs to stand For this contention he relied on two decisions of this court, (i) Himid · Mwilima v Tabora Regional Trading Co. Ltd [1997] TLR 156; and (ii) Willow Investment v Mbombo Ntunda and Two Others
- [1997] TLR 93. In Mwilima's case an applicant applied for a stay of execution of a judgment pending an appeal. It appeared that no · leave to appeal had been sought or granted and the time for applying for such leave to appeal had already run out and there was no application for an order to enlarge such time. A single judge of this court (Ramadhan, J.A.) as he the was, held that granting an order of · stay of execution pending the determination of a wishful thinking · appeal was idle and so struck out the application. However, in Civil Reference No. 8 of 1999, (i) Ignazio Messina (ii) National Shipping Agencies and (i) Willow Investment (ii) Costa Shinganya (unreported) this Court stated thus:- "/n our view, the filing of a notice of appeal under rule 9(2)(b) is a condition which must be satisfied before a party can bring an application for stay of · 6 -executioo. It is a condition precedent the non- fulfillment of which renders an application for stay of execution incompetent and hence entitles the court to strike it out. Once a notice of appeal has been filed, this gives the court jurisdiction to entertain the application for stay of execution" (emphasis added) Since there is a prpper notice of appeal, the court has jurisdiction to entertain the notice of motion. In paragraph 5 of the learned advocate's affidavit in reply he has stated:- "5. That no authority has been given to the Id applicant by the rest of the applicants to swear their affidavit on their behalf" Indeed the third applicant stated in her affidavit that the first and second applicants authorized her to swear the affidavit on their behalf. Rule 3(i) of Order XIX of the Civil Procedure Act provides:- · 7

- - Affidavits sba_/1 be confined to such facts as 11 the deponent is able of his own knowledge to prove, ·except in interlocutory applications, on which statements of his own belief may me permitted. " An affidavit is a written statement on oath which is factual and free from extraneous matter such as fiealsay, legal -arguments, objections prayers or conclusions (see: Uganda v Commissioner . of Prisons, exparte Matoru [1966] EA 514.). The question is does paragraph 2 of the third applicant's affidavit offend these legal requirements? Mr. Umbulla did not address his mind to this. Apart from that, is paragraph 2 a substantive part of the affidavit which once expunged, there is nothing else left of the said affidavit? I do not think so, the · substantive parts will remain still intact. One of the factors to consider is whether or not by not making an order of stay of execution, it would make the appeal if successful, nugatory in that it would deprive an appellant the results of the appeal. The dispute before the court is the ownership of two •
- 8 premises, Plot No. 8 Block "X" Area "F" Levulosi Arusha and Plot No. 273 Block "D" Title No. 10516 at Njiro which the High Court decreed that they belong to the respondent. In Deusedit Kisiwiwe v • Protaz B Bikuri, Civil Application No. 13 of 2001 (unreported) a single judge of this court (Ramadhani, J.A.) as he then was, . observed:- 11 The attachment and sale of immovable property will, invariably, cause irreparable injury. Admittedly, compensation could be ordered should the appeal succeed but money substitute is not the same as the physical house. The difference between the physical house and money equivalent, in my opinion, constitutes irreparable injury" With respect, I subscribe to these lucid observations. Admittedly the affidavit in support is not a model of clarity, but that is the point one can distil from paragraph 5 of the affidavit in support. If the decree is executed by the respondent, the substratum will disappear; the appeal will be rendered meaningless or nugatory and .. , 9 you cannot quantify the loss of houses in monetary terms. The loss will be irreparable. In the result, I use my judicial discretion under the then Rule 9(2) (b) of the Court of Appeal Rules and order stay of execution pending the appeal. Costs to follow the event. It is so ordered. DATED at ARUSHA this lih day of February, 2010. H. R. NSEKELA JUSTICE OF APPEAL f the original. DEPUTY COURTO

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