

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAM

AR CIVIL APPLICATION NO. 110F 1996

BETWEEN

NUR HUSSEIN

-

APPLICANT

AND

ABDIKHAN ISMAIL

-

RESPONDENT

(application for stay of execution of JUDGMENT of the
High Court of Tanzania at Arusha)

(M. D. Nchalla, J.)

dated the 13th day of December, 1996

in

Civil Case No. 30 of 1994

R U L I N G

SANATTA, JA

This is a short application, in which the applicant, Nur Hussein, is seeking an order for stay of execution of the decree made following the decision of the High Court (Nchalla J) in Civil Case No. 30 of 1994 pending the determination of the appeal intended to be lodged against the said decree in this Court. The principal basis for the application is that if the execution is allowed to take place before the intended appeal is determined the applicant will suffer irreparable injury. The application is opposed by the respondent, Abdikhan Ismail.

The background to the application may be summarised as follows. The applicant petitioned the High Court for grant of letters of administration in respect of the estate of his late brother, Ismail Hussein. The respondent, who is one of the deceased's children, entered a caveat under s. 58(1) of the Probate and Administration Ordinance (the Ordinance) and eventually entered appearance in accordance with the provisions of s. 59(2) of the Ordinance and Rule 82 of the Probate Rules. In the suit which emerged from these steps, the applicant asserted that the house which was said to constitute the deceased's estate was jointly owned by the deceased and himself. According to the respondent, however, the house was wholly owned by the deceased. It was not in dispute that the applicant had been living in the house at least since 1993 and collecting rent from a tenant occupying part of it. He is still living there.

The learned trial Judge held that the issue whether the house was jointly owned as asserted was prematurely brought before the Court and that, alternatively, the suit was bad in law for non-joinder, the other heirs to the estate having not been made parties thereto. The learned Judge nevertheless proceeded to appoint the respondent and the eldest son of the first wife of the deceased as "joint administrators of the suithouse", and to order that "the plaintiff (now the applicant) will continue residing in the suithouse as a tenant effective from 1st January, 1997 and will pay such monthly rent as the administrators herein appointed will fix in accordance with the Rent Restriction Act No. 17/1984. The rent to be realised or collected from the suithouse is to be applied to the benefit of the beneficiaries and heirs of the late Ismail Hussein.....". The learned Judge said he made this decision in the interests of justice.

The issue before me is whether the intended appeal has chances of success and whether any injury or loss that may be caused to the applicant as a result of the decree being executed before the hearing of the appeal would be irreparable. I am inclined to answer both questions in the affirmative. Prima facie, it is doubtful that, having held that the suit was bad for non-joinder and, alternatively, that the issue touching upon ownership of the house was prematurely brought before him, the learned trial Judge had power in law to make the orders he subsequently made in the case. The appellant asserted before me, and the respondent did not venture to contradict the assertion, that if he is forced to vacate from the house now he will not be able to find alternative accommodation for himself and his eight dependants, including his elderly mother. It seems to me that the loss the applicant is likely to suffer as a result of the decree being executed before the determination of the intended appeal will be irreparable.

For the reasons I have given, I am satisfied that it would be in the interests of justice to order stay of execution in this case. Accordingly, I allow the application with costs and order that the execution of the decree made following the judgement of Nichalla J delivered on December 13, 1996, be stayed pending the determination of the intended appeal.

.../8

DATED at DAR ES SALAAM this 23rd day of December, 1997.

B.A. SAMATTA

JUSTICE OF APPEAL

I certify that this is a true copy of the original.


(M.S. SHANGALI) .

DEPUTY REGISTRAR