

IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM

CIVIL APPLICATION NO. 56 OF 1995  
In the Matter of an Intended Appeal

BETWEEN

SAID SALIM BAKHRESSA. . . . . APPLICANT  
AND  
ALLY A. NGUME. . . . . RESPONDENT

(Application for Stay of Execution from  
the Judgment/Decree of the High Court of  
Tanzania at Dar es Salaam)

(MAINA, J.)

dated the 7th day of November, 1995

in

Civil Revision No. 28 of 1995

R U L I N G

LUBUVA, J.A.:

In this application, the applicant, Said Salim Bakhressa is applying for an order that the execution of the High Court (Maina, J.) order of 7th November, 1995 in Civil Revision No. 28 of 1995 be stayed pending the determination of the intended appeal to this Court. The application by way of a notice of motion is supported by the applicant's affidavit.

At the hearing of this application the applicant was represented by Mr. Kisusi and Mr. Chandoo, learned advocates. From the record it is apparent that before the High Court the applicant was also represented by Mr. Kisusi while Mr. Chandoo had again represented him before the District Court at Morogoro from where this matter originated.

From the oral submissions before me in this application and the depositions in the affidavit the main ground for the application for stay of execution is that as ordered by the

District Court Morogoro, the applicant has deposited in Court 10 million shillings as security for costs. That if the order by Maina, J. is not stayed, the respondent would execute the decree in which case the money so deposited would be released to the applicant who according to Mr. Chandoo is a man of no means. For this reason Mr. Chandoo learned advocate further stated that the applicant stands to loose as the respondent would not be able to reimburse the applicant in the event the intended appeal succeeds in favour of the applicant. It was also Mr. Chandoo's submission that the balance of convenience is infavour of granting stay of execution which would ensure that the money deposited with the Court still remains in Court until the determination of the intended appeal because the Court was a better custodian than an individual such as the respondent.

Furthermore, Mr. Chandoo urged that stay of execution should be ordered because there were special circumstances pertaining to this case. In elaboration of this, he stated that before the District Court at Morogoro, stay of execution was granted on 9.8.1995 on condition that a further 10 million shillings was deposited in Court. That as the applicant was dissatisfied with this condition in which stay of execution was granted by the District Court Morogoro, an appeal is now pending before the High Court. This fact is also borne out from paragraphs 5 and 10 of the applicant's affidavit. On being prompted by the Court on the exact position of the appeal pending before the High Court regarding the order for stay of execution granted by the District Court at Morogoro, a short adjournment was sought in order to look into the matter.

At the resumed hearing of the application, Mr. Kisusi, learned counsel for the applicant informed the Court that the applicant would withdraw the appeal which was pending before the High Court in connection with the condition upon which the stay of execution order was granted by the District Court.

Opposing the application, the respondent who appeared in person made a brief submission. This was in addition to the counter affidavit which he had filed in reply to the applicant's affidavit. Essentially, the respondent asserted that there was no ground for granting the application for stay of execution. He explained further that as far as he was concerned, the applicant had been granted stay of execution on condition that he deposited a further 10 million shillings in Court which the applicant had not complied with. Instead, the respondent stated, the applicant had preferred an appeal to the High Court against the condition given in granting the stay order. As indicated, in his counter affidavit, the respondent has vehemently denied the allegation that he is a man of no means because he owns property which among others, include a house and a motor vehicle - pick up type. He also stated that as yet, he has not applied for the release of the money from the Court. He prayed for the dismissal of the application which he claimed was time wasting to him disadvantage as the decree holder.

In determining this matter, the issue is whether there are special circumstances to justify the grant of the stay of execution order sought by the applicant. If the answer to this is in the affirmative, then there would be justification for exercising the Court's discretionary powers in terms of Rule 9 (2)(b) of the Court's rules, 1979. At this juncture,

I think it is relevant to set out in brief the historical background to the case. It is common ground that this matter arises from Civil Case No. 16 of 1993, Morogoro District Court in which the respondent was awarded judgment in the sum of Shs. 7,448,457/= against the applicant. As that involved an exparte judgment, the applicant applied before the District Court at Morogoro for the setting aside of the ex - parte judgment. The application was dismissed. The ground for the dismissal by the District Court was that the District Court had no jurisdiction to entertain the application to set aside the ex-parte judgment because the matter had gone on appeal before the High Court which was also dismissed. The High Court was again moved in Civil Revision No. 28 of 1995 to revise the District Court's order refusing to set aside the ex-parte judgment. The High Court (Maina,J.) dismissed the application by order of 7.11.1995. That is the order in respect of which this application for stay of execution has been filed.

In regard to the special circumstances of this case, and as already indicated in the notice of motion, the applicant has advanced the reason that he has deposited Shs. 10 million in Court at Morogoro as security for the satisfaction of the decretal amount as ordered by the Court. I pose to ask myself whether this is such special circumstance as to warrant the grant of stay order. With respect, I do not agree with Mr. Chandoo, learned Counsel for the applicant that this in itself is so as to warrant the Court's discretion in granting stay of execution as prayed. This is so because, it is normal practice in certain circumstances to provide security for the satisfaction of the decretal amount as was done in this case. It does not however,

follow that in every case in which a deposit is ordered as security for costs stay of execution is also warranted. Each case should be taken on its own merits. In this case I am not persuaded that the deposit of 10 million shillings was such special circumstance as to warrant the grant of stay of execution. I reject this ground.

Then the applicant had advanced the ground that the respondent being a man of straw, it would be difficult for the respondent <sup>to</sup> reimburse the applicant once the money now deposited in Court as security is released to him (respondent) if stay of execution order is not granted. As elaborated in Halsbury's Laws of England 4th Edition, Volume 17 paragraph 455, it is common knowledge that poverty of the respondent is one of the factors to be considered in deciding whether or not to grant stay of execution. In this application, the applicant has urged that the respondent being a man of no means, once he is paid the money, he would readily spend it in which case the applicant would not be able to recover the money if the pending appeal succeeds in his favour. It is my understanding that poverty is a term which should not be used loosely. It must be construed strictly within the context and circumstances of the case involved. In my considered opinion, a man of ordinary means capable of carrying on normal business and owning property such as the respondent, cannot be equated with a destitute who would not be in a position to reimburse any money released to him. In here, apart from the expressed fear by the applicant that the respondent is a man of no means which fact has been denied by the respondent, I can find no cogent evidence to substantiate this claim. On the contrary, the respondent seriously asserts

that he is a man of means owning property which include a house and a motor vehicle. In that situation, I am not satisfied that the respondent is in such a poor economic position that once the money is released to him from the Court, the applicant is likely to suffer loss and damage irreparably. At <sup>any</sup> least rate the respondent has not as yet sought the release of the money from the Court. If the loss can in one way or the other be atoned then such a loss would not in my view, not call within the purview of what is referred to as an irreparable loss.

Thirdly, there is the issue whether the order of 7.11.1995 by the High Court (Maina, J.) in Civil Revision No. 28 of 1995 requires execution in respect of which stay of execution is sought. As indicated earlier, the District Court at Morogoro in Civil Case No. 16 of 1993 having dismissed the application to set aside the ex-parte judgment, the applicant again applied before the High Court in Civil Revision No. 28 of 1995 for the revision of the District Court's order dismissing the application to set aside the ex-parte judgment. The application was dismissed by the High Court (Main, J.) on 7.11.1995. That is the order which in this application is the subject matter for stay of execution. With the dismissal of the application for revision by the High Court, consequentially, the emerging status quo in the matter is that the position reverted back to the stage where the ex-parte judgment was passed by the District Court. That is the decision which, in this case unless otherwise changed on appeal is capable of execution. That in my view, is the order which is capable of execution for which execution could be stayed. In my considered opinion,

the order of 7.11.1995 by the High Court (Maina, J.) was declaratory in nature. It was therefore not capable of execution in respect of which stay order of execution would be ineffectual contrary to the objective behind the application. On this ground alone, I would be inclined to dispose of this application.

For these reasons, I am satisfied that neither special circumstances nor good cause have been shown to warrant the granting of stay of execution in this application. Accordingly, I dismiss the application with costs.

DATED AT DAR ES SALAAM this 11th day of March, 1996.

D.Z. LUBUVA  
JUSTICE OF APPEAL

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

  
( M.S. SHANGALI )  
DEPUTY REGISTRAR