

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 39 OF 1995
In the Matter of an Intended Appeal

BETWEEN

JOSEPH K. MLAY APPLICANT

AND

AHMED MOHAMED RESPONDENT

(Application for Stay of Execution from
the Judgment of the High Court of
Tanzania at Dodoma)

(Mwalusanya, J.)

dated the 23rd day of March, 1995

in

Misc. Civil Cause No. 32 of 1994

R U L I N G

LUBUVA, J.A.:

In Application No. 39 of 1995, the applicant one Joseph K. Mlay by notice of motion is applying for an order that the execution of the decree passed in favour of the respondent Ahmed Mohamed in (DC) Civil Appeal No. 32 of 1993 and Misc. Civil Application No. 30A of 1994 be stayed pending the determination of the intended appeal. On the other hand, based on the same facts, in Application No. 42 of 1995 Ahmed Mohamed is the applicant in which by notice of motion, he is seeking to obtain from this Court an order that the notice of appeal filed by Joseph K. Mlay in the intended Appeal be struck out in terms of rules 77(1) and 82(1) of the Court's rules.

As these two applications are so interrelated, I ordered for the consolidation of application No. 39 of 1995 and No. 42 of 1995. This was done with the concurrence of the learned Counsel for both parties. I propose to deal first with application No. 42 of 1995 in which Ahmed Mohamed is the applicant and Joseph Mlay is the respondent. As already indicated, in Civil Appeal No. 32 of 1993, Joseph Mlay had his appeal dismissed by the High Court (Mwalusanya, J.). As a result, he (Mlay) again instituted Misc. Application No. 30A of 1994 before the same registry of the High Court at Dodoma seeking to have the judgment in the above mentioned Civil Appeal No. 32 of 1993 reviewed by the same judge. On 23.3.1995, the application was rejected. Dissatisfied with the ruling rejecting the application for review, Joseph Mlay, the respondent in this application (No. 42 of 1995) filed a notice of appeal on 3.4.1995. It is in connection with this notice of appeal that the applicant, Ahmed Mohamed in this application is praying to move this Court for an order that the notice of appeal filed by the respondent Joseph Mlay on the ground that an essential step in processing the intended appeal was not taken.

In support of this application in an affidavit deposed to by the applicant in paragraph 10 it is stated that the notice of appeal be struck out on the grounds that:

- (a) the respondent has not served me or my advocate with a copy of his

notice of appeal within 14 days of the date of judgment appealed against as required by Rule 77(1) of the Tanzania Court of Appeal Rules, 1979.

- (b) the respondent has not lodged his appeal within 60 days after lodging his notice of appeal as required by rule 83 (1) of the aforesaid rules.
- (c) the respondent is not entitled to rely on the exception of rule 83(1) because he has not served me or my advocate with a copy of his letter applying for proceedings as per rule 83(2).

Before me, Mr. Mselem, learned Counsel for the applicant argued these points very convincingly. He submitted that after the appeal in Civil Appeal No. 32 of 1993 in which the respondent was the appellant was dismissed instead of appealing against the decision of 6.5.1994, the respondent applied for a review of the decision. The application for review as pointed out was rejected on 23.3.1995 against which, Mr. Mselem stated, the respondent lodged a notice of appeal on 3.4.1995. As the notice of appeal was not served on the respondent or the advocate for the respondent, Mr. Mselem submitted, the notice should be struck out because some essential step in the proceedings has been taken or has not been taken within the prescribed

time. That is, a copy of the Notice of Appeal was not served on the applicant in terms of rule 77(1) of the Court's Rules, 1979.

At this juncture however, I think it is relevant for me to deal with the propriety of this application. Although the notice of motion was filed by Mr. Mselem, under rule 82 of the Court's rules, the validity of the application stands to question if the ground upon which the application is based is that the applicant was not served with a copy of the notice. Rule 82 provides:

82 - "A person on whom a notice of appeal has been served, may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice of appeal, as the case may be on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time". (Underlining supplied).

From this, it is clear to me that in order to invoke rule 82 of the Court's rules, the applicant must first have been served with the notice of appeal. In this application the applicant's ground for the application is that he was not served with the notice of appeal. For that reason, as shown in paragraph 6 of the affidavit, the applicant affirmatively deposed that he was not served with a copy

of notice. Such being the position, I am settled in my mind that the applicant cannot resort to rule 82 in applying for the notice of appeal to be struck out. He is unqualified by the fact that he was not served as he asserts in this application and I have no cause to doubt him on this. On this ground alone, the application lodged under rule 82 is thus incompetent, it is dismissed with costs to the respondent in this Application (No. 42 of 1995).

I will now deal with Application No. 39 of 1995. In this application the parties interchange their roles. Here, Joseph Mlay who is the respondent in Application No. 42 of 1995 is the Applicant and Ahmed Mohamed is the respondent. Under rule 9 (2)(b) of the Court's rules, the applicant is asking for an order of stay of execution pending the determination of his intended appeal in respect of which he filed the notice of appeal on 26.3.1995. As pointed out earlier in this ruling, the Applicant having lost before the High Court in (DC) Civil Appeal No. 32 of 1993 unsuccessfully applied for review before the same Court. That was Misc. Civil Application No. 30A of 1994. In his affidavit, he asserts that the judge erred in law in rejecting the application for review because an important point of law was involved. The point of law involved was that an important document in support of the sale agreement over the land in dispute was discovered which the applicant claims was the reason for his failure to prove that he had

bought the disputed plot. In paragraph 6 of the affidavit, the applicant depones that the intended appeal has overwhelming chances of success.

Addressing the Court briefly, Mr. Mlay, the applicant made a repeat of what is stated in the affidavit. On the application for stay of execution paragraph 7 of the affidavit summarily the essential features of what he is seeking.

It is stated:

"That, unless the execution of the decree passed infavour of the Respondent in (DC) Civil Case No. 65 of 1992 is stayed, then I shall suffer serious losses as the execution entails (a) demolition of several housing units and destruction of plants on the piece of land in dispute, (b) removal of several people (tenants) from the suit house for whom I cannot find alternative accommodation and (c) removal of my livestocks (sic) for which the Applicant cannot get alternative accommodation. In short, I shall suffer big losses amounting to millions of shillings and other serious consequences if the decree is executed".

Mr. Mlay concluded his submission by stating that as his whole life depends on his stay at the disputed plot, he would suffer irreparable loss if execution takes place before the intended appeal is heard.

Opposing the application, Mr. Mselem, learned Counsel for the respondent, strongly submitted that the application has no merit, it should be dismissed. He stated further that there was no evidence to show that the applicant would suffer substantial damage if the execution of the decree is effected. It was also Mr. Mselem's view that the intended appeal has no chance of success. He prayed for the dismissal of the application on these grounds and the fact that the applicant had not obtained leave for appealing.

As correctly pointed out by Mr. Mselem, the Court's powers under rule 9(2)(b) are discretionary and that such discretion should be exercised by the Court judicially. This is common knowledge in applications for stay of execution. In the instant application, I am not persuaded by Mr. Mselem's submission that the intended appeal is incompetent and that the application for stay of execution should be dismissed on the ground that leave to appeal has not been obtained. With respect, the issue of obtaining leave to appeal is not relevant at this stage. It may well be so at a later stage when the merits of the appeal is considered. Likewise, as regards the chances of success of the intended appeal, at this stage it may not be easy to predict positively the outcome of the intended appeal until the full hearing of the appeal takes place.

The next important factor for consideration in this application is the damage and loss that the applicant is likely to suffer if stay of execution is not granted. This, has been deposed to by the applicant in the affidavit as well as in his oral submission before me. It is the applicant's prayer that he would suffer irreparable loss if execution of the decree takes place before the hearing of the intended appeal because it would involve the demolition of the housing units in which he lives together with his tenants and livestock. On this, apart from merely denying that no substantial loss or damage would be incurred by the applicant if execution took place, Mr. Mselem, learned Counsel did not explain how the applicant would avoid such loss and damage if the housing units were demolished. As the execution of the decree invariably would involve the demolition of the appellant's housing units in the area of dispute which in turn would affect the applicant and his family, the tenants; the livestock and the plants therein, I accept the applicant's prayer that he is likely to suffer substantial and irreparable loss if execution takes place before the intended appeal is determined. This is so, especially if the execution would involve the demolition of the housing units and destruction of the plants on the land when the pending appeal may well succeed eventually. The outcome of the appeal would, in that eventuality be rendered nugatory. The applicant would have suffered substantial and irreparable loss.

For these reasons, I am convinced that the circumstances of this case are such as to warrant the Court's exercise of its discretionary powers under rule 9(2)(b) of the Court's rules. Stay of execution is granted as prayed. It is ordered that the execution of the decree in High Court (DC) Civil Appeal No. 32 of 1993 be stayed pending the determination of the intended appeal. It is so ordered.

Costs of this application to be costs in the appeal.

DATED at DAR ES SALAAM this 2nd day of October, 1995.

D. Z. LUBUVA
JUSTICE OF APPEAL

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


(M.S. SHANGALI)
DEPUTY REGISTRAR