IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MAKAME, J.A., RAMADHANI, J.A., And LUBUVA, J.A.)

CIVIL REFERENCE NO. 9 OF 1998

BETWEEN

IVAN MAKCBRAD ..... APPLICANT

AND

MIROSLAV KATIC)
VESNA PALADIN) ..... RESPONDENTS
INGRA)

(Reference from the Ruling of a Single Judge of the Court of Appeal of Tanzania at Dar es Salaam)

(Mfalila, J.A.)

dated the 14th day of August, 1998

in

Civil Application No. 36 of 1998

R U L I N G

RAMADHANI, J.A.:

The applicant, Ivan Makobrad, unsuccessfully applied for an order of stay of execution before our learned brother MFALILA, J.A. Naturally, he is dissatisfied with that refusal and hence he has filed this reference.

When we came to hear the application, the Respondents, Miroslav Katic, Vesna Paladin and INGRA, had a preliminary objection. Mr. Kesaria, learned advocate for the Respondents, pointed out that up to the time he was making his objection, he had not been served with a copy of the notice of motion and also a copy of the record of the reference. Mr. Kesaria pointed out that there is no specific rule in the Tanzania Court of Appeal Rules, 1979, dealing with the issue of service in applications for references. So, the learned advocate invoked Rule 3 (2) (a).

Mr. Mselem, learned advocate for the Applicant, pointed out that references are provided for under Rule 57. He pointed out further that he had lodged in the Court two extra copies of the record as required by Rule 51 (2). He submitted further that the Rule does not require an applicant to serve anything on the respondent. He offered an explanation for that by saying that as no new evidence is taken in a reference, a respondent is presumed to have in his possession a complete record of the application which was before a single Judge. Mr. Kesaria owned to have with him in Court a copy of that record. We reserved our ruling on the objection to this time.

As pointed out by Mr. Mselem, reference is provided for in Rule 57 to any one who is dissatisfied with the decision of a single Judge. An application for a reference can be made informally to the Judge at the time of giving the decision or by writing to the Registrar within seven days after the decision has been made. In this case it was made informally soon after MFALILA, J.A., gave his decision.

Mr. Mselem relies on the provisions of Rule 51 which says:

> (1) When an application is to be heard by a single Judge, the application and other documents relating to it shall be filed in duplicate, and in all other cases in quadruplicate.
>
> (2) When an application is adjourned by a single Judge for the determination of the Court and in any case where an application is referred to the Court under Rule 57, the person applying to the Court shall, before the date of the hearing of the Court,

> file two extra copies of the application and the other documents relating to it, including any affidavits filed by any other party prior to the adjournment or the giving of notice, as the case may be. (Emphasis is ours).

It is obvious that that rule deals with the number of copies to be filed in Court and not with service to the respondent. The two sub-rules are complementing each other. Two copies have to be filed in an application before a single Judge. A reference, on the other hand, is before a full Court and so, falls under "in all other cases" of sub-rule (1) requiring four copies. Hence sub-rule (2) requires an applicant to file two more copies. But can it be argued, then, that Rule 51 dispenses with the need to serve a respondent with the necessary documents?

Service of documents to parties is regulated by Rule 52 and sub-rule (1) provides:

> The notice of motion and copies of all affidavits shall be served on all necessary parties not less than two clear days before the hearing.

Now, a reference is an application and applications are required by Rule 45 (3) to be by motion except if made informally, like this one. Are the provisions of Rule 52 (1) ousted in informal applications?

We have to distinguish between two types of informal applications. There are those which are made in the course of a hearing. Certainly those cannot be bound by Rule 52 (1) unless there is an adjournment. The application before us belongs to the other type of informal applications which are heard after a lapse of time from the making of the application. It is our considered opinion that in this latter

type of informal applications, there is a need to serve copies of documents and also the grounds for the reference to the respondent. The whole purpose of service is to enable the other party to prepare and that he should not be taken by surprise.

However, we realise that the Rules are silent on the question of service to a respondent in a reference and we must admit that this is a shortcoming. We recommend to the Honourable the Chief Justice to consider regulating applications for reference. However, until such time as there are specific Rules, we have to fill the lacunae with a practice note. In future applicants for references should serve the respondents with copies of all the documents required to be filed under Rule 51 (2) and also to state the grounds for the reference.

We, therefore, dismiss the preliminary objection and we now go on to consider the merits of the reference.

One of the reasons for the application for a stay of execution is that the applicant will suffer substantial damage if stay of execution is not ordered because the first two respondents are not residents of Tanzania and so, should the appeal succeed, execution will be difficult if not impossible. The learned single Judge dismissed that argument because the third respondent, who is the employer of the two respondents as well as the applicant, is a company registered in Tanzania and that execution will be exacted on the company.

Mr. Mselem pointed out that INGRA was joined as the third respondent as prayed. He went further to point out that before INGRA filed a written statement of defence two more prayers were granted. An order of injunction made against the respondents on 16/12/1997 was vacated and in its place an injunction was issued against the applicants. The learned advocate submitted that

the main plank of the appeal pending before the Court in challenging the identity of the third respondent. Mr. Mselem alerted the Court that property might be left in the wrong hands if stay of execution is not ordered.

Mr. Kesaria, on the other hand, said that the applicant claims to be protecting the property of INGRA but when INGRA wants to take hold of its property, the applicant is resisting. On the issue of the identity of INGRA, the learned counsel submitted that there are two separate companies: INGRA and INGRA M & G. He admitted that the first respondent is a director of both companies. However, Mr. Kesaria conceded that if there is a dispute as to who is INGRA and so, the real owner, then the solution is to stay execution until the appeal is finalised.

After hearing submissions of both learned advocates, our minds are left in serious doubts as to who the real INGRA is, whose property is to be safeguarded, and who is the fictitious INGRA against whom the property is to be protected. Because of that nagging doubt, and as conceded by Mr. Kesaria, we order a stay of execution. So, the reference is allowed. Costs to follow the event.

DATED at DAR ES SALAAM this 8th day of December, 1998.

L. M. MAKAME
JUSTICE OF APPEAL

A.S.L. RAMADHANI
JUSTICE OF APPEAL

D. Z. LUBUVA
JUSTICE OF APPEAL

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

(A.G. MWARIJA)
DEPUTY REGISTRAR