

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 7 OF 1994
In the Matter of an Intended Appeal

BETWEEN

1. TRANSPORT EQUIPMENT LTD. 1ST APPLICANT
2. REGINALD JOHN NOLAN 2ND APPLICANT

AND

DEVRAM P. VALAMBHIA RESPONDENT

(An Application for the variation of the order of stay of execution by arrest and detention made by a single Judge of the Court of Appeal of Tanzania on 12th May 1993 in Civil Application No. 19 of 1993 inter partes)

R U L I N G

MFALILA, J.A.

Mr. Mbuya Counsel for the applicants, filed this application by motion purportedly under Rules 3(2)(a) and 9(2)(b) of the Rules of this Court. Why Mr. Mbuya sought to base his application on these two Rules is not easily comprehensible. This application which seeks to vary an earlier order of this Court, should obviously have been filed under Rule 59(2). In this application it is sought to vary the term requiring the second applicant Reginald John Nolan to deposit his passport with the Court and that the said passport be released to him so as to restore his freedom of movement both within and outside the country.

The background to this application is as follows: In one of a series of litigations between the parties to this application, the present respondent Devram P. Valambhia obtained in the High Court an order of arrest and detention

in a civil prison against the second applicant in execution of a decree. In consequence thereof, the second applicant was detained as a civil prisoner. Subsequently, he filed an application in this Court for stay of the execution of the order of arrest and detention issued by the High Court. This Court in Civil Application No. 19 of 1993 granted the application and ordered stay of execution on the following terms and conditions:

1. That the title deeds Nos. 31689 with L.O. No. 94334 and 38233 with L.O. No. 123149 shall form securities.
2. That Mr. Nolan's passport shall be surrendered.

And that all these steps shall be taken before an order of release from prison is issued.

It is the second condition requiring the second applicant to surrender his passport to the custody of the Court which is the subject of the present application that it be varied. I think the second applicant meant to say that it be rescinded.

In his affidavit in support of this application, the second applicant advanced two main grounds. Firstly, he averred that the loss of his passport(s) has caused him hardships in that he cannot travel abroad to attend to his family and other affairs and that this has led him to incur enormous costs of communication by telephone and telefax and the expense of sometimes paying all costs of travel for

people to come to Tanzania to see him. Secondly, he complained that this deprivation of his freedom of movement violated the fundamental rights enshrined in the international covenants on civil and Human Rights as well as the Constitution of the United Republic of Tanzania. He averred that the remaining conditions are adequate to ensure his return to Tanzania.

In his Counter Affidavit, the respondent contended that no fundamental rights of the second applicant had been violated by being committed to civil prison as the violation if at all was lawful and justified under the law and is legally permitted. Secondly, he averred that if the passport is released to the second applicant, this will enable him to escape from the jurisdiction of this Court and there will be nothing in Tanzania which will compel him to return, that the money lying with the Government of Tanzania to his credit would not be a factor to compel him to return to Tanzania as he could easily make arrangements to have the money remitted to him abroad as he did in three previous occasions in violation of the order of this Court.

At the hearing of this application, counsel on both sides amplified on the grounds contained in the affidavit and counter affidavit as outlined above. I want first to deal with the so called violation of fundamental rights of the second applicant by ordering his passport to remain in the custody of the Court, and that this deprived the second applicant his freedom of movement. In his Ruling,

Ramadhani, J.A. dealt at length with this question and I do not think more can be said about it. Every sentence of imprisonment involves a curtailment of somebody's freedom, but it cannot be challenged as a violation of fundamental rights of freedom so long as the curtailment of such freedom is brought about through due process of the law. In this case, the second applicant had his passport taken away through legal process allowed under the law. In the result I agree with the respondent that although the order of taking away the second applicant's passport entailed depriving him his freedom of movement, such deprivation was lawful and justified under the law.

I now turn to the main considerations in this case namely whether the remaining condition by itself is sufficient to ensure the continued presence of the second applicant within the jurisdiction of this Court. The second applicant says it is, and the respondent says it is not. Therefore the question which I have to ask myself in resolving this question is whether anything has happened since the orders of Ramadhani, J.A. which has made the additional requirement to deposit the passport superfluous to justify its variation or rescission.

In the proceedings before Ramadhani, J.A., security in the form of title deeds to two properties situated in Dar es Salaam with a combined total value of Shs.119,486,000/= was provided. Ramadhani, J.A. had this to say on these securities:

"Without going into these issues, I am satisfied that there is enough security to ensure that Nolan if released shall not jump bail as it were. To make it double sure his passport should immediately be surrendered to the Senior Deputy Registrar of the Court of Appeal."

It is obvious that Ramadhani, J.A. considered as adequate the security in the form of the two properties whose title deeds were deposited with the Court and that the deposit of the passport was merely a top up. Mr. Mbuya explained that this top up requirement was justified at that stage in view of the objection by the respondent's counsel that there was no resolution by the Board of Directors in respect of the properties to pledge them as security. But he said that now that the Board resolutions are available, there is no longer any need for such a top up requirement. The question then is whether the second applicant will not return to Tanzania once he travels abroad if the passport(s) are returned to him. Suppose he travels abroad and decides not to come back, what does he stand to lose? The respondent says the second applicant stands to lose nothing as he can arrange to be paid abroad whatever is owed to him by the Government of Tanzania. I disagree. Once the second applicant decides to remain abroad in violation of the orders of the Courts of this country, he will automatically render himself a fugitive from the laws of Tanzania and will automatically lose all rights he may have in Tanzania. These rights include a

claim of about \$ 190,000,000. I think no man in his right senses would risk the loss of such a colossal sum for fear of civil imprisonment which in any case is of limited value. But I think the second applicant stands to lose much more than \$ 190,000,000. This is his personal integrity and honour both to this Court and to the people who have put their properties on the line for his sake. The Court was also informed from the Bar that the second applicant demonstrated his integrity and good faith when he surrendered his two passports when the Court ordered the surrender of only one. The fact that the second applicant holds two passports under his dual British and Irish Nationalities was unknown to the Court at the time. This Mr. Mbuya stated demonstrated the second applicant's good faith as otherwise he could have kept one of the passports which could have enabled him to leave the jurisdiction of this Court.

On my part I am satisfied that this information which was not disputed strengthens the second applicant's case. To come back to the original question whether anything has happened since the order of Ramadhani J.A. to render superfluous the additional requirement that the second applicant surrenders his passport to the Court. Since then the missing board resolution in pledging one of the properties has been obtained, rendering both properties secure as securities. This has rendered the "double sure" requirement unnecessary. For these reasons I am satisfied that the current situation is such that the remaining securities are sufficient to ensure the continued presence

of the second applicant within the jurisdiction of this Court.

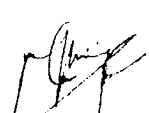
In the result I allow this application and order that the requirement made by this Court in its Ruling dated 12th May 1993 that the second applicant surrender his passport to the Registrar of this Court be and is hereby ~~reconsidered~~ and that the two passports which he surrendered should now be returned to him. I want however to impose ~~one~~ condition on the use of these passports, that anytime the second applicant wishes to travel outside the jurisdiction of this Court, he should inform his counsel who will ~~communicate~~ such fact both to this Court and to his opposite numbers, counsel for the respondent.

DATED AT DAR ES SALAAM THIS 6TH DAY OF JUNE 1994



L. M. MFALILA
JUSTICE OF APPEAL

I certify that this is a true copy of the origin


(M. S. SHANGALI)
DEPUTY REGISTRAR