

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 7 OF 1997
In the Matter of an Intended Appeal

BETWEEN

DAUDI MBARUKU. APPLICANT

AND

NORAH HAULE. RESPONDENT

(Application for stay of Execution
from the judgment of the High Court
of Tanzania at Dar es Salaam)

(Kileo, PRM/Ext. Jurisdiction)

dated the 2nd day of August, 1966
in

Civil Appeal No. 102 of 1995

R U L I N G

RAMADHANI, J.A.:

The applicant, Daudi Mbaruku, is applying for an order of stay of execution of the division of matrimonial property, namely, a house at Vingunguti, Dar es Salaam. The applicant was represented by Dr. Lamwai, learned counsel, while the respondent, Norah Haule, appeared in person.

Dr. Lamwai submitted that if the house is going to be divided then the appeal is going to be superfluous because it is against the order of equal division of the property between the parties. He confessed that the appeal requires leave and that an application for such leave is before the High Court but, as yet, no hearing date has been set.

The respondent, on the other hand, has pointed out that the applicant has been with legal representation throughout the litigation and she wondered why he was late to file the notice of appeal. She went further to say that granting the applicant a stay of execution would aggravate her financial

difficulties, a burden of looking after the issues of their association which she has carried for the last seven years. I have deliberately used the word association because I do not want to be dragged, at this stage, into a dispute which they raised as to whether there was a marriage or a concubinage and whether there were three or two issues.

At first I took the respondent to be a mere laywoman who did not know what she was talking about when she complained about the late filing of the notice of appeal. That notice was filed in time on 15/8/96 because the judgment was delivered on 2/8/96. But as the respondent appeared to me to be knowledgeable, I was a bit curious of that complaint and I was particularly so when Dr. Lamwai, an alert advocate, let the complaint pass uncontradicted. A cursory research of the file revealed that Dr. Lamwai had not told me that there are two applications before the High Court: an application to extend time within which to file an application for leave to appeal and also an application for leave to appeal. The affidavit of the applicant filed in support of this application in paragraph 5 is abundantly clear on this when it says "... there are several points of law which require to be resolved by this Honourable Court as indicated in my application for extension of time to file an application for leave to file an application for leave to file an appeal to this Honourable Court which is still pending in the High Court...". So, the respondent was talking about the applicant, who has been with an advocate, being late to apply for leave to appeal.

Dr. Lamwai was very emphatic that though leave to appeal has not been given there is an appeal before this court as there is a notice of appeal filed. I would qualify that as

I did in another application, very similar to this one, in this very session of chamber applications. In Said Hamid Mwilima v. Tabora Regional Trading Co. Civil Application No. 65 of 1996 I said "... there is a notice of appeal which is inoperative because there is not the prerequisite leave to appeal and that time for applying for such leave has already run out...". I said further in that ruling that "I have no doubt in my mind that granting an order of stay of execution pending the determination of a wishful thinking appeal is, to say the least, idle". The situation here is not different and I do not see why I should rule differently.

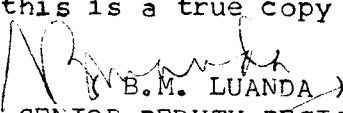
After all in this case the order of KILEO, PRM is that "The house at Vingunguti is to be valued and each party to get half share of the value. The respondent [the applicant] is to give the appellant [the respondent] half of the value of the house within six months as from this day, failing which the house is to be sold in a public auction and proceeds thereto to be divided equally between the parties". So, it is not the question of selling the house by auction straight away which would be difficult to restore the parties to their former position. The applicant is to give the respondent half the value of the house and only after six months is the house to be sold. So, it is like a money decree.

For the above reasons I dismiss the application with costs. It is so ordered.

DATED at DAR ES SALAAM this 2nd day of June, 1997.

A.S.L. RAMADHANI
JUSTICE OF APPEAL

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


(B.M. LUANDA)
SENIOR DEPUTY REGISTRAR