

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 8 OF 1998

BETWEEN

ASIM PROPERTIES LTD. APPELLANT

AND

ARUN PALEJA)
BHANUBHAI PATEL) RESPONDENTS

(Application for stay of execution from
the Decision of the High Court of
Tanzania at Dar es Salaam)

(Nsekela, J.)

dated the 1st day of December, 1997

in

Civil Revision No. 34 of 1997

R U L I N G

LUBUVA, J.A.:

In terms of rule 9 (2)(b) of the Court's Rules, 1979, the applicant, ASIM Properties Ltd., is applying for an order that the decision in High Court Civil Revision No. 34 of 1997 of 1.12.1997 be stayed pending the determination of the intended appeal. In support of the application is the affidavit of one Pradip Rajan, a principal officer of the applicant company.

In Kisutu RM Civil Case No. 44 of 1997 the applicant had filed a suit against the respondents claiming ownership over the suit premises. The respondents applied for leave to defend. The application was dismissed on 23.7.1997 and a summary judgment was entered in favour of the applicant. As the respondent was dissatisfied with the decision, the Honourable the J.K. was moved to initiate Revision proceedings in High Court Civil Revision No. 34 of 1997. In the course of hearing the revision proceedings, Mr. Hyera, learned counsel for the applicant in this matter raised a

preliminary objection which was overruled when the court held that there was a proper application for revision. That was on 3.9.1997. On 4.9.1997, the applicant lodged a notice of intention to appeal against the ruling. In order to appeal to this Court against the ruling of 3.9.1997, the applicant applied for leave to appeal. On 1.12.1997, the High Court struck out the application for leave to appeal on the grounds that the application was incompetent, it did not comply with Rule 46 (3). Against this decision, the applicant lodged a notice of appeal on 5.12.1997. Otherwise, the summary judgment as already indicated, was in favour of the applicant.

From the affidavit in support of the application and the oral submissions by Mr. Hyera, learned counsel for the applicant, it seems to me that the only and main concern of the applicant in this matter is the legality involved in the revision proceedings in the High Court. That is, according to Mr. Hyera, the ruling of 3.9.1997 was legally faulty. For that reason, he went on, if the revision proceedings are proceeded with before the hearing of the intended appeal to correct the legal error in the ruling, the subsequent court proceedings would proceed from illegality. Otherwise, if I understood him correctly, he correctly, in my judgment, conceded that the ruling of 1.12.1997 by the High Court (Nsekela, J.) was not capable of execution.

For the respondents, Mr. Kilindu, learned counsel was quick to oppose the application. In the first place, he stated, the application has no merit because the intended appeal is incompetent as leave to appeal to this Court was not granted. Having failed to obtain leave on 1.12.1997 in terms of rule 46 (3) (b) the applicant should have applied to the Court of Appeal within 14 days

from that date. Secondly Mr. Kilindu stated, the High Court order of 1.12.1997 is not capable of being executed, it was a decision which struck out the application for leave to appeal.

I have closely considered these submissions from counsel for both parties. The application for stay of execution is in respect of the High Court decision in Civil Revision No. 34 of 1997 of 1.12.1997. What was sought in that application was leave to appeal against the High Court ruling in the revision proceedings of 3.9.1997. As a result of that ruling, leave was not granted as the application was struck out. The question that poses for consideration is whether such a decision is capable of being executed. To my mind, the decision to strike out the application was merely declaratory that the application was incompetent. And, so, in my judgment, it was not capable of being executed. It follows therefore that stay order was sought in respect of an order which could not be executed.

Furthermore, as already indicated, the only concern of the applicant in this matter is the legality in the revision proceedings. That the applicant seeks to have the ruling by the High Court of 3.9.1997 examined on appeal. In view of the fact that no loss or damages of any kind is apprehended by the applicant if the revision proceedings are proceeded with before the appeal is heard, is there justifiable grounds for seeking stay? I do not think there is any. It is common knowledge that sufficient ground is laid for consideration of granting stay of execution if it is shown, inter alia, that the intended appeal would, if successful be rendered nugatory. In this case, the situation is different and on this, Mr. Hyera, for the applicant, concedes. Since the only concern by the applicant is the legality in the decision of the court, that aspect could, in my considered opinion, be attended to on appeal after the final

determination of the revision proceedings without stay of execution. In doing so, the outcome of the intended appeal would not be rendered nugatory. After all, as already observed, the summary judgment was in favour of the applicant.


Then there is the question of leave to appeal. What is the position after the application was struck out on 1.12.1997? I am respectfully in agreement with Mr. Kilindu that in terms of rule 43 (b) having been unsuccessful in the High Court in obtaining leave, the applicant should have applied to this Court within 14 days from 1.12.1997. This they have not done to-date, for a period about nine months since, and as yet, no application for extension of time has been made. Consequently, in the absence of leave to appeal and without an application for extension of time, in which to seek leave to appeal, it is most improbable that a valid appeal would be forthcoming before this Court in respect of which stay of execution is sought.

For the foregoing reasons, the application is dismissed with costs.

DATED AT DAR ES SALAAM THIS 4TH DAY OF SEPTEMBER, 1997.

D. Z. LUBUVA
JUSTICE OF APPEAL

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


(A.G. MWARIJA)
DEPUTY REGISTRAR