

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 64 OF 1997
In the matter of an Intended Appeal

BETWEEN

MILLAN ZINZUADIS APPLICANT

AND

1. ABDUL HAMID)
2. MBARAKA PARAJ ALI) RESPONDENTS

(Application for Stay of Execution
from the Judgement/Decree of the
High Court of Tanzania at
Dar es Salaam)

(Manento, PRM, Ext. Jurisd.)

DATED the 15th day of September, 1997

in

Civil Appeal No. 79 of 1996

R U L I N G

LUBUVA, J.A.:

In Kisumu JM's Court Civil Case No. 164 of 1995 the 1st and 2nd respondents in this application together with another person by the name of Feizal Salleh Hujjat had filed a suit against the applicant. The claim involved a motor vehicle which had been sold to the applicant. The Resident Magistrate's Court decided infavour of the 1st and 2nd respondents and ordered the motor vehicle to be returned to the second respondent on condition that the applicant was refunded by the respondents the money he had paid for the motor vehicle. Being dissatisfied with the decision, the 1st and 2nd respondents appealed to the High Court. In Ext. J.

Civil Appeal No. 79 of 1996 (Manento PRU,
Ext. allowed the appeal. The applicant was ordered
to restore the disputed motor vehicle to the 2nd respondent.

In this application, the applicant by a notice of
motion is seeking the Court's order that the decision
of the Court in Ext. J. Civil Appeal No. 79 of 1996
dated 16th September, 1997 be stayed pending the intended
appeal. The notice of appeal was filed on 17.9.1997.

In support of the application, Mr. Safari, learned
counsel for the applicant has sworn and filed an affidavit.
In paragraph 7 of the affidavit it is stated:

7. That the applicant stands to suffer
irreparable loss and hardship if stay
of execution is not granted as prayed
herein. Therefore if the stay of
execution is not granted, the respondents
who are determined and zealous shall at
any time carry out execution of the
judgment and seek restoration of the
disputed motor vehicle to themselves
and hence the whole purpose of the
applicant's intended appeal will be
completely defeated.

In response to the applicant's affidavit, the second
respondent has deposed and filed a counter-affidavit.
In the counter-affidavit, it is stated that the applicant
does not disclose the loss that the judgment debtor is
likely to suffer upon the execution of the decree. It
is further stated that as the applicant was ordered to

pay the decree holder the balance of shillings 5,000,000/= he cannot retain the vehicle and at the same time retain the balance of 5,000,000/=.

At the hearing of this application Mr. Safari essentially recapitulated what is stated in his affidavit. He emphasized the fact that the applicant would suffer an irreparable loss if execution takes place before the determination of the appeal. This is so, he stated, as a result of the execution of the decree the motor vehicle would be taken away from the applicant. Mr. Safari however concedes that the applicant could not comply with the order of the Court of the Resident Magistrate to pay the balance of the purchase price of the motor vehicle to the 2nd respondent because the matter was taken on appeal to the High Court.

Responding to these submissions, Mr. Kalolo, learned counsel raised three issues. First that the applicant had not complied with the order of the Resident Magistrate's Court to deposit in court the balance of shillings 5 million before the motor vehicle was taken from police custody. Secondly, that since the applicant had not paid the balance of the purchase price as ordered and still retained the motor vehicle, the respondents would suffer more loss and damages than the applicant if stay of execution is granted. Thirdly, the intended appeal does not raise any point of law for consideration by the Court of Appeal.

At the outset it must be pointed out that from the record, one curious and unexplained feature emerges. From the decree attached to the application, the Court of the Resident Magistrate had alternatively ordered the applicant to pay the decree holder (defendants) the balance of the purchase price of the motor vehicle. This is evident from paragraph 7 of the applicant's affidavit and 5(v) of the 2nd respondent's counter-affidavit. In that case, it remains an open question as to how the Police at the Gysterbay Police Station release the motor vehicle if the court order was not fulfilled. The applicant denies in his affidavit that the vehicle was released through dubious means. On this, Mr. Safari, learned counsel has valiantly submitted that the applicant could not make the balance payment because an appeal had been filed in the High Court. With respect, the filing of an appeal was no licence for not complying with the court order. If anything at all, until and unless it was ordered otherwise, the filing of an appeal was all the more reason for not releasing the motor vehicle until the appeal was determined.

The main ground advanced for seeking stay of execution is that the applicant is likely to suffer irreparable loss if execution takes place before the determination of the appeal in that the vehicle would be taken away. It was not elaborated as to whether the loss would in fact occur and to what extent. It is

that it cannot be atoned by way of damages. On this, this Court has on a number of cases reiterated this principle. Recently, a similar point was underscored in Civil Application No. 19 of 1997, Tanzania Posts & Telecommunications Corporation v M/s E.S. Henrita Supplies (unreported) and Civil Application No. 52 of 1996, Tanzania Cotton Marketing Board v Cogecot Cotton Company S.A. (unreported). In the instant case, considering the circumstances of the case, I am not settled in my mind that the applicant would suffer such irreparable and substantial loss if execution of the decree took place. With respect, I do not accept Mr. Safari's submission on this point just as much as I am not in agreement with Mr. Kalolo, learned counsel that the respondents would suffer more damages and loss if stay of execution is granted. This is for the simple reason that either way, the loss if any, would not in my view, be irreparable and incapable of being atoned by way of damages if the apprehension on the part of the applicant is that the motor vehicle would be taken from him. Such could not in my view, amount to an irreparable loss. He was merely at the stage of purchasing it and had not started putting it to some business use. The loss would not be an irreparable one.

Next, I would consider whether there are other special circumstances to warrant the granting of a stay of execution. Mr. Kalolo, learned counsel has submitted that the intended appeal raises no point of law.

Court of Appeal. At this juncture, it may well be asked as to what are the chances of success on appeal in this case. In doing so, sight should however not be lost of the fact that though the chances of success of an appeal is one among other factors for consideration in an application for stay of execution, generally, it is difficult to gauge such chances meaningfully at a stage when submissions on both sides have not been heard. In this case however, a cursory glance through the judgment of the Court (Manento, PRM, Ext. J) reveals what appears to me a legal aspect which in my view warrants close scrutiny. This pertains to the order issued by the trial court regarding the motor vehicle in question. It is an aspect which was also considered on appeal by Manento, PRM, Ext. J. The appeal having been allowed with the order that the 2nd respondent be handed over the motor vehicle, the question of the balance of the money paid in the purchase was left open ended. This poses the problem as to who among the parties paid what and who retains what vis a vis the purchase price of the motor vehicle. This is in order to do fair justice to the parties. It is, in my considered opinion a relevant and important legal aspect that may well be considered on appeal.

All in all therefore, I am satisfied that in the circumstances of the case the applicant is not likely to suffer substantial and irreparable loss which is

incapable of being atoned for by way of damages. However, considering other relevant perculiar circumstances of the case e.g. the legal issues pertaining to the motor vehicle, its purchase price and who retains what among the parties, in the interest of justice I am inclined to exercise the powers vested under rule 9(2)(b) of the Court's Rules, 1979. It is therefore ordered that the execution of the decision of the Court (A.R. Manento, PEM, Ext. J) in Civil Appeal No. 79 of 1996, dated 16th September, 1997 be stayed pending the determination of the intended appeal.


Costs in the cause.

DATED at DAR ES SALAAM this 3rd day of November. 1997.

D. Z. LUBUVA
JUSTICE OF APPEAL



Certify that this is a true copy of the original.


(M.S. SHANGALI)
DEPUTY REGISTRAR