

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 70 OF 1996
In the Matter of an Intended Appeal

BETWEEN

NICHOLAS NERE LEKULE APPLICANT

AND

1. INDEPENDENT POWER (T) LTD;
2. THE ATTORNEY GENERAL RESPONDENTS

(Application for Stay of Execution
of Decree from the Ruling of the
High Court of Tanzania at D'Salaam)

(Kaji, J.)

dated the 18th day of October, 1996

in

Civil Case No. 117 of 1996

R U L I N G

LUBUVA, J.A.:

In a notice of motion under rule 9(2)(b) of the Court's rules, the applicant is moving this Court for an order that the execution of the decree of the High Court (Kaji, J.) in Miscellaneous Cause No. 117 of 1996 be stayed pending the determination of the intended appeal. The applicant is represented by Mr. Maira, learned Counsel. Dr. Tenga, learned Counsel appeared for the first respondent while Mr. Salula, learned Senior State Attorney represented the second respondent, the Honourable the Attorney General.

In support of the application, Nicholas Nere Lekule, the applicant has filed an affidavit. In that affidavit it is stated inter alia:

On 12.9.1996, an application
for an interim injunction was filed.

No. 1331 Tegeta Salasala.

The application was dismissed on
18.10.1996.

2. That if the stay order is not granted, the intended appeal would be rendered useless and of mere academic interest.

At the hearing of this application, Mr. Maira, learned Counsel for the applicant with characteristic vigour and industry briefly set out the historical background to the case that led to this application. He stated that the matter arose from High Court Miscellaneous Cause No. 117 of 1996 and not Civil Case No. 117 of 1996 which was, through typing error indicated in the notice of motion. According to Mr. Maira, in that Miscellaneous Cause the applicant had applied before the High Court for a temporary order of injunction to restrain the 1st respondent, the Independent Power (T) Ltd. from entering into the land at Farm No. 1331 Tegeta Sala-sala. This order was sought Mr. Maira stated, pending the determination of a suit which was then yet to be instituted. Incidentally from the bar the Court was informed that the suit is now instituted before the High Court as Civil Case No. 15 of 1997, it is pending a hearing date to be fixed. A copy of the plaint in that case was, with the concurrence of both counsel availed to me. On 18.10.1996, the High Court dismissed the application for the temporary injunction sought. The applicant was dissatisfied with that decision, and has thus filed the notice of appeal on 22.10.1996. He is now as stated earlier seeking an order of stay pending the determination of the intended appeal.

intended appeal for two reasons. First, he stated, the applicant who owned land on Farm No. 1331 Tegeta Salasala was carrying out farming activities on that land which had been acquired by the Government on whose behalf the second respondent was appearing. As stated in paragraph 5 of the affidavit Mr. Maira vehemently submitted that if the execution of the decision/ruling of the High Court of 18.10.1996 is not stayed, the intended appeal would be rendered useless and of a mere academic interest. Elaborating further on this point he said the execution of the decision/ruling of the High Court would result in the farm plot being turned into a power station which would, in his view destroy the stratum of the intended appeal. Responding to paragraphs 6 and 7 of the affidavit in reply by one James R. Rugemalila, a director of 1st respondent company, Mr. Maira countered that in the intended appeal the crux of the matter for challenge on appeal is not the money but the principles involved in the acquisition of the land. It was however not denied by Mr. Maira that the 1st respondent had deposited money i.e. Shs. Million ^{2.4} ~~2.3~~ for compensation in respect of the suit-plot. He prayed that in order to minimize the loss on the part of the applicant, the status quo i.e. the position before the parties went to the court should be maintained until the pending appeal against Kaji, J.'s decision/ruling is determined.

Dr. Tenga, learned counsel for the 1st respondent argued three substantive grounds. Firstly, it was Dr. Tenga's submission that the order or ruling of the High Court of 17.10.1996 is a declaratory order which is not capable of execution. For that reason, Dr. Tenga maintained, a stay order cannot be issued. At this juncture, it is to be observed that Mr. Salula, learned Senior State Attorney, who appeared for the second respondent, the Attorney General was in agreement with most of the points argued by Dr. Tenga.

He however added a few more points which I will deal with later. On this submission it is relevant to note that the application before the High Court was seeking an interim injunction to restrain the 1st respondent from entering Farm No. 1331 Tegeta Salasala. That is, the application which was dismissed by Mr. Justice Kaji on 18.10.1996. It is that order in respect of which in this application as shown in the notice of motion and confirmed by Mr. Maira, in his submission before me a stay order is sought. In my understanding, with the dismissal of the application in High Court Miscellaneous Cause No. 117 of 1996 there was nothing, so to speak to be stayed. It was merely a declatory order that the application had been refused and so, the position on the ground as regards Farm No. 1331 Tegeta Salasala remained as before, much the same as if nothing effectual had taken place legally. With an order which is incapable of execution, as I hold, that would be sufficient to dispose this application. But then there are other points of substance which were raised that need to be considered as well.

Secondly, Dr. Tenga argued that the stay order even if granted would not serve any useful purpose. This is because he stated, as of now when this application is being heard, the 1st respondent has gone quite a long way towards the constructing of a power station. It was Dr. Tenga's further submission that with the Government acquisition of the land on farm 1331 Tegeta Salasala and the same land having been allocated to the 1st respondent, there was no legal basis upon which the 1st respondent could be restrained from carrying out development on the suit land. It is found by the learned trial judge that at the time when the suit plot was acquired, the applicant had no house on the land except for crops which have been uprooted and the land there is under construction, I agree with Dr. Tenga, that the order sought

would not serve any useful purpose. That is, the matter having been overtaken by events, the stay order sought would not achieve the purpose it was intended i.e. maintaining a status quo. Thirdly, it was also the submission of Dr. Tenga, learned counsel that there was no ground for the grant of a stay order. The reason he advanced was that in the circumstances of the case the applicant is not subjected to an irreparable loss which would not adequately be compensated by an award of damages. He went on in his submission that the 1st respondent has deposited Shs. 2.3 Million with the government for compensation in respect of the suit plot at the farm. In that case, Dr. Tenga submitted, as seen from the plaint filed in the substantive suit - Civil Case No. 15 of 1997, the issue being one of compensation, it is a matter which does not warrant the granting of a stay as the applicant could equately be compensated.

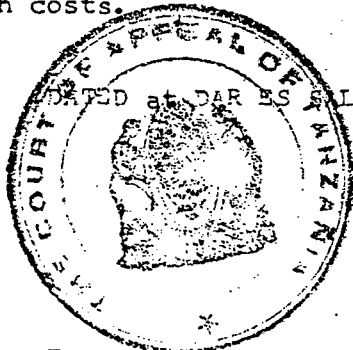
On the question whether or not to grant a stay, it is common ground that one of the essential conditions for granting a stay of execution pending the determination of an intended appeal is the loss or injury that an applicant is subjected. It should not be any ordinary loss, it must be an irreparable loss which cannot adequately be compensated by way of damages.

In the instant case, as found by the trial judge the issue is a narrow one, namely that of compensation in which case, the damage or loss that the applicant has suffered is capable of being qualified and paid for by way of damages. At the hearing of this application, Mr. Maira, learned counsel accepted as truthful that money to the tune of shillings ^{2.4} ~~2.3~~ Million has been deposited by the 1st respondent with the government for purposes of effecting compensation to the applicant. In addition to that fact, it was brought to my attention that except for the applicant and one other person, the rest of the occupiers of the land in the

area under dispute have moved out of the area after compromising on compensation. Additionally, it is also an undisputed fact that the applicant did not have any permanent structure on the land apart from perennial crops. In that situation, I am of the settled view that the applicant does not qualify for the grant of a stay. The loss involved is not irreparable, it is capable of being adequately compensated by an award of damages.

In view of the position I have taken of the matter, it is not necessary to go into the details of the other points which were raised by Mr. Salula, learned Senior State Attorney. In passing perhaps I should touch on one thing. He had taken issue with the affidavit in support of the notice of motion. That it was defective in terms of Order 19 Rule 3 of the Civil Procedure Code. Needless to go into the details of the matter especially on whether the affidavit was defective or otherwise. Suffice it at ^{this} stage to observe that, it is common knowledge that the Civil Procedure Code is applicable before the High Court and the courts below. In this Court, the procedure is governed by the Court's Rules, 1979.

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



D.Z. LUBUVA
JUSTICE OF APPEAL

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

(M. S. SIKHOLE)
DEPUTY REGISTRAR