

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 72 OF 1996
In the Matter of an Intended Appeal

BETWEEN

MOHAMED SAID BAKRAM APPLICANT

AND

1. GIDEON MHEWA }
2. JUMANNE JAMES } RESPONDENTS

(Application for stay of execution
from the decision of the High Court
of Tanzania at Mbeya)

(Mwipopo, J.)

dated the 12th day of September, 1996

in

Civil Appeal No. 18 of 1989

R U L I N G

LUBUVA, J.A.:

Resulting from the decision of the High Court at Mbeya in DC Civil Appeal No. 18 of 1989, the applicant Mohamed Said Bakram lost in favour of the respondents Gideon Mhewa and Jumanne James. The case originated from the Iringa District Court Civil Case No. 1 of 1979. It involved a tenant-purchaser sale agreement over a house on plot No. G.38 Jamat Street within Iringa Municipality. On appeal, the High Court (Mwipopo, J.) held that the sale agreement was void and that the applicant's stay in the house was illegal. An eviction order was also issued against the applicant. Dissatisfied with the decision of the High Court the applicant filed a notice of appeal.

In this application, an order for the stay of execution is sought by the applicant. That is, the execution of the High Court decision in DC Civil Appeal

No. 18 of 1989 is to be stayed until the final determination of the intended appeal. At the hearing of this application Mr. Maira, learned Counsel appeared for the applicant and Mr. Mkwata, learned Counsel represented the respondents. In support of the application, the applicant has also deposed and filed an affidavit. In that affidavit, essentially, the applicant states in paragraphs 4 and 5 as follows:

4. That the subject matter of the case is the house I am occupying with my family at Iringa.
5. That the respondents are now processing to evict me and my family from the house in dispute.

Briefly but pertinently, Mr. Maira, learned Counsel for the applicant stated that the applicant had taken all the necessary steps for the institution of the appeal before this Court. He said, the intended appeal is now pending a hearing date to be fixed. He strongly maintained that his clients, the applicants were apprehensive of threatened eviction from the house by the respondents. In that case, he said, if execution of the High Court decision takes place, it would render the outcome of the pending appeal nugatory in the event of it succeeding in favour of the applicant. It was Mr. Maira's further submission that as the applicant is occupying the house, the subject matter of the intended appeal, if the respondents take possession of the house involved in the case in execution of the High Court decision, the substratum of the appeal would be affected. This is so, Mr. Maira stressed, because once the respondents take

possession of the house, it would be open for the respondents at their will either to dispose of it or to have other tenants in the house. This, Mr. Maira urged, would lead not only to great inconvenience to the applicant who would have no place to stay but would also cause an irreparable loss to the applicant which cannot be atoned by way of damages. This is because Mr. Maira submitted, the subject matter involved is not the money aspect but the ownership of the house.

Mr. Mkwata, learned Counsel for the respondents urged for the dismissal of the application. It was his submission that the application does not disclose sufficient grounds for the issuance of an order for stay of execution. He further stated that if there is any loss that the applicant would suffer, such loss or damage would, in his view, be atoned for by way of damages if the appeal succeeds in favour of the applicant. It was also the submission of Mr. Mkwata that on the contrary, the granting of an order for stay of execution as sought by the applicant would aggravate further hardship to the respondents. This is because, Mr. Mkwata stated, the respondents as decree holders since 10.3.1980 have been denied of their right to enjoy the fruits of their successful litigation for the last 17 years when the applicant has been occupying the house without paying any rent. At any rate, Mr. Mkwata concluded, in terms of rule 9(2) (b) of the Court's rules, 1979, the institution of an appeal is no ground for suspending the execution of a decree.

The determination of this application depends on the single issue whether in the circumstances of the case, an order staying the execution of the High Court decision is justified. Mr. Maira's main contention as already pointed out is that if execution takes place before the intended appeal is determined, the substratum of the appeal would be affected in that the house in question would either be disposed of or rented to other tenants. The reason behind this according to Mr. Maira was that the core issue is the ownership of the house and not the money. If the bone of contention is the ownership of the house and not the damage or loss that the applicant would suffer if a stay order for execution is not granted as stated by Mr. Maira, is this an irreparable loss incapable of being atone for by way of damages? Mr. Mkwata, learned Counsel was positively of the view that it was not. He went even further in his submission that there is no injury which is incapable of being redressed by way of damages. With respect, it is my view that this rather general statement is partly correct. It is common knowledge that each case must be taken on its own merits. In that light, depending on the nature and circumstances of the case involved, in certain situations injury or loss sustained is incapable of being redressed by way of damages and vice versa. In the instant case, if the major cause for worry is the ownership of the house, such in my considered opinion can be resolved at any stage irrespective of whether or not a stay order of execution has been issued. Furthermore, granted that the issue of the ownership of the house is

account the chequered historical background of the case. A cursory glance through the judgment of the High Court reveals an unprecedented long delay of the case. It has been changing a hands in the court at various levels for the last 17 years. Mr. Mkwata, learned Counsel for the respondents, has pointed out that the granting of a stay order for execution would not facilitate the speedy disposal of the intended appeal by the applicant. This is because, Mr. Mkwata stated, the applicant has been staying in the house without paying rent all this time. With stay order for execution issued, Mr. Mkwata maintained, the applicant may not pursue the intended appeal enthusiastically. It is elementary that a decree holder should not unduly be denied to enjoy the fruits of his rights accruing from the judgment or decree passed in his favour. For that reason, even in deserving and warranting cases in which stay orders for execution are granted, such are nonetheless not meant to be of a permanent nature. In the instant case which as already pointed out, has been in the court corridors for the last 17 years without the decree holders enjoying the fruits of their rights, the issuance of the stay order sought should be done with extreme diligence and caution. This is in order to avoid further injustice and delay. In here, having regard to the circumstances and historical background of the case, I am satisfied that it is not in the interest of the justice of the case to issue a stay order for execution.

In the event, and for the foregoing reasons the plication is dismissed. Costs of this application

to be costs in the appeal pending. It is further ordered that the house on plot No. G.38 Jamat Street, Iringa Municipality is not to be disposed of in any way until the pending appeal is finally determined.

DATED at DAR ES SALAAM this 5th day of May, 1997.

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D. Z. LUBUVA
JUSTICE OF APPEAL

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


(M.S. SHANGALI)
DEPUTY REGISTRAR