

IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM

CIVIL APPLICATION NO. 50 OF 1999  
In the Matter of an Intended Appeal

BETWEEN

1. ATHANAS ALBERT	. . . . .	APPLICANTS
2. SERGI SHIRIMA		
3. YOHAKIM MGIMWA		
4. EMMANUEL LUPILYA		
5. FELIX KAPINGA		

AND

TUMAINI UNIVERSITY, IRINGA	. . . . .	RESPONDENT
UNIVERSITY COLLEGE		

(Application for Stay of Execution from  
the decision of the High Court of Tanzania  
at Songea)

(Mwipopo, J.)

dated the 26th day of June, 1999

in

Misc. Civil Application No. 9 of 1999

R U L I N G

KISANGA, J.A.:

This is an application for a stay of execution of the order of the High Court pending the hearing and determination of an intended appeal to this Court.

The background to the case is set out in a joint affidavit of the five applicants and it may briefly be stated as follows:- The applicants who are currently third year students at the respondent University College had their studies terminated on grounds of non-payment of fees. They filed a suit in the District Court against the respondent challenging such termination of their studies. They at the same time applied for temporary injunction to restrain the respondent from expelling them pending the hearing and determination of their suit. The District Court granted the temporary injunction but the High Court exercising revision powers set aside the order for temporary

injunction. The applicants gave notice of intention to appeal to this Court against that order of the High Court. In the present application to this Court the applicants are now seeking for a stay of execution of the order of the High Court pending the hearing and determination of the said intended appeal to this Court. At the hearing of this application the applicants were represented by Mr. B.P. Mkwata while the respondent was advocated for by Mr. M.T. Mwakingwe.

As intimated before, the notice of motion was duly supported by a joint affidavit of all the applicants. The respondent filed a counter-affidavit and a supplementary counter-affidavit. The applicants filed affidavit in reply to the supplementary counter-affidavit. Upon the application of counsel, I allowed counsel for both sides to make their submissions in writing.

The application was resisted mainly on two alternative grounds, namely, that the application was incompetent or, in the alternative, that there was no order of the High Court to be stayed. On the first ground it was contended that in law there was no intended appeal because a copy of the notice initiating the said appeal was not served on the respondent or its counsel. The applicants adduced evidence showing that a copy of the said notice was received by one Scolla Rwezaula, the secretary to the Vice Provost of the respondent University College. That evidence was not challenged or contradicted. The respondent's only argument was that the notice was not received by a responsible officer of the respondent's administration. It seems plain to me that that argument is untenable. The said Scolla Rwezaula was the secretary to the Vice Provost of the respondent University College, undoubtedly a very senior and responsible officer of the respondent's administration. In the absence of any contrary indication, one is entitled to assume that in that capacity it was part of Scolla's duties

to receive communications addressed or directed to the respondent through the Vice Provost. The said notice titled "Notice of Appeal in Misc. Civil Application No. 90/1999" was clearly addressed to "Tumaini University, Iringa University College". In my view the applicants were perfectly entitled to leave the notice with the said Scolla and to take it that it was duly served on the respondent ~~University College~~ through its Vice Provost. This ground of objection, therefore, fails.

Coming now to the second and alternative ground, the respondent contends that there is no order of the High Court to be stayed. The respondent's evidence ~~as adduced by counter-affidavit~~ shows that following the High Court order setting aside the temporary injunction granted by the District Court, the respondent proceeded on 26.6.96 to ~~take a number of steps against the applicants. These steps included:~~

- (i) Termination of the applicants' studies
- (ii) Instructions to lecturers to stop supervising the applicants' research work and to stop releasing any examination results to them
- (iii) Withdrawal from the applicants of the amenities such as accommodation and other facilities at the campus which are intended for bona fide students.

The respondent's contention, therefore is that when this application was filed on 2.7.99 it was already too late in the day because the respondent had already acted on the order of the High Court which was intended to be stayed. On the other hand the applicants vigorously contend and reiterate that if their application is not granted, they stand to suffer irreparable loss, and that the intended appeal to this Court stands good chances of success.

In my opinion the real question raised in this application is whether the High Court order in question was one in which it was capable of ordering a stay of execution. As stated before, the High Court order consisted of setting aside the order of the District Court which had granted temporary injunction to the applicants. The applicants, in effect, are now asking this Court to stop that order from taking effect. In other words the applicants are asking this Court to set aside the order of the High Court and thereby restore that of the District Court. But it seems that that can only be done in the course of hearing and determining the intended appeal to this Court. To do otherwise would amount to granting the applicants what they are asking for in the intended appeal, which to my mind would be wrong in principle.


I am increasingly of the view that there is nothing in the High Court order the execution of which is capable of being stayed. All that the High Court did was to set aside the order of the District Court which had restrained the respondent from terminating the applicants' studies. It seems to me that a stay of execution can properly be asked for where there is a court order granting a right to the respondent or commanding or directing him to do something that affects the applicant. In such a situation the applicant can meaningfully ask the court for a stay and to restrain the respondent from executing that order pending the results of an intended appeal. But in the present case after the High Court had set aside the order of the District Court, there is no order of any court now granting any rights to the respondent or commanding or instructing the respondent to do anything affecting the applicants or, indeed, anyone. There is a clean slate, as it were. Then the question is: Which order of the High Court are the applicants asking this Court to order a stay of execution of?

In my view there was no basis for the applicants seeking a stay of execution of the order of the High Court. For, the said order of the High Court did not grant to the respondent any right the enjoyment or enforcement of which could be stayed through a court order pending the results of the intended appeal by the applicants. In the result I am satisfied that this application was misconceived and it is accordingly dismissed with costs.

DATED at DAR ES SALAAM this 8th day of October, 1999.

R.H. KISANGA  
JUSTICE OF APPEAL

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

  
( N.M. MWAIKUGILE )  
SENIOR DEPUTY REGISTRAR