

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 62 OF 1998

BETWEEN

SHANI AYUBU. APPLICANT

AND

IRDAHM OSMAN MOHAMED. RESPONDENT

(Application for leave to appeal to Court
of Appeal of Tanzania at Dar es Salaam)

(Mackanja, J.)

dated the 4th day of September, 1998

in

Civil Appeal No. 70 of 1997

R U L I N G

LUBUVA, J.A.:

In this application, the applicant, Shani Ayubu is applying for leave to appeal to this Court. The matter originates from High Court Civil Appeal No. 2 of 1997 in which the applicant in this matter was the appellant. The appeal was dismissed. It all started with RM's Court Kisumu Civil Case No. 21 of 1992 in which the applicant was the plaintiff suing the respondent. At the same time, Criminal Case No. 1089 of 1996 was in progress before the Resident Magistrate's Court at Kisumu. At the hearing of Civil Case No. 21 of 1992, after four (4) witnesses had testified, the applicant applied to have the proceedings in this case (Cr. Case No. 21 of 1992) stayed pending the final determination of Criminal Case No. 1089 of 1996. The applicant unsuccessfully appealed against the order dismissing the application for stay of the proceedings. Dismissing the application, the learned judge (Kalegeya, J.) held that Civil Case No. 21 of 1992 had reached an advanced stage and that at any rate, the two cases had no direct bearing to each other. From that decision, the applicant applied for leave in the High Court to appeal to this Court. On 4.9.1998, the

application for leave to appeal was dismissed (Mackanja, J.). Hence this application.

In this application the applicant appeared in person while the respondent was represented by Mr. Ukwonga, learned counsel. At the hearing of the application the applicant did not wish to say more in addition to what was stated in his affidavit and the counter affidavit. He emphasized the fact that there was a point of law involved for which reason he had been pursuing this matter from the courts below so that the point of law involved is looked into by the Court of Appeal. As seen from paragraph 4 of the applicant's affidavit, the point of law is that the learned trial judge erred in law in not allowing an adjournment as applied for by the applicant. The refusal, the applicant claims, is against the provisions of Order 17 Rule 1 of the Civil Procedure Code, 1966. Mr. Ukwonga, for the respondent was also brief in his submission. He stated that there was no merit in the application because there is no point of law to be certified for the consideration of the Court of Appeal. Otherwise, Mr. Ukwonga stressed, the applicant is merely complaining against his dissatisfaction with the High Court decision to dismiss the appeal against the order of dismissal of his application to stay the hearing of Civil Case No. 21 of 1992 the RM's Court at Kisumu. Furthermore, Mr. Ukwonga also complained about the unsatisfactory manner in which the applicant had prepared the notice of motion and the counter affidavit.

Regarding the format of the notice of motion and the counter affidavit of the applicant, I hardly need to say much. Suffice it for me to repeat what I had pointed out to Mr. Ukwonga, learned counsel for the respondent at the hearing of this application. That is, I accept that there are deficiencies and some irregularities in the format of the notice of motion and the counter affidavit filed by the applicant. However, I am satisfied that such deficiencies or irregularities would

not be an unusual phenomenon in documents prepared by a lay person. Furthermore, it is my view that such irregularities are not of such a fundamental nature as to vitiate the essence of the notice of motion or the counter affidavit. I wish to say no more on this aspect which, Mr. Ukwonga as well did not wish to pursue any further.

Now I will deal with the merit of the application. In my considered opinion, the determination of this matter turns around one point, namely whether there is any point of law involved in the decision or order of the High Court (Kalegeya, J.) which is complained against for consideration of this Court. This is a mandatory requirement under Section 5 (2) (c) of the Appellate Jurisdiction Act, 1979. It provides to the effect that appeals such as this one shall not lie to this Court unless the High Court certifies that a point of law is involved in the decision or order. In the instant case the complaint of dissatisfaction is that the learned first appellate judge (Kalegeya, J.) erroneously held that the trial court correctly dismissed the application to have the proceedings in the ongoing Civil Case No. 21 of 1992 stayed until the final determination of Criminal Case No. 1089 of 1996. The reason advanced by the learned judge was that the criminal case had no direct relevance to the civil case at hand which had gone to an advanced stage in court. Factually, if the obtaining position was as found by the first appellate Court, I am unable to see any legal point for certification by the High Court to this Court.

Though legally unaided the applicant has also made the point that this Court should consider whether the trial court was legally correct in refusing to grant the application to stay the proceedings in the Civil Case (No. 21 of 1992) as requested by the applicant. This particularly so, the applicant asserted, having regard to the provisions of Order XVII Rule 1 (1) of the Civil Procedure Code, 1956. With respect, the instant case is widely distinguishable from the situation envisaged

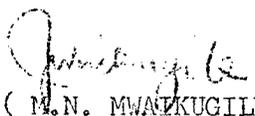
under this Order of the Civil Procedure Code cited above. Under this provision of the Civil Procedure Code, 1966, if sufficient cause is shown at any stage of the suit, the court has the discretion to grant an adjournment to the parties. In the instant case and as held by the first appellate judge, no sufficient cause had been shown for staying the proceedings. It was not even an application for an adjournment but it was an application for stay of proceedings. It would therefore appear to me that Order XVII Rule 1 (1) of the Civil Procedure Code 1966 would not apply to the circumstances of the case before me. The two cases were therefore distinctly different having no bearing with each other. In that light, as there was no basis upon which to stay the proceedings in Civil Case No. 21 of 1992 pending the determination of Criminal Case No. 1089 of 1996, I am satisfied that there is no legal point to be certified to this Court regarding the High Court ruling of 11.10.1997.

The application is without merit, I dismiss it with costs.

DATED AT DAR ES SALAAM this 23rd day of February, 1999.

D.Z. LUBUVA
JUSTICE OF APPEAL

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


(M.N. MWAKUGILE)
SENIOR DEPUTY REGISTRAR