IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MAKAME, J.A., KISANGA, J.A., And LUBUVA, J.A.)

CIVIL REFERENCE NO. 8 OF 1999

BETWEEN

1. IGNAZIO MESSINA
2. NATIONAL SHIPPING AGENCIES ..... APPLICANTS

AND

1. WILLOW INVESTMENT
2. COSTA SHINGANYA ..... RESPONDENTS

(Reference from the decision of a single Judge of the Court of Appeal of Tanzania at Dar es Salaam)

(Lugakingira, J.A.)

dated the 1st day of July, 1999

in

Civil Application No. 84 of 1998

R U L I N G

KISANGA, J.A.:

This is a reference from the Ruling of a single Judge of this Court (Lugakingira, J.A.) dismissing with costs the application for stay of execution pending appeal to this Court. The application was dismissed for not disclosing the grounds on which to exercise the Court's discretion whether or not to grant a stay of execution. Mr. Kalunga, learned advocate who appeared for the applicant in this reference, had also represented the applicant before the single Judge. Before the single Judge the learned counsel had submitted that:

> "... under rule 9 (2) (b) of the Court Rules, once notice of appeal has been lodged, the Court has no option but to grant stay. No other requirement.

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The learned judge disagreed with that submission. He held that under rule 9 (2) (b) of the Court Rules, the Court has discretion whether or not to grant a stay, but that in the instant case the applicant had advanced no grounds on which the Court could exercise that discretion.

When arguing the reference before us Mr. Kalunga prevaricated a lot. At one moment he seemed to stick to the stand he had taken before the single Judge, but at another he seemed to take the view that the Court had discretion although there were no principles guiding the exercise of such discretion. As far as we could gather from his submissions the learned counsel was not clear at all which of the two views he was urging and, regrettably, that only served to make our task more difficult.

In this state of affairs it seems necessary first of all to state what the law is on this point. Rule 9 (2) (b) of the Court Rules says:-

> "(2) Subject to the provisions of sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may -
>
> (a).
>
> (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 76, order a stay of execution, on such terms as the Court may think just."

According to Mr. Kalunga this provision means that a stay of execution is a basic or fundamental right to the judgement debtor, and that once the judgement debtor has filed notice of appeal against the decree in question the Court has no discretion but to grant a stay of execution of the decree upon application for the same. In other words the only

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thing an applicant for a stay need do is to file a notice of appeal; once he has done that the grant of stay is automatic.

With the greatest respect to the learned counsel, however, he is completely mistaken. In the first place such view would lead to undesirable consequences. It would enable unscrupulous judgement debtors to frustrate execution of decrees by simply filing notice of appeal even when they do not really intend to prosecute the appeal because, say, it has no merits. That would amount to an abuse of court process which undermines proper administration of justice.

Our reading of section 9 (2) (b) quoted above makes it plain that generally the institution of an appeal does not operate as a stay of execution. The rationale behind this broad rule is that the successful party should be able to enjoy the fruits of the judgement. However, this broad principle is qualified under the same rule which says in effect that where notice of appeal has been lodged the Court may, (in limited circumstances) order a stay of execution pending the outcome of the intended appeal. In our view, the filing of a notice of appeal under rule 9 (2) (b) is a condition which must be satisfied before a party can bring an application for stay of execution. It is a condition precedent the non-fulfilment of which renders an application for stay of execution incompetent and hence entitles the Court to strike it out.

Once notice of appeal has been filed, this gives the Court jurisdiction to entertain the application for a stay of execution. It is to be stressed, however, that this does not make the applicant automatically entitled to the grant of a stay order. The Court has discretion whether or not to order a stay. This is clearly borne out by the wording of sub-rule (2) the relevant part of which reads: ..... the Court may ..... order a stay of execution on such terms as

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the Court may think fit. In the light of such clear expression we could find no support or room for Mr. Kalunga's assertion that the grant of a stay of execution is automatic. It is hardly necessary to point out that the discretionary power vested in the Court by the sub-rule is exercisable judicially; in exercising that power the Court will not act capriciously or according to whims but will be guided by principles designed to secure justice and fairness to the parties.

In yet another dimension Mr. Kalunga contended that the Court has so far proceeded in a haphazard manner in handling the issue of whether or not to grant a stay of execution. He charged that the Court is confused in its application or interpretation of rule 9 (2) (b) of the Court Rules. In his view the decisions of the Court, whether the full Court or single Judges, based on this provision do not provide any useful guidance; each gives his/their own interpretation not based on any known principles. He cited over 20 cases decided by this Court purporting to illustrate the point he was making. We have to state at once that Mr. Kalunga's contention is a complete misrepresentation of what is actually on the ground. The true position is that over the years the Court has developed or adopted definite principles which, in the present day, guide it when considering applications for stay orders. Thus, for instance, it is now settled that the Court will grant a stay of execution if the applicant can show that refusal to do so would cause substantial irreparable loss to him which cannot be atoned by an award of damages. It is equally settled that the Court will order a stay if refusal to do so would, in the event the intended appeal succeeds, render that success nugatory. Again the Court will grant a stay if, in its opinion, it would be on a balance of convenience to the parties to do so. These principles were reviewed and elaborated on at considerable length by this Court in the two cases of Tanzania Cotton Marketing Board v. Cogecot

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With that statement of the law in mind we have had recourse to Mr. Kalunga's affidavit in support of the Notice of Motion. But like the learned single Judge we are satisfied that no grounds have been adduced or urged to justify invoking or the application of any of the laid down principles, or to constitute a new one, for granting a stay. Thus in paragraphs 1 - 8 of the said affidavit Mr. Kalunga alludes to matters which have no relevance at all to an application for a stay order. Rather, the paragraphs focus on various matters which the learned counsel proposes to raise in the intended appeal. The nearest Mr. Kalunga could get was in the last paragraph 9 of his affidavit which says:

> "9. That the applicants' appeal stands a good chance of success. If the execution of this judgement is not stayed pending the conclusion of this appeal, the applicants stand to suffer irreparably and the purpose of the appeal will be frustrated."

That the applicant's appeal stands a good chance of succeeding has often been urged as a ground for granting a stay, but it has in modern times been rejected by the Court. See, for example, the decision of this Court in Tanzania Cotton Marketing Board referred to above citing with approval the English case of Simonite v. Shefield County Council - Time Law Reports 12 January 1993. We need say no more on that as a ground urged for granting stay in this case.

Then Mr. Kalunga in the said paragraph 9 of his affidavit further alleges the ground of irreparable loss. As stated before it is now a settled principle that the Court will grant a stay upon proof that if stay is not granted the applicant will suffer substantial irreparable loss or damage. But there was nothing beyond the bare assertion by

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Cotton Co. SA [1997] TLR 63 and Kuljeet Singh Nahal v. Inderjeet Kaur Nahal Civil Application No. 90 of 1998 (Unreported). In fact the first of these two cases is among the long list of cases cited by Mr. Kalunga to demonstrate his contention that the Court is not guided by any settled principles when considering whether or not to grant a stay order. The reading of that case makes it plain that the Court was referring to laid down principles and that all it was doing was to determine whether the facts and circumstances of the particular case before it came within the ambit of any of those principles so as to warrant granting a stay. But why Mr. Kalunga should cite the said case as demonstrating how the Court was approaching haphazardly the issue of whether or not to grant a stay is far from clear.

More recently in the case of Tanzania Electric Supply Company Ltd. and Two Others v. Independent Power Tanzania Ltd. consolidated Civil Applications Nos. 39 and 27 of 1999 (Unreported) this Court held that it would grant a stay if it is demonstrated that the intended appeal has prima facie likelihood of success, it appearing on the face of it that the court handing down the decision being appealed against lacked jurisdiction to order the award it did. The thrust of what we are saying is that there are settled principles, such as we have already referred to in this Ruling, which guide the Court in deciding whether or not to grant stay of execution. An applicant is required to satisfy the Court that the facts and circumstances of his case bring that case within the ambit of one or more of those principles, and where he succeeds to do so this Court will grant a stay. We need to add here that the list of factors or circumstances which would warrant the grant of stay of execution is not closed. It can be envisaged that with the passage of time the Court might develop new or additional principles on which to act when considering whether or not to grant a stay. That would be in line with the accepted notion that the law is not static but growing or developing.

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Mr. Kalunga that his clients will suffer irreparably. There were no particulars whatsoever on how his clients would suffer irreparably if stay was refused. Such particulars ought to have been adduced to form the basis for the Court's exercise of discretion whether or not to grant a stay. That was not done. Mr. Kalunga in his prevarication asserted that there was no obligation to give such particulars or indeed even to allege that ground at all; once notice of appeal had been given nothing further required to be done.

In these circumstances we are satisfied, as indeed was the learned single Judge, that no grounds were adduced by or on behalf of the applicants on which the Court could exercise its discretion under rule 9 (2) (b) of the Court Rules. Accordingly the Reference is dismissed with costs.

DATED at B[illegible] y of June, 2000.

L. M. MAKAME
JUSTICE OF APPEAL

R. H. KISANGA
JUSTICE OF APPEAL

D. Z. LUBUVA
JUSTICE OF APPEAL

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

(A.G. MWARIJA)
DEPUTY REGISTRAR