

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

TBR. CIVIL APPLICATION NO. 9 OF 1999

LINUS FURAHA SHAO .....APPLICANT

AND

NATIONAL BANK OF COMMERCE.....RESPONDENT

(Application for Stay of Execution from  
the Judgment of the High Court at Tabora)

(Masanche, J.)

dated the 29th day of July, 1999

in

Civil Appeal No. 55 of 1995

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R U L I N G

KISANGA, J.A.:

This is an application for stay of execution pending appeal to this Court. The applicant appeared in person unrepresented while the respondent had the services of Mr. Mtaki, learned advocate. Mr. Mtaki had filed notice of a preliminary objection in terms of rule 100 of the Court of Appeal Rules but in the course of arguing the same he had second thoughts and withdrew the objection.

The application for stay is based on two grounds, namely, that the intended appeal has overwhelming chances of success and that if stay is not granted the applicant will suffer irreparable loss. The arguments advanced in support of ~~the~~ first ground need not detain me because this Court has said on many occasions that the allegation that the intended appeal has overwhelming chances of success is no ground for granting

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stay because, among other things, there is often no material on which the Court can at this stage ascertain that allegation. This is true in the instant case, for instance, where the record does not contain even the decision being appealed against, in which case I cannot justify my decision whether to accept the allegation or reject it.

The second ground, however merits consideration. In the affidavit supporting the notice of motion, the applicant deponed that if stay is not granted, he will suffer irreparable loss. He elaborated on this when arguing the application. He stated that execution of the decree involves attaching a residential house in which he and his family are living. His family consists of his wife, four children and three relatives. He said that if the house is attached and he and his family are thrown out, the loss that will be suffered cannot be compensated in monetary terms.

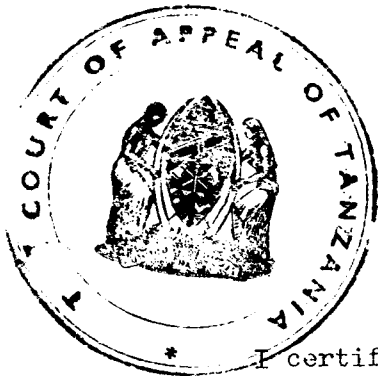
In response to this, Mr. Mtaki contended that the details of the alleged irreparable loss were not set out in the affidavit, they were given only during the hearing of the application, and this did not afford him the opportunity to challenge them by filing a counter-affidavit. Having said that, however, Mr. Mtaki did not seek an adjournment during which to look for counter-information.

I have carefully considered the applicant's allegation. As I said earlier, the allegation was set out in the affidavit while the details or particulars of it were given orally at the hearing. I think that ideally these details should have been given in the affidavit as well. But the fact that they were given only orally in the course of arguing the application cannot be a sufficient ground for rejecting them. If

Mr. Mtaki felt that he had reason to doubt the truthfulness of the details as given by the applicant, it was open to him to ask for adjournment to enable him to adduce counter-information, but he did not.

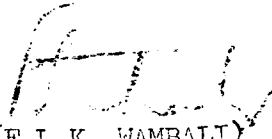
I have no good reason myself to doubt the applicant when he says that the execution of the decree will involve the attachment of a house in which he and his family are living. I am also inclined to the view that if stay is not granted then in the event the intended appeal succeeds the loss which will have been caused by throwing the applicant and his family out cannot be compensated in monetary terms; and on that ground alone I grant the application with an order that costs shall abide the results of the intended appeal.

DATED at MWANZA this 19th day of November, 2001.



R. H. KISANGA  
JUSTICE OF APPEAL

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

  
(F.L.K. WAMBALI)  
DEPUTY REGISTRAR