

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 13 OF 2001
In the Matter of Intended Appeal

BETWEEN

DEUSDEDIT KISISIWE APPLICANT

AND

PROTAZ B. BILAURI RESPONDENT

(An Application for Stay of Execution
of the Decision of the High Court of
Tanzania at Dar es Salaam)

(Bubeshi, J.)

in

Civil Revision No. 11 of 2000

R U L I N G

RAMADHANI, J.A.:

The respondent filed a plaint in the District Court of Kinondoni, Dar es Salaam and obtained an order to proceed ex parte on the grounds that the applicant had failed to file a written statement of defence. The applicant prayed to set aside that order but failed and on the same day the applicant complained to the High Court. However, before an order calling for the record for revision was issued, the District Court entered judgment in favour of the respondent. The revision was decided against the applicant and, hence, the applicant has filed a notice of the appeal in this Court but meanwhile he has made this application to stay execution.

On behalf of the applicant was Mr. Elisa Msuya, learned counsel, who advanced two grounds in support of the application. First, he claimed that the applicant's appeal has great chances of success. He argued that BUBESHI, J. has contradicted herself by

making a finding that a written statement of defence was filed and yet she refused to set aside the order to conduct the matter ex parte. Secondly, and following from the first point, Mr. Msuya said that the applicant will suffer irreparable injury should the appeal succeed but if stay of execution is not granted.

Opposing the application on behalf of the respondent was Mr. Peter Bakilana, learned advocate. His first point was that it is a cardinal principle of justice that a successful party should be allowed to enjoy the fruits of his judgment. He conceded that there are some exceptions to the general principle and that stay of execution may be granted. However, Mr. Bakilana submitted that in such cases there should be proper appeals before the Court. In the instant case, the learned advocate pointed out, there is an application for leave to appeal to this Court but leave has not been granted. He argued that the appeal is, therefore, not properly before the Court.

As for irreparable injury, Mr. Bakilana argued that Mr. Msuya has not substantiated the claim by showing what injury the applicant is going to suffer apart from merely asserting that the property is a residential house. Mr. Bakilana went on to argue that the appeal does not have any prospects of success. He submitted further that balance of convenience should be in line with the likely outcome of the appeal.

I agree with Mr. Bakilana that a successful party should be allowed to reap the fruits of the judgment without unnecessary delay. This means that stay of execution should not be granted where an applicant is playing delaying tactics and is abusing the process of the Court.

It has been held that the power to grant stay of execution under Rule 9 is exercisable only in proceedings which are properly before the Court. Thus where an essential step in the appellate process had not been taken, stay of execution was not granted by single judges in Willow Investment vs. Mbombo Ntumba and Two Others, [1997] TLR 93 (NYALALI, C.J.) and Said Himid Mwilima vs. Tabora Regional Trading Co., [1997] TLR 156 (RAMADHANI, J.A.). In both cases leave to appeal had not been granted under Rule 44. So the notice of appeal was held to be "inoperative", according to Said Himid at p. 157. However, the full bench of this Court has decided that all that is required under Rule 9 is that there should be a notice of appeal. As this Court is not bound by its own decisions, another panel may reverse that.


I am always wary to probe into chances of success of an appeal when considering an application to stay execution. There is a danger of prejudging an appeal at this stage. So I rather prefer to look at other factors which this Court has considered in granting stay of execution. One of them is irreparable injury which has been advanced by Mr. Msuya. Admittedly, as Mr. Bakilana rightly pointed out, Mr. Msuya did not substantiate his claim of irreparable injury. But what is at stake here, and Mr. Bakilana has conceded, is a residential house. The attachment and sale of immovable property will, invariably, cause irreparable injury. Admittedly, compensation could be ordered should the appeal succeed but money substitute is not the same as the physical house. That difference between the physical house and the money equivalent, in my opinion, constitutes the irreparable injury.

Therefore, I grant the application and order a stay of execution with costs. Title deeds of the property should be deposited with the Registrar to check against any disposition of the premises. It is so ordered.

DATED at DAR ES SALAAM this 24th day of February, 2003.

A.S.L. RAMADHANI
JUSTICE OF APPEAL

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


(F.L.K. WAMBALI)
DEPUTY REGISTRAR