

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPLICATION NO. 87 OF 2004

In the Matter of an Intended Appeal

MABRUCK MENGELE..... APPLICANT

VERSUS

**VERNON DAVID LAW AND ANOTHER.....
RESPONDENTS**

**(Application for Stay of Execution from the decision
of the High Court of Tanzania at Dar es Salaam)**

(Luanda, J.)

dated the 2nd day of July, 2004

in

Civil Case No. 123 of 2002

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R U L I N G**

MUNUO, J.A.:

Mr. Bethuel, learned advocate for the applicant Mabruck Mengele, brought a Notice of Motion under Rules 3 (2) (b) and (c), 9 (2) (b), 45 (1) and 46 (1) of the Court of Appeal Rules, 1979, seeking an order that the Ruling and Drawn Order of the High Court of Tanzania at Dar-es-Salaam in Civil Revision No. 123 of 2002 be stayed pending the determination of the intended appeal.

The application is supported by the affidavit of one Mabruck Mengele, a tenant in Plot No. 78 Apt 003 along Bagamoyo Road, Msasani Beach in Dar-es-Salaam City. He deponed to the affidavit that he is threatened with eviction

because the 2nd Respondent, the landlord of the suit premises is likely to execute a restoration order issued in RM Civil Case No. 27 of 2002 in favour of the 1st Respondent, Vernon David Law, on the 6th August, 2002. Adopting the affidavit in support of the application, counsel for the applicant contended that the suit premises were allocated to the applicant by the landlord on the 6th August 2002 after the first Respondent was evicted from the premises on the 31st July 2002 so he is in lawful occupation of the same. The landlord did not contest the application.

Mr. Nyange, learned advocate for the 1st Respondent, urged the Court to dismiss the application for want of merit because the trial Court restored the first Respondent at the suit premises on the 2nd August, 2002 as deponed in paragraph 3 of the counter-affidavit. Counsel for the 1st Respondent contended that the application is incompetent because the Drawn Order which is sought to be stayed is incapable of being executed.

The Drawn Order sought to be stayed is a negative order of dismissing Civil Revision No. 123 of 2002. It reads in part:

This Court Doth Hereby Order that The Revision be and is hereby dismissed. It is ordered that:-

- i) The Court refrains from exercising its Revisional powers under S. 44 (1) (b) of the MCA 1984 because there is no error apparent on the face of the record of the trial court.
- ii) The decision of the trial court stands.
- iii) In case one is aggrieved with the finding of the trial court basing on the facts he is entitled to appeal in this court.
- iv) To treat a finding of fact by trial court as an error and hence subject to Revisional Jurisdiction is tantamount to allowing parties to “appeal” through a backdoor. That should not be encouraged

and allowed.

4

v) Each party to bear its costs.

The issue is, are the above terms of the Drawn Order capable of being stayed pending the determination of the intended appeal?

As counsel for the 1st Respondent rightly observed, the Drawn Order sought to be stayed is incapable of being executed so it cannot be stayed because it is a negative order which dismissed Civil Revision No. 123 of 2002. The application for stay of execution is therefore incompetent.

Under the circumstances the application is dismissed with costs.

ATED at DAR ES SALAAM this 20th day of October, 2005.

E.N. MUNUO
JUSTICE OF APPEAL

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

(S.A.N. WAMBURA)

SENIOR DEPUTY REGISTRAR