

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

(CORAM: NSEKELA, J.A., RUTAKANGWA, J.A., And ORIYO, J.A.)

CIVIL APPLICATION NO. 132 OF 2009

JANE MACHESS MACHARIA.....APPLICANT

VERSUS

LUCY MACHARIA ESS.....RESPONDENT

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

(Mihayo, J.)

dated the 14th day of September, 2009

in

Probate and Administration Cause No. 31 of 1998

RULING OF THE COURT

18 October, & 10 November, 2010

ORIYO, J.A.:

At the hearing of the application for Stay of Execution pending the hearing and determination of the intended appeal, the applicant, Jane Maches Macharia, was represented by Mr. G. S. Ukwong'a, learned advocate and Mr. Jotham Lukwaro, learned advocate appeared for the

respondent, Lucy Macharia Ess. The application was, as usual initiated through a Notice of Motion under Rule 9(2) (b) of the Tanzania Court of Appeal Rules, 1979, (henceforth the Rules), and was supported by an affidavit of the applicant. The Notice of Motion lodged on 19 November, 2009 sought orders as follows: -

"This court be pleased to stay the execution of the order of the High Court of Tanzania dated the 14th day of September, 2009 in Probate and Administration Cause No. 31 of 1998 intended to remove the applicant and the rest of the family of Macharia Ess from the lawful occupation of and the management of the estate pending the hearing and determination of the intended appeal."

Upon our perusal of the record, it appeared to us that a copy of the Notice of Appeal on the intended appeal was lacking. Our concern was echoed by Mr. Lukwaro who urged us to strike out the Notice of Motion for incompetence.

Mr. Ukwong'a readily conceded that there was no Notice of Appeal filed. However he argued that the Notice of Appeal filed against another

decision of the High Court (Mihayo, J.) and dated 28 May, 2007 in Probate and Administration Cause No. 31 of 1998 was sufficient for the purposes of the instant application. The learned counsel urged us to grant stay of execution on the basis of that Notice.

Rule 9(2) (b) of the Rules states: -

"(2) Subject to the provisions of subrule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may –

(a) N/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."

It is evident that a Notice of Appeal as envisaged under Rule 9(2) (b), is a prerequisite for an application for a stay of execution. The Court's jurisdiction to order a stay of execution pending appeal is derived from the above provision and this Court has repeatedly stated so. In the case of **Engen Petroleum Limited vs Commissioner General Tanzania**

Revenue Authority, Civil Application No. 137 of 2004 (unreported), the Court had this to say: -

"It is only the notice of appeal which clothes this Court with jurisdiction to order stay of execution under Rule 9(2) (b) above... What is required is evidence that notice of appeal has been lodged in terms of Rule 76(1)."

Further, this Court has had an occasion to consider the import of Rule 9(2) (b) in the case of **Sadia Abdailah Aiawi vs (i) Zulekha Suleman Alawi (ii) National Bank of Commerce**, Civil Reference No. 29 of 1997. The Court stated: -

"Under the rule only the notice of appeal is made a prerequisite for granting a stay of execution."

The issue confronting us now is, if the power of this Court to grant a stay of execution under Rule 9(2) (b) is exercisable only upon there being a valid notice of appeal in Court, how do we circumvent the absence of a notice of appeal in this case to grant what Mr. Ukwong'a is asking for us. The answer is not far to fetch. It has been amply demonstrated by the Court in the cases of **Engen Petroleum Ltd** and **Sadik Abdailah**

Alawi, (*supra*), that the Court lacks jurisdiction to grant stay of execution in the absence of a Notice of Appeal. Therefore, the lack of a Notice of Appeal against the impugned High Court decision dated 14 September, 2009, renders the application before us incompetent. Therefore we lack the requisite jurisdiction to grant what Mr. Ukwong'a prayed for.

In the event, the Notice of Motion lodged on 19 November 2009 is incompetently before us and is accordingly struck out. We make no order for costs because the issue was raised *suo motu* by the Court.

DATED at DAR ES SALAAM this 25th day of October, 2010.

H. R. NSEKELA
JUSTICE OF APPEAL

E.M.K RUTAKANGWA
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

certified that this is a true copy of the original.




J.S. MGETTA
DEPUTY REGISTRAR

