

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KIMARO, J.A., JUMA, J.A., And MZIRAY, J.A.)

CIVIL APPLICATION NO. 229 OF 2014

AHMED MBARAKA.....APPLICANT

VERSUS

**MWANANCHI ENGINEERING AND
CONTRACTING CO LTD.....RESPONDENT**

**(Application for striking out a notice of appeal from the decision of the High
Court of Tanzania at Dar Es Salaam)**

(Msuya, J.)

dated the 24th of October, 2012

in

Civil Case No. 131 of 2005

RULING OF THE COURT

8th & 15th February, 2016

KIMARO, J.A.:

In this application, the applicant is represented by Dr. Masumbuko Lamwai, learned advocate. He filed an application under Rule 89(2) of the Court of Appeal Rules 2009 seeking to strike out the notice of appeal filed by respondent. The respondent seeks to appeal against the decision of the High Court given in respect of Civil Case No. 131 of 2005 by Msuya, J. The

application is supported by an affidavit affirmed by Ahmad Mbaraka. In paragraphs 4 and 5, Ahmad Mbaraka avers that the respondent has been inactive in taking the necessary steps toward pursuing the appeal. She failed to make efforts to obtain the documents she requested from the High Court to enable her file the appeal and he believes that this inaction on the part of the respondent is occasioned by an application for stay of execution she filed in this Court.

An affidavit in reply sworn by Maungo Obadia Kwabhi avers that after lodging the notice of appeal and writing a letter requesting for all relevant papers necessary for filing the appeal timely, he has been making a follow up of the documents without any success.

At the hearing of the application Dr. Masumbuko Lamwai learned advocate entered appearance for the applicant. Mr. Juliaus Kalolo Bundala and Mr. Bethuel Peter learned advocates entered appearance for the respondent.

Dr. Lamwai for applicant withdrew the application on the ground that he confirmed that the respondent was not to blame for not filing the appeal in time because the original case file was called by the Court when the

application for stay of execution was filed. The application for stay of execution had been pending for three years. Since the original case file for Civil Case No. 131 of 2005 the decision which the respondent seeks to appeal against was still in the Court, the respondent could not be supplied with the records she was asking for. Dr. Lamwai was contented that the respondent had a genuine reason for failing to get the required documents. He opted to withdraw the application, a request that was readily conceded to by Mr. Kalolo.

The matter did not end there. Dr. Lamwai made an oral application for direction; that because the applicant failed to get a copy of the proceedings, judgment and decree because the original case file was in the Court of Appeal for the pending application for stay of execution, the Court should direct that in future, original case files for intended cases to be appealed against, should not be called by the Court when applications for stay of execution are filed. He said the conditions for granting an application for stay of execution are well spelt out by Rule 11 (2)(b),(c),(d) and (e). These conditions, said the learned advocate for the applicant, do not require the original case file for the determination of the application. He prayed that the Court issues a direction to that effect. He said such a move will expedite

the obtaining of proceedings, judgment and decree for the intending appellants.

On his part Mr. Kalolo was hesitant to support Dr. Lamwai. He said apart from the application being informal, he was of a considered view that the original case files for the decisions intended to be appealed from should always be called by the Court when an application for stay of execution are filed. This will control any unscrupulous move in the execution process. He prayed that the Court should reject to issue the direction requested by Dr. Lamwai.

The suggestion made by Dr. Lamwai to the Court that it should issue a direction to the registry not to call for original case files for applications for stay of executions is sound and logical. The case forming the subject matter of the appeal was filed in 2005. That is Civil Case No. 131 of 2005. The trial of the case was completed on 28th October 2013, after a period of almost nine years. The respondent was aggrieved by the decision of the trial court. A notice of appeal was filed on 30th October, 2013. Until on 8th February, 2016 the respondent had not obtained copies of the documents requested for pursuing the appeal. The only reason for not obtaining the documents is absence of the original case file in the trial court because it was in this

Court for the pending Civil Application No. 207 of 2013 for stay of execution. This added another two years and more of waiting the finalization of the rights of the parties by the highest Court of the land.

The Constitution of the United Republic of Tanzania article 13(6) says (the Kiswahili version):

"Kwa madhumuni ya kuhakikisha usawa mbele ya sheria,
Mamlaka ya nchi itaweka taratibu zinazofaa au zinazozingatia
Misingi kwamba-

- (a) Wakati haki na wajibu wa mtu yeyote vinahitaji uamuzi wa mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu, **na pia haki ya kukata rufaa au kupata nafuu nyingine ya kisheria kutokana na maamuzi ya mahakama au chombo hicho kinginecho kinachohusika.**" [Emphasis added.]

The right of appeal for any aggrieved person is a constitutional one. This means that any aggrieved person for any decision made either by a

court or other institution is entitled to a right of appeal until the last Court of the land.

What the Court has been requested to do, is to facilitate the process of an aggrieved person to pursue his/her appeal by directing that the original case file for which an appeal is preferred should not be called for in an application for stay of execution. If the record remains in the trial court, while the application for stay of execution is pending determination, an intending appellant can be availed with the documents which are necessary for pursuing the appeal. Mr. Kalolo is worried that if that direction is given, an unscrupulous litigant may be able to carry out the execution and deny the intending appellant from filing the appeal by carrying out the execution while the application for stay of execution is still pending and hence infringe the intending appellant's right to appeal.

On our part we agree with the learned advocate for the applicant, and with respect to the learned advocate for the respondent, that this is a situation which needs the control of the courts.

Looking at the required conditions to be fulfilled by an applicant seeking for an order for stay of execution, it is clear that the original case is

6

expressed by the learned advocate for the respondent is unfounded.

7

Bearing in mind article 13(6) (a) of the Constitution of the United Republic of Tanzania we think it is important for the Court to expedite the appeal process by not calling for the original record of the case for applications for stay of execution. At the same time we warn the officers responsible for allowing the execution of decrees to comply with the law before authorizing execution to take place. We also recommend to the Rules Committee to harmonize article 13(6) (a) of the Constitution with Rule 11 (2) (b) of the Court of Appeal Rules.


DATED at DAR ES SALAAM this 10th day of February, 2016.

N.P. KIMARO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

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


P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL