



**IN THE HIGH COURT TANZANIA
AT BUKOBA**

CIVIL APPLICATION NO. 44 OF 2003

(In the matter of High Court civil Appeal No. 4 of 2003 and Original Bukoba RM's civil case No 3/1999)(Before: R. W. Chaungu Esq. RM.)

MATHIAS MUSHUTI=====APPLICANT

VRS.

THE REGIONAL DIRECTOR TRA.=====RESPONDENT

RULING

LUANDA, J.

This is an application for stay of execution. The application has been made under 0.39, R.5 (1) and S. 95 of the Civil Procedure Code, 1966.

The background history of this application is this: The Applicant's motor vehicle was attached by the Respondent with a view to selling it so as to realize taxes which were due. The Applicant went to the court of the Resident Magistrate of Bukoba to waive the order, claiming, inter alia, that he had paid the taxes.

The Resident magistrate court after hearing the parties, find out that the suit was devoid of merits.

Dissatisfied, the Applicant has filed an appeal in this court. Along with the appeal, he filed this application.

The Applicant is represented by Mr. Rweyemamu learned counsel; whereas the Respondent is represented by Mr. Switi - a legal officer.

Mr. Rweyemamu told this court that the Applicant had paid the taxes. He went on to say if the motor vehicle is sold before the appeal is heard, his client will not be compensated. Other grounds be said are contained in the affidavit.

(2)

Mr. Switi said Mr. Rweyemamu should have gone further in respect of compensation. He should state the inability on the part of the Respondent to pay. Mr. Switi said the Respondent is capable of compensating. They have sufficient money. He cited International Forex Bureau Ltd. V The Trustress of The Tanganyika National Parks Civil Application No. 25/1995 CAT (AR) and Tanzania Electric Supply Company Ltd. V Timber Enterprises company Ltd Civil Application No. 12/1999 CAT (MWZ).

As to the chances of success as raised in the affidavit Mr. Switi said that is not a ground at this stage as the court is not dealing with the merits of appeal. It is Mr. Switi's contention that as no special circumstances were shown to warrant granting the order of stay, the application should be dismissed with costs.

In reply Mr. Rweyemamu said the intrinsic value of the motor vehicle is a special circumstances.

It is now settled that lodging an appeal in this court does not operate as a stay of proceedings. However, this court may order the stay of execution of a decree if it is shown there is/are sufficient cause. And sufficient cause, in my understanding, should be confined to whether the party applying will suffer substantial loss which will not be adequately compensated otherwise referred to as irreparable loss. But before embarking to that exercise the party applying must first satisfy the court the following conditions; viz

1. The applications has been made without unreasonable delay and
2. That Security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

This position of the law has been stated under 0.39 R.5 (1) and (3) of the Civil Procedure Code, 1966. The Rules read:

5 (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the court may order, or shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the court may for sufficient cause order stay of execution of such decree.

(2) N/A

(3)

(3) No order for stay of execution **shall** be made under sub-rule (1) Sub-rule (2) unless the High Court is satisfied –

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

So before we embark on this issue of irreparable loss, did the Applicant comply with paragraph (b) and (c) of sub-rule 3? Mr. Rweyemamu did not touch on these issues. But on perusing the record, I am satisfied that this application has been made without delay. The appeal and this application was filed on the same day namely 27/10/2003 vide ERV 18506754 and ERV 18506755 respectively.

As regards to security, again like the above observation, Mr. Rweyemamu did not say anything. As no security was given, the application ought to have been thrown away.

Assuming for the sake of argument that security was given, did the applicant discharge his onus?

It is Mr. Rweyemamu's contention that if the motor vehicle is sold before the appeal is heard, his client will suffer irreparable loss. Other grounds he said are contained in his client's affidavit. Basically there are two other grounds namely, one, the appeal stands a very good chance of success. Two that he would not be compensated the intrinsic value of the motor vehicle. These grounds were countered by Mr. Switi, Legal Officer of the Respondent.

In responding to Mr. Rweyemamu's as regard to compensation, argument Mr. Switi rightly said the argument ought to go further and say the pecuniary inability of the Respondent to pay the Applicant. He submitted that the Respondent is capable in compensating the Applicant in case the decision of the

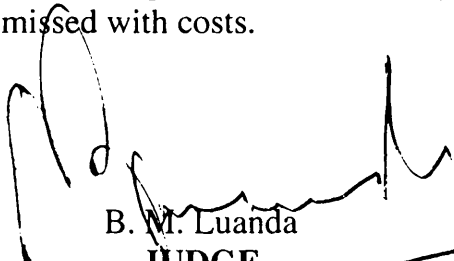
(4)

trial court is overturned. I entirely agree with Mr. Switi. This ground is devoid of merits:

I now turn to the issue of overwhelming chances of success. At this stage the court is not concerned with the merits or demerits of the case. Indeed that has never been a criteria in entertaining the application for stay of execution of a decree. The same is hereby rejected.

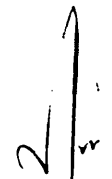
Last but not least is about intrinsic value of the motor vehicle. To allow this as a ground to order stay of execution is to set a bad precedent. If we accept this as a ground for stay of execution then no decree will ever be executed.

From the foregoing, I am not satisfied with the grounds adduced on which this court could exercise its discretion to grant the order of stay. The application has no merits. The same is dismissed with costs.



B. M. Luanda
JUDGE
14/11/2004

Delivered in court this 3rd day of December, 2004 in presence of Mr. Haule Advocate for the Respondent and in absence of the Applicant.



P. A. Lyimo
DISTRICT REGISTRAR
3/12/2004