

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

CIVIL APPLICATION NO. 74 OF 2004

In the Matter of an Intended Appeal

GRAYSON N. MACHENGO..... APPLICANT

VERSUS

ABDULRAHMAN HUSSEIN..... RESPONDENT

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

(Ihema, J.)

**dated the 31st day of December, 2003
in**

Misc. Civil Cause No. 66 of 2001

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R U L I N G**

NSEKELA, J.A.:

In this application, the applicant Grayson N. Machengo, seeks an order that the High Court decision of 31.12.2003 in Misc. Civil Cause No. 66 of 2001 be stayed pending the determination of the appeal

The respondent Abdulrahman Hussein in Misc. Civil Cause No. 66 of 2001 had petitioned the High Court challenging the elections for the post of, *inter alia*, Secretary General organized by Tanzania Railway Workers Union (TRAWU) held on the 19th and 20th March, 2001 at Morogoro. The applicant herein was the losing party and so filed notice of appeal on the 6.1.2001.

The notice of motion is supported by an affidavit sworn by the applicant himself. It provides in part as follows -

- “1. That I am the applicant herein and General Secretary of the Tanzania Railways Workers Union otherwise known as TRAWU, and I am conversant with what I am about to depose.
2. That on 31st December 2003, a decision was entered against me in High Court Miscellaneous Civil Cause No. 66 of 2001 and I am aggrieved and have filed notice of appeal -----
3. That through that decision, the High Court held that I did not qualify to be a member of TRAWU, with power to vote for, and that my election was void ab initio and proceeded to order fresh election for my post of General Secretary,

which election has to be conducted by the Tanzania Railway Workers Union within six months.

4. That I am challenging the decision passed in favour of the respondent on the following among other reasons and grounds namely -

a) The trial judge erred in law in entertaining the matter by way of election petition instead of a plaint and in my view, this makes the proceedings and subsequent decision impeachable.

b) The trial Court erred in fact in holding that I am not a member of TRAWU as the evidence on record proved otherwise.

5. That TRAWU is not a party to the appeal and the respondent cannot compensate me for the loss of the

post in monetary terms as he is a mere employee of the Tanzania Railway Corporation, which Corporation is now specified under the Public Corporations Act, and this Court cannot direct a third party to receive me as General Secretary when my tenure will have expired.

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6. That if stay of execution is not granted, and elections are held, I am bound to suffer irreparable loss because the moment my post is filled by someone else, I cannot be reinstated even if the appeal succeeds as my tenure expires within the coming twelve months and the appeal will be rendered useless.

7. That my appeal is likely to succeed because the High Court clearly misinterpreted the Trade Unions Act thereby arriving at a wrong decision that I was not a member of TRAWU.

When the application came for hearing on the 29.6.2004, the respondent was granted an interim order staying the elections which were apparently scheduled to be held on the 30.6.2004 to enable the respondent to file his counter-affidavits and the hearing of the application was

then scheduled to be held on the 15.7.2004. On this date, learned advocate for the applicant prayed that he needed time to file an affidavit in reply. Under the circumstances, the interim order was accordingly extended and hearing of the application was to be fixed by the Registrar in the normal course of events.

Mr. Kalolo, learned advocate, appeared on behalf of the applicant. He submitted that the High Court wrongly invoked the jurisdiction of the High Court and therefore the appeal had great chances of success. He added that the matter was filed as a petition and the issue at hand was not an election petition under the Elections Act, 1985. He also submitted that the Trade Unions Act does not provide for which court has jurisdiction. Under the circumstances, the decision of the High Court raises an issue of law which is problematic and where there is a problematic decision, the Court is inclined to issue a stay order. The learned advocate also submitted to the effect that there could be a possibility of having two Secretary Generals and this was not a desirable situation. Lastly he contended that if a stay order is not granted, the respondent will not be able to pay damages.

The respondent filed his counter-affidavit affirmed by the respondent himself and there was also an affidavit sworn

by Gregory Makula, Deputy General Secretary of TRAWU. The respondent's affidavit in reply to the applicant's reads in part as under -

“3. That the contents of paragraph 1 of the affidavit are disputed as the applicant is no longer the General Secretary of TRAWU following the decision of the High Court and the office is run by Mr. Rwegasira a member of TRAWU from TAZARA who is the Acting General Secretary.

6. That the contents of paragraph 4 of the applicant's affidavit are disputed for the grounds to be relied upon have no merits as the adopted procedure of challenging the election results were proper and the court was properly moved and furthermore applicant was never a member of TRAWU as he is not and has never been an employee of Tanzania Railways Corporation (TRC) nor Tanzania Zambia Railways Authority (TAZARA).

7. That as regards paragraph 5 of the applicant's affidavit, I believe the application ought to have been directed against TRAWU as I am merely a member and I have no mandate over the elections and the issue of costs or compensation

has nothing to do with the elections and the notice filed by TRAWU is yet to be marked withdrawn.

8. That the contents of paragraph 6 of the affidavit are disputed as the applicant was replaced immediately after the decision of the High Court and is not in office as alleged and I believe the said TRAWU deliberated the decision of the High Court and that is why they decided not to proceed with the intended appeal.

9. That the contents of paragraph 7 of the applicant's affidavit are disputed as applicant is not a member of TRAWU and that was as per the evidence before the High Court and as provided by the relevant Trade Unions Act read together with the governing constitution of TRAWU.

In his submissions, Mr. Rutabingwa, learned advocate for the respondent submitted that the Elections Act did not apply. It was not an election as contemplated in those elections. He also submitted that a party can come before a Court either by petition or by filing a plaint and the applicant

has not shown how he has been affected. Furthermore Mr. Rutabingwa submitted that the applicant has never been a member of TRAWU and consequently cannot succeed or chances of doing so are very remote.

The law relating to stay of execution is I think well settled now. The factors that the Court should take into account include (i) whether the appeal has, **prima facie**, a likelihood of success; (ii) whether its refusal is likely to cause substantial and irreparable injury to the applicant and (iii) balance of convenience. It is trite law that the Court will not deprive a successful party the fruits of his litigation until an appeal is determined unless the unsuccessful party can show special circumstances to justify it as developed by the Court above. I should also hasten to point out that the onus is on the applicant to demonstrate the existence of circumstances to justify the grant of a stay order.

The applicant, the respondent and one Gregory Makula, Deputy General Secretary of TRAWU all filed their respective affidavits. I have particularly considered paragraph 6 of the applicant's affidavit; paragraph 8 of the respondent's affidavit and paragraphs 4 and 5 of Mr. Makula's affidavit. It is evident from the contents of these affidavits in support and in opposition to the notice of motion, that the central issue in the dispute is the election of the General Secretary

of TRAWU. Understandably, each party is pulling on its side. This issue will be resolved once the intended appeal has been heard and determined. All the rival contentions on procedural and substantive law governing the disputed election will be fully canvassed. I have seriously considered the matter and in order to resolve the contentions of the parties, on balance of convenience, it is only fair that a stay order be issued.

In the result, it is ordered that the execution of the judgment and decree in High Court Misc. Civil Cause No. 66 of 2001 dated 31.12.2003 be stayed pending the hearing and determination of the intended appeal. Costs to be in the cause.

DATED at DAR ES SALAAM this 17th day of October, 2005.

H.R. NSEKELA
JUSTICE OF APPEAL

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

(S. M. RUMANYIKA)
DEPUTY REGISTRAR