IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

MZA CIVIL APPLICATION NO. 7 OF 1997

BETWEEN

BLUE STAR SERVICE STATION ..... APPLICANT

AND

JACKSON MUSSET t/a MUSSETI ENTERPRISES ... RESPONDENT

(Application for stay of execution of the decree from the High Court of Tanzania at Mwanza)

(Mrema, J.)

dated the 24th day of April, 1997

in

Civil Case No. 65 of 1994

R U L I N G

NYALALI, C.J.

This is an application for stay of execution of the decree of the High Court in a judgement dated 24th April 1997 pending the hearing and determination of an intended appeal to the Court of Appeal. The application is supported by the affidavit of SALIM H. SHIVJI. A counter affidavit was filed by the respondent on 27th November 1997. When the hearing of the application was resumed today 01-12-97 after it had been adjourned on 26-11-97, Mr. Matata, learned advocate asked for leave to file and serve a supplementary affidavit. Initially Mr. Rutaisire, learned advocate for the respondent objected to the request, after considering points raised by the Court, he rightly withdrew the objection and the supplementary affidavit was filed and duly served.

There is one important problem with this application. The decree of which execution is sought to be stayed is neither attached to the documents filed nor are its terms disclosed in affidavits filed in support of the application.

Mr. Rutaisire has submitted that the effect of these omissions is to render the application incompetent. Mr. Matata on his side has argued

that since there is no specific requirement for the decree to accompany the application, the omission is curable by allowing the applicant to supply the decree which ... after considerable delay, was at last supplied to applicant by High Court registry on 18/11/97.

The relevant provisions of rule 9(2) of the Tanzania Court of Appeal Rules, 1979 under which this application is made states:

> "(2) Subject the provisions of sub-rule (1), the institution of an appeal shall not operate ... to stay execution, but the Court —
>
> (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 obvious that since the Court is empowered to impose terms as it may think just upon an order of stay of execution, it is assumed that the application would in any event be accompanied with the decision or sufficient information concerning such decision sought to be stayed and in the light of which the Court may determine whether to impose conditions and if so, what kind of conditions. That being the position, it follows that where the decision sought to be stayed does not accompany the application and no information concerning the terms of such decision is contained in the affidavit, the application can not be anything but incompetent, and I so find. Consequently, this application is hereby dismissed with costs.

DATED at MWANZA this 1st day of December, 1997.

F.L.NYALALI
CHIEF JUSTICE

Delivered in the presence of advocates for both sides.

F.L.NYALALI
CHIEF JUSTICE

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

N.M.MWAIKUGILE
DEPUTY REGISTRAR