

TANZANIA / JUDGMENT

20060421 TZCA Dar es Salaam

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM CIVIL APPLICATION NO. 179 OF 2005

1. MATUNDA BUILDING CONTRACTORS LIMITED]
2. SEVERIAN NDYETABULA]
3. VALENCE SIMON MATUNDA] APPLICANTS
4. GRESHA VALENCE MATUNDA]
5. FLORA VALENCE MATUNDA]
6. JAQUELINE VALENCE MATUNDA] VERSUS N.B.C. LIMITED
~ RESPONDENT (Application for Stay of Execution from the Judgment and Decree of the High Court of Tanzania, Commercial Division, at Dar es Salaam (Kimaro, J.) dated the 25 th day of November, 2005 in Commercial Case No. 8 of 2004 3 & 21 April 2006

RULING

MUNUO, J.A.: The applicants, Matunda Building Contractors Limited and five others, through the services of Dr. Mapunda, learned advocate, seek stay of execution in Commercial Case No. 8 of 2004 at Dar es Salaam pending the determination of Civil Appeal No. 119 of 2005 which is pending in this Court. The respondent bank was represented by Mr. Kabakama, learned advocate. 2 Urging the Court to grant stay pending the determination of the said appeal, counsel for the applicant submitted that the said appeal has good chances of success. He adopted an affidavit deposed by the 3rd applicant, one Valence Simon Matunda. Under paragraph 5 of the affidavit in support of the application, the deponent averred that if the pledged house is sold before the appeal is determined, the applicant would suffer irreparable loss not capable of being atoned by damages because once sold, it would not be able to recover the material property, a residential house which was pledged by the fifth applicant as security for the applicants' overdraft facility. Counsel for the applicants further contended that on the balance of convenience, the applicants would suffer greater hardship and loss than the respondent bank if execution proceeds so stay of execution should be granted. Furthermore, counsel for the applicants contended that the Notice of Appeal was duly filed and the appeal has already been instituted, that is Civil 119 of 2005. He

referred to the case of Ngulililepe Saidi Mkufu versus Ally Abdallah Mkufu, Civil Application No. 75 of 2002, Court of Appeal (unreported) in which the 3 Court held that an existence of a Notice of Appeal is a pre-requisite for granting stay of execution. The second condition, counsel for the applicants, submitted, is a prima facie likelihood of the intended appeal succeeding, which he observed, is the case here. On this counsel for the applicants cited the case of Tanzania Electric Supply Company Limited versus The Permanent Secretary Ministry of Energy and Others, Civil Application No. 19 of 1999, Court of Appeal of Tanzania (unreported) in which stay of execution was granted because the intended appeal had chances of success. Contending that there are serious triable issues in the intended appeal, counsel for the applicant urged the Court to grant stay of execution because neither party is certain how much money the applicant owes the respondent bank, and what is more, the award of three different types of interest further complicated the situation. The bank statements, counsel for the applicant observed, are inaccurate. For these reasons, the application should be allowed, he maintained. He cited the case of Independent Power Limited versus VIP Engineering and Marketing Limited, Civil Application No. 32 of 2002, Court of Appeal of Tanzania (unreported) wherein 4 stay of execution was granted because the decretal amount was problematic. Counsel for respondent opposed the application. He adopted a counter-affidavit deposed by one Godson Kiliiza, the Company Secretary of the respondent bank. At paragraph four of the said counter-affidavit, the deponent contended that the applicants did not demonstrate how they would suffer irreparable loss if stay of execution is granted considering that the house in question is the property of the second applicant alone; it is not jointly owned by the applicants. Counsel for respondent maintained that the applicants' inability to repay the overdraft will cause irreparable loss to the respondent because the respondent would continue to part with its; money, which is its sole stock in trade. Maintaining that the applicants failed to prove that they would suffer irreparable loss if the pledged house is sold to recover the decretal amount, counsel for the respondent cited the case of China Henan International Group Limited versus Salvand K.A. Rwegasira, Civil Application No. 71 of 2005, Court of Appeal of Tanzania (unreported). In the said case, the Court held that in an application for stay of execution, the 5 affidavit in support of the application should disclose the extent of the irreparable damage and loss the applicant would suffer if execution is not stayed. The Court stated at Page 8 of the typed

Ruling:

It is trite law that it is not enough to simply state that the applicant will suffer irreparable loss which cannot be atoned by way of damages. Particulars of such irreparable loss should be given in order to satisfy the conscience of the Court that the applicant will suffer such irreparable loss or damage. The same principle was pronounced by the Court in the case of Tanzania Cotton Marketing Board versus Cogecot Cotton SA

(1997) TLR 63 at Page 67. In this case, the awarded interest rates vary and the accuracy of the bank statements have to be scrutinized to establish the exact debt the applicants are liable to pay. In such circumstances, the applicants would certainly suffer irreparable loss or greater hardship than the respondent if execution is not stayed pending appeal. On 6 the

balance of convenience, therefore, stay of execution is allowed pending the determination of the appeal. Costs to abide the result of the pending appeal. DATED at DAR ES SALAAM this 21 st day of April, 2006 E.N.MUNUO JUSTICE OF APPEAL I certify that this is a true copy of the original. KA) RAR

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