

TANZANIA / JUDGMENT

syvester lwegira bandio and another vs national bank of commerce limited 2005 tzca 96 27 april 2005

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TZCADECIDED
27 April 2005

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THE COURT OF APPEAL OF TANZANIA AT PAR ES SALAAM CIVIL APPLICATION NO. 113 OF 2003
In the Matter of Intended Appeal BETWEEN SYLVESTER LWEGIRA BANDIO ... 1st APPLICANT
HILDA KARABARUNGA BANDIO ... 2nd APPLICANT AND NATIONAL BANK OF COMMERCE
LTD. ... RESPONDENT (Application for Stay of Execution of Ex parte Judgment and Decree of the
High Court of Tanzania, Commercial Division, at Dar es Salaam) (Kimaro. 3.) dated the 31st day of
October, 2003 in Commercial Case No. 171 of 2002

RULING

RAMADHANL J.A.: The respondent, National Bank of Commerce Ltd., sued the two applicants, Sylvester Lwegira Bandio and Hilda Karabarunga Bandio, who are man and wife, for repayment of a loan advanced to them and the interest that had accrued. On 26/09/2003, KIMARO, J. struck out the written statement of defence filed by the applicants for being incurably defective. The respondent was ordered to prove its claim and an ex parte judgment was entered on 24/10/2003 to the total tune of shs. 76,083,979/=. The learned judge gave the following order: In the event that the defendants will fail to pay the decretal amount, the properties taken as security to be sold. 2 These properties taken as security are a motor vessel with registration No. MZA 140 with engine No. CESJ 0360, and a house on Plot No. 166 Block D with Certificate of Title No. 033011/29 at Isamilo, Mwanza. The applicants are seeking a stay of execution to protect these properties from being sold to pay the decretal sum and they were represented in this application by Mr. N. Rweyemamu, learned advocate, while the respondent had the services of Mr. Magai, learned counsel. Mr. Rweyemamu advanced three grounds for applying for stay of execution. First, he said that the intended appeal has overwhelming chances of success. The joint affidavit of the applicants raises 19 errors in the handling of the matter at the High Court. Mr. Magai objected to that. The second ground is that the balance of inconvenience is in favour of the applicants in that if the appeal is dismissed the respondent would still be in a position to sell the two properties while the applicants would be deprived of them in case they win and if stay of execution is not granted. The third ground in support of the application is that of irreparable injury to the applicants should the properties taken as security be sold. It has been argued that the construction of a similar vessel as the one pledged would take about two or three years from the

date 3 of placing of an order. As for the house the applicants have argued that should the appeal be allowed they would never be in a position to get a similar house if stay of execution is not granted. Mr. Magai submitted that the irreparable losses have not been substantiated and in any case the losses can be adequately compensated in money form. Admittedly, this Court has, on a number of occasions, said that details and particulars of irreparable loss have to be specified. We said so, for instance, in *Tanzania Cotton Marketing Board v. Coaecot Cotton Co. SA* [1997] TLR 63, and also in *Ignazio Messina & National Supplies Agencies v. Willow Investment & Costa, CAT* Civil Reference No. 8 of 1999 (unreported). However, I said in *Deusdedit Kisiwe v. Protaz B. Bilauri*. Civil Application No. 13 of 2001 (unreported): The attachment and sale of immovable property will, invariably, cause irreparable injury. Admittedly, compensation could be ordered should the appeal succeed but money substitute is not the same as the physical house. That difference between the physical house and the money equivalent, in my opinion, constitutes irreparable injury. I have no difficulty in holding the same in this application with respect to the house situate at Isamilo in Mwanza. As for the boat and the engine I would not put them at par with the house. However, I ask myself what useful purpose would be served by not also staying execution on the vessel and the engine? I find none. 4 So, I order stay of execution on the motor vessel with registration No. MZA 140 with its engine, No. CESJ 0360, and all that house on Plot No. 166 Block D with Certificate of Title No. 033011/29 at Isamilo, Mwanza. However, I also order that the title deed of the house and the registration cards of the vessel and the engine, if any, be deposited with the Registrar of the Court of Appeal immediately. Costs to follow the event. DATED at PAR ES SALAAM this 27th day of April, 2005. A. S. L. RAMADHANI JUSTICE OF APPEAL. I certify that this is a true copy of the original.

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