

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KIMARO, J.A., MASSATI, J.A., And MANDIA, J.A.)

CIVIL REVISION NO. 3 OF 2012

ABDI ALLY SALELHE.....APPLICANT

VERSUS

**1. ASAC CARE UNIT LIMITED
2. AYOUB SALEHE CHAMSHAMA
3. KENYA COMMERCIAL BANK LTD }.....RESPONDENTS**

**(Revision from the decision of the High Court of Tanzania
at Dar es Salaam)**

(Muruke, J.)

**Dated the 28th day of November, 2011
in
Land Case No. 71 of 2011**

.....

RULING OF THE COURT

27th June & 30th July, 2013

MASSATI, J.A:

This ruling follows a complaint filed by M/S Mbamba & Co. Advocates on behalf of the applicant in his letter to the Hon. The Chief Justice, dated 27th March, 2012. In response, the Hon Chief Justice ordered that a revision **suo motu** be opened under section 4(3) of the Appellate

Jurisdiction Act, cap 141, for this Court to inspect the propriety of the decision of Hon Muruke J sitting at the High Court at Dar es Salaam in Land Case No. 71 of 2011. In the course of the hearing of the application it was clear that the impugned decision was a ruling dated 28th November, 2011.

The brief background of this matter is that on 26th September, 2011, the applicant filed a plaint in the High Court, Dar es salaam (Land Case No. 71 of 2011) against the respondents. According to paragraph 3 of the plaint:-

" The plaintiff's claim against the defendants, jointly and severally is for declaratory orders that the purported mortgage of the plaintiff's rights of occupancy to the 3rd defendant for obtaining of a loan by the first and second defendant is null and void due to fraud and for an order that the 1st and 3rd defendant (sic) be ordered to offer their own securities to replace the plaintiff's security and for an order directing the 3rd defendant to discharge the mortgage created over the plaintiff plot, for damages and costs"

He then went on to list the particulars of the fraud in paragraph 8. As for the reliefs, the applicant went on to pray that the alleged mortgage of the

applicant's certificate of title be declared null and void, and for the same to be discharged and released to him. These allegations were disputed by the defendants in their respective written statements of defence.

On 6th October, 2011 the applicant filed a chamber application under s 68 and Order 37 rule 1(a) of the Civil Procedure Code Cap 33 RE 2002.

for the court to :-

" grant a temporary injunction against the third respondent, its agents, servants assignees and whoever work under his instruction to restrain them from selling the land and buildings held and situated over plot No. 12 Block 1 Kariakoo Area Dar es Salaam, C.T. 28181, pending the determination of this suit "

The application was supported by the applicant's affidavit but opposed by the counter affidavit from the 3rd respondent taken out by a Mr. Phidelis Joseph; its Principal officer. In paragraphs 5 ,7 and 8, of the affidavit, the applicant contended that there were serious triable issues, mainly on the legality of the mortgage; that he stood to suffer irreparable loss which could not be atoned for by way of damages because he would lose a house; and that the balance of convenience was in his favour. In their counter affidavit, the 3rd respondent seriously put the applicant at issue on

all the points of contention. These can be found in paragraphs 5,6,7,8, and 9. In short, the respondent denied that there was any fraud in the creation of the mortgage, and therefore that there were no triable issues; that the applicant did not stand to suffer any irreparable loss; and that, otherwise, there were no sufficient grounds for the court to grant the temporary injunction.

In its ruling, the High Court restated the principles for the grant of a temporary injunction but concluded that none of them were fulfilled in favour of the applicant, and so dismissed the application, hence the present proceedings.

At the hearing of the application in this Court, the applicant was represented by Mr. Samson Mbamba, learned counsel. Mr. Isaac Tasinga, learned counsel appeared for the 1st and 2nd respondents, whereas Mr. Peter Kibatala, appeared for the 3rd respondent, as he did in the High Court.

Mr. Mbamba started by restating the principles for the grant of temporary injunctions, which were:

- (i) the existence of a prima facie case

- (ii) imminent irreparable loss, incapable of being atoned for by way of damages, and
- (iii) balance of convenience

In his view in the present case all the conditions were met. He particularly criticized the trial judge for having found that fraud was not proved. He said that at this stage, the applicant did not have to prove anything, but only to show that there was a prima facie case. He referred us to several passages from MULLA: **THE CODE OF CIVIL PROCEDURE** 16th ed. Vol. 4 and the decision of this Court in **KIBO MATCH GROUP LTD Vs H.S IMPEX LTD** (2001) TLR. 152. He contended that, in this case, the applicant had shown that there was a prima facie case; because it was demonstrated that there was a fair question for determination. He also referred us to the decision of this Court in **COLGATE PALMOLIVE Vs ZACHARIA PROVISION STORES & OTHERS** Civil Appeal No 1 of 1997 (unreported). The learned counsel also went on to submit that, the applicant had also established that he stood to suffer irreparable loss if his house was sold, citing in support the decisions of **DR WILLIAM SHIJA Vs FORTUNATUS MASHA** (MZA Civil Application No. 1 of 2002 (unreported), and **KAMPALA DISTRICT LAND BOARD & ANOTHER Vs NATIONAL**

HOUSING CONSTRUCTION CORPORATION (2005) 2 EA. 69; and that as between the applicant who stood to lose the house and the 3rd respondent, who could still sell the house if it won the main suit, the balance of convenience tilted in favour of the applicant. He thus prayed that the application be allowed.

On his part, Mr. Tasinga had nothing to say on behalf of the 1st and 2nd respondents.

Mr. Kibatala, started by reminding the Court that, the grant of a temporary injunction was discretionary and if exercised judicially, this Court, should not easily interfere with it. He then went on to submit that in its decision, the High Court considered all the principles applicable in granting a temporary injunction, and reached at a correct decision. He went on to submit that on the issue of fraud, the learned judge correctly considered the genuineness of the issue of fraud and having found that it was not a genuine claim, correctly went on to overrule its existence. He thus prayed that the application be dismissed.

We wish to fully associate ourselves with Mr. Kibatala, learned counsel, that the grant of a temporary injunction is an exercise in judicial

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- (iii) the balance of convenience in favour of the party who will suffer the greater inconvenience in the event the injunction is or is not granted.

(See **GIELLA V CASSMAN BROWN AND CO. LIMITED** (1973) EA 358)

The object of this equitable remedy is to preserve the pre dispute state until the trial or until a named day or further order. In deciding such applications, the court is to see only a prima facie case, which is one such that it should appear on the record that there is a bona fide contest between the parties and serious questions to be tried. So, at this stage the court cannot prejudge the case of either party. It cannot record a finding on the main controversy involved in the suit; nor can genuineness of a document be gone into at this stage (See **SARKAR ON CODE OF CIVIL PROCEDURE** (10th ed. Vol. 2 pp 2009- 2015))

Once the court finds that there is a prima facie case, it should then go on to investigate whether the applicant stands to suffer irreparable loss, not capable of being atoned for by way of damages. There, the applicant is expected to show that, unless the court intervenes by way of injunction, his position will in some way be changed for the worse; that he will suffer damage as a consequence of the plaintiff's action or omission, provided that the threatened damage is serious, not trivial or minor, illusory, insignificant, or technical only. The risk must be in respect of a future

damage (See **RICHARD KULOBA PRINCIPLES OF INJUNCTIONS** (OUP) 1981).

And on the question of balance of convenience, what it means is that, before granting or refusing the injunction, the court may have to decide whether the plaintiff will suffer greater injury if the injunction is refused than the defendant will suffer if it is granted.

When all the above minimal conditions are established, the court, before deciding one way or another should then consider other factors, such as the conduct of the parties, delay, acquiescence, lack of clean hand etc. This is because, as seen above, the remedy of injunction has its roots in equity and so, equitable principles may be applied in appropriate cases.

In the present case, the High Court correctly directed itself on the need for the three preconditions to coexist before temporary injunction is granted; but in dismissing the application, the learned judge reasoned as follows; (page 171 of the record of revision:-)

"The biggest tests of triable issues in regard to injunctions is the question of genuineness. For the issues to be triable they must be genuine.

She went on :

"Fraud cannot just be pleaded without attaching technical report to support the allegation. Court cannot rule on the signature as being forged by a mere statement. Looking up the pleadings there is no where fraud alleged had reported to the police or other relevant authority. There is no even loss report of the title deed used as a security for the overdraft issued to be first respondent.

It is clear to me that issues of fraud has been raised conveniently to fit the situation at hand.

and later:-

"The court needs evidence of the person acquainted with the signature of the applicant/Plaintiff as required by sections 49(1) of the Evidence Act....

And she then went on to examine a vital document, which to her, cemented her opinion that the document was not forged; and so on p. 173

went on:-

"With the above piece of evidence on record and all the facts before me I am not satisfied that the applicant has been able to surmount, the first hurdle, that there is serious issue to be tried with a probability of success"

" In the case at hand applicant having not PROVED fraud committed by the first respondent this court cannot be in a position to grant injunction"

With due respect to the learned judge, this was a serious misdirection. As demonstrated above fraud was the bone of contention in the main suit. By demanding proof of fraud at that stage, the court was placing on the applicant a higher standard of establishing a prima facie case. It also went on to consider extraneous matters which it shouldn't have, such as failure on the part of the applicant to report the fraud to the police and failure to produce a loss report. In our view, so long as the 1st respondent was a body corporate and so could not personally commit fraud except through its director, the 2nd respondent, who is alleged to have committed those frauds in the particulars of fraud in the plaint, a prima facie case was made out and the High Court should have so held. So the finding itself was not supported by the pleadings. It also prematurely considered and concluded on the genuineness of contested documents. By so doing the High Court had jumped the gun and went on to conclusively decide the question of fraud which was the bone of contention between

the parties. Since the purpose of a temporary injunction is to maintain status quo pending determination of the suit, if a prima facie case is made out, it was not proper at that stage to decide an issue which should have been resolved and determined at the trial of the main suit.

In CPC INTERNATINOAL INC. Vs ZAINAB GRAIN MILLERS LTD CIVIL APPEAL No. 49 of 1995 (unreported) the appellant had applied for a temporary injunction to restrain the respondent from using its trade name "MAZOLA" pending determination of the main suit. The High Court refused to grant the order on the ground that the basis of the infringement of the goods for which the applicant's trade mark was registered were different from those in respect of which the trade mark was complained of.

This Court observed:

" From the lengthy and well researched ruling, it is apparent to us that the learned judge went far beyond the scope necessary for the determination of an application for an interim injunction pending the determination of the main suit.

...(It) is elementary that the purpose of an interlocutory injunction is to maintain the status quo until the main suit is finally determined.

...In that case, in dealing with the proceedings for an interlocutory injunction the learned judge embarked on resolving issues which were appropriately due for trial of the main suit later when evidence would be led on same:

In doing so, that in our view amounted to the learned judge trying the main suit, at a stage which had not been reached. That is, with the triable issues in the main suit decided and resolved at that stage, it rendered the subsequent trial of the main suit superfluous With respect this was not relevant for the purposes of determining the application for a temporary injunction.

In that respect, **SARKAR ON CODE OF CIVIL PROCEDURE** (supra) at page 2011 also emphasizes:

" In deciding application for interim injunction, the Court is to see only prima facie case, and not to record finding on the main controversy involved in the suit prejudging issue in the main suit, in the latter event the order is liable to be set aside."

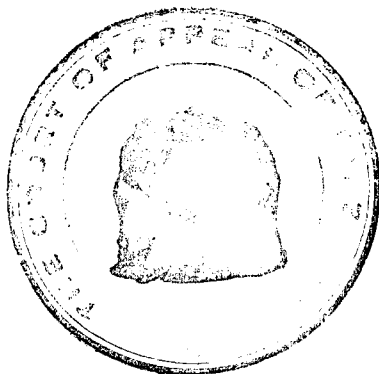
In view of the above, we are satisfied that by prejudging the issue of fraud in the application for temporary injunction, which is also the main contention in the main suit, the High Court improperly exercised its discretion and the resulting order refusing to grant a temporary injunction

was erroneous and calls for our intervention. This is sufficient to dispose of the matter. We accordingly set it aside. However, since we are not sure on the real situation on the ground at present about the suit property we make no further orders about it, but direct that the case should now be placed before another judge to proceed with it.

We make no order as to costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 12th day of July, 2013.



N. P. KIMARO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

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


P. M. KENTE
REGISTRAR
COURT OF APPEAL