IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CIVIL CASE NO.177 OF 2006

GAPCO TANZANIA LIMITED...1ST PLAINTIFF/APPLICANT
GAPOIL TANZANIA LIMITED..2ND PLAINTIFF/APPLICANT

VERSUS

BARCLAYS BANK PLC.......1ST DEFENDANT/RESPONDENT

STANDARD CHARTERED BANK
TANZANIA LIMITED......2ND DEFENDANT/RESPONDENT

RULING

KALEGEYA, J:

The Plaintiffs/Applicants seek for

"A temporary injunction restraining the Defendants/ Respondents from commencing or continuing with any receivership action against the assets of the Plaintiffs/Applicants until the determination of the main suit."

The said prayer is contained in a chamber summons filed together with a plaint whose prayers are as follows:

"a) *a declaratory order that the Defendants' intention to commence receivership is premature;*

b) an order restraining the Defendants or any of their agents from instituting receivership or continuing with any receivership action against the assets of the Plaintiffs until the negotiations between the Plaintiffs and Defendants are concluded so that the Plaintiffs repay the loans to PTA Bank and Afrieximbank.

c) An order condemning the Defendant to costs, and

d) Any other relief which this ..... court may deem fit to grant".

The application is supported by an affidavit of one Leon Hooper described as the Managing Director of the Plaintiffs/Defendants, and, it is resisted on behalf of Defendants/Respondents by a counter-affidavit of one Clive Gallagher described as Head of Business Supports and Recoveries for Barclays Bank Plc Global Retail and Commercial Banking – International.

Parties are ably represented. Described in the order they presented themselves, the Plaintiffs/Applicants are represented by Mr. Rwechungura, Dr. Kapinga and Prof. Mwaikusa, Advocates, while the Defendants/Respondents are represented by Ms Fatuma and Mr. Charles, Advocates.

I should start by commending Counsel for both sides for their speedy and prompt compliance with schedules set, of course with

their consent. They were able to submit all main written submissions and rejoinder on same day and within working hours. Not only that, the submissions themselves indeed display seriousness exalted in them. Secondly, I am gratified that the Counsel fully comprehend and appreciate the principles which guide courts in granting or refusing an application for temporary injunction.

The Counsel correctly restated the said principles by making reference to commonly cited decisions in **Giella vs Cassman Brown & Co. Ltd (1973) E.A 358; Attilio v Mbowe (1969) HCD 284 and American Cyanamid Co. vs Ethicon Ltd. (1975) AC 396.**

Simply put, the said principles are as follows:

First, it should be established that there is a serious triable issue between the parties with a probability that that issue may be decided in favour of the Plaintiff/Applicant.

Secondly, the prevailing circumstances should be such that if the injunction sought is not issued the Plaintiff/Applicant would suffer an irreparable loss even if he subsequently succeeds in the main suit, and, thirdly, that on a balance of convenience the Plaintiff/Applicant stands to suffer more if the injunction is refused than what the Defendants/Respondents would suffer if granted.

The Plaintiffs/Applicants' Counsel vigorously submit that all the three conditions have been established. Further to the three decisions already referred to above, they also made reference to **(HC) Songea Agricultural Marketing Cooperative Union Ltd and another v National Bank of Commerce, Civil Case No.101 of 1997 (DSM Registry); (HC) Tanzania Breweries Ltd v Kibo Breweries Ltd and Another, Civil Case No.34 of 1999; (HC – Commercial Division), Civil Case No.20 of 2000; (HC) Agency Cargo International v Eurafrican Bank (T) Ltd, Civil Case No.44 of 1998; Peter Anyang' Nyong' & 10 others v The Attorney General of the Republic of Kenya & 5 others, East African Court of Justice, East African Court of Justice, Reference No.1 of 2006; Noormohamed Janmohamed v Kassamali Virji Nadhani (1952) 19 E.A.C.A 8; and (HC Commercial Division) Scandinavia Tours Ltd v CRDB Bank Ltd, Commercial case No.115 of 2005.**

Submitting on the three principles, relying on the authorities cited, the Plaintiffs/Applicants' Counsel urge that serious issues that need to be determined are *"whether it is proper for the Bank to seriously engage in negotiations with its indebted customers for rescheduling repayment of the debts and then swiftly move to appoint receivers even before the negotiations reach determination or otherwise get abandoned; ...... to encourage its indebted customer to get financing for servicing its debt and yet discourage the customer from alternative sources of refinancing; .... to encourage*

its customer to seek alternative sources of refinancing and yet suddenly and swiftly close the door available for the customer to get such source," and that considering the negotiations between the parties, the actions taken; the inactions on Defendants' part the said issues stand to be resolved in their (Plaintiffs/Applicants') favour.

They (Plaintiffs/Applicants) submit further that if the status quo is not maintained the injury/hardship or mischief that the Plaintiff will suffer will be irreparable as it will cover *"loss of property, loss of business and even loss of existence"* while the Defendants will simply *"suffer delay in getting repaid"* which is incomparable.

On the other hand, equally strongly, the Defendants/ Respondents' Counsel urge that circumstances do not exist for the prayers sought.

As did the Plaintiffs/Applicants' Counsel, the Defendants/ Respondent Counsel, made some references to other supporting decisions apart from the cerebated trio, including – **Toms vs Wilson (1862) 43 & S.442; Brighty v Norton (1862) 3 B&S.305 at 312; and Frederick Henry Moore v Rowland Mansfield Shelley and another (1883) 8 App. Case 285 at 293** (that a borrower is obliged to pay upon demand after being given reasonable time and is not entitled to further time to source for the money) and **Kihara vs Barclays Bank (K) Ltd, East Africa Law Reports (2001) 2 E.A at 423** (that a person who puts up his property as security for a loan

does so knowing that it is property for sale and that the Plaintiffs property which falls under that category has its value known hence can be compensated and does not therefore qualify for the category of irreparable loss).

The Defendants submit that the Plaintiffs have had enough time at their disposal; that they can not be given indefinite time to get funds; that there is no evidence that they have funds available to meet the liability currently standing at US $ 43,479,908.77 nor that they are engaged in negotiations to get it hence no existence of a prima facie case or irreparability of injury.

On balance of convenience, the Defendants urge that the Receiver having been duly appointed following default by Plaintiffs should be allowed to take possession of the assets as the business will continue to run *"employees continue to be employed, debts will be paid – good for banks and economy"* and that receivership is preferable to winding – up to which Plaintiffs are also susceptible.

The response to the main application as detailed above put aside however, the Defendants/Applicants also fronted preliminary issues, termed *"procedural points".*

- that the debenture executed by parties provide that disputes would be filed before the Commercial Division of the High Court and that therefore an application filed before this registry should be rejected

- that the November, 2006, agreement is governed by English law and that under the latter law the time applied for is not allowed
- that the verification clause of the supporting affidavit is defective in that it makes reference to 26 paragraphs when they actually only 12.
- that Dr. Kapinga and Prof. Mwaikusa should be restrained from acting in this matter because they are advocates from Mkono & Company Advocates which is in association with Denton Wilde Sapte, a firm which drafted the November "Syndicated Loan Agreement" and was acting on behalf of 1st Defendant, and that therefore this falls under the domain of conflict of interest and make reference to **Uhuru Highway Development Limited and others v Central Bank of Kenya and others (2002) 2 E.A 654.**

In rejoinder, the Plaintiffs/Applicants simply reiterated their main submission adding that substantive issues raised have not been responded to by Defendants/Respondents. On the objections on procedural aspects they submitted

- that it is unfair and improper to be raised for the first time in the submissions while they had ample time to raise them earlier on – that they have been taken by surprise
- that for the forum, the Defendants are late in the process as they should have raised it before filing a counter-affidavit; that they have submitted themselves to the current forum.

- that while the alleged conflict of interest could be a serious one, it cannot be tackled at this stage and in this manner as evidence for or against is required; that as it is not intended that the proceedings should be stayed pending proper investigation into the matter, it should be ignored.

Now for the merits.

I will start with the procedural aspect complaints.

While appreciating human lapses here and there, with respect to the Defendants/Respondents' Counsel, matters raised under the topic should have been so raised at the outset and not at this stage. On this, I am on all fours with Plaintiffs/Applicants' Counsel's complaint that this is taking them by surprise. That said however, starting with the complaint on forum, as conceded by the Defendants, the inclusion in the agreement that disputes between the parties would be referred to the Commercial Division of the High Court, per se, does not exclude the jurisdiction of this registry. However, under normal circumstances, courts are expected to honour terms and conditions set and agreed upon by parties to an agreement. If therefore, the Defendants/Respondents had raised this issue at the outset, before submitting themselves to this forum, their arguments, in my view, would have been but valid. Unfortunately however, they are late in the process: they subjected themselves to the current forum and we have gone into and reached

appreciable lengths in the process to make a u-turn on these preliminaries.

On the conflict of interest, again as professionally conceded by the Plaintiffs/Applicants' Counsel, this is a sensitive issue which deserve all due seriousness. However, as stated by the same Counsel, the manner in which and the time when it has been raised is but wanting with no other consequences but an arrest of this Court's hands to investigate and possibly hand down a positive reaction. The matter should not have been raised in submissions. It should have been substantively raised and this would have created the normal climate of proof, for or against. While still on this, I should observe that while appreciating the persuasive reasoning in the Kenyan case **Uhuru,** referred to by Defendants/Respondents, with respect, I should go further and state that, even if, in the present case, the matter was to be argued and decided in favour of the Defendants it would not affect the process because there would still be available one Advocate, Rwechungura, to proceed with the matter. The Defendants can still raise the matter in the proceedings if they are still inclined to but at this stage it cannot legally be disposed of.

Regarding the argument on reliance on English law, the Defendants made no attempt to expound the submission. That said however, the law of the land to which the parties have taken forum has not been excluded.

Lastly, on verification, I can only observe that the very authority relied upon by Defendants/Respondents, **Mulla on Civil Procedure, 16th Ed., Vol.2, at page 2349,** talks loud against the complaint for it clearly states,

"Every defect in an affidavit is not fatal. For example non-mention of date and place is a mere irregularity"

Now, looking at the impugned affidavit, the obvious to any focusing eye is that it contains 12 affidavits and not 26 and the verification clause refers to all paragraphs save one as being to the best of his (deponent) own belief. The Plaintiffs/Applicants in rejoinder submitted that it was a typographical error. Indeed, reading "26" into "12" in the circumstances cannot be explained in any other manner.

We now turn to the application proper.

Looking at the plaint, the supporting affidavit and the counter affidavit no one is left in any doubt that the Plaintiffs/Applicants are indebted to the Defendants/Respondents and that the securities provided for appointment of Receiver/s. However, it is equally reflected that the parties had engaged in some negotiations to reschedule repayments leading to *"Syndicated loan Agreement and facility letter"* of as late as Nov. 2006 showing the repayment schedules spilling close to mid 2007.

Now, looking at these documentations in relation to the plaint, can one say that the first principle of existence of serious triable issued(s) has not been made out? As stated by the Counsel of both sides, what is required is existence of a serious triable issue between parties. Here it is being contested whether, on the stage reached in their relationship, time is ripe for the Defendants to exercise their rights under the debentures. Indeed this is a serous triable issue. However, this alone is not enough. The question is whether there exists a probability that the issue(s) may be decided in Plaintiff's favour.

As I had an occasion to state in **Commercial Case No.5/99, Tanzania Tea Packers Ltd vs The Commissioner of Income Tax and another,**

> *"... although attilio case shows that there should exist a probability of applicant's success in the main matter, in my view, this should not be interpreted to mean that the facts at hand should declare the applicant a winner. To conclude as such would be to pre-empt the trial and would militate against the basic principles of justice. It will tantamount to pre-judging parties before they are heard on the controversy. In my view therefore, what is meant is that the applicant should show that though evidence has not been given, the allegation so for made by him, prima facie portray him as having been aggrieved*

by the Respondent entitling him to the reliefs being sought in the main suit."

I reiterated this **in Tanzania Breweries** case referred to above, in which, I again stated,

"The extent of proof required in establishing a prima facie case when dealing with an issue of temporary injunction, I must admit, is a tricky one. This is so because no evidence has so far been issued. The court should tread on this very fine string with all necessary caution lest it be condemned for prejudging the matter (the suit) before hearing."

Taking all the above into consideration, I am satisfied that principle one has aptly been established.

We turn to the next, of whether irreparable loss would be occasioned.

I am on all fours with the Defendant's Counsel that once a party subjects his property to security status for financing facility, he declares it as property subject to be sold. Thus, if limited just to the selling of properties I am more than satisfied that the two giant Banks world-wide would easily compensate the Plaintiffs of the value of the sold property if it came to that.

That said however, it has been stated, and so far unchallenged, that the Plaintiffs has 40% market share in the distribution of petroleum products in the Tanzania economy. Now, with this scenario, the picture does not end with just possible sale of properties that can be atoned by momentary compensation as argued by the Defendants but the entire business, face, name and obviously would impact on the distribution status that would be destroyed. Can we, objectively argue that this can be atoned by monetary considerations? In my considered view, and with respect to the Defendant's Counsel, it cannot. I am more than satisfied that this kind of situation would fall under the category of irreparability even if the Plaintiff was to subsequently succeed.

As to the third condition, balance of convenience, I do appreciate that the Banks can only keep afloat if debtors pay. I do also appreciate that clossal sums are involved. However, on a balance of convenience, the Plaintiffs/Applicants stand to suffer more if the injunction is refused than the Defendants/Respondents would if granted because the latter have to be paid in any eventuality and for that matter, interest and any penal clauses, would still apply. What is required is a just expeditious disposal of the dispute between the parties.

For the clear reasons discussed above, I am satisfied that the requisite conditions for granting an injunction have been met. This however, in the circumstances of the case, has a qualification. The

Receiver(s) have already been appointed. This appointment is not revoked, it remains intact. The injunctive order hereby issued is only limited to the extent that the said receiver should not take possession of the charged assets. In other words, the status quo as of now should be maintained until the disposal of the substantive matter.

And, considering the role of the parties to the economy of the Country, this matter should be placed on speed track one, notwithstanding the X-mas Court vacation, provided parties oblige because they cannot be forced to work during the period. Costs in the cause.

L. B. Kalegeya

JUDGE

Date: 20/12/2006

Coram: Kalegeya, J.

For the Plaintiffs/Applicants – Mr. Rwechungura.

For the Defendants/Respondents – Ms Fatuma.

Ruling delivered.

L. B. Kalegeya

JUDGE

20/12/2006

Ms Fatuma:

We appreciate the court's recognition that the matter is of urgent nature. We need to file a WSD. We are ready to file the same by 29/12/2006

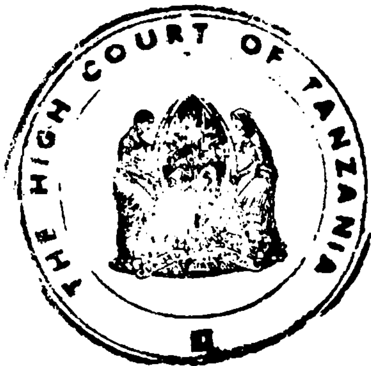
Mr. Rwechungura:

I pray to file my reply by 10/1/2007.

Order:- WSD by 29/12/2006

: Reply, if any, by 10/1/2007

: 1st pretrial and scheduling conference 11/1/2007.



L. B. Kalegeya

JUDGE

20/12/2006

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