

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

**MISCELLANEOUS CIVIL APPLICATION NO. 594 OF 2019**  
*(Emanates from Civil Case No. 190 of 2019)*

**PIL TRADE AND SERVICE ENTERPRISES LTD----- APPLICANT**

*VERSUS*

- 1. NMB PLC**
- 2. GADAU AUCTION MART & CO. LTD----- RESPONDENTS**

**RULING**

*Date of last order: 26.11.2019*

*Date of Ruling: 20.12.2019*

**Ebrahim, J.:**

The applicant has filed the present application seeking for an order of temporary injunction to restrain the respondents from attaching and selling the mortgaged properties; 977.700 tons of maize totaling to 19,632 sacks of 50 kgs per sack stored in a controlled warehouse at Kibamba Kibwegele, Ubungo Dar Es Salaam; Plot ILA/KTD/MZG16/12 Kidunda Area, Ilala Municipality, Dar Es Salaam with Residential Licence TMK040984; and Plot No.

TMK/YBV/SGR23/134, Yombo Vituka, Sigara, Temeke Municipality, Dar Es Salaam; as well as the Debenture over both floating and fixed assets of the company both present and future for unspecified amount, and a first loss guarantee to be issued by Private Agriculture Sector Support (PASS).

The applicant is a company dealing with supplying bulk food crops including the maize inside and outside the country. On 14<sup>th</sup> November 2017, she secured an additional loan from the 1<sup>st</sup> respondent. However the applicant claims that due to the sudden government ban to export the maize, the plaintiff managed to look for domestic markets and obtained one from Tanzania Breweries Limited. The 1<sup>st</sup> defendant has already issued a sixty days' notice to the plaintiff and instructed the 2<sup>nd</sup> defendant to sell the mortgaged properties and maize stored in various controlled warehouses; hence the present application.

When this case was called for hearing, it was agreed by the parties and ordered by the court that the matter be disposed of by way of written submission as per the set schedule. Both parties adhered to the set schedule.

The applicant in this application was represented by Mr. Samson Rusumo, learned advocate and the 1<sup>st</sup> respondent was represented by advocate Sangi Zilahulula. The 2<sup>nd</sup> respondent did not enter appearance and no information was availed to the court.

In his submission, Mr. Rusumo submitted at lengthy the difficulty associated with the frustration of business and their efforts to secure a tender to sell the maize to Tanzania Breweries Limited. He stated that the 1<sup>st</sup> respondent has refused to release the stock of maize to be transported to TBL under Collateral Agreement (Annexure K7-G and K9-1). Mr. Rusumo submitted further that the act of 1<sup>st</sup> respondent of refusing to release the stock of maize while the price has now increased and would be a huge opportunity for the plaintiff to sell the same is actuated by personal interests of the bank officers. He explained therefore that the applicant intends to sell the stocked maize and pay part of the 1<sup>st</sup> respondent's loan and that if the maize are sold by the 2<sup>nd</sup> respondent, the applicant shall suffer irreparable loss considering that the 1<sup>st</sup> respondent has not expertise in the business. He outlined the financial loss that the applicant is suffering of incurring costs of Tshs. 2,500,000/- after every three months to fumigate the warehouse to prevent perishable goods from

continuing to be destroyed by insects. He also pointed out the uncertainty of the maize business and that if they continue to wait long even the sale agreement entered between the applicant and TBL shall be frustrated hence causing loss to the applicant. Mr. Rusumo made reference to the case of **Alloys Antony Duwe Versus Ally Juu ya Watu** (1969) HCD 268 on the discretion of the court to issue temporary injunction basing on the set criteria as elaborated in the case of **Atilio Versus Mbowe** (1969) HCD 284. He therefore prayed for the restraining order against the 1<sup>st</sup> and 2<sup>nd</sup> respondents from attaching the maize and listed mortgaged properties; and the release of the consignment so that the applicant can proceed to sell the same.

Responding to the submission by the applicant, Counsel for the respondent Ms. Zilahulula referred to the three mandatory conditions to be proved by the applicant in order for the court to issue an injunctive order. She referred to a number of cases in substantiating a point that failure to meet the conditions cumulatively, it will not be sufficient for the court to exercise its discretion. The referred cases are **Christopher P Chale Versus Commercial Bank of Africa**; Misc Civil Application No. 635 of 2017; **Maithya Vs Housing Finance Co of**

**Kenya and Another** {2003} 1 EA 133 (CCK). She contended that the applicant has failed to establish a prima facie case and the loss that she will suffer if the application is not granted but rather the outstanding debts stands at Tshs. 1,368,583,150.93. In further reference to the cited case of **Christopher P Chale (supra)** Counsel for the respondent argued that the applicant has not elaborated on the irreparable loss and as for the balance of convenience, it is in favour of the 1<sup>st</sup> Respondent who is in a position to repay the decretal amount in the event the applicant succeeds at the trial. She was of the strong views that the court interference is not necessary as it would interfere with the right of the mortgagee to exercise its power of sale under the mortgage deed (**NBC Vs Dar ES Salaam Education and Office Stationery** [1995] TLR 272 CAT. She concluded therefore that the applicant has failed to prove essential elements for grant of injunctive orders.

In rejoinder, the applicant mainly challenged the submissions made by the Counsel for the respondent on the absence of criterions to warrant the court issue an order for injunction.

Having carefully followed the submission by both parties, the task of this Court therefore is to gauge the facts that have been

presented before this court and find if they sufficiently establish or disestablish the existence of the named pre-conditions as far as issuance of injunction is concerned.

Indeed the submissions by both Counsels for and against were grounded on the principles underlying the grant of temporary injunction as set in the celebrated case of **Atilio V Mbowe (1969) HCD, 264**. The principles in the cited case require the applicant to show that;

- (a) There are serious questions of facts to be decided/ prima facie case.
- (b) Courts interference is paramount to prevent irreparable loss; and
- (c) On balance of convenience, there would be greater hardships or mischief suffered by the applicant in case his application is not granted than that suffered by the respondent.

Counsel for the respondent has numerously referred to the cited case of **Christopher P Chale** (Supra) in substantiating her argument that there is no prima facie case that has been established by the

applicant. While I associate myself with the principles enunciated in the cited case as well as the cited case of **Maithya case (supra)**, I find that the facts of the **Christopher P Chale's case** served the circumstances of the cited case which are not the same with the present case. What I could gather from the submissions presented before the court and the affidavit and counter-affidavit, the bone of contention is mainly on the interference of the 1<sup>st</sup> respondent to refuse to release the stocked maize so that the applicant can proceed with the sale of the same as per the agreement she entered with Tanzania Breweries Ltd. Inarguably is the fact that the applicant had mortgaged her properties to secure a loan from the 1<sup>st</sup> respondent and defaulted to service the same. The arguable issue here is whether the 1<sup>st</sup> respondent in a bid to exercise her options as a mortgagee can go further and halt the process of selling maize by the applicant to the 3<sup>rd</sup> person.

I am restraining myself to go into the main case to discuss the issue of mortgaged properties; however having visited the plaint, written statement of defense, an affidavit and counter affidavit, there is nowhere that the business consignment of the applicant (in

this case a consignment of maize) has been listed as collateral in case of default. As pointed out by the Counsel for the Applicant in his rejoinder, the said maize consignment is the property of the applicant and the 1<sup>st</sup> respondent should presently maintain her options in the mortgaged properties. In turn, I find that the first pre-condition does exist.

As for existing of the second pre-condition as to whether Court's intervention is paramount to prevent the irreparable loss or injury on the part of the applicant that needs court intervention; this condition is predicated on the circumstances that court shall grant injunction if there will be irreparable loss which cannot be adequately compensated by award of general damages (**Hotel Tilapia Ltd V Tanzania Revenue Authority**, Commercial Case No. 2/2000 (Unreported)). The learned Counsel for the respondent has submitted that there are no particulars of irreparable loss that have been shown by the applicant. I do not agree with that assertion. Counsel for the applicant in his submission has pointed out the expertise in handling the maize business and if allowed to sell the same at the earliest, she would manage to salvage and mitigate the



loss and eventually make part payment to the 1<sup>st</sup> respondent. He also pointed out the business loss and frustration of the agreement that the applicant has entered with the 3<sup>rd</sup> party (TBL). I therefore find that the loss of business opportunity with the 3<sup>rd</sup> party would not be adequately atoned by payment of general damages alone. It is for that reason; I find that court interference is necessary to prevent such irreparable loss.

Coming to the balance of convenience, Advocate for the respondent submitted that the balance of convenience is in their favor as they would manage to pay the applicant should the matter be decided in her favor at the trial. She extensively urged the court to consider the nature of business of the 1<sup>st</sup> respondent and the delay in interfering to recover the loan amount. I share her views and again fully associate myself with the principles held in the cited cases of **Agency Cargo International (supra)**; **NBC V Dar Es Salaam Education and Office Stationery (supra)**; and to add the case of **General Tyre East Africa Ltd. V HSBC Bank PLC** (2006) TLR page 60 at page 69. However as intimated earlier the 1<sup>st</sup> respondent has gone further to halt the process of selling the consignment of the applicant

hence frustrating her business as opposed to realize and exercise her options on the mortgaged properties. It is on that background I find that on balance of convenience, prudence demands that the sought injunctive orders be granted.

The above notwithstanding, I grant a temporary injunction and restrain the respondents/defendants, their agents and or their servants from attaching and disposing the maize consignment of Tone 977.700 totalling to 19,632 sacks of 50 kgs each stored at Kibamba Kibwegele, Ubungo Dar Es Salaam **only** pending the hearing and final determination of the main suit. **I further order** the release of the maize consignment stored in the Godown situated at Kibamba Kibwegele and granted to the Applicant to enable her sell the same and mitigate the loss being that they are perishable goods. The application is only allowed to the extent explained above. Costs shall follow the outcome of the main case.

It is so ordered.



A handwritten signature in black ink, appearing to read "R. A. Ebrahim".

**R. A. Ebrahim**

**JUDGE**