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

MISC. CIVIL APPLICATION No. 387 OF 2019

SJ3 IWAWA's COMPANY LIMITED.....APPLICANT

Versus

ACESS BANK TANZANIA LTD.....RESPONDENT

RULING

28/08/-08/10/2019

J. A. DE-MELLO, J;

Through the services of **Counsel Bwire Benson Kuboja**, the Applicant above named, has moved this Court under **Order XXXVII Rules (2) (1) (b)** and **Rule 4, section** of the **Civil Procedure Code Cap. 33 R.E. 2002** seeking for an order for **Temporary Injunction** to restrain the **Respondents,** their **Agents,** or assignee or any person acting under the instruction of the Respondent to collect any monthly loan repayments from the Applicants pending determination of the main suit.

The Application is supported by an Affidavit, affirmed by the Applicant's Principal Officer, one **Salum Kazindogo Mbilinyi** while the Counter Affidavit is in place sworned by **Patrick Suluba Kinyerero** noting some of the contents while contesting some. Oral submissions was prayed and duly granted as **Counsel Kuboja** submitting that the Application has its

genesis from **Civil Suit No. 115 of 2019**. It is Counsel's further contention that notwithstanding the Applicants full satisfaction of the loan that she applied and granted, the Respondent in total of disregard of the fact that out of **TShs. 500,000,000/=** and return of **TShs. 300,000,000/=,** forcefully continues to deduct and charging interest to the earlier sum. That it even came to the knowledge of the Applicant disbursing of other loans using the Applicants account without her consent. The **TShs. 200,000,000/=** loan has been serviced effectively by depositing **TShs. 4,000,000 million** until 'last month', uncertain of what the remaining balance is having off-setted **TShs. 240,000,000/=** as per **2015 -2019** as per annexture **IWAWA-4.** From this, Counsel in as far as advised from his client has accomplished payment of loan in full. The celebrated case of **Atilio** vs. **Mbowe (1969) HCD 284** for principle governing injunction was cited, for **Triable issues, Irreparable Loss** (see the case of **Fatuma Mlakangara** vs. **Administrator General, Civil Application No. 169 of 2007**) and, that of **Balance of Convenience** to condense his point.

Opposing the said Application, **Suluba Kinyerero** argued that, nothing from the three principles has the Applicant advanced to the satisfaction for the Court to consider. The contents of paragraph of the Applicant's

Affidavit rebuts what **paragraph 15** as seen in **annexture ABT**, while on irreparable loss nothing seemingly far fetched similarly. With regard to Balance of Inconvenience it is the Respondent who is to suffer more than the Applicant it being a financial institution, certain that the loan is in default. Case of **Christopher Kichare** vs. **Commercial Bank of Africa, Misc. Civil Application No. 635 of 2017** holding in favour of financial institution as follows;

"Respondent must have funds to service its creditors and customers". The Application is unmeritorious and ought to be dismissed with costs, he summed up.

Rejoining, **Counsel Kubajo** reiterates his earlier stance as he draws the Court to the Plaint which is clear of the facts that the loan has been off-setted after the balance not required was reimbursed back to the Bank, the Respondent. Paragraph 21 of the Affidavit "...professional negligence seemingly...", while paragraph 22 loss is vivid. The case of Christopher supra) has neither value nor relevance he observed.

It is Trite law that, for considering Restraining orders, Courts are guided by the principles as laid down by law as well as case law as observed hereunder;

(i) **There must be a serious question to be tried on the alleged facts and a probability that the plaintiff will be entitled to the relief prayed,**

(ii) **That, the court's interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established and,**

(iii) **That, on the balance there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendant from the granting of it."**

Many and several cases have settled for the above and to mention a few are; **Atilio** vs**. Mbowe (1969) HCD 284, Giela** vs. **Cassman Brown & Co Ltd (1973) E.A 358** and, **Hardmore Productions Limited & Others** vs. **Hamilton & Another (1983) 1A.C 191** where **Lord Diplock** at **page 220** had this to say:

"An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court Judge by whom the Application for it is heard".

The rationale is to evolve a workable rather duable formula to the extent called for by the demands of the situation, keeping in mind the pros and cons of the matter and, thereby striking a delicate balance between two conflicting interests, such as injury and prejudice, likely to be caused to the Parties, if the relief is granted or refused. At the outset, I ask myself as to whether or not the Applicant has managed to keep up to the principles as observed above. That is, first any Prima Facie and, second Triable issue on which the Application and on balance of inconvenience is established?

Based on the Affidavit in support of this Application, as well as the written submissions thereof, it is my settled view that at this stage the Court cannot search for evidence to establish and ascertain facts surrounding the claim and even worse on the illegality or otherwise of the deductions. All this, is a matter of evidence.

In the case of **Colgate Palmolive** vs. **Zakaria Provision Stores And Others, Civil case No. 1 of 1997 (**unreported**), Mapigano J**; (as he then was) held that;

"I direct myself that in principle the prima facie case rule does not require that the court should examine the material before it close it and come to a conclusion that the plaintiff has a case in which he is likely to succeed, for to do so would

amount to prejudging the case on its merits, all that the court has to be satisfied of, is that on the face of it the Plaintiff has a case which needs consideration and that there is likelihood of the suit succeeding."

In absence of proof and, with such contentious issues, I am satisfied that there is no Prima Facie case before the Court that the Application has established, to be duly heard and, determined in that line.

This will thus translates and on evidence, established whether or not the Applicant will suffer irreparable loss, in course of addressing serious triable issues on the alleged illegal transaction of the Applicant's loan account. This is in line with the case of **Kibo Match Group Limited** vs. **H.I.S Impex Ltd (supra) [2001] TLR 152.**

No suffering at all as the Respondent is a reputable financial institution and in the event the suit is not in his favour, the Applicant Plaintiff is assured of her safety.

On the strength of the authorities cited hereinabove and the analysis drawn, I am satisfied that this Application has no merit. Let the main suit be heard expeditiously in the interest of justice to both sides. Judiciously exercising Court's powers, and I order.

Costs in due cause.

J. A. DE-MELLO

JUDGE

08/10/2019.