

IN THE HIGH COURT OF TANZANIA
MAIN REGISTRY REGISTRY
AT DAR ES SALAAM
MISCELLANEOUS CIVIL APPLICATION No. 45 OF 2019
(Arising from Civil case No. 173 OF 2018)

AVCC TRADERS LIMITED.....1st APPLICANT
ALPHONCE JOHN MUSHI.....2nd APPLICANT

Versus

EQUITY BANK TANZANIA LIMITED.....RESPONDENT

RULING

13th December-21st February ,2020

J. A. DE-MELLO J;

This Court is moved to order for Temporary Injunction, restraining the Respondent, or any other person acting under his authority or his instruction from selling the Applicant's properties **Ex-Parte** pending the hearing of this application **Inter Parties**, to restrain the Respondent or any one acting under his instruction from continuing with the intention to sell the Applicants properties, pending the determination of the main suit. The Court is moved by **Order XXXVII Rule 1(a) & section 68 (e) & 95 of Cap. 33 RE 2002**. The Application was supported by an Affidavit of **ALPHONCE JOHN MUSHI**, the Principal Officer of the 1st Applicant, to the effect that the Mortgaged properties of the Applicants which are subjected for sale by the Respondent are **subject matter to the main suit**, in **Civil Case No. 173 of 2018** pending before this Court.

The Respondent strongly countered the said Application via the Affidavit of one **MARY GABRIES MOSHA**, the Principle Officer of the Respondent, observing lack of sufficient grounds to move this in that accord. It is Counsel's further observation that in the event the Court grants, the respondent stands to suffer most and comparably. **Norbert Mlwale** stood for the Respondent whereas Kephias Mayenje fended the Respondent.

The principles enumerated in the celebrated case **Atilio vs. Mbowe [1969] HCD 284**, that is;

- i. Existence of triable issues and chances of success.**
- ii. Irreparable loss, suffered in the event the Application is granted.**
- iii. Balance of inconvenience.**

It is Counsel's assertion that, if not for the fire that, gutted the mortgaged suit premise, the debt would have not been affected and coupled with indemnity complications and constrains it has been quite a torture. In **paragraph 5** of the Counter Affidavit the Respondent has vigorously been denied. referred to the case of **John P. Sakaya vs. Azania Bank Ltd. Misc. Commercial Application No. 62 of 2018 (Unreported)**. On the 2nd test, that of **irrepealable loss suffered**, in adopting **paragraphs 7 and, 8** of the 2nd Applicants Affidavit need for the insurance Policy Premium to cover the burnt stock and, which was not forthcoming That, it is properties mentioned in **paragraphs 4 and 13** of the 2nd Applicant's Affidavit in **Plots No. 40, Block 44** with **Certificate of Title No. 186245/40, Plot No. 57 Block 44** with **Certificate of Title No.**

186245/57 and, Debentures on fixed and, floating assets of the **1st Applicant** in which the loan was secured and now due to the Respondent. If not prevented, both the stock and the premium owned by the Applicant will be lost, causing suffer irreparable loss. The case **Kibo Match Group Ltd. vs. H. S Impex Ltd [2001] TLR 152** in which the Court observed that;

“Satisfied that rules immediate action is taken the Applicant will suffer the irreparable loss, final decisions rendered nugatory”.

On the 3rd test that of **balance of convenience**, considering the properties which others are residential, disposal if any, will inconvenient the Applicant. The **sixty (60) months** loan advanced is even yet to expire, rendering its implementation null in the event this happens hence to cause again yet greater inconvenience than that, of the Respondent. In the case of **John Paschal Sakaya [supra]** in which the court held that;

“the Applicant stands to suffer greater hardship than the Respondent.”

Counsel Kephass Mayenje while adopting the Counter Affidavit of the Principal Officer of the Respondent submitted that, in line with **Atilio’s case**, nothing of essence and substantial has been met by the Applicants. Neither is the Insurance Police for consideration nor party to the Loan and **Mortgage Agreement** that, the two have sealed. As such no **Prima Facie** case is there for the first test. On the second condition, that suffer loss, Counsel observes that the properties that are subject to disposal owing to the debt and Mortgaged, again and in the event this Court decide

against the Applicant, the Bank and a reputable financial and sound institution, can easily restore the Applicant well by settling the decree. Ne cited cases including the **Sakaya's** as well as the **Kibo Match**(supra) which specifically dealt with Trade Marks are totally distinguishable and misconceived, he stated. On the 3rd condition, Counsel attacked the submissions by Counsel for the Applicant on bringing on board a new fact that the said mortgaged properties are residential houses, something not pleaded before but purely an afterthought. Similarly, is the **sixty (60) months** loan expiration period. He further notified this Court of the previous injunction that had been granted and on the same aforementioned Mortgaged Properties in **Miscellaneous Land Application No. 77 of 2018** for **Tabata Premise and Miscellaneous Land Application No. 20 of 2018** for **Kijitonyama Premises**. The Application is baseless, it has no merits and abuse of Court process.

Rejoining, the Counsel for the Applicants submitted that, so long as the properties were gutted the Insurance cover comes in as revealed in **annexure A** of the Applicants Affidavit, of which the Respondent is the **1st payee** under the said insurance cover in case of loss. **Wellnet** is a sister company owned by the 1stApplicant. With regard to cases referred and alleged distinguishable, Counsel finds them relevant. However, Counsel submitted not to be aware of injunctive granted by the **Land Tribunal** over the same suit properties, whose absence of objection from the Respondent the matter would have been Res Subjudice.

Now for consideration, I totally concede with both Counsels, that such interlocutory orders attracts the three conditions that, the case of **Atilio** vs.

Mbowe (1969) HCD 284 highlighted. I am even grateful for their industry and, energy, in addressing the Court for and, against the said Application. In exercise of its discretion and, judiciously the Court has to take into account; **existence of serious question to be tried on the facts alleged with the probability of succession the suit; demonstration that the Applicant stands to suffer irreparable loss requiring the Courts intervention before the Applicants legal right is established and; proof of greater hardship and mischief suffered by the Applicant if the injunction is not granted than the Respondent will suffer if the order is granted.**

This has been all along stance of which many other and several cases have adopted namely; **Noor Mohamed vs. Mohamed Kassamali Virji Madani (1953) 20 EACA 8, E. A Industries Ltd. vs. Trufford Ltd [1972] EA 20, Giela vs. Casman Brown & Co. Ltd [1973] EA 358 and Tanzania Tea packers Ltd vs. Commissioner of the Income Tax, Comm. Case No. 5 of 1999 (Unreported) and American Cynamid vs. Ethicon Ltd [1975] 1 ALLER 504.** It is also the trite law that, the said conditions set out must all be met cumulatively and not individually. It is fire that the Applicant's ascribes to for his failure to service the loan. It is from the premium from the **Insurance Policy No. 010/010/1/1001714/2015** that, he expects to rescue his predicament, of which he is certain to prove a **Prima Facie** case.

Be it as it may, all factors considered and having regard to the authorities shared above and without going into the merits of the main suit, the facts discerned, a **Prima Facie** case has been established. It is even logical as it

unfolds there from that in the event the Application is not granted it is the Applicant who will suffer irreparably. I am even in one with Counsel, that notwithstanding the financial muscles of the Bank, the loss and injure will occur to the Applicant. Such irreparable losses cannot be adequately compensated by award of General Damages as was the findings in the case of **American Cynamid Co. vs. Ethicon Ltd [1975] 1 All ER 504** at p.509 Per Lord Diplock **Hotel Tilapia Ltd vs. Tanzania Revenue Authority, Commercial Case No. 2 of 2000 (unreported)** in which **Lord Diplock** stated:

"...The object of the temporary injunction is to protect the plaintiff against injury by violation of his right for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favor on the trial...." (at p.509)

Such losses will translate into lose of indemnity from the Insurance Policy but even the right to shelter for the family residing in one of the Mortgaged property a residential outfit. While Counsel for the Respondent disregards this, and condensing his submissions with the cases of **Giela vs. Casman Brown & Co. Ltd**(supra), **James Mizanza Kelelav. KCB Bank (T) Ltd & Another, Misc. Land Case No. 240 of 2016** (unreported) however the circumstances of this case cries more than the expected. I will now discuss the third pre-condition which deals with **Balance of Convenience** which in my sincere and logical mind falls in favour of the Applicant. It is true that between the Applicant and the Respondent, it is the Applicant who stands to suffer greater hardship, considering that some

of the mortgaged properties are residential houses. It is even apparent that while this happened, the sixty months tenure for the loan still exists. An afterthought or else they go to the root of the Application considering it touches the lives and lively hood of the residents. Regarding the injunction orders allegedly granted on the aforementioned mortgaged properties in **Miscellaneous Land Application No. 77 of 2018** for **Tabata Premise** and, **Miscellaneous Land Application No. 20** of 2018 at Kinondoni for Kijitonyama Premises rendering this Application abuse of Court process, Counsel terms it a fallacy, considering lack of evidence to prove the existence of such orders as required by section **110 (1)** of the **Evidence Act Cap. 6 R.E 2002 which requires whoever desires any Court to give judgment as to any legal right or liability depends on the existence of some facts which he must prove that those facts exist .Annexure LLA-1 to the respondents affidavit are the copies of applications and not injunction orders.** True as observed, in absence of proof the mentioning of the Application from the Land Tribunals and whose facts are missing, remain speculative.

Having said that, the Application sails through, as I grant it as prayed save for costs.

In the interim we here the substantive suit on its merits.

It is so ordered


J. A. DE MELLO

JUDGE

21/02/2020