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

MISC. CIVIL APPLICATION NO. 681 OF 2020
(Originating from Civil Case No 194 of 2020)

OTA EDWARD MSOFU & COMPANY .....APPLICANT
VERSUS
EQUITY BANK TANZANIA LIMITED.....1ST RESPONDENT
NUTMEG AUCTIONEERS & PROPERTY
MANAGERS CO. LTD.....2ND RESPONDENT
BENEDICT MBERESERO.....3RD RESPONDENT
MAJINJAH LOGISTICS CO. LTD.....4TH RESPONDENT
FARID AMOUR.....5TH RESPONDENT

RULING

Last order: 27/7/2021
Date of Ruling: 3/9/2021

MASABO, J:-

The ruling is in respect of application for temporary injunction made under Order XXXVII Rule (1)(a) of the Civil Procedure Code, Cap 33 R.E 2019. The facts ascertainable from the affidavit deponed by one Izack Edward Msofu are as follows: On 15th December 2017, the applicant herein secured a loan of Tshs 1,550,000,000/= from Equity Bank Tanzania Limited, the 1st Respondent herein. In securing the loan, she mortgaged among others, his business chattels comprising of a fleet of motor vehicles. Things did not go well. The applicant defaulted repay his dues. in turn, the respondent ignited recovery measures. She issued the applicant a default notice on 30th November, 2018.

Thereafter, negotiation ensured between them. By then, the applicant had allegedly already paid a substantive amount of Tshs 2,874,920,985/=. She also continued to reservice her loan through monthly deposits. Unexpectedly, during the pendency of the negotiations, the 1st respondent unlawfully attached and sold the applicant's motor vehicles with the following registration numbers: T371 DC1J, T372DCJ, T711DDT, T712DDT, T714DDT, T198DGK, T199DGK, T200DGK and T201 DGK to the 3rd, 4th and 5th respondents and still, he intendeds to sell more. Injunction is thus sought to restrain sale by auction or disposal of the applicant's motor vehicles with registration No. T.819 AMQ, T789 ANB, T202 DGK, T203 DGK, T205 DGK, T206 DGK and other mortgaged properties which are in a danger of being sold/disposed of by the 1st respondent if not restrained.

In a counter affidavit deponed by Priscilla Clemence, the 1st respondent did neither refute her banking relationship with the applicant nor dispute the fact that she sold the nine motor vehicles. It was deponed however that, there was no fault in selling the motor vehicles as the 1st respondent was exercising his contractual right for recovery of the loan by way of sale of the mortgaged chattels upon the applicant's default to repay the loan. Further, it was deponed that the chattels against which the injunction is sought were already sold through a public auction.

In a *viva voce* hearing, the applicants counsel, Mr. Saulo Kusakala, adopted the content of the applicant's affidavit and proceeded to submit that, the prayer for injunction pending the determination of the main suit is sought to restrain the respondents from selling/disposing of the

remaining properties. He added that, the disposal of the remaining properties by the 1st respondent will be severely injurious to applicant who stands to suffer more than the respondent if the injunctive order is withheld. He submitted further that, the respondent conduct is unjustified as the applicant has greater chances to succeed in the main suit as he has already paid more than 100% of the loan amount.

Responding to the submission, counsel Godwin Nyaisa, for the 1st and 2nd respondent adopted the counter affidavit filed by the 1st and 2nd respondent and proceeded to submit that, there is no triable issue between the applicant and the 1st respondent as the existence of the loan is undisputed. He reasoned that, the applicant's submission that she repaid 100% of the loan is nothing but a lie as the loan has remained due and several demand notices have been served upon the applicant. He added that, the reason advanced for the default is an afterthought and unfounded as the applicant defaulted in 2018 way long before the COVID 19 pandemic. Thus, she cannot cite the pandemic to justify her default. Besides, clients affected by the Covid 19 pandemic, approached the bank and their loans were restructured.

In regard to irreparable loss, Mr. Nyaisa submitted that, the applicant's assertions that he will suffer an irreparable loss is too general and devoid of any merit as no particulars has been demonstrated in the affidavit or submission to assist the court to determine whether, indeed, the applicant stands to suffer an irreparable loss if his prayer is denied. He argued further that, the 1st respondent is the one likely to suffer the irreparable loss as the value of motor vehicles placed as collaterals depreciates with

time and it is likely that by the time the main suit is fully determined they will have depreciated beyond repair. Besides, the loan interest is accumulating with time and by the time the main suit is finalized the interest will be higher than the value of the security.

Regarding the balance of convenience, he submitted that, loans are advanced from other customer's money deposited and saved in the bank. Thus, if a loan is not repaid the bank and its clients will suffer most. Mr. Nyaisa concluded his submission by arguing that, there are several decisions of this court where it has been held that court should not hurriedly interfere in the contracts freely concluded by the parties and pleaded that this court take similar view.

Mr. Kilenzi, learned counsel for the for the 4th and 5th defendant submitted on two issues; *one,* whether the applicant meets the condition for injunction and *two*; whether this *application is over taken by events*. On the first issue he cited the case of **Atilio V Mbowe and Gilla v Kassiman Brown Co. Ltd** (1973) EA 359 where the three principles for grant of injunction were articulated namely: whether there is a triable issue between the parties; whether the applicant would suffer an irreparable loss if the injunction is withheld; and whether on the balance of convenience the applicant stands to suffer more than the respondent. He then submitted that there is no triable issue between the parties as the applicant admits that he obtained the loan from the 1st respondent, mortgaged the business chattels but defaulted repayment.

Regarding the fact that the application is overtaken by events, Mr.Kilenzi submitted that, the properties subject to this application were sold on 7.10.2020 whereas this application was filed on 22nd November, 2020 which was approximately a month and 3 weeks after the suit properties were sold to the 5th defendant. Thus, there is nothing to restrain as the ownership of the motor vehicles now vests in the 5th Respondent. He reasoned further that, in this premises, if the status is to be maintained, then, status quo to be maintained is the 5th respondent's ownership of the motor vehicles, as this is the status which existed prior to the institution of this application. In conclusion, Mr. Kilenzi argued that, courts are designed to issue executable orders. They do not issue orders just for the sake of it. Therefore, since this application has been overtaken by events it should be dismissed. He then cited the case of **Automech Limited v TIB Development Bank**, Misc. Land Application No.72 of 2020, HC at Dar es Salaam (unreported) and **Florence Chacha v TPB PLC** & Others, Misc. Land Application No. 21 of 2021, HC at Musoma (unreported) in support of his point that, the status quo to be maintained is the one before the institution of the suit.

Rejoining Mr. Kusakala ardently resisted. He submitted that it is not true that all the vehicles are sold. The application herein is in respect of the unsold vehicles. Further, he submitted that it is in the interest of justice that the status quo be maintained as the loan amount was Tshs 1,5000,000,000/= but the applicant has already paid about Tshs 2,800,000,000/=.

I have thoroughly read and considered the application, its affidavit and the supporting documents, the counter affidavit and its respective annexture and the rival submissions from the parties. There is only one major question for determination by this court, namely *whether the prayer for injunction can issue*. Prior to determining this question, it is pertinent in my view to ascertain if, as alleged by Mr. Kilenzi and partly by Mr. Nyaisa, the chattels subject to this application have been sold and the application is, consequently, overtaken by events. I have found it proper to start with this point because, as correctly submitted by Mr. Kilenzi, courts are designed to issue executable orders. They do not issue orders just for the sake of it. A prayer cannot issue if in the eyes of the law, its enforcement is impracticable, or where for example, as argued in this case, the order is sought to restrain a party from selling an asset which has already been sold and ownership has vested in another person.

As per the chamber summons, injunction is sought to restrain the sale of motor vehicles with Registration No. T.819 AMQ, T789 ANB, T202 DGK, T203 DGK, T205 DGK and T206 DGK. Upon consulting the counter affidavits by the 1st and the 5th Respondents and their respective annextures in which the details of the sold motor vehicles are divulged, I have observed that, the motor vehicle with registration No. T205 DGK was sold to the 5th Respondent at a public auction conducted on 7th November 2020. Other vehicles sold on the said date were motor vehicles with registration No. T198DGK, T199DGK, T200DGK, T201DGK, T371DCJ, T372DGT, T711DDT, T712DDT and T714DDT. Now, therefore, since no more details as to further sale/auction if any can be ascertained, it can be

safely concluded that the observation is valid only with respect to the motor vehicle with registration No. T205 DGK.

This brings me to the main issue for determination, namely whether the injunction can issue for the rest of the motor vehicles. As submitted by Mr. Kilenzi, the cardinal law in our jurisdictions is that, before exercising the discretionary powers to order a temporary injunction under Order XXXVII, the presiding judge or magistrate should be satisfied that, the conditions articulated in **Atilio versus Mbowe** [1969] HCD 284 have been satisfied, that is, **first,** there must be a serious question to be tried and the plaintiff is likely to succeed; second, the court's interference is necessary to protect the applicant against an irreparable loss, and **third**, on a balance of convenience there will be greater hardship on the part of the plaintiff if injunction is not issued.

Starting with the first question, the materials placed before me entertains no doubt that as to the existence of the loan facility between the parties. It is also not disputed by the parties that, although the applicant had started to reservice her debt, in August 2018 when the 1st respondent served the applicant with a default notice and on November 2020 when she exercised the recovery measures by way of sale of the mortgaged chattels, the applicant was under default. What I find to be contentious between them is mostly the actual default amount and whether the payments made by the applicant has sufficiently repaid the loan due to the 1st Respondent. It is averred by the applicant that she is no longer in default as she has settled all the amount due to the 1st respondent

whereas her party, the 1st respondent maintains that, the applicant is still indebted to her. This is a triable issue.

Regarding the second test, the applicant has to show irreparable loss if the injunction is not granted. As held in **Kibo Match Group Limited v H.S Impex Limited** [2002] TLR 152, he has to show that unless immediate action is taken the applicant may suffer a quantified or unquantified irreparable damage and if the temporary injunction is withheld the final decision would be rendered nugatory. The applicant in the instant case has miserably failed this test. He has neither described nor demonstrated the irreparable loss likely to be suffered if this application is not granted.

He has similarly failed to satisfy the b*alance of convenience* tests. Apart from the general averment that he stands to suffer more than the respondents, there is nothing in the affidavit or even in the submission for this court to decipher the greater hardship likely to be suffered by the applicant.

Needless to emphasize, the discretion to grant injunction, like any other judicial discretion, must be judiciously exercised upon the court being satisfied of the existence of three tests above. A court cannot grant an injunction simply because it think it is convenient to do so. As held in **Charles D Msumari & 83 Others versus The Directors of Tanzania Harbours Authority,** Civil Appeal No. 18 of 1977, HCT.

> "Convinience is not our business. Our business is doing justice to the parties. They only exercise this discretion sparingly only to protect rights or prevent injury according

> to the above principles. The court should not be overwhelmed by sentiments, however coftly or mere high driving allegations of the applicants such that the denial of the relief will be nunous and or cause hardship to them... They have to show that they have a right in the main suit which ought to be protected or there is an injury (real or threatened) which ought to be prevented by an interim injuction and that if that was not done, they would suffer irreparable injury & not one which can possibly be repaired".

Having observed as above, I can summarily conclude that the applicant in the instant case has not demonstrated a sufficient case worth the grant of temporary injunction as he has failed the test in **Atilio v Mbowe**(supra). The application for temporary injunction, is thus, denied. And, as per the general rule of costs, the costs of this application shall follow the event.

DATED at **DAR ES SALAAM** this 3rd September 2021.

17/09/2021

X _____

Signed by: J.L.MASABO

J.L. MASABO

JUDGE