IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 56 OF 2020

COSMOS DEVELOPERS LIMITED.....1ST APPLICANT

COSMOS PROPERTIES LIMITED.....2ND APPLICANT

VERSUS

MARK AUCTIONEERS AND COURT BROKERS LIMITED.....1ST RESPONDENT

AZANIA BANK LIMITED.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

RULING

Date of last Order: *21/04/2021*
Date of Ruling: *03/05/2021*

MLYAMBINA, J.

The Applicants by way of Chamber summons made under *Order XXXVII Rule 1 (a) and (b), Sections 68 (e) and 95 of the Civil Procedure Code Act, Cap 33 (R.E. 2019)* applied for orders of temporally injunction:

(a) Restraining the Respondent, its Directors, employees, servants, agents and or assignees and whomsoever is appointed or instructed by the Respondent from in any manner, sell, alienate or transfer all the properties and developments known as or made on Plots Nos. 63/27

apartment "E" CT No. 38083/29, 63/27 apartment "C" CT No. 83083/09, 63/27 apartment "C" CT No. 38083/27, 63/27 apartment CT No. 38083 Upanga area, Plots No. 928-930 with CT No. 49058, 2051 with CT No. 95104, 931 with CT No. 79036 and 2016 with CT No. 86923 Ukonga area situated in Ilala Municipality within the Region of Dar es Salaam (collectively referred to as the suit properties) pending the hearing and determination of the main suit.

(b) Restraining the Respondents, its Directors, employees, servants, agents and or assignees and whomsoever is appointed or instructed by the Respondent from removing, evicting the Applicants' staffs and or agents, tenants from the properties mentioned in paragraph (a) above and

(c) Ordering that the costs of the application be borne and paid for by the Respondents; and

(d) Issuing any other order (s) the Hon. Court may consider fit and proper to grant in the circumstances.

The application has been supported with an affidavit of Festo Silvester, Principal Officer of the 1st and 2nd Applicants. Paragraphs 5-18 of the supporting affidavit carries the evidences thereof. For easy of reference, I will quote paragraphs 12 and 18 which appears to be worth of consideration:

12. That further to paragraphs 10 and 11 herein above, default Notices issued on 23rd January, 2020 made reference to a loan facility dated 27th September, 2017 and which formed the basis of auction and any sale of the properties thereof is never known to the Applicants neither did any of the Applicants signed and or known its Directors or Shareholders thereof to warrant its liability.

18. That based on what is stated in the paragraphs herein above, the Applicant's Directors, and Shareholders suffered considerable emotion, physiological damage and loss of reputation of which as a result affected the Applicants financial position.

The application was objected by the Respondents through a Counter affidavit sworn by Charles James Mugila. He counter testified that the business relationship between the Applicant and the Respondent started way back in 2011 todate, where the Applicants on divers' dates secured different credit facilities from the 2nd Respondent.

Mr. Charles Mugila was of testimony that on 2nd August, 2018 the Central Bank of Tanzania (BOT) took over the administration of Bank M Tanzania PLC due to its serious liquidity problem. To that

effect, the 2nd Respondent acquired all assets and liabilities of the then Bank M Tanzania PLC including loan defaulters of which the Applicants are among them.

The credit facility to the tune of USD 2,681,000.00 extended to the 2nd Applicant herein was the result of the partial modification of different facilities availed to the Applicants via Letter of Offer with Ref. No. BANKM/CIB/1050/2017 dated 31st March, 2017 which aimed at restructuring the type and tenure of the credit facility as per Letter of Offer with Ref. No. BANKM/CIB/3060/2017 dated 31st July, 2017.

According to the counter testimony of the Respondents, the Applicants were required to repay the loan of USD 2,681,000.00 on monthly basis as per repayment schedule while overdraft of USD 100,000 was required to be repaid within a period of one year from the date of inserting limit in his account. However the Applicants defaulted to repay the loans as agreed, several effort including calling the Applicants reminding her to cure the default, issuing her Demand Notices who in turn replied the said notice and the Demand Notice and later on 23rd January, 2020 the Applicants were issued with a default Notices giving them 60 days to cure the default. However, the Applicants have rejected. Failed and ignored

to heed the demand. Consequently, USD 3,265,528.64 and TZs 161,736.99 remained unpaid up to 23rd January, 2020.

It was further counter testified *inter alia* that the 90 days Default Notice was issued and the public auction was conducted, concluded and certificate of sale were issued to successful bidders.

At the hearing, learned Counsel Sisty Bernard in his submission in chief referred to the three principles of granting injunction as stated in the case of **Suryakant B. Ramji v. Savings and Financial Limited and Others,** TLR 200 at page 21. There are the same principles as stated in **Attilio v. Mbowe** [1969] HCD 284. He submitted that looking at paragraph 12 of the supporting affidavit, the Respondent did issue a Default Notice which refer a loan agreement dated 27th September, 2017 but the same was not signed by the Applicants. The loan agreement signed by the Applicants herein was dated 31st July, 2017 and not 31st September, 2017. In view of Counsel Sisty Bernard, the trial issue here is: *whether the loan facility refereed in the default Notice issued by the respondent warrant the respondent to claim the amount therein.*

In reply to the first issue, learned State Attorney Gati Mseti told the Court that the Applicants failed to raise any serious triable issue for

this Court to grant the sought temporal injunction. The reason being that the Applicants in their pleadings acknowledged and accepted to had acquired a loan from the 2nd Respondent and to have defaulted the repayment on the said loan. The Applicants further wrote a letter to the Bank acknowledging his default and proposed repayment plan contrary to the agreement. Nevertheless, the Applicant never made any deposit or made any effort to repay the said loan.

State Counsel Gati Mseti submitted that, if one keenly read the Default Notice, paragraph 2, the date quoted is the defaulting date and not the agreement date. Thus, the date is also quoted in the first paragraph of the default Notice as the agreement date. To her, this was an error as the sum quoted therein accrues from various outstanding balance of which the applicant herein does not dispute.

It was further submitted by learned State Attorney Gati Mseti that in case the applicant has issues with the amount or interests, he had a duty as the Bank Client to rearise with the Bank and reconcile with the Bank. It will be a burden into a Court to act as interpreter and define the outstanding amount.

After going through the affidavit, counter affidavit and submissions of both parties, the issue for determination is; *whether the*

applicant has established all the three principles for application of this nature to be granted as stated in the case of ***Attilio v. Mbowe*** *for the Court to exercise its discretionary powers in granting or refusing the application.* As per the cited case, for injunctive order to be granted three conditions must be met:

1. *That there is a serious question to be tried and the Plaintiff is likely to succeed;*
2. *That the Court's interference is necessary from the irreparable loss;*
3. *That on balance of convenience there will be greater hardship on the part of the Plaintiff if injunction is not issued.*

For the requirement to show a *prima facie* case or a serious issue with reference to the 1st condition, it is now settled that a *prima facie* case does not necessarily mean that the Plaintiff/applicant will win the case or obtain a decree against the defendant. What ought to be looked at in this test/ principle is the cause of action. In the case of **Channel Tunnel Group Ltd v. Balfour Bealty Construction Ltd** [1993] AC 334 at pp. 360 – 362, the Court observed:

> *The right to an interlocutory injunction cannot exist in isolation, but is always incidental to and*

dependent on the enforcement of a substantive right, which .... Although not invariably takes the shape of cause of action.

In the light of the supporting affidavit and submissions before the Court, as stated by the Respondents, it is crystal clear that the Applicants do not dispute to had acquired a loan from the 2nd Respondent and to have defaulted the repayment on the said loan. Therefore, there is no serious triable issue to be determined by this Court. The Applicants' argument that the Default Notice issued by the Respondent makes a triable issue, is of no weight because the Respondent has admitted that it was a typo error. As such, there is no any serious triable issue in the matter.

It must be appreciated that the effect and object of the temporary or interlocutory or preliminary injunction is to keep matters in status quo until the hearing or further order (**See Leney & Co. v Calling ham and Thompson,** (1908) 1K.B. 84 **and Jones Vs Pacata Rubber Co.** (1911) 1 K.B. 457. However, injunction cannot be granted as a weapon to protect the party who is in breach of the contract as against the lender. The absence of a serious triable issue negates the importance of granting interim injunction.

As regards the second principle, that is to say; *whether the applicant will suffer irreparable loss,* it is my considered opinion that the Court must exercise this principle /test carefully and judiciously. Lord Diplock in **American Cynamid Company Vs. Ethicon Ltd** [1975] AC 396 noted that:

> *The Court should first consider whether, if the Plaintiff were to succeed of the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant continuing to do what was sought to be enjoined between the time of application and the time for the trial. If the damages in the measure recoverable at common law would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should be granted, however strong the Plaintiff's claim appeared at this stage.*

This principle was also re-stated in the case of ***Central Bank of Kenya V.*** **Giro Commonwealth Bank Limited & Another** [2007] 2 EA 93 in which it was held that:

An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury and when the Court is in doubt, it will decide the application on the balance of convenience.

In the present application, the Applicant submitted that through paragraph 13 of the Plaint and 11 of the supporting affidavits, the first Respondent did publish notice that several Plots will be sold by way of public auction on 2nd August, 2020 and on 5th August, 2020. The Plots to be auctioned includes the properties which are the subject matter before the Court.

It is from the afore position, the Applicant was of view that, if the Court will not grant the orders sought, the Respondents will proceed to auction the property subject matter of the suit which will lender the matter meaningless. Also, that the act of the Respondent to contest the present application shows there is an intention of selling the mentioned properties.

In response, learned State Attorney Gati Mseti told the Court that the Court interference is not necessary as the parties entered into free agreement without any force and each party had an obligation to perform. The 2nd respondent performed its obligation by advancing the loan but the Applicant failed to perform its obligation

by repaying the loan advanced to it. Thus, failure of a party to honour his or its contractual obligation cannot warrant the Court to interfere and protect the defaulter. The Court has to allow the Respondent to exercise her contractual rights of selling the securities. On that note, Ms. Mseti cited the case of **Fulgence Pantaleo Kavishe t/a Double Way Outo Parts v. Tanzania Postal Bank,** Misc. Land Application No. 890 of 2017 High Court of Tanzania Land Division at page 6 where it was stated:

> *The applicant must fulfill his contractual obligation to pay the loan as agreed and since the agreement was contractual agreement between the applicant and the respondent, the Court is not allowed to interfere with the contractual obligation of the parties as it was held in the case of* ***General Tyre EA Ltd v. HSBC Bank PLC*** *(2006) TLR 60.*

In the light of the facts stated in the affidavit and in the submissions by the learned counsel for both parties, it is the findings of this Court that the Applicants have not definitively shown in this Court that the mischief hardship likely to be suffered if the injunction is not granted cannot be compensated by the Respondent. It follows therefore that test number two on grant of injunction as per the cited case above is to the negative.

On the last test, that is on balance of convenience, the Applicants submitted that he is the owner of the properties subject of the main case and he has rented the properties to some of the tenants, some of whom are still living in the said properties. In view of the Applicant, in case the injunction is not granted, the Applicant will suffer most inconvenience than the Respondents. To buttress his submission, the Applicant cited the case of Hon. **Zito Kabwe v. Board of Trustees of Chama Cha Demokrasia na Maendeleo and Another**, Civil Case No. 270 of 2013 High Court of Tanzania at Dar es Salaam Main Registry (unreported).

In reply, learned State Attorney Gati Mseti stated that the Applicants have failed to establish the extent as to which is bound to suffer. He stated that his tenants will be evicted. He is trying to benefit from his own defaults. Thus, the 2nd Respondent is bound to suffer much because he has lost business and failed to provide service to other clients. The applicant is seating with a large amount of money and he has no intention to repay or taken step to repay the same.

From the afore submissions, I am of the opinion that the convenience should be taken in parallel with the rights of the parties and the legal principle, as it was decided in the cited case of **General Tyre E.A. Ltd Vs. HSBC Bank PLC** (*supra*). The Court

is of further observation that in order for the application of injunction to be granted all the three conditions in **Atillio v. Mbowe** (*supra*) must exist conjunctively. In the instant case, there are no serious triable issues, it cannot be stated that the Court interference is necessary to prevent the Applicants from suffering irreparable loss. There are no reasons on the Respondents inability to redress the suffering by Applicants if any through compensation.

Moreover, the Applicants have not shown if the Respondent is not in the financial position to compensate them in case the suit will be in their favour. It is my settled view that the Applicants have not been able to establish the first, second and the third elements for this Court to grant temporary injunction. What is before me are mere statements that there are issues to be determined by the Court and that the applicant will suffer irreparable loss, and suffer more inconvenience if the application is not granted.

In the circumstances of the foregoing, this application is dismissed for lack of merits. Since there is a pending main suit, I order costs to follow events.

Y. J. MLYAMBINA

JUDGE

03/05/2021

Delivered and dated this 3rd day of May, 2021 in the presence of learned Counsel Sisty Bernard for the Applicants, learned State Attorney Vivian Method and Legal Officer Kendael Mziray for the 2nd and 3rd Respondents and in the absence of the 1st Respondent.

Y. J. MLYAMBINA

JUDGE

03/05/2021