

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

MISC. CIVIL APPLICATION NO. 133 OF 2021

CHAI BORA LIMITED ----- APPLICANT

VERSUS

ALVIC BUILDERS (T) LIMITED ----- 1ST RESPONDENT

ADELARDO AUCTION MART & GENERAL

MART & GENERAL BROKERS CO. LTD ----- 2ND RESPONDEDNT

R U L I N G

Date of last Order: 16/07/2021

Date of Ruling: 06/08/2021

MGONYA, J.

This is an Application for temporary injunction filed under **Order XXXVII Rules 1 (a) and 2 (1) and Section 68 (e) of the Civil Procedure Code Cap. 33 [R.E. 2019]**. The same was brought under certificate of urgency.

The Applicant seeks for an order of temporary injunction to restrain the Respondent, its Agents, Servants, or Workmen and Assignees or any other person acting on their behalf from disposition of any property belonging to the Applicant, pending determination of the main suit before this honorable court.

The Application is supported by an affidavit sworn by **NAVO MSHANA** the Applicant's Principle Officer.

In determining this Application, I ordered that the Application be disposed of by way of written submissions. As the said order had been adhered to, I proceed to determine the same as here under. However, I have to make it clear from the outset that, I have carefully read and took note on Parties' respective submissions for and against the Application. Therefore, in the cause of writing this Ruling, I don't intend in anyway reproducing the parties' respective submissions and instead, I prefer to straight focus on determining the merits of the Application to the decision.

In the event therefore, it suffices to say that the Applicant's Counsel herein submission in support of the Application for injunctive orders sought; referring to the three principles articulated in the famous case of ***ATILIO VS. MBOWE [1969] HCD 284***, prayed the Application sought be granted. Briefly, the Applicant stated that, through the facts adduced in the Applicant's Affidavit, the *prima facie* case has been established since there are triable issues to be determined by this honorable court in the main case since the Respondent herein has gone contrary to the terms and conditions of the contract between the parties.

On the second principle in respect of the irreparable loss, the Applicant through her Advocate demonstrated before the court that, in the event where the Applicant's properties are disposed at this stage prior the hearing and determination of the controversy between the parties through the Main case before the court, the Applicant will suffer irreparable loss.

As regards to the third condition, on the balance of inconvenience, the Applicant's Counsel is of the view that on the comparison, and in the event where the prayer sought is denied, the Applicant is the one who will suffer more than the Respondent herein.

In the premises, the Applicant's learned Counsel prayed for the court to grant an order of temporary injunction pending determination of the main suit.

In reply thereto, learned counsel for the Respondent contended that, the Applicant has failed to fulfil the conditions for the Court to grant temporary injunction as laid down in the case of ***ATILIO VS. MBOWE (Supra)***. Further to that, neither in the Applicant's Affidavit nor in her submission, the Applicant's Counsel has bother to clarify or demonstrate on the serious issues to be determined in the main case. In the event the learned Counsel for the Respondent was of the view that, the first test for issuance of temporary Injunction has not been met.

Responding on the second limb of principle of temporary injunction; it was the learned Counsel for the Respondent's view that, the Applicant is not going to suffer any irreparable loss since she was offered the loan advance of which in default, the only remedy is to dispose the Applicant's properties to recover the amount on controversy.

As for the balance of inconvenience, the Respondent's Counsel submitted that, it is the Respondent who will suffer more loss compared to the Applicant in the event the Application is granted.

In the premises the Court was invited to dismiss the present Application since the Applicant is said to have not satisfied the principles governing temporary injunction.

Thus, it is from this juncture, I will start by expressing the Principles governing an order for temporary injunction which are generally founded under three main grounds.

Firstly, the Applicant should show a *prima facie* case with a probability of success against the Respondent. **Secondly**, the Applicant should prove that if the application is not granted the injury that would be suffered would be irreparable by way of damages. The third principle one is the balance of convenience; that the Applicant would stand to suffer greater hardship if the order is refused than what the Respondent would suffer if granted.

As well said by both parties, these principles were well established in a number of cases including case of ***ATILIO VERSUS MBOWE 1969 HCD 284***. Others are ***GIELA VS CASSMAN BROWN & CO LTD (1973) E.A 358, AND GAZELLE TRUCKER LTD VERSUS TANZANIA PETROLEUM DEVELOPMENT CORPORATION, Civil Application No. 15 of 2006*** to mention a few.

These principles were also expounded in the book of ***SOHONI'S LAW OF INJUNCTIONS; Second Edition: 2003 at page 93*** where the learned Author expounded:

"The principles on which the exercise of discretion rests are well settled. The said principles have been outlined as hereunder. They are;

- (i) In the facts and circumstances of each individual case there must exist a strong probability that the petitioner has an ultimate chance of success in the suit. This concept has been otherwise expressed by saying that there must be a prima facie case.*
- (ii) As the injunction is granted during the pendency of the suit the court will interfere to protect the plaintiff from injuries which are irreparable. The expression irreparable injury means that it must be material one which cannot*

be adequately compensated for in damages. The injury need not be actual but may be apprehended.

(iii) The court is to balance and weigh the mischief or inconvenience to either side before issuing or withholding the injunction. This principle is otherwise expressed by saying that the court is to look to the balance of convenience."

It has to be noted that, all the three above principles must be met before a temporary injunction can be granted.

Now in applying these principles to the case at hand, I will strictly confine myself with the above mentioned principles in its pure meaning as above illustrated in determining the matter at hand. To start with, the first issue to deal with is as to whether the Applicant has established a *prima facie* case.

Since at this stage of proceedings the Affidavit is the only evidence upon which the Application is pegged of course the controversy can only be appreciated by traversing the **20** paragraphs therein, thereof if I may choose to quote **paragraphs 7, 10 and 18** of the said Affidavit in this respect, the same reads:

"7. That, on 10th December, 2019, the Applicant received Agency Notice from Tanzania Revenue Authority demanding the Applicant to make

payments to the Commissioner for domestic revenue a sum of TZS 380,227,881 being Tax due of the 1st Respondent, that the debt was now transferred to TRA and not the 1st Respondent and the same was now treated as Tax which had to be recovered as Tax.

10. That, surprisingly the 1st Respondent stopped again issuing physical receipts to the Applicant once the payments have been made to the TRA, with long follow ups and reminders the 1st Respondent has remained mute to act.

18. That, the Applicant believes that there is a legal issue which needs to be determined by this Honourable Court as to whether the Respondents can attach the property of the Applicant and auction it without court orders."

As said earlier, the Respondents have seriously opposed the Application through a Counter Affidavit it suffices to say that they have strongly objected the Application claiming that the Application has no merits.

Now, from the above the most important issue is whether the Applicant has managed to establish a ***prima facie*** case to

command the issuance of an order sought pending the final determination of the main case before this honorable court.

In determining this principle of establishment of a *prima facie* case or rather a serious question with a probability of success, the Applicant cannot escape from showing two things:

- i. The relief sought in the main suit is one which court is capable of awarding; and*
- ii. The Applicant should at the very minimum show in the pleading that in the absence of any rebuttal evidence he/she is entitled to said relief.*

In the case of ***AMERICAN CYANAMID VS. ETHICON [1975] I ALL E. R. 504***, it was stated that:-

"In order to grant a temporary injunction the court no doubt must be satisfied that the claim is not frivolous or vexatious."

In the same series, my learned brother Nsekela, J. as he then was in the case of ***AGENCY CARGO INTERNATIONAL VS. EURAFRICAN BANK (T) LTD, HIGH COURT, DAR ES SALAAM, Civil Case No. 44 of 1998 (unreported)*** when explaining what the Applicant is required to show said:

"It is not sufficient for the Applicant to file a suit with claims. The Applicant must go further and show that

he has a fair question as to the existence of a legal right which he claims in the suit.”

The task then before me is to exhaust and measure out from the submission elaborated by the Applicant whether the court has been referred to the reliefs sought in the main suit in order to look whether the claims made have elevated a serious question/(s) for determination by the court. Of course in the instant principle my task is to look at the reliefs sought in the main suit and the claims made and see if they raise a serious question for determination by the court and then assess whether there is a justification for granting a temporary injunction. From the above Respondent's Counsel concern, I am aware of the extent of proving whether there is a serious question for determination in this kind of Application that, **it is not conclusive evidence which is required but rather the facts as disclosed by the Plaint and the Affidavit** and so the standard of proof required would be somehow below the expected standard in full trials. See the case of ***SURYA-KANT D. RAMJI VS. SAVINGS AND FINANCE LTD & 3 OTHERS, HIGH COURT, Commercial Division Dar es Salaam, Civil Case No. 30 of 2002 (unreported)***.

Now having careful gone through the facts disclosed in the Applicant's submission in chief in respect of the instant

Application and 20 paragraphs of the Affidavit in support of the Application, it is my considered view that **the Applicant has managed to solicit a *prima facie* case to the main suit for the court to determine the controversy at hand.**

From the same also, I find that the Applicant has at minimum managed to show at the very beginning of the pleadings that in the absence of some important answers to some matters, the Applicant is entitled to the reliefs sought but upon consideration and analysis of the evidence and the determination of those matters to clear the controversy between the parties.

For this reason, I will thus hold that **this condition has been satisfied.**

On the second condition which is that of suffering irreparable injury if the prayer for injunction is refused. I am mindful that the purpose of granting temporary injunction is to prevent irreparable injury befalling on the Applicant while the case is still pending.

The tangible issue in this principle is the phrase "***irreparable injury***". What is the irreparable injury? In the case of ***KAARE VS. GENERAL MANAGER MARA COOPERATION UNION [1924] LTD [1987] TLR 17 Mapigano, J.*** (as he then was) clearly stated that:

"The Court should consider whether there is an occasion to protect either of the parties from the

species of injury known as "irreparable injury" before his right can be established.....

By irreparable injury it is not meant that there must be no physical possibility but merely that the injury would be material, for example one that could not be adequately remedied by damages."

It follows therefore that, the irreparable injury is an injury which could not be adequately remedied by damages. If I may quote part of the pleading by the Applicant on this aspect under **paragraph 19** of her Affidavit, the same reads:

"That if the prayers sought on chamber summons are not granted then the Applicant shall stand to suffer irreparable loss."

Further, in determining this point, I would like to refer to the case of ***RAMADHANI ALLY & 2 OTHERS VS SHABANI ALLY, Civil Appeal No. 3 of 2008 [Unreported]*** where the Court of Appeal held that:

"The attachment and sale of immovable property will, invariably, cause irreparable injury. Admittedly, compensation could be ordered should the appeal succeed but money substitute is not the same as the physical house. The different between the physical house and money equivalent, in my opinion,

constitutes irreparable injury. (Deusdedit Kisisiwe v. Protaz B. Bikuli, Civil Application No. 13 of 2001 (unreported)).

From the above quoted submission by the Applicant, and from the above precedent, I have no query to find that the purported injury mentioned will be irreparable since under the Applicant's condition as pleaded, can't be adequately remedied by damages. I proceed to find **the second condition likewise has been met.**

The last condition is balance of convenience. Of course the question here is who is going to suffer greater hardship and mischief if the temporary injunction is not granted.

On a comparative basis, as the second condition has been met, the sun follows the night and under the circumstances, the answer to this principle follows the second principle that the Applicant is the one who is going to face more hardship if the temporary injunction is denied; unlikely to the Respondents who have in his possession hundreds of clients and deposits under his roof.

On my comparative basis from the submissions for and against, I proceed to find the **third condition has similarly been met.**

At this juncture therefore, having weighed the facts in totality, I will hold that this is a fit case for temporary injunction

because all the conditions for granting temporary injunction have been met.

Consequently, **I hereby grant the Application accordingly.**

I make no order as to costs.

It is so ordered.



L. E. MGONYA
JUDGE
05/08/2021

Court: Ruling delivered in my chambers in the presence of Mr. David Ndossi, Advocate for the Applicant, Mr. Richard, RMA and in absence of the Respondents, this 5th day of August, 2021.



L. E. MGONYA
JUDGE
05/08/2021