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

MISC CIVIL APPLICATION NO. 585 OF 2021

LEOPARD NET LOGISTICS COMPANY LIMITED.....APPLICANT
VERSUS
TANZANIA COMMERCIAL BANK LIMITED.....1ST RESPONDENT
CHIEF EXECUTIVE,
TANZANIA FOREST SERVICE AGENCY.....2ND RESPONDENT
AFRIMAX ENTERPRISES LIMITED.....3RD RESPONDENT
ATTORNEY GENERAL.....4TH RESPONDENT

RULING

Last Order:14/12/2021
Ruling:28/12/2021

MASABO, J.:-

Leopard Net Logistics Company Limited has moved this court under a certificate of urgency. The main prayer in her application is for a *mareva injunction* restraining the sale of Plot No. 67 H2 FLUR III with CT. No. 186104/20 located at Temeke with Dar es Salaam which was mortgaged to secure a loan from the 1st Respondent. The order is sought to restrain the respondents jointly or severally, its directors, employees, servants, agents and assignees from selling alienating or disposing in any way the disputed premise and the developments therein.

The application is by way of chamber summons filed under section 2(3) of the Judicature and Application of Laws Act [Cap 358 R.E 209] and is of accompanied by an affidavit deponed by one Nabil Juma Iddi Rashid who is identified as the Principal Officer of the Applicant from which the

following facts are discernible: The genesis of the matter is a contract for harvest and collection of different species and forests produce at Rufiji Hydropower Project. The contract is between the applicant and the 2nd respondent and was executed on 20th December, 2018.Through this contract, it is asserted, the 2nd respondent agreed to sell the applicant all types of trees in blocks No.3 and 4 comprising of 6000 hectares with total volume of 207,000 cubic meters.

Having executed the contract, the applicant approached the 1st respondent for a loan to boost her working capital whereby she secured a total of Tshs 1,100,000,000/=. She then proceeded to pay the necessary charges and procured two trucks worth 59,000,000/=. When the harvest started, she realized that she was shortchanged as there were huge discrepancies on the measurement and volume of block 3 and 4. The actual measurement of these blocks and their actual volume were far below what was stipulated in the agreement executed by the parties. Contrary to what was demonstrated in the agreement, there were no trees but shrubs and bushes. As result, the harvest did not yield the contractual quantity. Only 2000 cubic meters were harvested and transported. The applicant's operation was frustrated further when TANESCO burned her from accessing the project area before the expiration of the contract period.

The 1st respondent was notified of these misfortunes which prevented the applicant from repaying the loan but still, on 22nd June 2021 she issued the Applicant with the 30 days default notice demanding payment of Tshs.1,331,957,588.56 in 60 days' time failure of which would make the

disputed premise liable for sell and on 1st November 2021, she issued another notice through the 3rd Respondent demanding payment of the outstanding sum within 14 days. It is this notice which has disgruntled the applicant who now intends to sue the respondent but, owing to the requirement for a 90 days' notice to sue the Government, he has filed this application seeking intervention as she is worried of that the 1st respondent will sale the disputed promise pending the expiry of the 90 days after issuance of the notice.

During the hearing of the application, Mr. Elly Msyangi, learned counsel appeared for the Applicant whereas the respondents enjoyed the service of Mr. Daniel Nyakiha, learned State Attorney.

Submitting in support of the application, Mr. Msyangi adopted the applicant's affidavit and proceeded to submit that, the application seeks to restrain the respondents from selling the disputed plot. It has been filed pending expiration of 90 days' notice to sue the Government. The notice which is a mandatory legal requirement has been issued and is due for expiration on 9th February 2022. He submitted further that, the application is within the jurisdiction of this court and cited the case **of Abdallah M. Malik & 545 Others v AG**, Misc Land Appl. No. 119 of 2017, HC. Land Division (unreported) and **Jitesh Ladwa v Yono Auction Mart and Co. Ltd & Others,** Misc. Civil Land Application No. 26 of 2020 HC. Dar es Salaam District Registry (unreported) where it was held that, this court has jurisdiction to entertain and grant mareva injunction. He prayed further that; the prayer be granted as the respondents will never be prejudiced if mareva injunction is granted.

Mr. Nyakiha firmly resisted the application. He adopted the content of the counter affidavit deponed by one Lilian Akwitunda and proceeded to argue that, the application is devoid of merit as it is only aimed at evading the obligation to repay back the loan. He cited the case of **Mareva** [1980]1 All ER 213 from which the mareva injunction emanates and argued that in this case, the court cautiously considered the order of freezing an asset subject to the anticipatory case noting that, the principle can only apply in special and proper case. He proceeded to argue that, principles applicable to other kinds of injunctions apply to Mareva injunction. Thus, as propounded in **Atilio v Mbowe** (1969) HCD 284 and **Christopher P. Chale v Commercial Bank of Africa**, Misc. Civil Application No. 635 of 2017 (HC, Dsr es Salaam Registry (unreported); three things must be available for an injunction to issue. **One,** there must be a serious question of law that would entitle the applicant to a relief. **Two**, the courts interference is necessary to protect the applicant against an irreparable injury. **Three**, balance of convenience in that it has to be demonstrated that there will be greater hardship suffered by the applicant if the application is withheld. These three conditions must all be met for an injuction to be granted in an ordinary injunction and so in mareva injunction.

Mr. Nyakiha argued further that, the facts deponed by the applicant in paragraph 2 of the affidavit are devoid of merit as the agreement between the applicant and the 2nd respondent expired on 20 February 2019 and there is no any agreement whatsoever. Besides, the 1st respondent was given extension of time to collect tools and forest produce which remained on the site. The applicant defaulted payment of the loan for one year and

has never paid a single installment since being advanced the loan although he has continued to do business and reap profit while 1st respondent has continued to suffer loss. Thus, there is no serious triable issue between the parties and, on the balance of the convenience it is the 1st respondent who stands to suffer more compared to the applicant. For the 1st respondent to continue with business, the applicant and other clients, must repay the loan due. The Applicant's refusal to repay the loan has substantially affected the respondent's operation. The balance of convenience, consequently, lies on the respondent's favour. He added that, all three conditions are in favour of the respondent. If the applicant's prayer is granted the 1st respondent will not regain the money. Finally, he argued that, the cases cited by the applicant are irrelevant as they deal with the issues of jurisdiction of the court to deal with injunction.

In the rejoinder, Mr Msyangi distinguished **Christopher Chale's** case as it was filed during the pendency of the case. He maintained that this application has merit as there is a dispute to be tried and, if the property is auctioned the applicant will suffer irreparable loss as the disputed premise may be disposed of prior to the expiration of the 90 days.

I have carefully and dispassionately considered the content of the application and the prayers thereto, the affidavit filed in support of the application and the counter affidavit filed by the respondent and their respective annextures. From these documents, it is common ground that the interim injunction is sought before institution of the suit. The issue for determination, therefore, is whether the application for interim injunction can issue? An interim injunction order preceding the institution of a suit

or *mareva injunction* as it is commonly known, is a common law remedy developed by the courts of England. It derives its name from the case of **Mareva Compania Naviera SA v International Bulkcarriers SA** [1980]1 All ER 213 where Lord Denning accorded a broader interpretation to section 25 of the Judicature Act of 1873. Since then, the application has been applied in many jurisdictions, albeit with certain modifications and improvements. Applying this principle in **Aetna Financial Services v Feigelman** (1985) 1 SCR 2, the Supreme Court of Canada stated that, in granting mareva injunction, two conditions must be satisfied. **One**, the applicant must demonstrate a strong *primafacie* case or a good and arguable case and **two,** having regard all the circumstances of the case, it appears that granting the injunction is just and justifiable.

In our jurisdiction, it is a settled principle of law that, this court has jurisdiction to grant such injunction under section 2(3) of the Judicature and Application of Laws Act which braces the application of common law and equity in our jurisdiction. This position has been stated in plethora of authorities, including **Abdallah M. Malik & 545 Others v AG** (supra); **Jitesh Ladwa v Yono Auction Mart and Co. Ltd & Others** (supra); **Ugumba Igembe & Machanya Nemba Singu v The Trustees Of The Tanzania National Parks & The Attorney General,** Miscellaneous Civil Application No. 1 of 2021, HC- Mbeya (unreported)**.** And, as argued by both parties, for such an injunction to issue, the court must be satisfied that there is no pending suit because, as pointed out in **Daudi Mkwaya Mwita v Butiama Municipal Council & AG,** Misc. Land Application No 69 of 2020, HC Musoma (unreported), mareva injunction cannot be applied or granted pending a suit. It is an application

pending obtaining a legal standing to institute a suit. It may be issued where, the applicant cannot institute a law suit because of an existing legal impediment. Since the instant application is applied pending the expiry of the 90 days' notice to sue the Government which impends the institution of a suit by the applicant, there is no doubt that the application falls within the realm of *mareva injunction* and can be issued if the conditions for grant of injunction are demonstrated.

As correctly argued by the learned state Attorney, the criteria articulated in **Atilio v Mbowe** (supra) as regards grant of injunction apply in the instant application. Thus, the applicant must demonstrate a *primafacie* case. He must show that there is a serious question to be tired on the alleged facts and probability that the applicant will be entitled to the relief prayed; he should demonstrate that, the court's interference is necessary to protect the applicant from the kind of injury which may be irreparable before his legal rights is established and lastly, the balance of convenience. Thus, on balance there will be greater hardship or mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendant from granting of it.

Regarding the triable issue, all what is required at this stage is for the applicant to demonstrate that he has a case worth consideration and that there is a likelihood of the suit to succeed See: **Colgate Palmolive v. Zakaria Provision Stores and Others**; Civil Case No. 1 of 1997 HCT (Mapigano, J) (unreported). Looking at the facts asserted in the application, much as there could be a triable issue between the applicant and the 2nd respondent, the applicant has miserably failed to demonstrate

a triable issue between her and the 1st respondent against whom the interim injunction is sought. I say so because, the applicant does not dispute to have obtained the loan from the first respondent and to have mortgaged the suit property as security. He duly acknowledges his indebtedness and total default of the credit facility extended to him on 22nd January 2019. With these facts at hand and in the absence of any demonstration in the applicant's affidavit that the 1st respondent was party to the misrepresentation by the 2nd respondent or that repayment of the credit facility was contingent to the contract between the applicant and the 2nd respondent, I do not see how the enforcement of loan recovery measures by the 1st respondent which is sought to be restrained would constitute a triable issue with the possibility that the applicant will emerge successful.

Regarding irreparable loss and balance of convenience, I entirely agree with Mr. Nyakiha that the applicant has failed the test as the averments that the applicant stands to suffer irreparable loss and that on the balance there will be greater hardship and mischief suffered by her if the injunction is withheld are merely casual and unsubstantiated hence incapable of forming a basis for a judicial pronouncement. It need not be overemphasized that, the requirement to demonstrate all the three criteria is a mandatory requirement. Failure/omission to demonstrate any of them is fatal and attracts dire consequences on the outcome of the application. Underlining this point, this court (Rutangwa J (as he then was in **Charles D Msumari & 83 Others v The Director of Tanzania Habours Authority**, Civil Appeal No. 18 of 1997, HC (Tanga) (unreported), emphatically stated thus:

"Courts cannot grant injunctions simply because they think it is convenient to do so. Convenience is not our business. Our business is doing justice to the parties. They only exercise this discretion sparingly and only to protect rights or prevent injury according to the above stated principles, court should not be overwhelmed by sentiments however lofty or mere highly driving allegations of the applicants such as the denial of the relief will be ruinous and or cause hardship to them and their families without substantiating the same. They have to show 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 injunction and that if that was not done, they would suffer irreparable injury and not one which can possibly be repaired." [emphasis added]

In the foregoing, I find the application devoid of merit and I hereby dismiss it with costs.

DATED at DAR ES SALAAM this 28th December 2021.

28/12/2021

X _____

Signed by: J.L.MASABO

J.L. MASABO

JUDGE

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY