

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

MISC. CIVIL APPLICATION NO. 6 OF 2021

(Originating from Civil Case No. 2 of 2021)

MOSES LOTH A LUKUMAY @

MOSES EPHRAEM LOTH A.....APPLICANT

VERSUS

CRDB BANK PLC..... RESPONDENT

RULING

1/10/2021 & 3/12/2021

ROBERT, J

This ruling emanates from an application for temporary injunction made under Section 68 (c), (e) and Order XXXVII Rule (I)(a) of the Civil Procedure Code, Cap. 33 (R.E 2002). The application is supported by an sworn by the applicant, Moses Lotha Lukumay aka Mosses Ephraem Lotha.

Briefly stated, facts ascertainable from the affidavit in support of this application reveals that, on 9th day of March, 2020, the applicant herein executed a facility agreement under which the respondent bank advanced him a term loan and overdraft facility both at the tune of TZS 500,000,000/= pursuant to the terms and conditions specified therein. The facility was secured by landed properties described as C.T No. 22156; L.O: f251355, being Plot No. 11 Olasiti Area in Arumeru District,

and C.T No. 222158, L.O No. 251357; being Plot No. 38 Olasiva Area in Arumeru District.

Things did not go well. The applicant defaulted repayment of amount due under the facility. In turn, the respondent initiated recovery measures.

In her counter affidavit, the respondent neither refuted her banking relationship with the applicant nor disputed the fact that the applicant was served with a fourteen days' notice requiring the applicant to pay his outstanding arrears of the term loan. It was deposed however that, the respondent had not started the process of selling the securities. However, if she starts, the applicant will have nothing to lose as he voluntarily placed the mortgaged properties as security and decided to default the terms of the facility agreement.

Hearing of this matter proceeded by way of filing written submissions whereby the applicant was represented by Mr. kelvin Kwagwilwa, learned counsel whereas the respondent was represented by Ms. Lilian Joel, learned counsel.

Submitting in support of the application, Mr. Kwagwilwa submitted that, to exercise its discretion to grant an interlocutory injunction the Court is guided by three points, prima facie case, irreparability and balance of convenience. He referred the Court to the case of **Atilio vs Mbowe** [1969] HCD 284 in support of his argument.

He submitted further that, the question in the present case is whether the stated principles are applicable in this case. He argued that, the first principle is met because, the applicant indicated in paragraph 3.1 of his plaint that facility agreement between the parties was

oppressive and illegal. Further to that, the respondent acted unreasonably due to his failure to grant the applicant extension of time to repay his loan as per the customer/banker relationship. He wanted the Court to consider the two issues in granting this application. He referred the Court to the case of **Kibo Match Group Ltd vs HS Impex Limited** (2001) TLR 158 in support of his submissions.

Opposing this application, Ms. Joel informed the court that this application does not meet the test set in the cited case. Responding to the first principle, she argued that, there is no prima facie case as alleged by the applicant. Under paragraph 3,4 and 5 of the applicant's affidavit, he admitted that the respondent bank advanced to him the term loan and overdraft facility both in the sum of TZS 500,000,000/= and his own reason for failure to repay the loan was the outbreak of the Covid 19 pandemic. Unfortunately, there is no clause in the facility agreement which covers any pandemic as justifiable cause for non-payment of the loan.

Responding to the applicant's argument that the agreement was oppressive and illegal, counsel for the respondent maintained that, prior to the signing of the said agreement the applicant had received an advice from his lawyer, therefore the allegation is unfounded and an afterthought as it came after his failure to repay the loan. She argued further that, the loan facility does not warrant the applicant to be given extension of time and it is against the policy of the lending bank. The extension is only given on humanitarian reasons and its refusal is not a breach of a customer/bank relationship. She maintained that, the cited case of **Kibo Match group Ltd** (supra) is distinguishable as the present case does not meet the test cited in Atilio's case.

On the second principle, it was Mr. Kwagilwa's submission that, as the respondent already issued a default notice to the applicant, if the injunction will not be granted the applicant will suffer irreparable loss. He argued that, since the properties mortgaged were commercial properties if the respondent will be allowed to exercise the intended sale, the injury to the applicant will be irreparable and the individuals who depend on the said properties will be affected.

Responding to this issue, Ms. Joel informed the court that, the notice of default issued to the applicant on 24/10/2021 and 30/10/2021 was just a normal obligation of the respondent to remind the applicant to repay the loan and that his properties are in danger of being sold, they were not notice of sale. In case the respondent wants to sale the said properties, the applicant will be issued with a notice of sale, therefore this application together with its main case were filed prematurely as there is no action which needs intervention of the court.

Regarding the issue of the employees to suffer in case the properties were sold, she argued that it was the duty of the applicant to foresee that his employees will suffer upon his failure to repay the loan as the respondent has a right to sell the said properties to recover the said loan.

On the last principle, Mr. Kwagilwa informed the court that, as the properties mortgaged are used for commercial purposes which the applicant's family depends on for their livelihood if the application will not be granted the applicant will suffer. However, the respondent has nothing to lose as she has a lot of options including sale of the mortgaged property, sue the applicant or appoint a receiver. He referred

the Court to the case of **Ramji Suryankati vs Savings & Finance Ltd and Others** (2002) TLR 122.

Responding to the question of balance of convenience, Ms. Joel told the court that, the respondent is the one to suffer if this application will be granted as the applicant failed to show any reason which needs the court's intervention. The respondent was duty bound to remind the applicant when he defaulted to repay which is a duty of the bank under the loan facility. Thus, she prayed for the application to be dismissed.

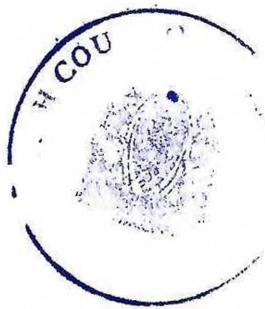
In his brief rejoinder, Mr. Kwagilwa submitted that, the respondent's counsel failed to appreciate that there is a prima facie case and that the issue raised needs a full trial by the court. The order sought is to stop something from happening, therefore it cannot be prematurely filed. The said notice issued to them was not only a reminder but a notice consisting of intended consequences. In the end, he maintained his prayer for this court to grant the application.

From the submissions made by both parties, considering the circumstances of this case, this Court finds that, the pertinent question for determination is whether the applicant will suffer more than the respondent if the orders sought will not be granted.

This court is of the views that, the balance of convenience weighs in favour of granting the prayers sought by the Applicant because whereas the refusal of the prayers will result in denial of the Applicant's property before the determination of the pending matters, the grant may not cause any new hardships as we strive to determine the pending matters.

Consequently, I hereby grant a temporary injunction order restraining the respondent, its servants employees and or agents from possessing, selling or dealing in any manner whatsoever with the applicant's ownership, possession and occupation of the landed properties comprised in C.T No. 22156; L.O: f251355, being Plot No. 11 Olasiti Area in Arumeru District, and C.T No. 222158, L.O No. 251357; being Plot No. 38 Olasiva Area in Arumeru District pending the determination of Civil Case No. 2 od 2021 but not later than six months from the date of this order.

It is so ordered.



A handwritten signature in dark ink, appearing to read 'K.N. Robert'.

K.N.ROBERT
JUDGE
3/12/2021