

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

MISC. LAND APPLICATION NO. 08 OF 2021

BENNY JOSEPHATY MDESA.....1ST APPLICANT

MDESA GENERAL SUUPPLY AND SPARES LTD.....2ND APPELLANT

VERSUS

NATIONAL MICROFINANCE BANK PLC (NMB BANK).....1ST RESPONDENT

**NUTMEG AUCTIONEERS AND PROPERTY
MANAGERS CO.LTD.....2ND RESPONDENT**

**PERMANENT SECRETARY, MINISTRY OF
AGRICULTURE AND COOPERATIVES.....3RD RESPONDENT**

THE ATTORNEY GENERAL TANZANIA.....4TH RESPONDENT

RULING

Date of last order: 05th July, 2022

Date of ruling: 19th August, 2022

E.E.KAKOLAKI, J.

This is an application by the applicants for temporary injunction preferred under Order XXXVII Rule 1(a), section 68 (e) and section 95 of the Civil Procedure Code 1966[CAP. 33 R.E 2019] (the CPC). The applicants are seeking to stop/restrain the 1st and 2nd Respondents' servants, agents or representatives from auctioning and /or selling the 1st applicant's mortgaged properties comprised under CT No.27434-MBYLR,Plot No.582, Block D, Sabasaba Area, Mafinga and CT No.81893,Plot Nos.104 & 106,Block E, Yombo Vituka Area in Dar es salaam pending determination of the main case.

The application is supported by an amended affidavit duly sworn by the 1st applicant. On the other side the prayer is vehemently opposed by the 1st respondent through the counter affidavit duly sworn by Consolatha Resto, her principal officer. Save for the 2nd respondent who neither filed her counter affidavit nor entered an appearance in court despite of being served, hence hearing proceeded ex-parte against her, the 3rd and 4th respondents did not challenge the prayer sought by the applicants.

The story leading to this application as scanned from the amended affidavit sworn by the 1st applicant goes thus; the 1st Applicant who is the director cum shareholder of the 2nd applicant, sometime in 2015, mortgaged his properties under CT No.27434-MBYLR, Plot No.582, Block D, Sabasaba Area, Mafinga and CT No.81893, Plot Nos.104 & 106, Block E, Yombo Vituka Area in Dar es salaam, to guarantee the 2nd Applicant's credit facility of Tshs. 400,000,000/- issued to her by the 1st Respondent. The said loan was meant to boost 2nd respondent's agricultural inputs business for supply of fertilizers and seeds to various farmers of Kilolo District, Mafinga town council and Mufindi District in Iringa region and Kilombelo District Council in Morogoro. Through that business which was performed by the 2nd respondent under the Ministry of Agriculture and Co-operatives and now the Government is

indebted to her to the tune of Tshs.1,016,858,000.00, the money if paid to her would have assisted her settle the loaned money by the 1st respondent. As the applicants have managed to pay the 1st respondent Tshs. 150,000,000.00 only from the private sources of income while waiting for the government to settle the 2nd applicant's claim, the 1st respondent has secretly and without notice to the applicants unsuccessfully conducted two public auctions of the 1st Applicant's properties and she is planning to re-auction for the third time, hence the present application to restrain her from so doing pending hearing and determination of the main case.

Hearing of the matter proceeded by way of written submission as both parties were represented. The 1st and 2nd applicants enjoyed the legal service of Mr. Silas Nziku, Advocate while the 1st respondent was represented by Mr. John James, advocate as the 3rd and 4th respondents though represented by Ms. E verius Mwendwa learned State Attorney, did not file their submission having indicated their intention not to contest the application right from the onset.

This Court is seized with the necessary powers to entertain and grant the prayer sought in this application upon the applicants meeting the three conditions as set out in cases without numbers, the celebrated one being

the case of **Atilio Vs. Mbowe** (1969) HCD 284. See also the cases of **Hash Energy Tanzania Limited Vs. Richol Company Limited and 3 Others** [2016] TLS LR 340, **Christopher P. Chale Vs. Commercial Bank of Africa** (Misc. Civil Application No.136 of 2017) [2018] TZHC 11; (13 March 2018) **JS3 Iwawa's Company Limited Vs. Access Bank Tanzania Ltd**, Misc. Civil Application No. 387 of 2019 (HC-unreported) and **Urafiki Trading Agencies Ltd and Another Vs. Abbasali Aunali Kassam and 2 Others**, Misc. Civil Application No. 53 of 2019 (HC-unreported). The said three conditions are:

1. That, on the facts alleged, there must be a serious question to be tried by the Court and a probability that the plaintiff will be entitled to the reliefs prayed for (in the main suit);
2. That, the temporary injunction sought is necessary in order to prevent some irreparable injury befalling the Plaintiff while the main case is still pending; and
3. That, on the balance of convenience greater hardship and mischief is likely to be suffered by the Plaintiff if temporary injunction is withheld than may be suffered by the Defendant if the order is granted.

In this matter therefore the 1st applicant is expected to simply establish that, **one**, there is a prima facie case or arguable case in the main case calling for this Court's intervention hence injunctive orders are necessary to avail it with time to hear and determine the same, **second**, to demonstrate that he will suffer irreparable harm or loss if the injunctive orders are not granted and **third** that, the balance of convenience tilts in favour of the applicant on the hardship to be suffered if the prayer for injunction order is withheld by Court than it would do to the respondent.

I have carefully gone through both parties fighting submission as well as the affidavit by the 1st applicant in support of the application and counter affidavit by the 1st respondent in contest. The issue now for determination before this Court is whether the applicants has established sufficient grounds to warrant this Court exercise its discretion to grant them temporary injunction as sought.

Submitting on the first condition after adopting the 1st applicant's affidavit Mr. Nziku argued that, the 1st respondent is aware that the borrowed money was used to trade with the Government and therefore the Government is indebted to her, the debt which is still under verification and if paid in her account through the 1st respondent, she will be entitled to deduct it. Further

to that he contended, the loan due amount which the 2nd applicant owe the 1st respondent is contested hence a need to be addressed by the Court as the 1st respondent says it is Tshs. 326,686,725.92 while the 1st respondent claims to be Tshs.420,269.577.50. On the other hand Mr. James is of the contrary view arguing that, the applicants have failed demonstrate that there is arguable case as the application is intended to delay the loan recovery process since there is no dispute that loan was secured for the purposes of supply of fertilizers. He invited the Court to find the first condition is not met. In his rejoinder submission reiterated his earlier submission that, the applicants managed to disclose to the court that there is arguable case in the main suit.

It is true and I agree with Mr. James that, the applicants have failed to establish to the Court's satisfaction that, there is arguable case in the main suit. There is no dispute that the 2nd applicant is indebted to the 1st respondent and that she has failed to settle the said loaned amount since 2015. The assertion that the 2nd applicant claims from the Government a total amount of Tshs.1,016,858,000.00 out of the agreements for supply of fertilizers and seeds to various farmers, which fact is not even established in the applicant's affidavit by documentary evidence, in my opining does not

raise any arguable case against the 1st respondent who is not privy to their agreements. Again I find to be an afterthought the contention by Mr. Nziku that, the loan due amount is contested in the main suit as that fact is not pleaded in the 1st applicant's affidavit to form part of evidence in this matter but rather comes from the advocate's submission. It is trite law that, arguments and submission by an advocate in court cannot be a substitute of evidence, and therefore Court is barred from acting on it as part of the evidence to prove a certain fact. This legal stance was aired by the Court of Appeal in the case of **Tina & Co. Limited and 2 Other Vs. Eurafrican Bank (T) Ltd Now known as BOA Bank (T) Ltd**, Civil Application No. 86 of 2015 (CAT-unreported) when cited with approval the Ugandan Court of Appeal case of **Trasafrica Assurance Co. Ltd Vs. Cimbria (E.A) Ltd** (2002) E.A where the court held that:

"As is well known a statement of fact by counsel from the parties is not evidence and therefore, court cannot act on."

In view of the above, I find the applicants have failed to establish the first condition as this Court cannot act on mere submissions or argument by the counsel not supported by the affidavit.

Next for consideration is the second condition in which the applicants are to demonstrate that the sought temporary injunction is necessary in order to prevent some irreparable injury befalling the 1st applicant while the main case is still pending. It is in Mr. Nziku's submission that the 1st applicant will suffer irreparable loss if the mortgaged properties are auctioned as together with his family will be rendered homeless. He argued the 1st applicant will not suffer anything as his interest on the outstanding loan debt will keep on accruing while awaiting for the Government to pay the 2nd applicant. To the contrary Mr. James argues that, since the 1st applicant is in a position to repay the decretal amount in the event the applicants/plaintiffs succeeds in the main suit then she stands not in a position of suffering irreparable loss. He said, the 1st respondent's survival depends on recovery of loans advanced to its clients otherwise she stands to be a candidate of bankruptcy. He referred to the case of **Agency Cargo International Vs. Eurafrica Bank (T) LTD**, HC (DSM), Civil case No.44 of 1998 (unreported) In his rejoinder submission Mr. Nziku said that the 1st respondent failed to counter his arguments and reiterated his submission in chief.

Having considered the above fighting arguments, I think this condition need not exercise my mind. As stated above the onus of proving that irreparable

loss will be suffered if grant of application is withheld lies on the applicants. It is settled law that, courts will only grant injunctions if there is evidence that there will be irreparable loss which cannot be adequately compensated by award of general damages and where the particulars of such irreparable loss are demonstrated. See the case of **Christopher P. Chale** (supra). My thorough perusal of the amended applicants' affidavit has taken me to the conclusion that there is no evidence to establish and prove that the 1st applicant will suffer irreparable loss if the prayer sought is withheld. In paragraph 11 of the amended affidavit, the 1st applicant avers that, the 1st applicant stands to suffer irreparable loss as the 1st and 2nd respondent shall proceed to re-auction the mortgaged properties. There is no single paragraph deposing that, the mortgaged properties are family houses in which if auctioned the 1st applicant's family will be rendered homeless as asserted by Mr. Nziku in his submission, the submission which I hold is not evidence hence this court cannot rely on to exercise its discretion whether to grant the prayer or not. In absence of such evidential materials to enable this Court exercise its discretion, I find the applicants have failed to convince the Court that, should the prayer not be granted then the 1st applicant will suffer irreparable loss that cannot be atoned by monetary value. In the

circumstances I buy Mr. James's proposition that, should the applicants emerge successful in the main suit the 1st applicant is in a position to repay the loss suffered. I so view basing on the fact that, the 1st respondent is a stable financial institution hence capable of compensating the 1st applicant. The second condition for that matter has not been established.

Lastly is the third condition in which Mr. Nziku contends that the 1st applicant stands to suffer more than the 1st respondent would do if temporary injunction is withheld as being a financial institution maintaining the 2nd applicant's account is capable of deducting its due amount once the claimed money from the Government is paid to the 2nd respondent including accrued interests. On the strength of the above submission, he submitted the principles laid down in the case of **Atilio Vs. Mbowe's** case have been met by the applicants and prayed for the Court to grant the application. In rebuttal submission Mr. James tried to convince the court otherwise that, on the balance of convenience the scale tilts in the 1st respondent's favour. Citing the case of **Christopher P. Chale** (supra) and **Hotel Tilapia Ltd Vs. Tanzania Revenue Authority**, Commercial Case No. 2 of 2000 (HC-unreported) submitted that, the purposes of temporary injunction is to protect the applicant from injury by violation of his right for which he could

not be adequately compensated in damages if the disputed issue in the main suit is resolved in his favour. That since the 1st applicant has failed to establish that there is arguable case in the main case and that, he will suffer irreparable loss then the third condition is also not met by him. In his rejoinder Mr. Nziku stated that, the sought to be auctioned properties are located in town and that, not only do they have monetary value but also they have sentimental values to the title holders and their families, hence to let them be auctioned will render the 1st applicant and his family homeless and suffer him great loss than the 1st respondent would do. He added that, the 1st respondent has not even substantiated the loss that would be incurred if temporary injunction is granted hence the balance of scale cannot fall on his part. Otherwise he maintained his earlier prayers.

It is true as submitted by Mr. Nziku that, the sought to be auctioned properties are all located in town centers and that they all have monetary value and that is why were all accepted as collaterals to secure the 2nd applicant's loan. However the mere fact that, they are located in town centers does not in my firm view negate the true fact that, they stand to be collaterals for the 2nd applicant's long standing unpaid loan debt nor does it substantiate applicants' delay in making sure that the said loan repaid. Again

as said earlier above there is no evidence to prove Mr. Nziku's assertion that, the same are family houses so as to be attributed to the family sentiments, in the event temporary injunction is not granted. Thus I am satisfied that, the materials advance by the applicants to establish to the Court that, on the balance of convenience the 1st applicant is likely to suffer great hardship and mischief if temporary injunction is withheld more than the 1st respondent would do, are wanting in merit. It is the living policy and I need not cite any authority to that effect that, banks need to be protected from defaulting borrowers who if allowed to repay loans timely through Court's cover can lead them into bankruptcy as most of them depend on realization of security to recover the lent money. See the case of **Agency Cargo International** (supra). The loan beneficiary or guarantor is therefore duty bound to make sure that the loaned money is paid back timely so as to make sure that the lenders are surviving in money lending business. In this matter as alluded to above when considering the first condition it is more than seven years (7) now since the 2nd applicant took the said loan from the 1st respondent, the money which if paid timely would have benefited other bank loan clients. In this matter the act of denying the bank of the right to loan recovery process on unestablished and flimsy grounds advanced by the applicants is to

tantamount to issue her with the death certificate, which act this Court is not prepared to do. In light of the above reasons, I am satisfied that on the balance of convenience the scale tilts in the 1st respondent's favour, hence the 3rd condition is not establish by the applicants. It is the law that, in granting the application for temporary injunction all three conditions must be met, in which in this matter neither of them has been established by the applicants.

In the premises and for the foregoing reasons, I am satisfied that this application devoid of merits and the same is hereby dismissed with costs.

It is so ordered.

DATED at DAR ES SALAAM this 19th August, 2022.



E. E. KAKOLAKI

JUDGE

19/08/2022.

The Ruling has been delivered at Dar es Salaam today 19th day of August, 2022 in the presence of Mr. Silas Nziku, advocate for the applicants, Mr. Ignas Komba, advocate holding brief for advocate Mr. John James advocate for the 1st Respondent, Mr. Evelius M. Elias, State Attorney for 3rd

and 4th Respondents and Mr. Asha Livanga, Court clerk and in the absence of the 2nd respondent.

Right of Appeal explained.

A handwritten signature in blue ink, appearing to be 'E. E. Kakolaki', written in a cursive style.

E. E. KAKOLAKI

JUDGE

19/08/2022.