

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

MISC. LAND APPLICATION NO. 52 OF 2022

KIBAIGWA FLOUR SUPPLIES LIMITED.....1ST APPLICANT

KONGWA FOOD TRADERS LIMITED.....2ND APPLICANT

SEBASTIAN ABDALLA MSOLA.....3RD APPLICANT

VERSUS

M/S CRDB BANK PLC.....1ST RESPONDENT

PASS TRUST.....2ND RESPONDENT

CITYLAND COMPANY LIMITED.....3RD RESPONDENT

RULING

(INTER - PARTIES)

11.10.2022 & 24.10.2022

KAGOMBA, J.

This is a Ruling on the application for injunctive orders filed by Kibaigwa Flour Supplies Limited (Henceforth "the 1st applicant"), Kongwa Food Traders Limited (Henceforth "the 2nd applicant") and Sebastian Abdalla

Msola (Henceforth "the 3rd applicant") which was heard inter-parties subsequent to the *ex-parte* Ruling delivered by this court on 29/6/2022.

The application is made under sections 68(c) & (e) and 95 and Rule (1) (a) of Order XXXVII of the Civil Procedure Code, [Cap 33 R.E 2019], and seeks the following Inter-Parties orders: -

1. That, this court be pleased to grant an order for injunction against the respondents, their agents, assignees, workmen, or any person acting under their authority from auctioning, appropriating, disposing or dealing in any way with the properties at Plot No. 6 Block "G" Kisimani situated at Kibaigwa Urban, Dodoma Region; Plot No. 2 Block "A", Kibaigwa, Dodoma Region and Plot No. 4 Block "G" Kisimani -Kibaigwa Urban, Dodoma Region pending the hearing and determination of the Land Case No. 20 of 2022 between parties herein pending before this court.
2. Cost of the application
3. Any other relief(s) this court shall deem fit to grant.

The application is supported by affidavits of Kelvin Sebastian Msola, and Victoria Sebastian Msola who are the officers of 1st and 2nd applicants

respectively as well as the affidavit of Sebastian Abdalla Msola, the 3rd applicant.

The respondents opposed the application vide the joint courter affidavit of the 1st and 3rd respondents sworn by Suebert Baguma, a Principal Officer of the 1st respondent, as well as the affidavit of the 2nd respondent sworn by Leah Ayoub Mwakang'ata, Business Development Manager of the 2nd respondent.

On the date set for inter-parties hearing, Mr. Elias Machibya and Ms. Catherine Wambura, learned advocates appeared for the applicants; Mr Raineri Songea appeared for the 1st and 2nd respondents while Ms. Norah Marah appeared for the 2nd respondent.

In moving the court to grant an order for temporary injunction against the respondents in respect of properties situated at plot No. 6 Block G Kisimani Area, Kibaigwa; Plot No. 2 Block A, Kibaigwa and Plot No. 4 Block G, Kisimani, Kibaigwa, Mr. Elias Machibya, submitted that the application has met all the three (3) essential conditions set out in the famous case of **Atilio v. Mbowe** (1969) HCD 294.

On the first condition, Mr. Machibya elaborated that the dispute between the 1st applicant and the 1st respondent on the restructuring of the loan facility constitutes an arguable case as the 1st respondent invited the 2nd respondent to guarantee the loan without the 1st applicant's knowledge. The Land Case No. 20 of 2022 pending before this court was also mentioned to consolidate this argument.

Regarding the 2nd condition, Mr. Machibya referred to the contents of paragraphs 11 and 12 of the joint affidavit, arguing that there would be irreparable loss if the properties which the 1st and 3rd respondents intended to sell are actually sold. He elaborated that there is an industry within the said properties which the 1st applicant depends on for repayment of the loan to the 1st respondent and that the industry also relates with another business arrangement between the 1st applicant, National Bank of Commerce (NBC) and Tanzania Breweries Ltd (TBL). He added that the 1st respondent was aware of the said arrangement and consented to it vide her letter addressed to NBC dated 22/10/2019, annexed to the supporting affidavit as annexure MPA-9.

For the above reason, Mr. Machibya argued that any disposal of the mortgaged properties, if allowed before determination of the main case, will cripple the business of the 1st applicant; cause a new dispute between the 1st applicant, NBC and TBL; render the pending suit nugatory and deny the 1st applicant his right to be heard as per Article 13 of the Constitution of the land. He thus said, the second condition in **Atilio v. Mbowe** (supra) has also been met.

Regarding the satisfaction of the third condition, Mr. Machibya submitted that if the injunction would not be granted, the applicants were likely to suffer more than the respondents because they will not be able to do any business, and their case will be rendered nugatory. In contrast, he said, the 1st respondent's loan is secured by the mortgaged properties and its 40% is guaranteed by the 2nd respondent as stated by the 1st respondent in her counter affidavit. For these reasons, he rested his case and prayed the court to grant the application.

Mr. Songea, for the 1st and 3rd respondents resisted the application for failure to meet the conditions set in **Atilio v. Mbowe** (supra). He elaborated that the supporting affidavit has failed to show that there was a serious

triable matter. He argued that since the applicants know that 40% of the loan is guaranteed by the 2nd respondent, the complaint about 2nd respondent's interference in the said loan arrangement lose its footing.

He argued further that the 1st and 3rd respondents' joint counter affidavit showed clearly that there was an agreement supporting the role of the 2nd respondent in the loan arrangement, as well as the agreed fees and payment modality. He said, such an acknowledgment negated the complaint on deduction of Tshs 19,402,144 from the 1st respondent's account as raised by the applicants in the supporting affidavit.

Mr. Songea also argued that since the appellants haven't attached a bank statement to back up the claim that they have been paying their loan without problem, and since this case came about after the applicants had defaulted to rectify the default within 60days, it meant that what the respondents did was a natural consequence following the default, as such there was no serious matter requiring the court's intervention by granting the temporary injunction. He cited the case of **Issa Hamadi Kivila & Another v. Equity Bank (T) Ltd**, Misc. Land Application No. 572, High Court Land Division, DSM.

Mr. Songea further referred to the case of **Thomas A Mbega & Another v. Lipina Michael Mrema & Another**, Misc. Land Application No. 2 of 2018 where this court insisted that all the three principles in **Atilio v Mbowe** have to co-exist for the injunction to be granted. He insisted that the applicants have failed to meet the first condition.

With regard to the second condition, Mr. Songea argued that the issue of irreparable loss does not arise because, if the loan securities are sold, the applicants can be compensated if they win the main suit, according to the respective valuation of the properties. To this end, he cited the case of **Christopher P. Chale v. Commercial Bank of Africa**, Misc. Civil Application No. 635 of 2017, High Court DSM where the case of **American Cyanamid v. Ethicon Limited** [1975] 1 All ER 504, was referred to on the point that where any loss can be monetarily compensated, an injunction should not be granted.

Mr. Songea submitted that what was done by the respondent was so much lawful because the applicants have defaulted, and the objective of loan security was well explained in **Christopher Chale** (supra). Thus, he argued that the applicant had failed to meet the second condition too.

Arguing on the third condition regarding the balance of convenience, Mr. Songea said that it was the 1st respondent who stood the chance to suffer more as the applicants failed to comply with agreed instalments since 2019 despite several restructuring sought by the applicants themselves. He cited **Dotto Luguisha Kaji v National Microfinance Bank PLC**, Misc. Land Case Application No. 658 of 2019, High Court Land Division, DSM to the effect that it was the bank that suffered more as the outstanding balance is the capital of the bank.

He further cited Lucy **Annastazia Mkopoka v Allan Peter Mkopoka & 3 Others**, Misc. Land Application No. 15 of 2015 where the case of **George Ndegeyiswa v. National Bank of Commerce (NBC)**, was referred to, stating that courts should take a U-turn and protect banks from unscrupulous loan defaulters. Mr. Songea went on to cite the decision in Tatu **Bakari Msanma v. Zuberi Hassan Nzainzai & Another**, Misc. Land Application No. 642 of 2017 to the effect that the bank will suffer more from the grant of injunction.

On the agreement between the applicants, TBL and NBC, Mr. Songea submitted that the same was private and should not be used as a reason to

grant this application. He said, the document which the applicants were to comply with is the first deed of variation (Annexure MPA-4), by paying the agreed quarterly instalments since 30/12/2021 up to 30/3/2024 so as to clear the whole debt. He would up his reply submissions by prayed the court to dismiss the application with costs.

Ms. Nora Marah, for the 2nd respondent, also opposed application. She said the applicants opted not to attach the agreement signed between them which was the basis for the disputed amount deducted from the 1st respondent's account. She referred to annexure R2-4 of her client's counter affidavit, being the agreement between the 1st applicant and her client showing that the amount deducted was service fee for the loan guarantee, accompanied with explanation on how the same would be paid.

Ms. Marah further submitted that the said annexure R2-4 was approved by the 3rd applicant and one Kelvin Msola who signed it. She contended further that the correct amount paid out of the 1st applicant's account was Tsh. 13,201,895/= and not Tshs. 19,402,144.68 as wrongly submitted by the applicants. Like Mr. Songea, Ms. Marah expressed her surprise that the applicants conceded that there was a loan guarantee, yet

they pretended not to know the basis of the loan guarantee fees debited to their account.

On the other hand, Ms. Marah submitted that the application was devoid of merit in respect of the 2nd respondent, as it concerned the mortgaged properties on which her client was not privy. She therefore prayed for its dismissal with costs.

In his rejoinder, Mr. Machibya started by challenging the documents attached to the 2nd respondent's counter affidavit for being old documents of 2016 and 2017. He said the annexures were related to an overdraft and not the term loan of 2019 which is in the current dispute. He clarified that from 2019 the term loan had no guarantee of the 2nd respondent. That, it was renewed in 2020 and the 2nd respondent chipped in in 2021 without any agreement and without knowledge of the applicants. For this reason, he argued that the counter affidavit of the 2nd respondent was misplaced.

Mr. Machibya vehemently denied that he had made an admission of the 40% of the loan being guarantee by the 2nd respondent. He clarified that he

was referring to the counter affidavit of the 1st and 3rd respondent and was not making an admission that the loan was so guaranteed.

Regarding the contention that the application had not met the conditions set in **Atilio v. Mbwe**, Mr. Machibya strongly objected. On the first condition, he rejoined that since the applicants and the 1st and 3rd respondents have exchanged complaints as to who frustrated the restructuring of the loan, that proved existence of a serious triable issue. He added that the loan agreement (MPA-1) under para 2.1(a), prohibited disbursement to a third party. For this reason, he reiterated that the first condition was met.

Regarding the cases cited by Mr. Songea, Mr. Machibya rejoined that all the cases are not binding but were persuasive and distinguishable too. He said, in the case at hand the triable issue was very clearly admitted in the pleadings of 1st and 3rd respondents, that there was frustration of the agreement between the parties. He added that, the question as to who to blame shall be determined in the main suit. With this explanation, Mr. Machibya submitted that the second condition was also met.

On the third condition, regarding irreparable loss, Mr. Machibya pointed out that Mr. Songea had not addressed the concern of the 1st applicant, that the business of the 1st applicant would be completely ruined. He referred to annexure MPA-9, being a letter from the 1st respondent introducing the agreement (MPA-1) to NBC, which he said, Mr. Songea had not mentioned. It was Mr. Machibya's argument that the arrangement was not a private one but was part and parcel of the arrangement between the 1st applicant and the 1st respondent.

Regarding compensation to the applicants if they won the main suit, Mr. Machibya rejoined that that statement was from the bar as it was not stated in the counter affidavit. He again pointed out that, Mr. Songea had not replied to his submission that the mortgaged properties are concerned with the business of the 1st applicant, and to the submission that the main suit would be rendered nugatory if this application would not be granted.

He distinguished the case of **Christopher Chale** (supra) in that, while in this application the applicant has shown irreparable loss which he would suffer if the injunction was not granted, there was no such evidence shown in the cited case. He rejoined further that the allegation of the respondent

being the one who would suffer more on balance of convenience had not been pleaded in the joint counter affidavit. He insisted that the applicants would suffer more hardship, including making the main suit academic and completely ruining the business of the 1st applicant, TBL and NBC.

Mr. Machibya further rejoined that the agreement between the parties in 2018 changed completely the loan terms between the 1st applicant and the 1st respondent, adding that there was no any reference to the previous loan or any previous deed of settlement. He wound up his rejoinder by submitting that the third condition was also met, hence prayed the court to grant the application with costs.

I have considered the application as submitted by Mr. Machibya as well as the opposition to it by Mr. Songea, and Ms. Marah, for the respondents. The issue here is whether the application has merit.

As correctly submitted by Mr. Machibya, for the applicants, in application of this nature the conditions set out in **Atilio v. Mbowe** should guide the court's decision, a position which the respondents' advocates appear to join hand with him. I would like to state in the outset that some

of the submissions made by the learned advocates could drag the court into considering issues reserved for the main suit. For example, I have noted the call to protect the banks against unscrupulous loan defaulters. It's a right call for the good of our economy and prosperity. However, for now, I shall have to resist any such temptation so as not to render this Ruling injudicious, prejudicial or biased. For this reason, the court shall confine itself to the prayers before it and how the same are supported by the pleadings and the law. Certainly, time will come for determination of the rest of the issues comprising the main dispute.

In this application, the court is called upon to decide whether or not to grant a temporary injunction, pending determination of the main suit. There is no dispute that the Land Case No. 20 of 2022 between the two sets of parties as herein is pending for determination before this court. What has prompted the applicants to file this application is the urge to prevent the respondents, the 1st and 3rd respondent to be precise, as well as their agents, assignees, workmen or any other person acting under their authority from auctioning, appropriating, disposing or dealing in any way with the properties at the cited plot locations in Kibaigwa, in Dodoma region, pending the hearing and determination of the Land Case aforesaid.

I have carefully considered the submissions by both sides on whether or not the application has met the conditions set out in **Atilio v. Mbowe**. With regard to the first condition, I agree with Mr. Machibya that there are, indeed, triable issues to be resolved as to whether the applicants have failed to honour their obligation to service the loan; who between the 1st applicant and the 1st respondent frustrated the loan agreement; whether the 1st respondent had a right to deduct the fees paid to the 2nd respondent under the current term loan agreement. Mr. Songea had submitted that no serious triable issues have been shown. With respect, I differ with him as I find there are serious issues emanating from the letter and spirit of the term loan agreement, with each side holding their own positions.

Existence of serious triable issues may not be enough, though absolutely necessary for the court to grant temporary Injunction. The second condition also needs to be established, to the satisfaction of the court. The condition that irreparable loss would ensue if the injunction would not be granted, has also been shown in this application. I have considered the position in **Christopher P. Chale** (supra) that an order for temporary injunction should not be granted where a loss can be monetarily

compensated. On this argument, I can only say that each case has to be determined on its own set of facts and obtaining circumstances.

In this application, Mr. Machibya has been able to show the extent of loss that may ensue, including the business of the 1st applicant being completely ruined. I also agree with him on the argument that the issue of compensating the applicants if they won the main suit was not part of the pleadings of the 1st and 3rd respondent. It appears to have come as an afterthought, and from the bar. I accordingly disregard this argument as I find the second condition satisfactorily met by the applicant.

In **Astepro Investment Co. Ltd v. Jawinga Co. Ltd**, Civil Appeal No.8 of 2015, (unreported), the Court of Appeal stated that it is;

"...a cherished principle in pleading that, the proceedings in a civil suit and the decision thereof, has to come from what has been pleaded, and so goes the parlance 'parties are bound to their own pleadings'".

As regards the third condition, it is apparent from the counter affidavit of the 1st and 3rd respondents that the argument the 1st respondent would suffer more on balance of convenience, was not from them. It is another statement from the bar. As correctly submitted by Mr. Machibya, the joint

counter affidavit of the 1st and 3rd respondent states that the 1st respondent was exercising her rights under the mortgage. It is true that if the application would not be granted, the applicants would suffer more, not only through loss of the mortgaged properties but disruption of the business arrangement of the 1st applicant with TBL and NBC, an arrangement which the 1st respondent appeared to endorse vide annexure MPA-9.

The above said, I think, on the balance of convenience, the applicants are likely to suffer greater hardships than the respondents if the injunctive order is not granted. For all these reasons, I find merit in this application and the same is accordingly granted.

Consequent to the above, I hereby grant a temporary injunction against the respondents, their agents, assignees, workmen, or any person acting under their authority from auctioning, appropriating, disposing or dealing in any way with the properties at Plot No. 6 Block "G" Kisimani situated at Kibaigwa Urban, Dodoma Region; Plot No. 2 Block "A", Kibaigwa, Dodoma Region and Plot No. 4 Block "G" Kisimani -Kibaigwa Urban, Dodoma Region pending the hearing and determination of the Land Case No. 20 of 2022 between the parties which is pending before this court.

Before I wind up this Ruling, there is an issue raised by Ms. Marah that the 2nd respondent ought not to be dragged into this application since the same is about mortgaged properties to which the 2nd respondent has no connection. She prayed for costs. I agree with Ms. Marah that surely the 2nd respondent isn't a necessary party in this application. Order 1 rule 3 of the Civil Procedure Code [Cap 33 R.E 2019] is concerned and the case of **Amon V. Raphael Tuck & Son** (1956) All E. R 273 sufficiently explains it. In this cited case, at p. 287, Delvin, J. had this to say;

"The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the results of the action and the question to be settled. Therefore, there must be a question which cannot be effectually and completely settled unless he is a party".

With the above explanation, I think it was not necessary for the 2nd respondent to be made a party in this particular application. The application could be determined without her being joined. For this reason, the prayer for costs merits, and I accordingly grant it.

Otherwise, the costs for rest of the parties to be in the main suit. It is so ordered.

Dated at Dodoma this 24th day of October, 2022.



A handwritten signature in blue ink, appearing to read "Abdi S. Kagomba".

ABDI S. KAGOMBA

JUDGE