

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**(DODOMA DISTRICT REGISTRY)
AT DODOMA**

MISC. CIVIL APPLICATION NO. 43 OF 2021

(Originating from Civil Case No. 5 of 2021 in the High Court of Dodoma)

RAMADHANI SALUM KIMOLO..... APPLICANT

VERSUS

NATIONAL BANK OF COMMERCE LTD.....1ST RESPONDENT

HARVEST TANZANIA LTD.....2ND RESPONDENT

RULING

31/03/2022 & 05/05/2022

KAGOMBA – J

Vide a chamber application made under Section 68 (e), Order XLIII Rule (2), Order XXXVII Rule (1) (a) and (b) as well as Section 95 of the Civil Procedure Code, [Cap 33 R.E 2019] (the "CPC"), RAMADHANI SALUM KIMOLO (the applicant) seeks an interim order of this court to stay, suspend and/or restrain the NATIONAL BANK OF COMMERCE LTD and HARVEST TANZANIA LTD (the 1st and 2nd respondent, respectively) from auctioning the properties which were furnished as securities for a loan taken by the applicant from the 1st respondent. The said properties are listed as follows;

- a) Property registered under Certificate of Title No. 9227-DLR, Plot No. 5 Block "R", Mlimwa East Area, Dodoma Municipality.
- b) Property registered under Certificate of Title No. 4315-DLR, Plot No. 31 Block 11 Makumbusho street, Dodoma Municipality.
- c) Property registered under Certificate of Title No. 13711, Plot No. 22 Block D, Mlimwa West, Dodoma Municipality.

- d) Property registered under Certificate of Title No. 5315, Plot No. 3 Block "74" Chinangali East, Dodoma Municipality.
- e) Any other property that may be intended for recovery of the loan in the form of overdraft facility under this suit.

Or, enforcing repayment of the loan facility extended by the 1st respondent to the applicant as per the schedule of loan repayment, until the main suit filed by the applicant, which is pending before this court, is heard and determined on merits. The applicant also prayed for maintenance of status quo and any other order the court may deem fit and just to grant.

The application is supported by the affidavit of the applicant which reveals that the applicant had secured four loans in a form of an overdraft facility, by way of topping up, amounting to TZS 380,000,000/= (The hundred eighty million) from the 1st respondent, who had issued through the 2nd respondent, a 14-day notice of intention to dispose of the mentioned securities to recover the said loan following applicant's default.

The affidavit further reveals that all the listed properties were duly issued as security for the said loan and necessary documentation were duly executed.

The applicant however, states in paragraph 5, 6 and 7 of the affidavit that his failure to repay the loan within agreed schedule was due to some events of frustration of the contract, namely; sesame seeds bought by the applicant for reselling were found to contain unacceptable amount of

sand; 60 tons of pigeon peas were stolen on the way to delivery, leading to a loss of more than Tanzania Shillings 359.7 million; instability of price as a result of declining demands and change of quality of products which affected most exporters.

The applicant named the above reasons as “unexpected events” which caused him huge loss, hence unable to meet his repayment obligation. That, he had informed the 1st respondent and requested for rescheduling of payment and waiver of interest, if possible, but the 1st respondent had neglected, refused and/or ignored the applicant’s request.

During hearing of the application, Mr. Ezekiel Amon, the learned advocate for the applicant submitted his views that the application had met the three criteria for issuance of temporary injunction as stated in the case of **Atilio V. Mbowe (1969) HCD 284**. Firstly, that, the reasons stated by the applicant in paragraph 5, 6 and 7 of the affidavit raised a serious question as to whether the loan issued by the 1st respondent was frustrated by the mentioned events.

Secondly, that the applicant had shown that court interference was necessary to protect his right, as the circumstances stated in the affidavit were beyond the control of the applicant.

Thirdly, that, the houses offered as loan securities belonged to some guarantors as well as the applicant himself, who were residing in those houses with their families. He argued that if they are sold the residents

therein will suffer eviction. On the other hand, he submitted that the 1st respondent is covered by an insurance under the overdraft agreement.

Mr. Mazoea Africa, also learned advocate, appeared for the respondents. He vehemently opposed to the submission by the applicant's advocate on the last criteria, that it's the applicant who would suffer greater hardships if the application was rejected. He submitted that the principle of irreparable loss adduced by the applicant's advocate was misplaced in that, it was the 1st respondent who will suffer irreparable loss if the injunction order will be granted. He had reasons to back his assertion, as follows: -

Firstly; that, the applicant wanted to keep both the loan availed to him as well as security for the said loan, which would mean that there was completely no loss to be suffered by him.

Secondly; that, the 1st respondent being a bank, will suffer more because the only way for the bank to recover the loan is by selling the securities. For this reason, Mr. Africa submitted that the applicant's prayer to restrain the respondents from advertising, attaching and selling the loan securities was detrimental to the 1st respondent's business. At this juncture, he referred this court to the case of **General Tyres East Africa Ltd V. Hsbc Bank Plc** [2006] TLR 60 where this court held that for the bank to continue with its banking business it had to recover the loans, and that it therefore was unreasonable to restrain its recovery of the loans.

Thirdly; that there was clear admission by the applicant of his failure to remit to the 1st respondent the loan amount of Tanzania Shillings 380,000,000/= as per agreed loan repayment schedule, while he was aware that the loan amount was secured by the securities listed in his affidavit and that the loan was subject to terms and conditions as contained in the loan facility instrument. He referred to the case of **Hydrox Industrial Services Ltd & Dickson Kashura V. CRDB (1996) Ltd & 2 Others**, Civil Case No. 194 of 1999, a decision of the High court, to argue that the applicant was seeking for court assistance to enjoy his default, while courts should not be places to hide.

Mr. Africa dismissed the loss allegedly suffered by the applicant as a fact known to the applicant himself and was none of the business of the 1st respondent. He therefore concluded that the criteria set in the case of **Atilio V. Mbowe** (supra) have not been met by the applicant. On this point Mr. Africa referred to the case of **SJ3 Iwawa's Company Ltd Vs Access Bank Tanzania Ltd**, Misc. Civil Application No. 387 of 2019, High court Dar es Salaam. He accordingly prayed this court to dismiss the application with costs.

Mr. Amon rejoined by first distinguishing the case of **Hydrox Industrial Services Ltd** (supra) with the application before the court. He said that that case was not on application for a temporary injunction but was the main case.

He also sought to distinguish the case of **SJ3 Iwawa's Company Ltd** (Supra) for having ruled that a case can be dismissed when the applicant

has failed to established the three conditions set in **Atilio V. Mbowe** (Supra). He also said the case of **SJ3 Iwawa's Company Ltd** (Supra) is not binding on this court.

On the inference that the applicant is trying to hide in court, Mr. Amon submitted that the allegation of applicant trying to hide in court will be determined in the main suit. He equally down played the case of **General Tyres East Africa Ltd** (Supra), for the same reason.

For the remaining part of his rejoinder, Mr. Amon reiterated what he submitted in his submission in chief and rested his case by praying the court to grant the application pending determination of the main suit where the rights of both parties will be argued and determined.

Having carefully gone through the submissions by both advocates and after further perusal of the pleadings, the main issue to be determined is whether the applicant has met the established criteria for the court to grant him the prayer for a temporary injunction.

In determining the above issue, I shall direct my mind to the criteria stated in **Atilio V. Mbowe** (supra) and consider them one by one.

Firstly, on the existence of a serious question to be tried by the court in respect of the facts alleged by the applicant, I must confess that I see no any serious question arising from the stated facts. This is because, the applicant has made an admission in his affidavit that he took a loan from the 1st respondent; he pledged the landed properties as security for the

said loan and he has defaulted on the payment as per agreed schedule. The only fact worth consideration by this court is what is averred in paragraph 6 of the affidavit that he "faced challenges as a result of instability of price of sesame oil seeds due to the fact that the above products are mainly for export purpose".

Such an assertion raises, to a certain degree, a reasonable question as to whether the loan agreement was thereby frustrated. Since, I cannot go into details of this matter at this stage, justice requires that the applicant be given an opportunity to be heard on this matter for the court to be able to appreciate the claim he may have.

As to the second criteria that the applicant has to show the need for court's interference to protect his right, I think the applicant has demonstrated that if the application is not granted the landed properties registered as loan securities will be disposed by the applicant. It is the view of this court that such a disposal should only be done if the issue of frustration of loan agreement has been duly heard and determined.

As for the third and last criteria regarding who will suffer the most if the application for temporary injunction would not be granted, I should again confess that the submission by Mr. Africa was very impressive. He said that the only way for the 1st respondent to recover the loan is through the sale of the pledged securities. I have read the authorities submitted by Mr. Africa in regard and I subscribe fully to the core principle stated therein, that banks have a right to be protected from borrowers who would wish to seek refuge in courts of law after breaching their obligations

under loan facilities agreements. Protection of banks is, obviously, the protection of the national economy. It is a matter of life and death which may not be fully appreciated unless an economy suffers from a terrible collapse of its banking sector.

With the above position in my mind, I think to strike a balance between the applicant's right of protection through injunctive orders, and protection of banks as aforesaid, this application has to be granted with a condition that the temporary injunction shall remain temporary indeed. The court shall achieve this balance by expediting the determination of the main case in every way possible.

Accordingly, the application for interim order is granted. Costs to follow events.

It is so ordered.

Dated at Dodoma this 05th day of May, 2022.




ABDI S. KAGOMBA
JUDGE