

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF DAR ES SALAAM**

**AT DAR ES SALAAM**

**MISCELLANEOUS CIVIL APPLICATION NO. 584 OF 2021**

**[Arising From Civil Case No.176 of 2021]**

**BETWEEN**

**COSMOSS PROPERTIES LIMITED.....APPLICANT**

**VERSUS**

**EXIM BANK TANZANIA LIMITED.....RESPONDENT**

**RULING**

**MRUMA, J**

This Application is brought under **Order XXXVII Rules 1 (a) (b) 2 (1)** and **Sections 68(c) and 95 of the Civil Procedure Code Cap 33 R.E. 2019** and **Section 2(3) of the Judicature and Application of Laws Act Cap 358 R.E. 2019**. The Applicants are seeking from this court the following orders:

1. A temporary injunction order restraining the Respondents, its directors, employees, servants, agents and/or assignees and whomsoever is appointed or instructed by any Respondent from in any manner surveying, demolishing, cancelling and disposing transferring any of those titles

with CT. No. 38083 with sub-titles Nos. 4, 10, 11, 17, 18, 23, 89, 127, 128, 129, 133,134,135, 136, 138, 161, 162, 176, 31, 32, 33, 36,38, 215, 216, 217, 206, 207, 208, 209, 210, 211, 212, 218, 219, 220, 221, 222, 223, 224, 225, 214, 180, 205, 213, 131, 198, 201 and 204;

2. That the cost of this Application be in the cause and;
3. The honourable court be pleased to grant such other orders as it may deem fit, proper and just in the circumstances.

The grounds for the Application are set out in the affidavit sworn by Festor Silvester, principal officer of the Applicant and are briefly as follows; That on 4<sup>th</sup> September 2018 vide an offer letter with reference number EX/CD/408/2018 and OL/DSM/219/2018 respectively the Respondent offered a term loan facility to the Applicant worth United States Dollars 5,340,000.00 which were to be repaid on or before 31<sup>st</sup> December, 2019. That subject to issuance of the said loan facility, the following properties were mortgaged as security, those are Title with CT. No. 38083 with sub titles No. 4, 10, 11, 17, 18, 23, 89, 127, 128, 129, 133, 134, 135, 136, 137, 138, 161, 162, 176, 31, 32, 33, 36, 38, 215, 216, 217, 206, 207, 208, 209, 210, 211, 212, 218, 219, 220, 221, 222, 223, 224, 225, 214, 180, 205, 213, 131, 198, 201, and 204.

It is the Applicant's contention that in 2020 it requested for and the Respondent accepted the restructuring of that loan facility. According to the Applicant in the restructured loan it was agreed that 2% would be the interest rate from the date of restructuring and that 8% interest rate was to revert in the event the Applicant defaulted to

honour the offer terms which terms were to expire on 30<sup>th</sup> June 2021. The Applicant contends that in the meantime her businesses were adversely affected by the Corona Pandemic as a result of which her loan repayment ability was incapacitated the fact which was duly communicated to the Respondent.

It is further averred that there were other financiers who were interested to settle the Applicant's outstanding balance with the Respondent and the Respondent was duly informed about that arrangements and that negotiations were going on with the said financiers. According to the Applicant the said financiers were interested to settle her term loan with the condition of buying her properties but without dealing and engaging with the bank in any way.

In January, 2021 the Applicant requested to swap some 17 titles for purposes of sale and were to be replaced with original Title No. 186165/18 of a residential bungalow situated at Plot No. 82 Lugalo street Upanga Dar Es Salaam which had overall market value of USD 5 Million at the time of request compared to 17 titles which had overall market value of USD 4 Million. Through their letter to the Applicant dated 21<sup>st</sup> January, 2021 the Respondent indicated that they had no objection to the proposed swap provided that they are availed with details of the potential buyers in which the Applicant had informed them that the buyer didn't want to meet and be involved with the bank at any stage.

It was further assertion of the Applicant that having requested and agreed to swap its titles which had higher value than those of 17 titles mentioned in these pleadings, the Respondent had no justification to refuse, delay and or deny the swap deal other than accepting the deal without giving any condition because the title to be swapped from the Applicant was of higher value than those with the Respondent. Being aggrieved by the conducts of the Respondent, the Applicant filed Civil Case No. 176 of 2021 seeking for the following orders:

- i. A declaration that the conducts of the Respondent herein who is the Defendant in the suit are unjustifiable an unlawful;
- ii. A declaration order that the Defendant's refusal to swapping the title caused and /or frustrated the Applicant's (i.e. Plaintiff in the suit) loan repayment plan and opportunity;
- iii. A declaration that the Defendant's conduct complained of are being made in bad faith to deny the Plaintiff's right to dispose and obtain better price;
- iv. Payment of T.shs 1 billion as general damages;
- v. Payment of T.shs 1 Billion as general damages
- vi. Costs of the suit and;
- vii. Any other reliefs.

While the suit is pending, counsel for the Applicant has filed this application seeking for temporal orders to restrain the Respondent from dealing with the listed properties as stated at the outset of this ruling.

Counsel for the Respondent filed an affidavit in reply opposing the prayers in the Chamber summons. The counter affidavit is sworn by Mr Edmund Mwasaga, principal officer of the Respondent's Bank.

I have taken note of the several grounds supporting the Application but I am of the view that these grounds can be adequately summarized under the question whether the conditions for granting temporary injunction had been met in this case. The law on temporary injunctions is spelt out under Order 37 Rule 1(a) and (b), 2(1) of the Civil Procedure Code provides as follows;

*“Where in any suit it is proved by affidavit or otherwise-*

*(a) that any property in dispute in a suit is in danger of being wasted. Damaged, or alienated by any party to the suit or suffering loss of value by reason of its continued use by any party to the suit or wrongly sold in execution of a decree or;*

*(b) that the defendant threatens or intends to remove dispose of his property with a view to defraud his creditors;*

the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of

the property as the court may deem fit, until the disposal of the suit or until further orders”.

From the above quoted provisions of the law it can be deduced that the purpose of the temporary injunction order is to preserve the status quo of the suit property until the parties’ rights in the subject matter are determined in the main suit. The conditions to be satisfied by a party seeking temporary injunctive order have been discussed in several cases based majorly on Order 37 Rule 1 of the Civil Procedure Code including the famous case **of Atilio Vs. Mbowe (1969) TLR 17** which laid down the conditions for a grant of an order of a temporary injunction to be;

- 1. The applicant must show a prima facie case with a probability of success.*
- 2. The applicant is likely to suffer irreparable injury.*
- 3. When the court is in doubt, it will decide the application based on the balance of convenience. ’*

I have perused the pleadings and the submissions filed by Counsel for the parties in these proceedings and I shall proceed to apply the facts adduced to the application and scrutiny to see whether the requirements have been met. To do this, I shall rely mainly on the principal laid down in Atilio Versus Mbowe’s case (supra). The most

important purpose of the grant of temporary injunctions is as I have just said is to preserve the matters in status quo until the question to be investigated in the main suit is finally disposed of.

In my view in considering whether to grant or not to temporary injunction orders in the circumstances a case like this, where the Applicant admits that she has defaulted and has failed to repay his debt or service his loan on time, court should largely put emphasize on condition number three namely the balance of convenience. To hold otherwise will be tantamount to court imposing terms and conditions of the agreement which was not agreed by the parties. That is not the duty of the court. The duty of the court is limited to interpreting and enforcing agreed terms and conditions.

Now on the first principal of prima facie case, the applicant is duty bound to show that there is a prima facie case in the substantive suit with a probability of success. At this stage, court does not delve deep into the merits of the case to see if the Applicant has a plausible case rather, court determines that the claim is not frivolous or vexatious and that there is a serious issue to be determined at the trial.

I have perused the pleadings of the parties in the application and the plaint indicates that the Applicant is complaining of the Respondent's refusal or denial to a swap deal. A quick perusal of **the Letter of Offer (Annexure MOP-1 to the Chamber summons)** which is a contract that states the terms of the loan package offered by the Respondent's

bank to the Applicant after approval of the loan application, and I find nothing suggesting that swapping of titles was among the terms and/or conditions of the parties' contract. The Letter of Offer simply touched the loan amount, the loan tenure, interest rate and repayment mode together with other terms and conditions but it has nothing about swapping which entails surrendering some mortgaged titles and receive some other titles in exchange. Thus, without deeply delving into the merits and plausibility of the case which is pending, whereas I may say that the refusal to swap may constitute a prima facie case, I am not at this stage prepared to hold that it has a probability of success or hold that that alone is suffice to warrant court to grant temporary injunction orders sought. To do so will have the effect of predetermining the main suit which is pending.

Regarding the second principal of irreparable injury, irreparable injury does not mean that there must not be physical possibility of repairing the injury but means that the injury must be a substantial or material one that is to say, one that cannot be adequately compensated for in damages. In **American Cyanamid v Ethicon Limited 1975 AC at page 396**, court noted that the injunction would not be granted;

*'If damages in the measure recoverable at common law would be adequate remedied and if the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage'.*



Such damage is usually not reversible and cannot be quantified. An injunction is therefore necessary to protect the parties from such harm. In the case at hand it cannot be said that the Respondent would not be in a financial position to compensate the Applicant if injunction is denied. As I have just stated here is a situation where the bank debtor admits that he has failed to repay his debt on time and that he is trying to procure another financier who is ready to pay to him but who is not ready to be exposed to the bank. I think the bank was entitled to refuse the swap under those conditions because it has the right to know the person she is dealing with. The duty of the court is to interpret the terms of the parties' agreement and protect their rights in accordance with what they have agreed. Issuing a temporary restraining order to restrain one of the parties from exercising her rights under the same agreement in a circumstance like this would be tantamount to having the Court interfere with the parties' agreement.

In the instant application, the plaintiff/ applicant's cause of action as indicated under paragraph 12 of the plaint the Defendant had no justification to refuse delay and or deny the swap deal other than accepting the deal without giving any condition because the titles to be swapped from the Plaintiff was of higher value than those with the Defendant hence no risk on the part of the Defendant in terms of security valuation over the loan secured. At this stage of the trial it is not possible to adequately quantify the damage that would be suffered and in any event the respondent is financially fit to remedy the injury in the event the Applicant suffer due to refusal to grant the injunction sought. I am satisfied that the applicant has not demonstrated sufficiently that she would suffer irreparable injury if the injunction is not granted.

Having answered question 1 in the affirmative and question 2 in the negative, the next question to be considered is on which part the balance of convenience tilt. In paragraph 3 of the Written Statement of Defence it is stated that the pleaded properties were all mortgaged to secure credit facilities and that the Plaintiff is in default to honour the terms and conditions on repayment of the credit facilities advanced to her (See paragraph 8 of the written statement of defence).

In her reply to the Defendant's written statement of defence, the Plaintiff didn't specifically deny to be in default. It is my finding that the balance of convenience is tipped in favour of the Respondent who is the person in possession of the property. Court's duty is only to preserve the existing situation pending the disposal of the substantive suit. In exercising this duty, Court does not determine the legal rights to property but merely preserves it in its actual condition until the rights of the party can be established or declared. Balance of convenience literally means that if the risk of doing an injustice is going to make the applicant suffer then probably the balance of convenience is favourable to him/her and the court would most likely be inclined to grant to him/her the application for a temporary injunction. On the other hand if the risk of doing injustice is going to make the Respondent suffer then the balance of convenience is favourable to him.

In the present case, parties are in agreement that the listed properties are mortgaged to the Respondent and that the plaintiff is in default. The court has a duty to protect the interests of parties pending the disposal of the substantive suit. In my view, the legal rights of the parties in this case demands that temporary injunction be denied. If

temporary injunction is granted against the Respondent in a case where the Applicant is admitting to be indebted and the properties against which the injunction is sought have valid legal charges over them, then she will suffer injustice.

In conclusion I decline to grant the temporary injunction sought by the Applicant. Accordingly the Application is dismissed. Costs will be in the cause.



A handwritten signature in black ink, appearing to read "A.R. Mruma", is written over a light blue circular stamp.

**A.R. Mruma,**

**Judge**

Dated at Dar Es Salaam, this 21<sup>st</sup> Day of April, 2022.