

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM REGISTRY)
AT DAR ES SALAAM
MISC. LAND APPLICATION NO. 55 OF 2020**

**MSIMBAZI CREEK HOUSING ESTATE
LTD.....APPLICANT**

VERSUS

**KEDS TANZANIA COMPANY LTD.....1ST RESPONDENT
STANDARD CHARTERED BANK LTD.....2ND RESPONDENT**

R U L I N G

Date of last Order: 13/12/2021

Date of Ruling: 18/02/2022

MGONYA, J.

Before the Court is the Temporary Injunction Application by the Applicant **MSIMBAZI CREEK HOUSING ESTATE LTD** made under **Order XXXVII 2(1) and sections 68(e) and 95 of the Civil Procedure Code, Cap. 33 [R. E. 2019]**.

The Application is supported by an Affidavit duly affirmed by **YASIRALI JAHANGIR POPTANI**. It is from the said Affidavit, the Applicant herein affirmed that, he is the Director to the Applicant who is well conversant with the facts deponed.

The gist of the Applicant's Application of which was brought under a Certificate of Urgency is to seek for an injunctive order to prevent the Respondents from interfering in any way with the escrow funds deposited by the 1st Respondent into the Escrow Account held by the 2nd Respondent.

In the preliminary stage of this matter, on 22nd December, 2020, after the service of the Respondents and upon their absence in court, the court satisfied itself and the matter was heard *Exparte*. In the proceedings, the Applicant prayed for an interim order of the maintenance of the *status quo ante* in respect of the Escrow Account named **KEDS TANZANIA/MSIMBAZI CREEK/SCB** where the same was granted.

On 12th May, 2021, before the Applicant's Advocate Mr. Shuma Kisenge and learned Counsel John James who was representing both Respondents, this honorable court ordered the Application be disposed through written submissions. It is from the records of this court that only the Applicant has adhered to the said order where the same was not the case by both Respondents. Despite of the failure to file the written submissions by the Respondents as ordered by this court, the Application before the court deserves to be determined. Hence this *Exparte* Ruling.

I have read the facts deponed in the attached Affidavit duly deponed by the Applicant herein. It came to the knowledge of this honourable court that the controversy between the parties emanated from the 2nd Respondent's notice to the Applicant's bank, Diamond Trust Bank Ltd through its email dated 16th November, 2020 concerning the intended termination of the Agreement for sale an account of a *force majeure* situation. As a result, the Parties herein are said to have also entered to Escrow Account Contract to safeguard the interests of parties herein.

Submitting for the instant Application, the Applicant admitted further that, indeed in the Court Order there was an error of the single digit to the Escrow Account number of which was not supposed to be an issue as the Parties to the Account are known even to the 2nd Respondent who is the custodian of the same, the fact which is supported by this Honourable court as to any reasonable man could have acted promptly and diligently and professionally. However, that was not the case.

The Applicant further submits that the Order was served on the Respondents on 23rd December, 2020, during business hours and before the alleged expiry of the Escrow Account, and therefore the 2nd Respondent had a reasonable opportunity to seek a correction,

except that its conduct may have been informed by a prior decision to avoid having to obey the Order.

Further, it is the Applicant's view that, the 2nd Respondent being seasoned bankers, should have immediately recognized the gravity of the Court order and the objective for which it was intended to serve and sought a clarification from the Court instead of rejecting the same.

Submitting further, the Applicant's Counsel informed this court that the objective of seeking an Order for securing the escrow account pending the determination of the main suit remains. Thus the obligations of the Respondents to ensure the integrity of the account remain undischarged, and hence the need for this Honorable Court to issue a conservatory Order to secure the account and an injunctive order to prevent the Respondents from interfering with the account. The reasons given by the Applicant are as below:

- i. The order of 22nd December, 2020 was served on the Respondents before the expiry of the **180 days**;
- ii. While the Order contained a clerical error in the number of the account, the Respondents failed to act quickly by seeking a clarification from the Court;

- iii. By responding on 8th January, 2021, **two weeks after** the date of the Order that they were unable to obey the order, the Respondents showed an uncharacteristic contempt for due process, especially considering that they were both aware of the main case pending before the court;
- iv. The Applicant is seeking not to withdraw any funds from the Account pending the final determination of the rights of the respective parties;
- v. The Respondents will not suffer any harm or be exposed to any risk if the Court issues its orders prayed for by the Applicant.

In the event therefore, the Applicant is praying that this Court be pleased to issue the following orders, namely:

1. An order that the *status quo ante* in respect of Escrow Account **No. 87-020-222340-01** in the name of **KEDS TANZANIA/MSIMBAZI CREEK/SCB** opened by the 2nd Respondent be maintained pending the determination of the main suit;
2. Costs to be in the cause;
3. Any other reliefs that this Court will see it fit and just to grant.

Thus, at this juncture, as this is an application for Injunctive Orders, I will start by expressing the Principles governing an order for temporary injunction which are generally founded under three main grounds.

Firstly, the Applicant should show a *prima facie* case with a probability of success against the Respondent. **Secondly**, the Applicant should prove that if the application is not granted the injury that would be suffered would be irreparable by way of damages. **The third** principle one is the balance of convenience; that the Applicant would stand to suffer greater hardship if the order is refused than what the Respondent would suffer if granted.

As well said by parties, these principles were well established in a number of cases including case of ***ATILIO VERSUS MBOWE 1969 HCD 284***. Others are ***GIELA VS CASSMAN BROWN & CO LTD (1973) E.A 358, AND GAZELLE TRUCKER LTD VERSUS TANZANIA PETROLEUM DEVELOPMENT CORPORATION, Civil Application No. 15 of 2006*** to mention a few.

These principles were also expounded in the book of ***SOHONI'S LAW OF INJUNCTIONS; Second Edition: 2003 at page 93*** where the learned Author expounded:

"The principles on which the exercise of discretion rests are well settled. The said principles have been outlined as hereunder.

They are-

- (i) In the facts and circumstances of each individual case there must exist a strong probability that the petitioner has an ultimate chance of success in the suit. This concept has been otherwise expressed by saying that there must be a prima facie case.*
- (ii) As the injunction is granted during the pendency of the suit the court will interfere to protect the plaintiff from injuries which are irreparable. The expression irreparable injury means that it must be material one which cannot be adequately compensated for in damages. The injury need not be actual but may be apprehended.*
- (iii) The court is to balance and weigh the mischief or inconvenience to either side before issuing or withholding the injunction. This principle is otherwise expressed by saying that the court is to look to the balance of convenience."*

It has to be noted that, all the three above principles must be met before a temporary injunction can be granted.

Now in applying these principles to the case at hand, I will strictly confine myself with the above mentioned principles in its pure meaning as above illustrated in determining the matter at hand. To start with, the first issue to deal with is as to whether the Applicant has established a *prima facie* case.

Since at this stage of proceedings the Affidavit is the only evidence upon which the Application is pegged of course the controversy can only be appreciated by traversing the **16** paragraphs therein. And since the Application stood uncontested as the Respondents have opted not to file written submissions in respect of the application, then I will gauge the grant or otherwise of the Application in accordance with the above three principles concerning the grant of temporary injunction.

In determining the first principle of establishment of a *prima facie* case or rather a serious question with a probability of success, the Applicant cannot escape from showing two things:

- i. The relief sought in the main suit is one which court is capable of awarding; and***
- ii. The Applicant should at the very minimum show in the pleading that in the absence of any rebuttal evidence he/she is entitled to said relief.***

In the case of ***AMERICAN CYANAMID VS. ETHICON [1975] I ALL E. R. 504***, it was stated that:-

"In order to grant a temporary injunction the court no doubt must be satisfied that the claim is not frivolous or vexatious."

In the same series, my learned brother Nsekela, J. as he then was in the case of ***AGENCY CARGO INTERNATIONAL VS. EURAFRICAN BANK (T) LTD, HIGH COURT, DAR ES SALAAM, Civil Case No. 44 of 1998 (unreported)*** when explaining what the Applicant is required to show said:

"It is not sufficient for the Applicant to file a suit with claims. The Applicant must go further and show that he has a fair question as to the existence of a legal right which he claims in the suit."

The task then before me is to exhaust and measure out from the submission elaborated by the Applicant whether the court has been referred to the reliefs sought in the main suit in order to look whether the claims made have elevated a serious question/(s) for determination by the court. Of course in the instant principle my task is to look at the reliefs sought in the main suit and the claims made and see if they raise a serious question for determination by

the court and then assess whether there is a justification for granting a temporary injunction.

Referring to the facts deponed by the Applicant in the Affidavit and some prayers in the main suit, in the submission before the court, the Applicant has raised the serious matter on the 1st Defendant's breach of the Sale Agreement and the Escrow Agreement between the Parties herein. It is from this factor and the contents of the breach, this court is satisfied that the Applicant has successfully established that there is a *prima facie* case that is fairly to be heard and determined to end the controversy between the parties. Thus **the first principle has been met.**

Further, out of the same, it is also obvious that, if the Application is denied, the Applicant will suffer irreparable loss as the amount involved in the sale transaction is huge. Further, on comparison as to who is going to suffer more between the parties, as day follows the night, it is my considered decision that the Applicant is the one who will suffer more than the Respondents if the prayer sought is denied. Consequently, **the 2nd and 3rd principles for grant of the temporary injunction has been met by the Applicant.**

At this juncture therefore, having weighed the facts in totality, I will hold that this is a fit case for temporary injunction because all the conditions for granting temporary injunction have been met.

Consequently, **I hereby grant the Application as prayed accordingly.**

For avoidance of doubt, an order that the *status quo ante* in respect of Escrow Account **No. 87-020-222340-01** in the name of **KEDS TANZANIA/MSIMBAZI CREEK/SCB** opened by the 2nd Respondent be maintained; and further the Respondents are hereby restrained from interfering in any way with the Escrow funds thereto deposited by the 1st Respondent into the Escrow Account held by the 2nd Respondent, pending the determination of the main suit, **Land Case No. 27 of 2020** before this honorable court.

I make no order as to costs.

It is so ordered.



L. E. MGONYA
JUDGE
18/02/2022

Court: Ruling delivered before Honourable Luambano-Deputy Registrar in chambers in the presence of Mr. Shuma Kisenge learned Advocate for the Applicant, also holding brief of Mr. John James learned Advocate for the Respondent and Richard –RMA.



A handwritten signature in blue ink, appearing to read 'Mgonya', is written above the printed name of the judge.

**L. E. MGONYA
JUDGE
18/02/2022**