

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

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 175 OF 2022

JALUMA GENERAL SUPPLIES LTD.1ST APPLICANT

FEREJI SAID FEREJI2ND APPLICANT

LUCAS PIUS MALLYA3RD APPLICANT

VERSUS

INTERNATIONAL COMMERCIAL BANK

OF TANZANIA LIMITED.....RESPONDENT

Date of the last order: 24/10/2022

Date of the Ruling: 17/2/2023

R U L I N G

MGONYA, J.

The Applicants filed this Application under **Order XXXVII Rule (1) (a) and Section 68(c) and (e) of the Civil Procedure Code Cap. 33 [R. E. 2019]**, praying for the following order:

"That this Honorable Court be pleased to order for Temporary Injunction order to restrain the Respondent, her agents, workmen, assignees and/or any other person working under her instructions or authority from executing her

intention to dispose landed property held under Certificate of Title No. 177932, Plot No. 4, LO. No. 920260, Block 34 Kariakoo Area, Ilala Municipality Dar es Salaam registered in the name of the 2nd Applicant pending hearing and determination of the main suit”.

The Application is supported by Affidavits duly affirmed by **FEREJI SAIDI FEREJI** the 2nd Applicant herein and sworn by the 3rd Applicant **LUCAS PIUS MALLYA** respectively.

The Applicants were represented by **Mr. Nobert Mwale** learned Advocate whereas the Respondent was represented by **Mr. Richard Madibi** learned Advocate. With the leave of the Court, the Application was ordered to be disposed by way of written submissions.

Submitting in support of the Application, the Applicant cited the case of ***ATILIO VS. MBOWE (1969) HCD 284*** which outlined necessary conditions for grant of temporary injunction; being establishment of the *prima facie case*, irreparable injury and the balance of convenience.

On *prima facie case*, the Applicants’ Counsel submitted that; the existence of *prima facie case* with triable issues can be derived from the pleadings; particularly in the Applicants’ Affidavits, the Counter Affidavit, Reply to Counter Affidavit and the supporting

documents annexed thereto. Further, that triable issues can be derived by looking at paragraphs **7, 8, 9, 10, 11, 12** and **13** of the Affidavit of Fereji Said Fereji the 2nd Applicant and annexure **A-7** thereto and paragraphs 6, 7, 8, 9, 10, 11, 12, 13 and 14 of the Affidavit of Lucas Pius Mallya the 3rd Applicant as well as annexure **A-7** thereto.

The Council also referred the court to the **Civil Case No. 58 of 2022** which concerns the instant Application and also pending before this Honorable Court between the same parties whereas the Applicants are challenging performance of the Overdraft Facility Agreement for its impossibility due to the Government's wrongful acts that frustrated its performance. Thus, it is the Applicants view that through the above avenues, Applicants have managed to establish that there is a *Prima facie* case before the case.

As for the second test of irreparable loss, the Applicant Counsel informed the court that, from the facts stated under paragraphs **2, 16** and **18** of the Affidavit of Fereji Said Fereji and also paragraph **18** of the affidavit of Lucas Pius Mallya, the suit property is a three-store building located at Kariakoo Area Dar es Salaam. Although its value is not stated, but given the commercial significance of Kariakoo Area, its value is no doubt, high. Further that the contents of paragraph 16 of the Affidavit of the 2nd

Applicant reveals that the disposition of the property will occasion irreparable loss to the 2nd Applicant unless the Respondent is restrained from doing so by a Court order. The court was referred to the case of ***KIBO MATCH GROUP LTD VS. HS IMPEX LTD [2001] TLR PAGE 152***, the High Court of Tanzania (Commercial Division) at Dar es Salaam where, his Lordship Dr. Bwana J; granting injunction order in favour of the Applicant, had this to say:

"The Court is satisfied that unless immediate action is taken, the applicant may suffer irreparable damage, whether quantifiable or not, and further the final decision would be rendered nugatory as consequence of not granting the temporary injunction"

Concluding on this point, it is the Applicant's counsel submission that the 2nd principle to Temporary Injection has similarly been met.

On the third test of balance of inconvenience, repeatedly, the Applicant's Counsel referred this court to paragraphs 16 and 18 of the Affidavit of the 2nd Applicant where it has been stated that the suit property is occupied by tenants. As such, any act and/or attempt of the Respondent to dispose the same, will occasion conflicts between the 2nd Applicant and the tenants. Further, that this fact may further compel the 2nd Applicant to terminate the

Lease Agreements with the tenants in occupation of the property. All these eminent occurrences which will bring a lot of hardship and inconveniences to the 2nd Applicant. On the other hand, Applicants averred that the Respondent will not have any hardships and inconveniences in case the order is granted like the fact which was supported by the High Court of Tanzania in case in ***John Pascal Sakaya Versus Azania Bank Limited*** (Unreported).

On the other hand, the Respondent's Counsel replying to the Applicants submission, prayed the court to adopt the contents of the Respondent filed Counter Affidavit sworn by **Vitalys Evarist Salimu** and form part of the Respondent's submission.

Referring to the 1st principle of granting this kind of Application being the establishment of the *prima facie* case, it is the Respondent's assertion that the Applicants have failed to establish that there are some bona fide contentions between the parties, or a serious question to be tried before the court. Further, that being the position, this Application is devoid of merits. To support their assertion, the Respondent's Counsel referred this court to learned Author **S. C. SAKAR** in his book **LAW RELATING TO INJUNCTIONS, CALCUTA S.C SAKAR 1992** at page 57 where he defined a *prima facie* case to be:

"Prima facie case means a case where there is a bona fide contentions between the parties or a serious question is to be

tried.....It would be sufficient for him to show that he has a fair question to raise as to the existence of the right he claims and that it is necessary in the interest of justice to preserve the said right till the disposal of the suit."

It is the Respondent's assertion that the Applicants have not advanced the *prima facie* case for them to be availed with the prayer sought.

Replying on the 2nd principle of irreparable loss, it is the Respondent's concern that, the 2nd Applicant is the lawful owner of the Mortgaged property, Plot No. Block 34, Kariakoo Area, Dar es Salaam. It is also a fact that the 2nd Applicant mortgaged the said property to secure the loan facility by the 1st Applicant from the Respondent. It is further a fact that the 1st Respondent have defaulted to repay the said loan owed by the Respondent.

Further, it is the Respondent's submission that there is no any injury which will be occasioned in case the temporary injunction is retrained by this Honorable Court on the grounds that in selling the said property, as the Respondent is exercising her remedies in the Mortgaged Deed as agreed between the parties. Further, the term cannot be termed to cause loss for something which the 2nd Applicant agreed to. Submitting more, the Respondent reminded the court that the 1st and 3rd Applicants are not the owner of the said mortgaged property. Thus they have nothing to lose once the

said property is sold by the Respondent. Moreover, the 2nd Applicant was aware of all the consequences of being a guarantor to the said loan facility and securing the same by his property as he accepted and allowed the Respondent to execute the mortgage documents.

Thus it is the Counsel's view that the 2nd principle to Temporary Injunction has not been met.

On the 3rd principle as to who, between the Applicants and the Respondent will suffer most if the injunctive orders are issued or refused; likewise, it is the Respondent's Counsel submission that under the given position and the relationship between the parties, it is the Respondent who will suffer hardship mischief when the prayer for Injunction is granted. Thus it is said that similarly the 3rd principle has not been met.

After Respondent's respective submission, the Court was invited to dismiss the present Application since the Applicant is said to have not satisfied the principles governing Temporary Injunction.

Thus, it is from this juncture, 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 both 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 Applicants' Affidavits are the only evidence upon which the Application is pegged, of

course the controversy can only be appreciated by traversing the **paragraphs** therein.

As it has been observed, the Respondent has seriously opposed the Application through a Counter Affidavit deposed by **VITALYS EVARIST SALIMU**, the Principal Officer of the Respondent.

Apart from responding the contents of Applicants' Affidavits in support of Application, it is a fact that the Respondent has literally showed that the Applicants' Application does not have merits as the money that have been advanced to the 1st Applicant has to be reimbursed to the Respondent as the agreement behind is contractual.

Now, from the above, the most important issue is whether the Applicant has managed to establish a ***prima facie*** case to command the issuance of an order sought pending the final determination of the main case before this honorable court.

In determining this principle of establishment of a *prima facie* case or rather a serious question with a probability of success, the Applicants 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.

At this juncture, I would like to refer to the contents of two Affidavits that is by the 2nd and 3rd Applicants. It is from there, I have been privileged to read the history of the business that was carried out by the 1st Applicant and Respondent herein of which is termed to use to be straight and good business relationship as the money advanced to the 1st Applicant used to be remitted timely without any failure before the very unfortunate situation conducted by the Government Task Force. From the contents of the said Affidavits, indeed there is a need for the Main Case to be heard not only by its merits but most of all in a much harmonized situation where the Applicants can seek remedy of their claims from the appropriate parties.

It also came to my knowledge that the Plaint in **Civil Case No. 58 of 2022** which concerns the instant Application and also pending before this Honorable Court between the same parties herein, the 1st Applicant in particular is also challenging the performance of the Overdraft Facility Agreement for its impossibility due to the Government's wrongful acts that frustrated its performance. By all standards, those are serious triable issues which calls for determination by this court.

From the above Respondent's Counsel concern, I am aware of the extent of proving whether there is a serious question for determination in this kind of Application that, **it is not conclusive evidence which is required but rather the facts as disclosed by the Complaint and the Affidavit** and so the standard of proof required would be somehow below the expected standard in full trials. See the case of ***SURYA-KANT D. RAMJI VS. SAVINGS AND FINANCE LTD & 3 OTHERS, HIGH COURT, Commercial Division Dar es Salaam, Civil Case No. 30 of 2002 (Unreported)***.

Now having carefully gone through the facts disclosed in the Applicants' submission in chief in respect of the instant Application and in the paragraphs of the Affidavits in support of the Application it is my considered view that the Applicants have managed to solicit a ***prima facie*** case to the main suit for the court to determine the controversy at hand. From the same also, I find that the Applicant's have at minimum managed to show at the very beginning of the pleadings that in the absence of some important answers to some matters, they are entitled to the reliefs sought, but upon consideration and analysis of the evidence and the determination of those matters to clear the controversy between the parties.

For this reason, I will thus hold that **the 1st condition has been satisfied.**

On the test of irreparable loss, it is submitted by the Applicants that if their application is denied, under the circumstances, they will suffer irreparable loss. Further that, if the Respondent succeeds to sell the suit property, the Applicants will severely suffer loss into the 1st Applicant's business of which have already been disturbed by the Government's acts through its Task Force. Further to that, the suit property has tenants who in a first place are not supposed to be disturbed and that out of the given situation, there is no any other alternative at hand to accommodate them.

On the this second condition which is that of suffering irreparable injury if the prayer for injunction is refused, I am mindful that the purpose of granting temporary injunction is to prevent irreparable injury befalling on the Applicant while the case is still pending.

The tangible issue in this principle is the phrase "***irreparable injury***". What is the irreparable injury? In the case of ***KAARE VS. GENERAL MANAGER MARA COOPERATION UNION [1924] LTD [1987] TLR 17 Mapigano, J.*** (as he then was) clearly stated that:

"The Court should consider whether there is an occasion to protect either of the parties from the

species of injury known as "irreparable injury" before his right can be established.....

By irreparable injury it is not meant that there must be no physical possibility but merely that the injury would be material, for example one that could not be adequately remedied by damages."

It follows therefore that, the irreparable injury is an injury which could not be adequately remedied by damages. On this I wish to refer the contents in **paragraphs 6 to 16** of the 3rd Applicant's Affidavit which upon reading they portray the real meaning of the irreparable loss despite the fact that the property is owned by the 2nd Applicant. The fact that the same has guaranteed the 1st Applicant's business of which also accommodated the 3rd Applicant, the suffering is inevitable.

Further, in determining this point, I would like to refer to the case of ***RAMADHANI ALLY & 2 OTHERS VS SHABANI ALLY, Civil Appeal No. 3 of 2008 [Unreported]*** where the Court of Appeal held that:

"The attachment and sale of immovable property will, invariably, cause irreparable injury. Admittedly, compensation could be ordered should the appeal succeed but money substitute is not the same as the

physical house. The different between the physical house and money equivalent, in my opinion, constitutes irreparable injury. (Deusdedit Kisisiwe v. Protaz B. Bikuli, Civil Application No. 13 of 2001 (Unreported)).

From the above, I have no query to find that the purported injury mentioned will be irreparable since under the Applicants' condition as pleaded, the same cannot be adequately remedied by damages. I proceed to find **the second condition likewise has been met.**

The last condition is on balance of convenience. Of course the question here is who is going to suffer greater hardship and mischief if the temporary injunction is not granted.

On a comparative basis, as the second condition has been met, the sun follows the night and under the circumstances, the answer to this principle follows the second principle that the Applicants are the ones who are going to face more hardship if the Application for Temporary Injunction is denied; unlikely to the Respondent who have in his possession hundreds of clients and deposits under his roof.

On my comparative basis and from the submissions for and against the Application, I proceed to find the **third condition has similarly been met.**

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 accordingly.**

For the avoidance of doubt and under the given circumstances of this Application, the court is hereby restraining the Respondent, her Agents, Workmen, Assignees and/or any other person working under her instructions or authority from executing her intention to dispose landed property held under **Certificate of Title No. 177932, Plot No. 4, LO. No. 920260, Block 34 Kariakoo Area, Ilala Municipality Dar es Salaam registered in the name of the 2nd Applicant pending hearing and determination of the Main Suit; i.e. Civil Case No. 58 of 2022 before this Honorable Court.**

I make no order as to costs.

It is so ordered.



L. E. MGONYA

JUDGE

17/2/2023

ORIGINAL