IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO 04 OF 2022

(Arising from Land Case No. 29 of 2020)

COSMOS DEVELOPERS LTD..... 1ST APPLICANT

COSMOS PROPERTIES LTD.....2ND APPLICANT

VERSUS

MARK AUCTIONEERS AND COURT

BROKERS COMPANY LIMITED.....1ST RESPONDENT

AZANIA BANK LIMITED.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

RULING

Date of Last Order: 04/04/2023

Date of Ruling: 05/05/2023.

E.E. KAKOLAKI, J.

By way of chamber summons, the applicant herein has instituted the instant application seeking for the temporary injunctive orders restraining the Respondents or its directors, employees, servants, argent, and assignee and whoever is appointed or instructed by the respondent in any manner from selling, alienating, assigning any right or transferring all or any of the properties and developments made on Plots No. 63/27 apartment "E" CT NO. 38083/29, 63/27 Apartment "C" CT No. 38083/27, 63/27 Apartment "C" CT No. 38083/27, 63/27 Apartment "C" CT No. 38083/83 Upanga areas,

Plots No.928-930 with CT No. 49058,2051 with CT No.95104,931 with CT No.79036 and 2016 with CT No. 86923 Ukonga area situated in Ilala Municipality within the region of Dar es Salaam collectively referred to as the suit properties pending hearing and determination of the application inter-parties.

Secondly; an order restraining the respondents, its directors, employees, servants, agents and or assignees and whomsoever is appointed or instructed by the respondent from removing, evicting the applicant's staff and or agents, tenants from the properties mentioned above. Thirdly, any other order that this court may consider fit to grant in the circumstances.

The application has been preferred under Order XXXVII Rule 1 (a), and (b), Order XLIII Rule 2 and section 95 of the Civil Procedure Code, [Cap 33 R.E 2019] and is supported by an affidavit and reply to counter affidavit affirmed by Muhammad Owais Pardesi, the director and shareholder to the 1st and 2nd applicants. According to the Applicant's supporting Affidavit, the matter is originating from the applicants' default in payment of the loan alleged to raise to a total sum of USD 3,256,528.64 and Tshs. 161,736.99 as per the loan agreement/term loan/overdraft facilities of 27/09/2017 referred in the Notice of Default dated 23/01/2020, collected from Bank M Tanzania

succeeded by 2nd respondent instead of USD 2,681,000.00 as per the banking facility letter of 31st July, 2017 secured by the principal securities (landed properties) mentioned above supported by personal guarantees of Mohammad Owias Pardesi, Gulam Muhammad Hassan and corporate guarantees from the applicants as supplementary security, in which on 11th July, 2020 via Gurdian Newspaper, the 1st respondent published a notice to the effect that, several plots will be sold by way of public auction on 2nd August, 2020 and 5th August, 2020, the properties which include 4 apartments and 4 landed properties while the expiration of the facility repayment date was yet to become due until 28 July 2022. It is deposed in the Affidavit also that, on 2nd and 5th August 2020 respectively, public auction was conducted but neither of the properties was fully and effectively sold.

It is out of the above referred notice of public auction the applicants aver Civil Case No. 29 of 2020 pending before this Court was preferred while filing Misc. Land Application No. 56 of 2020, seeking for injunctive orders in pendency of the main case, the application which unfortunately was dismissed on the ground that, the applicants did not demonstrate the conditions for grant of the same. It was further deposed that, applicants amended the plaint in the main suit that was filed in Court on 30th November

2021, hence the present application in which applicants contends that, it is of the essence that, the prayed orders be issued to serve the interest of justice.

When served with the application save for the 1st whose hearing proceeded ex-parte against, the 2nd and 3rd Respondent resisted the same by filing Counter affidavit challenging applicants' averments and stating that, the case emanated from credit facility entered between the applicants and the 2nd respondent of which the applicant defaulted repayment since 27th September 2019, and that, efforts taken by the 2nd respondent to cure the default became fruitless, consequently the 2nd respondent was justified to realize securities per the terms and conditions of the agreement. In addition it was averred that, this court has already determined the application for temporary injunction regarding the subject matter and parties herein via Misc. Land Application No. 56 of 2020.

Hearing of this application was done viva voce, where by Mr. Ambrose Nkwera, learned Counsel appeared for the Applicant while the 2nd and 3rd Respondents were represented by Ms. Ghati Mseti and Ms. Upendo Mbaga, both learned State Attorneys. As alluded to above the 1st Respondent did not enter appearance, thus the matter proceeded ex-parte against her.

Notably this court is seized with jurisdiction to entertain and grant prayers sought in this application upon the applicant establishing to the court's satisfaction that the three principles or tests, are established. The principles are well spelt in the cerebrated case of **Atilio Vs. Mbowe** (1969) HCD 284 and **The Registered Trustees of the Mount Meru University and Another Vs. The Development Bank Limited and 4 Others**, Misc. Civil Application No. 99 of 2022 (HC-Unreported), **Christopher P. Chale vs Commercial Bank of Africa**, Misc. Civil Application No.136 of 2017 [2018] TZHC 11, to mention few. The said principles are that, **one**, there must be a serious question to be tried by the court and probability that the plaintiff will be entitled to the reliefs prayed for (in the main suit), **second**, the temporary injunction is necessary in order to prevent some irreparable injury befalling while the main case is still pending and **third**, that on the balance of convenience greater hardship and mischief is likely to be suffered by the defendant if the order is granted.

The object of granting temporary injunctive order as equitable remedy is to preserve the pre-dispute state until the trial or until a named day or further order, hence it is imperative for the applicant supply the trial court with materials sufficient to be tested and enable the Court to exercise its

discretion judiciously before the same is granted. The necessity of the party in establishing these imperative requirements has been given an extended and a more refined postulation in subsequent decisions such as the case of **Abdi Ally Salehe Vs. Asac Care Unit Ltd & 2 Others,** Civil Revision No. 3 of 2012, where the Court of Appeal of Tanzania observed:

> *"The object of this equitable remedy is to preserve the pre-dispute state until the trial or until a named day or further order. In deciding such applications, the Court is only to see a prima facie case, which is one such that it should appear on the record that there is a bonafide contest between the parties and serious questions to be tried. So, at this stage the court cannot prejudice the case of either party. It cannot record a finding on the main controversy involved in the suit; nor can genuineness of a document be gone into at this stage. Once the court finds that there is a prima facie case,* ***it should then go on to investigate whether the applicant stands to suffer irreparable loss, not capable of being atoned for by way of damages. There, the applicant is expected to show that, unless the court intervenes by way of injunction, his position will in some way be changed for worse; that he will suffer damage as a consequence of the plaintiff's action or omission, provided that the threatened damage is serious, not trivial, minor,***

illusory, insignificant or technical only. The risk must be in respect of a future damage. (Emphasis supplied)

The combination of the above cited decisions conveys one key message that, temporary injunctive order should only be granted in a fitting circumstance. In determination of this application, I am proposing to address the three principles one after another as submitted by the parties.

In support of the first principle and after adopting the affidavit by the applicants, Mr. Nkwera relied on three grounds submitting that, **one**, in the default notice dated 23/01/2020 issued by the 2nd respondent against the applicants, she recalled the entire outstanding loan facility as of 23/01/2020 while the same was to become due on 28/02/2022 as stated in paragraph 11 of the affidavit. **Second** that, as per paragraph 12 of the affidavit the claimed amount outstanding loan by the 2nd respondent as per the default notice is USD 3,265,528.64 and Tsh.161,736,000.99 which is disputed by the applicants as the amount due according to them is to the tune of USD 2,681,000.00 only. **Third** that, there is dispute that the applicant signed the loan facility on 27/09/2017 referred in the default notice as evidence has to be presented by the parties in the main suit for determination by the Court in the main suit of the correct amount to be paid to the 2nd respondent. It

was his take basing on the three grounds that, there is are serious questions to be tried by this court which calls for grant of this application.

In rebuttal, Ms. Msetti, while adopting the 2nd and 3rd respondent's counter affidavit, prefaced her submission by informing the Court that the applicant filed similar application to the present which was dismissed on 3/05/2021. She then went on to submit that, applicants have failed to establish that, any triable issue exist for determination by this Court in the main suit. She argued that, looking at the main case and the application applicant does not deny to have acquired loan facility from the respondent and defaulted repayment of the said loan facility nor do they pleaded to have paid the same as per terms of the agreement.

She then attacked the contention and submission that, notice of default was issued prior to the maturity of the loan and term it invalid as to her, according to the loan agreement when the borrower defaults even for a single day, the lender is entitled to recall the security. To support her argument, she referred the Court to paragraph 11 of the loan agreement annexure MoP4. Concerning the disputed amount to be repaid, she contended, the same cannot be triable issue as the applicant ought to have settled the fact which they failed to discharge. Ms. Msetti referred the court to the case of

National Bank of Commerce Vs. Stephen Kyando TA Asky International Trade, Civil Appeal No. 162 of 2019 [CAT-Unreported] stating that, according to the law, where one instalment in a series of instalment is breached the entire contract is breached.

She went on submitting that, in this case since the applicant do not dispute breach of respondent's terms of the loan then the 2nd respondent had the right to sale the mortgaged properties. In conclusion, she submitted that, the applicant has not established existence of triable issues warranting this court to grant the prayer sought.

In rejoinder submission Mr. Nkwera started by informing this court that Land Case No. 29 of 2020 was amended by the order of the court on 23/10/2021, according to him, once the plaint is amended all the previous order or decision seize to exist. He contended that, Ms. Msetti argument that the application was already heard was raised as preliminary objection in this matter and decision thereof made as per the decision of Hon. Ismail J. on 14/04/2022. Regarding triable issues, Mr. Ambrose reiterated his submission in chief and expressed that, applicants have shown triable issues exist because of the fact explained at paragraph 15 of the affidavit but also on the dispute of amount to be paid. Regarding the referred Case Misc. Land

Application No. 56 of 2020 he submitted that, the same was made when respondent were about to sale the suit property. He contended further that, the line of argument obtained there is quite different from the one presented in this case particularly when considering the first conditions whether there is triable issue or not. He thus implored the Court to find the first principle/test is established by the applicants.

I have dispassionately considered the submissions of both parties and revisited the affidavit by the applicants, 2nd and 3rd respondents counter affidavit and applicants' reply to counter affidavit with a view of finding whether the applicant has established the first principle for granting temporary injunction. Before proceeding to determine whether the first principle is established or not I wish to address first the point raised by Ms. Mseti that, the application of this nature was filed and determined by this Court with dismissal in Misc. Land Application No. 56 of 2020 hence res-judicata to the present application, in which Mr. Nkwera submitted the issue was raised in this matter as preliminary objection and overruled. I think this point need not detain this Court as I shall not discuss it further for being functus officio as it is not in dispute that, the same point is already determined by this Court in its ruling dated 14/04/2022 (Ismail J) as the

decision in Misc. Land Application No. 56 of 2020, was neither as encroachment on the merits of the controversy between the parties nor was it as conscious adjudication of the issues touching on the substance of the controversy of the parties for it to be res-judicata.

Having so found I am now set to determine the issue as to whether the first principle is established by the applicants. Gleaned from the applicants' affidavit, reply to counter affidavit and parties' submissions it is apparent that, the applicants do not deny to have acquired a loan from the second respondent and defaulted repayment of the same. It is also not in dispute as correctly submitted by Ms. Msetti that, applicants must fulfil their contractual obligation to pay the loan as agreed since this Court is not allowed to interfere with the contractual obligation of the parties. See the case of **General Tyre EA Ltd Vs. HSB Bank Plc** [2006] TLR 60. The disputes as per the applicants are **one**, on the date to recall repayment of the outstanding loan which they claim was due on 28/02/2020 and not on 23/01/2020 as per the default notice, **second**, the amount due which the applicants' claim to be USD 2,681,000.00 and not USD 3,265,528.64 and Tsh.161,736,000.99 as claimed in the default notice and **third**, the loan facility allegedly signed on 27/09/2017 which the applicants claim not to

have signed apart from that of 31/01/2017. Ms. Mgeni for the 2nd and 3rd respondents contends that, those allegations by the applicants do not exist as there is evidence that, they never repaid their loan. It is the law that, in proving whether there is a serious question for determination by the court, it is not conclusive evidence which is required but rather the facts as disclosed in the plaint and the affidavit. See the decision of this Court in **Surya Kant D. Ramji Vs. Saving and 12 Finance Ltd & three Others,** Civil Case No. 30 of 2000, HC Com. Div. at DSM (unreported). In this matter as alluded to above and deduced from the applicants' affidavit the issue is not whether the outstanding loan is paid or not but how much is to be repaid, the due date to be recalled and whether the referred loan agreement is that of 27/09/2017 as referred in the default notice or of 31/01/2017 which the applicants admit to have signed, the issue which I find to be worth of determination by this Court in the main suit. As to whether there are chances of success in those raised issues I hold save for the loan of USD2,681,000.00, which applicants do not dispute to have taken and defaulted repayment, it is premature to determine at this stage whether they will emerge successful as the contentious issues require tendering of evidence from both parties. The first principle therefore I find is established by the applicants.

Next for determination is the second principle that the court's interference is necessary as the applicants will suffer irreparably loss. It was Mr. Nkwera's submission that, **first**, the respondents are about to dispose the suit property by way of sale and have so attempted as stated in paragraph 2 and 6 of the affidavit. Thus injunction order if withheld and the disputed properties are sold, applicants' claim in the main suit will be rendered nugatory and their rights be in jeopardy as they will have no properties to run their business in real estate which is their core business. **Secondly**, some of the said properties are leased hence if sold their tenants will be rendered homeless the loss which is irreparable. He thus pray that respondent being restrained from disposing the said property pending determination of the main suit.

In response, Ms. Msetti argued that, applicant entered into agreement knowing the consequences that, failure to repay the loan will attract sale of his properties. Concerning the allegation that tenants will suffer, Ms. Msetti countered that, the same is irrelevant as when mortgaging the properties, applicants were aware that he had them in and that, default in payment will affect them. The learned State Attorney submitted further that, since there was contractual obligation for payment of loan between the parties this Court

is not allowed to interfere with the same obligations of parties as it was held in the case of **Fulgence Pantaleo Kavishe t/a the Double way Auto Parts Tanzania Postal Bank,** Misc. Land application No 890 of 2017 (HC) at page 6. She had it that, applicants have not proved to this Court any serious mischief or loss likely to be suffered by them if the application is not granted as all their contentions are based on contractual obligations. It was her further argument that, there is nothing which cannot be compensated by way of damages as the bank is well capable of compensating them in case they succeed in the main case.

In rejoinder submission, it was Mr. Nkwera's submission that, the applicants have not failed to discharge their obligations as they wrote the 2nd respondent seeking to negotiate terms of repayment of outstanding loan as deposed in paragraph 15 of the affidavit but the 2nd respondent was adamant to respond to their letter since she had intention of selling the houses. Regarding the submission that, the respondents are ready to compensate the applicants he submitted that, the respondent cannot repay tenants who are about to be rendered homeless for being evicted.

Its true and I subscribe to Mr. Nkwera's submission that applicants are trading in real estate and if grant of the application is withheld they will lose

business as they also have tenants leasing the said properties. However, they do not dispute to have taken loan to the tune of USD 2,681,000.00 which is yet to be repaid leave alone the disputed amount of outstanding loan of USD 3,265,528.64 and Tsh.161,736,000.99 as per the default notice, which is to be determined in the main suit. The undisputed amount of loan of USD 2,681,000.00 which is 2nd respondent's client money has remained unpaid since 31/07/2017, when the loan agreement was executed amongst parties without any justifiable reasons, hence a great loss to the 2nd respondent. Under the circumstances granting the application in favour of the applicants on the ground of loss of business and sufferings of their tenants who are not parties to the loan agreement will be tantamount being driven by sentiments and not the urge to protect injury or rights of the party who is likely to suffer more as in this matter, the 2nd respondent being the financial institution with muscles to indemnify the applicants in the event the main suit is determined in their favour as compared to the applicants. Similar stance was taken by this Court in the case of **Charles D. Msumari & 83 Others v. The Director of Tanzania Harbours Authority**, HC-Civil Appeal No. 18 of 1997 (unreported) stressed that,

> *"Courts cannot grant injunctions simply because they think it is convenient to do so. Convenience is not our business. Our business is doing justice to the parties. They only exercise this discretion sparingly and only to protect rights or prevent injury according to the above stated principles, court should not be overwhelmed by sentiments however lofty or mere highly driving allegations of the applicants such as the denial of the relief will be ruinous and or cause hardship to them and their families without substantiating the same.* ***They have to show they have a right in the main suit which ought to be protected or there is an injury (real or threatened) which ought to be prevented by an interim injunction and that if that was not done, they would suffer irreparable injury and not one which can possibly be repaired****."* (Emphasis supplied)

With the above reason and authorities cited, I am at one with Ms. Msetti's submission that, applicants have failed to establish to the Court's satisfaction that, irreparable loss capable of being atoned by monetary value will be suffered by them. The allegation by the applicants that, their tenants will be rendered homeless, I hold has no basis as when mortgaging the said properties for the loan, had them in already and knew the consequences befalling them due to default in payments. Holding otherwise in my profound view is tantamount to not only allow but assist the applicants to benefit from

their own wrong and going against the object of granting temporary injunctive orders which is preventing irreparable injury which is substantial and cannot be adequate remedied or atoned for by monetary value. I am therefore convince and proceed to pronounce that, applicants have failed to establish the second principle.

Lastly is the third principle stating that, on the balance of convenience who will suffer more or be in hardship than the other party? In this Mr. Nkwera is of the submission that, it is the applicants as their tenants will be not only disturbed but also rendered homeless. In response Ms. Msetti countered that, on balance of probability it is the 2nd respondent who will suffer much as applicants have held the respondent's money for more than 5 years thus makes it impossible for the 2nd respondent as bank to operate its business, while the applicant is trying to benefit from his own wrong. Secondly, she contended some properties have already been sold to other people thus if this application will be granted the 2nd respondent will be denied right to transfer the properties to the respective buyers.

Having considered the fighting arguments by the parties, I distance myself from Mr. Nkwera's proposition that, under the circumstances of this case it is the applicants who will suffer more if grant of the application is withheld.

As alluded to the applicants do not dispute to have collected loan of USD 2,681,000.00 from the 2nd respondent since 31/07/2017 and that they have not repaid the same todate which is more than 5 years as correctly submitted by Ms. Mseti. The bank being a financial entity doing business in lending money after collecting money from clients, need to keep the capital revolving so as to enable it pay interest to its clients who deposited the same with it. To allow the defaulting borrower to continue retaining its capital for uncertain period of time apart in my view it to force it commit suicide. In this matter since it is the applicants who have defaulted repayment of undisputed loaned amount of USD 2,681,000.00, the balance of scale of convenience tilts on 2nd respondent's side. And for that matter I find the applicants have also failed to establish the third principle exists in this application.

Undisputedly, in order for an application of injunction to be granted all the three principles or conditions provided for in the case of **Atilio vs Mbowe** (supra) must be established conjunctively. In this application since applicants have proved only the first one and failed to prove the 2nd and 3rd principles stated, I decline to exercise my discretion in favour of them. Consequently, the application is dismissed with costs.

It is so ordered.

Dated at Dar es Salaam this 5th May, 2023.

E. E. KAKOLAKI
JUDGE
05/05/2023.

The Ruling has been delivered at Dar es Salaam today 05th day of May, 2023 in the presence of Mr. Ibrahim Malekela, advocate holding brief for advocate Ambrose Nkwera for the 1st and 2nd applicants, Ms. Rose Kashamba State Attorney for the 2nd and 3rd respondents and Ms. Asha Livanga, Court clerk and in the absence of the 1st respondent.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
05/05/2023.