

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM SUB DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**  
**MISC. CIVIL APPLICATION NO. 295 OF 2022**

(Arising from Civil Case No. 150 of 2021)

**EURO COMMERCIALS LIMITED..... APPLICANT**

**VERSUS**

**BANK OF AFRICA TANZANIA LIMITED.....1<sup>ST</sup> RESPONDENT**

**NAMPULA AUCTION MART AND**

**COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT**

**EMMANUEL MBUGA.....3<sup>RD</sup> RESPONDENT**

**YUSUFU AMIRI MBARAKA.....4<sup>TH</sup> RESPONDENT**

**RULING**

Date of Last Order: 25/04/2023

Date of Ruling: 19/05/2023.

**E.E. KAKOLAKI, J.**

Under certificate of urgency and by way of chamber summons, the Applicant herein has instituted the instant application seeking for the interim orders, *one*, to restrain the 1<sup>st</sup> Respondents and its agent or representative who may act under her instruction to seize or impound and sale mobile cranes with registration numbers T. 230 DDL, T. 152 CDJ and T. 181 DDT the properties

of applicant, pending determination of the main suit filed before this Honourable court. *Second*, grant of an interdiction order against the 1<sup>st</sup> respondent from performing and/discharging loan contract/facility between the applicant and the 1<sup>st</sup> respondent ,pending determination of the main suit before this Honourable court and *third*, costs of the suit, and any other reliefs this honourable court may deem fit and just.

The application is preferred under Order XXXVII Rule 1 (a), and 2 (1) (2) section 68 (c) (e) 3A (1) (2) and section 3B (1) (a), section 95 of the Civil Procedure Code, [Cap 33 R. E 2019] (the CPC) and any other enabling provisions of the law, supported by an affidavit of **Dismas Leone Massawe**, the principal officer to the applicant, explaining reasons in support of the application.

The application could not be let to land in peace in this Court as was stifled by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent when filed their joint counter affidavit strenuously resisting it. On the side of the 4<sup>th</sup> respondent, no counter affidavit was preferred to contest the facts deposed by the applicant in support of the application.

Briefly as gathered from the affidavit and counter affidavit by the parties, this application is stemmed from Civil Case No. 150 of 2021, in which the applicant is challenging unlawful sale of her crane by the respondents in realization of the outstanding loan amount. Initially by facility letter dated 17<sup>th</sup> March 2020, the applicant and 1<sup>st</sup> respondent had entered into asset financing loan agreement for twelve (12) months, whereby a total amount of Tsh. 200,000,000/ was advanced to the applicant for the purposes of purchasing two (2) mobile cranes, in which the same was secured by among other securities a specific debenture dated on the 25<sup>th</sup> March 2020 over the assets, cranes with Reg. No. T977 DCU and T 230 DDL to be purchased. It appears the applicant within the first six months had repaid the loan to the tune of more than Tsh. 150,000,000 as up September, 2020, the outstanding loan was standing at the tune of 47,943,673/- (Forty-Seven Million Nine Hundred forty-three thousand six hundred and seventy-three shillings only. It is contented that, the 1<sup>st</sup> respondent in total disregard to the payment already made by applicant went ahead as she illegally and without following proper procedure in the facility letter and specific debenture of the loan, to impound and sale applicant's mobile crane Reg. No. T. 977 DCU for Tshs. 70,000,000/ only and contrary to its market value of Tsh. 350,000,000 or

forced sale value of Tshs 245,000,000/=, to recover the outstanding balance of the loan to the tune of Tsh. 47,943,673/=. And that the respondent had been unlawfully discharging the loan agreement by imposing miscellaneous charges including penalties, interest and legal charges as the current outstanding debt has hiked to the tune of Tsh. 124,507685.16, meaning the outstanding balance increased for more than 100% in a year. It is out of the claimed illegal acts of the 1<sup>st</sup> respondent, the applicant filed Civil Case No. 150 of 2021 pending in this Court, in which this application is premised.

Hearing of this application took the form of written submission, in which all parties were represented. Applicant had representation of Mr. Gideon Opanda, 1<sup>st</sup> to 3<sup>rd</sup> respondent were represented by Mr. Jonathan Mbuga, while 4<sup>th</sup> respondent enjoyed the services of Mr. Sylvanus Mayenga assisted by Rosaria Ntiluhungwa all learned advocates. Before I endeavor to determine the merit or demerit of the application, I find it imperative to address the concern raised by Mr. Opanda, in court on 18/04/2023 as well as in his submission in chief, concerning the 4<sup>th</sup> respondent's submission to the effects that, he submitted on both law and fact despite of his failure to file the counter affidavit and that the same was filed out of time, hence a prayer for the said submission to be struck out. Both parties were heard on the raised

concern and the ruling to that effect reserved in which I am now set to address.

It is Mr. Opanda's contention that, the 4<sup>th</sup> respondent's act of submitting on both facts and law as depicted in paragraphs 5 and 6 of his reply submission without filing the counter affidavit contravened the laws. That aside he added the same was filed out of time, thus deserves to be struck out. In response, Mr. Mayenga recanted the contention by Mr. Opanda submitting that, the 4<sup>th</sup> respondent's reply submission is not in violation of the law for countering the facts in the applicant's affidavit as alleged, since he was making reference to the fact in relation to the 1<sup>st</sup> prayer by the applicant in her chamber summons, and that's why he even cited the Court of Appeal decision in that, parties cannot be stopped by the Court from performing the agreed terms in the contract. As to why the submission were filed out of time, Mr. Mayenga submitted it was so as the 4<sup>th</sup> respondent was served with the applicant's submission in chief one day before deadline of the filing of reply submission, hence did not want to delay the proceedings to seek for extension of time. In a short rejoinder, Mr. Opanda argued that, the 4<sup>th</sup> respondent admitted to have made reference to the facts in his submission

and was insistent that, his submission be struck out for contravening the law.

It is true as submitted by Mr. Opanda and rightly conceded by Mr. Mayenga that, the reply submission by the 4<sup>th</sup> respondent was filed out of time. As the law stands, filing of submission out of time is equally to failure to prosecute, more so when the party has even failed to file the counter affidavit, like the situation obtained in the present matter against the 4<sup>th</sup> respondent. Having being out of time to file the same the 4<sup>th</sup> respondent was duty bound to seek court's leave to have the said submission filed in Court. As he picked to act in contravention of the law, I proceed to struck out the said 4<sup>th</sup> respondent's reply submission from the record, hence will not be considered by the Court. For that matter I find no reason to address the remaining issue on the contention of 4<sup>th</sup> respondent's act of making his submission both on fact and law without filing the counter affidavit.

Now reverting to the merit of the application, I find it apposite to review the law relating to the grant of injunctive orders. The law under Order XXXVII Rule 1 (a), and 2 (1) (2) and section 68 (c) (e) of the CPC as cited by the applicant crowns this Court with powers to grant temporary injunction upon proof by affidavit that, 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. It follows therefore grant or refusal is in the discretion of the Court. However, there are three conditions to be satisfied by the applicant before the Court exercises its discretion whether to grant the application or refuse to do as stated in numerous decisions of this Court, the famous one being the case of **Atilio vs Mbowe** (1969) HCD No.284. See also the cases of **Lushoto Tea Company Limited Vs. NMB Bank Plc & another**, Misc. Land Application No.413 of 2019, and **Jonathan Omary Mbwambo vs Said Shabani Mtonga & Others**, Misc. Land Case Application No. 774 of 2016, (both HC -Unreported) as referred to by the applicant in his submission as well **Omary Kilalu and 40 others Vs. Temeke Municipal Council and AG**, Misc. Civil Application No. 674 of 2020 (HC-unreported). The said three principles or conditions according to **Atilio case** are:

1. That, on the facts alleged, there must be a serious question to be tried by the Court and a probability that the plaintiff will be entitled to the reliefs prayed for (in the main suit);

2. That, the temporary injunction sought is necessary in order to prevent some irreparable injury befalling the Plaintiff while the main case is still pending; and
3. That, on the balance of convenience greater hardship and mischief is likely to be suffered by the Plaintiff if temporary injunction is withheld than may be suffered by the Defendant if the order is granted.

Submitting in support of the application Mr. Opanda, adopted the applicant's affidavit and gave a detailed account on how the applicant obtained the loan of Tshs. 200,000,000/ to buy two mobile cranes, and how his crane was sold below the market value, despite of repayment of large part of the loan, which sale according to him, did not follow the proper procedure of public auction. He told the court that, there is pending case, Civil Case No. 150 of 2021 before this court challenging the said sale of crane. As to the interdiction order he submitted that, if within a year the outstanding balance had increased from Tsh.47,943,673/= to Tsh. 124,507,685.16, meaning more than 100% per year above the reality, the applicant can only be rescued through an intervention of this honourable court by way of temporary injunction and interdiction against the 1<sup>st</sup> respondent, otherwise she will suffer irreparable loss in case the Court withhold the sought orders. Mr.



Opanda referred the Court to the case of **Lushoto Tea Company Limited** (supra), **Jonathan Omary Mbwambo** (supra) and **Atilio vs Mbowe** (supra), the case which provides for the conditions to grant temporary injunction. He mentioned the conditions as enumerated above and submitted that, the application for temporary injunction before this court met the threshold set out in the cited cases above and prayed the court to grant the application with cost.

In response, 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> respondent adopted the counter affidavit to form part of their submission. Mr. Mbuga affirmed the position of the law that, grant or denial of the orders sought in the chamber summons is entirely in the discretion of this court, guided by three principles as recited in the case of **Omari Kilalu and 4 Others** (supra). He said, the object of granting temporary injunction is to preserve the property in dispute in its status quo until the question to be investigated in the main suit related to that property is finally determined. He was of the view that, this application clearly does not intend to achieve the above purposes rather the court is invited to restrict the 1<sup>st</sup> respondent from discharging the obligations vested to her both by way of contract entered between parties and the law, which is not right.

Concerning the ground of serious question to be tried in the main suit he submitted that, as the matter of law temporary injunction should be granted in respect of property which is also subject of dispute in the pending case as per Order 37 Rule 1 of the CPC, but in the present situation neither the mobile crane nor issues of breach of loan contract are subject of dispute in the pending suit, rather challenging of the purported irregularities of auctioned mobile crane T. 977 DCU, and not otherwise. He contended further that, this court lacks jurisdiction to interfere with enforcement of contractual obligation unless clear breach of the contract is prima facie disclosed which is not the issue in the main suit. To cement his argument, he cited the case of **General Tyres East Africa Vs. HSBC Bank Plc** (2006) TLR 60. He took the view that, there is no serious question to be tried which is subject of pending dispute in the main suit.

Concerning irreparable loss, it was his submission that, the material injury to be dealt with at this stage is the one that cannot be atoned by way of compensation/damage. He cited the case of **Cyanamid Vs. Ethicon Ltd** (1975) AC 396 which provides that, if damage in the measure recoverable at common law would be adequate remedy and if the defendant would be in a financial position to pay them no interlocutory injunction should be

granted however strong the plaintiff's case appears to be. It was his submission that, neither the facts regarding loss on the account of the applicant nor inability of the 1<sup>st</sup> respondent to compensate the same in case of loss is traced in her affidavit. He took the view that, the 1<sup>st</sup> respondent being a financial institution, regulated by the Bank of Tanzania on financial matters with statutory financial limit is capable to compensate the applicant in case of loss and upon obtaining decree in her favour in the main suit.

Regarding balance of inconvenience, it was Mr Mbuga's submission that, the same tilts in favour of the 1<sup>st</sup> respondent because banks lend money to the public and receives deposits, contrary to the applicant here in. According to him, restricting the bank from discharging her statutory obligations, will suffer more the 1<sup>st</sup> respondent and public than the applicant would do. He added, there is no any fact in the affidavit in line with the above principle. He finally referred the Court to the case of **Alhaji Muhidin Ndolanga and 7others Vs. The Registrar of sport and Sports association & Others**, Misc. Civil Cause No. 54 of 2000, and pray the application be dismissed with cost.

In a short rejoinder, Mr. Opanda attacked the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' submission terming it misconceived. He lamented that, 1<sup>st</sup> respondent sold

the mobile crane below market value which amounts to injustice to the applicant. Basing on the above submission he contended that, the applicant have established all salient features in the application leading to granting the temporary injunction / interdiction per the law and took the view that, it will be injustice and gross miscarriage of justice in case the Court denies the applicant with the reliefs sought in the chamber summons. He was of the view that, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents failed totally to show how respondents will suffer and be prejudiced in case the application is granted. Otherwise he reiterated his prayers.

I have dispassionately considered the affidavit, counter affidavit and the submissions of both parties with a view to find whether the applicant has satisfied the necessary or prerequisite conditions for the grant of temporary injunction. Notably and as hinted above, 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, as stated in the case of **Atilio Vs. Mbowe** (supra) and I would add the cases of **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) and **Christopher P. Chale Vs.**

**Commercial Bank of Africa**, Misc. Civil Application No.136 of 2017 [2018]

TZHC 11.

Before discussing whether the applicant has proved each condition, I wish to state from the outset that, the object of granting temporary injunctive orders as equitable remedy is to prevent the applicant/plaintiff against irreparable injury or to maintain the status quo or preserve the pre-dispute state until the trial is concluded or named day or further order is made, hence it is imperative for the applicant to supply the trial court with materials sufficient to be tested on three principles as demonstrated in the cited cases above and enable the Court to exercise its discretion judiciously before the orders are granted. The necessity of the party to establish the three imperative requirements has been given an extended and given more refined postulation in subsequent decisions such as the case of **Abdi Ally Salehe Vs. Asac Care Unit Ltd and 2 Others**, Civil Revision No. 3 of 2012, where the Court of Appeal of Tanzania held as follows:

*"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.

With the above principles in mind and gleaned from the chamber summons and applicant's affidavit, it is uncontroverted fact that the applicant seeks the court to restrain the 1<sup>st</sup> respondent and his agent to seize or impound and sale mobile cranes with registration numbers T. 230 DDL, T. 152 CDJ and T. 181 DDT and to interdict her from performing or discharging loan facility agreement between the applicant and the 1<sup>st</sup> respondent. However, the cause of action obtained in paragraph 7 of plaint in the main case which

would have raised prima facie or arguable case pending for determination before this Court, is neither premised on breach of contract/agreement or contest of realization of the outstanding amount of loan by the 1<sup>st</sup> respondent by sale of securities, but rather for the return of sold crane with Reg. No. T. 977 DCU in good condition, the crane which is believed to have been illegally sold in an auction improperly conducted. On what might constitute arguable case I find inspiration on the Kenyan case **Mrao Vs. First American Bank of Kenya and Two Others** [2003] KLR 125, which though persuasive, I find it very relevant to the fact in issue, where the Court observed thus:

*"...a prima facie case in a civil application includes, but is not confined to, a genuine and arguable case. It is a case which, on the material presented to the court a tribunal directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."*

Guided by above cited definition of prima facie case and the first principle as obtained from the case of **Atilio vs Mbowe** (supra), in that the applicant must prove that *there is a serious issue to be tried **on the facts alleged** and a probability that the plaintiff will be entitled to the relief prayed in the main suit*, I find the applicant has failed to pass the first test. I so view as it

is apparent that, neither the mobile crane mentioned in the chambers summons nor issues of breach of loan contract deposed in the applicant's affidavit are subject of dispute in the pending main suit, rather the challenge on the purported irregularities of auctioned mobile crane T. 977 DCU. In other words the cause of action in the main case does not relate with the facts alleged in the present application so as to raise prima facie or arguable case against the 1<sup>st</sup> respondent and other respondents in the main suit. The first principle therefore is not established.

Concerning the second and the third conditions for grant of temporary injunction, it is obvious and as correctly submitted by Mr. Mbuga that, the same were neither deposed nor discussed either in the applicant's affidavit or his submissions. Since the applicant failed to address them, I hold the same are not established as per the requirement of the law. As alluded to above, a temporary injunctive order should only be granted in fitting circumstances upon the applicant showing that, he has the right which ought to be protected and there is a serious threat which ought to be prevented by intervention of the Court. 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 point when observed 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)

In this matter, I have no doubt in making a finding that, the applicant has failed totally to establish the pre-conditions for grant temporary injunction as prayed since Court's business is to do justice on both parties and not grant the orders on mere convenience without any justifications. In the event the application stands dismissed with costs.

Order accordingly.

Dated at Dar es salaam this 19<sup>th</sup> day of May, 2023.

E. E. KAKOLAKI

**JUDGE**

19/05/2023.

The Ruling has been delivered at Dar es Salaam today 19<sup>th</sup> day of May, 2023 in the presence of Mr. Alfred Rweyemamu, advocate for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, Ms. Rosalia Ntiluhungwa, advocate for the 4<sup>th</sup> respondent and Ms. Asha Livanga, Court clerk and in the absence of the applicant.

Right of Appeal explained.

E. E. KAKOLAKI

**JUDGE**

19/05/2023.

