THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT – LAND DIVISION

(MUSOMA SUB REGISTRY)

AT MUSOMA

Misc. CIVIL APPLICATION No. 17 OF 2023

(Arising from the High Court [Musoma Sub Registry] in Civil Case No. 12 of 2023)

STANBIC BANK TANZANIA LIMITED ..... **APPLICANT**

Versus

1. **KIRIBO LIMITED**
2. **KIBACHO CHACHA MONATA** ..... **RESPONDENTS**
3. **AMOS KIBACHO CHACHA**

RULING

28.06.2023 & 10.07.2023

Mtulya, J.:

In the present application, **Dr. George Mwaisondola**, learned counsel for **Stanbic Bank Tanzania Limited** (the applicant) appeared in this court on 28th June 2023, carrying at his hands a barrage of precedents regulating temporary injunctions and banking businesses in Tanzania. In his opinion, the precedent of **Attilio v. Mbowe** (1969) HCD 284 had already laid down three (3) important principles in assisting courts to resolve contests of temporary injunction species and the principles have survived since 1969 to date without any interventions or any reservations.

Regarding banking businesses, Dr. Mwaisondola thinks that the judgment in **SME Impact Fund CV & Two Others v. Agroserve Company Ltd**, Civil Appeal No. 9 of 2018 may be invited to assist this court in deciding the present application. In citing other authorities in support of the indicated precedents, Dr. Mwaisondola had produced decisions of this court and Court of Appeal in **General Tyre East Africa Ltd v. HSBC Bank PLC** [2006] TLR 60 and **The Private Agricultural Sector Support trust & Another v. Kilimanjaro Cooperative Bank Ltd**, Consolidated Civil Appeals No. 171 & 172 of 2019, respectively. According to Dr. Mwaisondola, the therapy for borrowers of monies is to pay back the borrowed sum, and that there are no shortcuts.

The thinking and interpretations of the indicated precedents brought in this court by Dr. Mwaisondola were not protested by **Mr. Emmanuel Msengezi**, learned counsel for **Kiribo Limited**, **Kibacho Chacha Monata** & **Amos Kibacho Chacha** (the respondents). However, Mr. Msengezi thinks that there is new development in precedent of this court which places a reservation in applications for temporary injunctions, like the instant application. According to him, this court, in the precedent of **Cosmoss Properties Limited v. Exim Bank Tanzania Limited**,

Misc. Civil Application No. 584 of 2021, has introduced a concept of balance of convenience which moves into scrutinizing probability of causing injustice between the contesting parties. In order to appreciate the present application and arguments produced by the dual learned minds, I will briefly explain the background of the matter, albeit, in brief, that:

The applicant had advanced to the respondents two loans amounting to **United States Dollars Six Hundred Seventy-Five Thousand Seven Hundred and Ten Only** (675,710.00/=USD) by way of restructured facility. The securities of the loans were recorded in three (3) terms, *viz*: first, joint registered twenty-seven (27) assets which had been issued under VAF facilities associated with debenture creating a first ranking specific charge of the assets; second, chattel mortgage over three (3) assets; and finally, personal guarantees. The deed of debenture and chattel mortgages are currently in possession of the respondents and are hired to third parties.

However, the record shows that the respondent have defaulted payment of the loans hence the applicant has approached this court and complained in **Civil Case No. 12 of 2023** (the case) praying for payment of outstanding unpaid sum

of monies Tanzanian Shillings 1,958,941,046.00/=. According to Dr. Mwaisondola, the continued use of the deed of mortgage and chattel mortgages to the third parties may cause a great damage and irreparable loss to the applicant. Following the thinking, the present application was filed to pray for temporary injunction in order to retrain the respondents or their agents from continuing use, operating, wasting, disposing, leasing, renting, licencing or parting with the assests.

The assests indicated in the application are registered in: T.793DGS; T.428DGX; T.154CMK; T.562CJV; T.604DBW; T.796DED; T.601CCN; T.726CEK; T.297CLZ; T.774AUU; T.756CJV; T.224AER; T.334CES; T.982DKG; T.979DKG; T.980DKG; T.195DGR; T.194DGR; T.193DGR; T.192DGR; T.190DGR; T.867CSA; T.983CLQ; T.982CLQ; T.899DKA; T.525DEP and T.250CHK, which are jointly registered in the names of the plaintiff and the first defendant.

Other assets, are namely: Used Power Screen (S/No. PID0012VDGC95774; Used Terex Finlay Cone Crusher (S/No. TRX1540CT0CTOMB22167; Used Terex Finlay Jaw Crusher (S/No. TRX1175JSOMB52819); and Used Shindaiwa Generator/ Welder (S/No. 0000683DGW311L), which their acquisitions were

financed by the applicant. Finally, assets with registration numbers: T304DNH; T.270DPK; and T.173DGC, which are in the name of the second respondent.

In order to persuade this court to decide in favor of the applicant, Dr. Mwaisondola had cited the authority in **Attilio v. Mbowe** (supra), which had outlined necessary conditions in granting application like the present one, and linked them with the facts in the present application. Regarding the first condition, that there must be serious question of law to be tried on the alleged facts which probably the plaintiff will be entitled to reliefs prayed, Dr. Mwaisondola submitted that the applicant had advanced loan to the respondents, but they have declined to pay the same up to 12th April 2023, and the loan remains vulnerable as it is not secured by any assets.

According to Dr. Mwaisondola, once there is allegation of unpaid loans as indicated in the plaint of the case, the court may be moved to grant the application as it was held in case of **General Tyre East Africa Ltd v. HSBC Bank PLC** [(supra), where this court stated that if a bank does not recover loans, it will surely be an obvious candidate for bankruptcy. According to Dr Mwaisondola, the thinking of this court has been receiving

support from this court and Court of Appeal (see: **SME Impact Fund CV & Two Others v. Agroserve Company Ltd** (supra) and **The Private Agricultural Sector Support trust & Another v. Kilimanjaro Cooperative Bank Ltd** (supra).

On the second condition, whether this court can interfere to protect the applicant from irreparable injury before the case is resolved to its finality, Dr. Mwaisondola submitted that the nature of the assets and amount of the monies involved in the complaint attracts this court to grant the application. According to Dr, Mwaisondola, the assets carry with them valuable and movable properties, whereas the total amount of monies involved is a large sum of Tanzanian Shillings. In his opinion, if the assests are in continue use, operation or leased or transferred, will prejudice the applicant.

Finally, Dr. Mwaisondola stated that the final issue in the precedent of **Attilio v. Mbowe** (supra) on who will suffer more if the application is granted, its reply is found in the decision of **General Tyre East Africa Ltd v. HSBC Bank PLC** (supra), that to restrain a bank from exercising its contractual right, is unreasonable and contrary to the express contractual terms.

In replying the three (3) indicated questions and facts of the present application, Mr. Msengezi submitted that the respondents have been paying loan in accordance to the restructured loans agreement and proceeds of the assets' lending agreements with third parties are currently used to pay loans monies. In his opinion, the loan agreements were intended for the assets to produce income for loan payments and that restraining the assets by court orders will frustrate the payments. According to Mr. Msengezi, for the assets to work properly, they need to be well serviced and well maintained to be able for lending activities, which in turn makes the repayment of the monies possible. Mr. Msengezi submitted further that restraining the equipments will cause more harm to the respondents than good as the assets will depreciate and loose value from rusting and decay.

Regarding the second issue on courts interference to protect applicant's interest from irreparable loss, Mr. Msengezi submitted that court may restrain from issuing an order that will ground the assets as they will remain in a state of disrepair. In opinion of Mr. Msengezi, the precedent of **Attilio v. Mbowe** (supra) did not

intend courts to produce orders that will ground down assets for decay.

Finally, Mr. Msengezi submitted that on balance of greater mischief and hardship, the respondents will suffer more as indicated in the first and second conditions for reasons that: first, halting down the assets, will chock down the blood streams through which money required for payment of loans falls; second, the contracts between the applicant and respondents involves third parties; third, the respondents will decline further payment as they will have no means to pay; and finally, this court may learn from the precedent of **Cosmoss Properties Limited v. Exim Bank Tanzania Limited** (supra), where it was resolved based on the last condition only on great mischief and hardship to the respondent.

Rejoining the submission of Mr. Msengezi, Dr. Mwaisondola sought that the listed conditions in the precedent of **Attilio v. Mbowe** (supra) were squarely met hence this court cannot produce further interpolations on the established principles. Regarding the allegation of good services, repair and condition for lending the assets, Dr. Mwaisondola submitted the claim is not part of the counter affidavit and in any case, no evidences

were attached to support the move. According to Mr. Mwaisondola, similarly to issues of chocking blood streams and payment of loans have no attachments to support the allegation whereas the applicant had produced annextures from P.1 to P.6 to substantiate his claim.

Regarding the argument that the assets were leased to third parties and the same monies used to pay back the loaned monies, Dr. Mwaisondola resisted the point contending that the point was raised without any support of annextures hence this court may wish to disregard the same. In the opinion of Dr. Mwaisondola even the argument that grounded equipments are prone to decay and rust does not have any merit as the opposite is not true, that used equipments retain quality and good state of affairs.

According to Dr. Mwaisondola, Mr. Msengezi had produced issues which are not listed in the precedent of **Attilio v. Mbowe** (supra), and if he would have understood the purpose of temporary injunctions, he would have appreciated the grounding of the assets to maintain status quo.

I have perused the provisions in section 95 and Order XXXVII Rule (1) (a) (b) & (2) (1) of the **Civil Procedure Code**

[Cap. 33 R.E. 2019] (the Code) and scanned the cited precedent in of **Attilio v. Mbowe** (supra) with regard to conditions necessary for granting temporary injunction. His Lordship, Georges, C.J., (as he then was) had resolved that:

> *It is generally agreed that there are three conditions which must be satisfied before such an injunction can be issued: (i) there must be serious question to be tried on the facts alleged, and a probability that the plaintiff will be entitled to the relief prayed; (ii) that the court's interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established, and (iii) that on the balance there will be greater hardship and mischief suffered by the plaintiff from the withholding of the injunction than will be suffered by the defendant from the granting of it.*

Following the indicated directives of the court on the subject, the first issue in the present application is whether there is serious question to be tried in the facts alleged, and a probability that the applicant will be entitled to the relief prayed in the case. I have scanned the materials drafted in plaint of the

case and annextures from P.1 to P6 in this application, it is obvious that the plaintiff has serious question to be tried on the alleged facts, and may probably be granted the reliefs prayed in the case.

I am aware that the applicant has indicated in seventh and eight paragraphs on default of the respondents and attached P.6 to justify his complaint. The respondent on the other hand had replied in general statement at the fifth paragraph of the counter affidavit and during the submission in protest of the application in this court that the respondents have been paying the loans in accordance with the restructured payment terms and continues to pay to date. However, that crucial statement was not supported by any necessary materials. This is unfortunate on part of the respondents. In that case, I hold that the first condition has been satisfied in the instant application.

The parties in the present application had entered into agreement in banking businesses. However, the facts of the case show that the respondents had declined payment since April 2023, and have been reluctant to cooperate despite default notice and filing of the case.

There are multiple decisions in a bunch of precedents available in this court and Court of Appeal regulating the subject of banking, financial institutions, lenders and borrowers of monies transactions (see: **SME Impact Fund CV & Two Others v. Agroserve Company Ltd** (supra) **General Tyre East Africa Ltd v. HSBC Bank PLC** (supra); **Cosmoss Properties Limited v. Exim Bank Tanzania Limited** (supra); **Mroni Garden Construction Ltd v. Esther Nicholas Matiko**, Civil Appeal No. 9 of 2022; **F.B.M.E Bank v. John Kengele & Two Others**, Commercial Revision Case No. 1 of 2008; **The Private Agricultural Sector Support trust & Another v. Kilimanjaro Cooperative Bank Ltd** (supra); and **The Registered Trustee of St. Anita's Greenland Schools (T) & Six Others v. Azania Bank Limited**, Civil Appeal No. 225 of 2019). According to the Court of Appeal in the judgment of **The Private Agricultural Sector Support trust & Another v. Kilimanjaro Cooperative Bank Ltd** (supra), the parameters of a loan are pretty straightforward. If you borrow money, you must ultimately pay it back, and in most cases with interest. There is no shortcut, even to JRT [the appellant]. This court in the precedent of **SME Impact Fund CV & Two Others v. Agroserve Company Ltd** (supra) thought that courts of law are not bushes

where defaulters from lending institutions may hide to escape their contractual liability.

Following observations of the indicated precedent, it is obvious that in the instant application, court's interreference is necessary to protect the interest of the applicant's assets which are in use without repayments. If the assets are not protected today while in use, they may depreciate value at the irreparable loss to the applicant. That is why the decision in **General Tyre East Africa Ltd v. HSBC Bank PLC** (supra) has put in place a chilling clause that: *if a bank does not recover loans, it will surely be an obvious candidate for bankruptcy*. The conclusion of this court in the precedent is that:

> *The law is that, banks/ lenders and their customers/ borrowers must fulfill and enforce their respective contractual obligation under the various lending/ securities agreements entered into by the partis.*

The statement has recently received the support of our superior court in the precedent of **The Registered Trustee of St. Anita's Greenland Schools (T) & Six Others v. Azania Bank Limited** (supra), which had resolved that:

...we should interpose here and observe that ***the function of the courts is to enforce and give effect to the intention of the parties as expressed in their agreement****. Contracts belong to the parties who are free to negotiate and even vary the terms as and when they choose.*

(Emphasis supplied).

This court in March this year had invited the decision of the Court of Appeal in **The Registered Trustee of St. Anita's Greenland Schools (T) & Six Others v. Azania Bank Limited** (supra) and concluded that:

I must state that the current thinking and trend of decisions of this court and Court of Appeal is like the Swahili Saying that: ***dawa ya deni ni kulipa****. A good example of such understanding is displayed by the Court of Appeal in the last week precedent of* ***The Registered Trustees of St. Anita's Greenland Schools (T) & Six Other v. Azania Bank Limited*** *(supra), at page 19 of the judgment.*

I am inclined to the indicated trend of our courts of record and hold that the second question on courts interreference in the

current dispute is obvious to protect applicant's interest from irreparable loss before the rights of the parties are determined to the finality in the case.

I am aware Mr. Msengezi has alerted this court on the peril of granting restraint order and produced a bunch of reasons, *viz*: assets will remain without service; assets will remain in a state of disrepair; the assets will depreciate and loose value from rusting and decay; the proceeds of the assets are currently used to pay back loans; and the assets are currently in the hands of third parties. However, there were no materials registered in support of move. In the same level, the submission on the allegations was produced contrary to the laws regulating pleadings.

The established practice has been that parties in hearing proceedings are bound by their pleadings and any facts in variance of the pleadings cannot be considered by courts of law. There is a bundle of precedents in the Court of Appeal on the subject (see: **Barclays Bank (T) Ltd v. Jacob Muro**, Civil Appeal No. 357 of 2019; **Madam Mary Silvanus Qorro v. Edith Donath Kweka & Another**, Civil Appeal No. 102; and **Samwel Kimaro v. Hidaya Didas**, Civil Appeal No. 271 of 2018). Similarly, Mr. Msengezi has submitted that the respondents have been paying

loan in accordance to the restructured loans agreement, but he also declined to produce relevant annextures in support of the submission.

I have also scanned the precedent in **Cosmoss Properties Limited v. Exim Bank Tanzania Limited** (supra), which had declined temporary injunction to the applicant. However, in the precedent, it was the applicant who had approached this court seeking for an injunction order to restrain the respondent/ Exim Bank Tanzania Limited in surveying, cancelling and transferring title deeds. This court had found, at page 9 of the decision, that the respondent would be in a financial position to compensate the applicant if the injunction was to be denied, and in fact it was refused. This court stated further that in a situation where the bank debtor admits that he has failed to repay his debt on time, he has no other remedy than to pay.

This court in the precedent had reasoned that issuing temporary restraining order to restrain one of the parties from exercising her right under the same agreement in a circumstance like that would be tantamount to having the court interfere with the parties. Finally, it resolved at page 7 of the Ruling, that: *the*

duty of this court is limited to interpreting and enforcing the agreed terms and conditions.

The indicated practice is precisely the Court of Appeal has been encouraging and this court has been following without any reservations (see: **The Registered Trustee of St. Anita's Greenland Schools (T) & Six Others v. Azania Bank Limited** (supra); **The Private Agricultural Sector Support trust & Another v. Kilimanjaro Cooperative Bank Ltd** (supra); **General Tyre East Africa Ltd v. HSBC Bank PLC** (supra); and **SME Impact Fund CV & Two Others v. Agroserve Company Ltd** (supra).

Owing to the circumstances of the present application, and considering current precedents are in favor of enforcing agreements entered and agree by the parties, I think the present application intends to do just that without further interpolations. Therefore, I hold the applicant has established all necessary conditions for granting temporary injunction as enacted in **Order XXXVII Rule 1 (a)** of the Code and interpretation displayed in the precedent of **Attilio v. Mbowe** (supra) and hereby grant the prayer number 2 in the chamber summons with regard to restraint order of the cited assets until when the main suit in **Civil Case No. 12 of 2023** lodged in this court, is resolve to the

finality. I reserve prayer number 3 in the chamber summons with regard to costs until when the main case is done. I need not to reply applicant's prayers in number 1 and 4 of the chamber summons for obvious reasons of declining academic exercise.

It is so ordered.

F.H. Mtulya

Judge

10.07.2023

This Ruling was pronounced in Chambers under the Seal of this court in the presence of **Ms. Pilly Otaigo,** holding brief of learned counsel, **Dr. George Mwaisondola** for the applicant and in the presence of **Mr. Emmanuel Msengesi** for the respondents.

F. H. Mtulya

Judge

10.07.2023