

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

MISC. CIVIL APPLICATION NO. 42 OF 2021

(Arising from the Civil Case No. 9 of 2021)

AL ADAWI COMPANY LIMITED.....APPLICANT

VERSUS

TIB DEVELOPMENT BANK.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

11th April & 29th August, 2023.

S.M. KULITA, J.

By way of chamber summons the Applicant herein lodged this application in terms of Order XXXVII, Rule (1)(a) of the Civil Procedure Code [Cap 33 RE 2019] seeking for a temporary injunction restraining the 1st Respondent and or its agents whomsoever from evicting, selling, alienating or in any manner whatsoever tempering with the applicant's properties mortgaged to the 1st Respondent, pending hearing and final determination of the main suit. The application is supported with an

affidavit sworn by Abdul Hillal Ally, the Applicant's Principal Officer on 21st November, 2021.

The historical background of the matter in a nut shell is that on 4th June, 2008 the applicant and the 1st respondent executed a credit facility agreement. Later, the loan was restructured on 4th January, 2010 whereby the applicant was extended on the amount of money to loan. In securing the said loan, the applicant put her property as collateral. In unexpected situation, the duo entered into misunderstandings whereby the figures in repayment of loan did not match between them. It was that time when the respondent sought to evict and sell the mortgaged properties of the applicant. Having seen that intention, the applicant approached this court, to decide their dispute in the main suit and this application, seeking for court's intervention restraining the 1st respondent from alienating whatsoever the mortgaged property.

On the 20th day of February, 2023 the matter came for hearing. Mr. Kelvin Mashole Advocate, appeared for the Applicant, whereas Mr. George Kalenda, State Attorney appeared for the Respondents.

Submitting in support of the application Mr. Mashole prayed their affidavit be adopted as part of their submissions. He stated that, the applicant seeks for injunction as her property is in danger of being

alienated. He added that, he knows the conditions for grant of injunction as set in the case of **Atilio V. Mbowe 1969 TLR 284 HCD** of which he described as hereunder.

Concerning the first condition set in the cited case, Mr. Mashole stated that there two limbs. On the first limb he submitted that, this court is capable of awarding the relief sought in the main suit which is a Civil Case No. 9 of 2021. He said that in the said original case the Applicant prays for a declaration that, she had already paid Tshs. 1,500,000,000/= to the 1st respondent, thus the respondent has no claim over the applicant. To him all these orders are capable of being awarded by this court.

As for the second limb, Mr. Mashole stated that, the applicant has a great chance to win/succeed in the main suit. As for the cause of action, he stated that, there are some claimed money which the respondent has increased/exaggerated, of which the applicant does not recognize. In that sense, the applicant's counsel said that, there is a triable issues in the main case which they are capable to prove.

On the second condition, Mr. Mashole stated that, if injunction is not granted, the respondent is likely to evict them and sell the

mortgaged asset. To him, this will render the main suit nugatory and the applicant will suffer irreparably.

He went further stating that, as the debt is already cleared, selling the mortgaged property will render irreparable loss to the applicant which cannot be settled in monetary transactions. To buttress his argument, he cited the case of **Chai Bora Ltd V. Alvic Builders (T) Ltd, Misc. Civil Application No. 133 of 2021, High Court at DSM.**

As for the last issue Mr. Mashole submitted on the balance of inconvenience, that who is going to suffer the most if temporary injunction is not granted. To him he said that, it is the applicant. He said further that, as the applicant is the one who may suffer irreparable loss. Hence, will suffer great hardship than the respondent. He added that, respondents have nothing to suffer as they have already been paid in full. He said that, this condition having been fulfilled the application can be granted.

In reply Mr. Kalenda, State Attorney firstly prayed for the reasons stated in the counter affidavit be adopted to form part of his submission. He went further stating that, the provisions making the application bars temporary injunction to be granted against the Government. He cemented his argument by contending that, the word Government

includes the first respondent. Reliance was made under section 16 of the Government proceedings Act, as amended by Act No. 1 of 2020 at section 26 in which subsection 4 has been created. He added that section 2 of the Parastatal Organization (Financial Supervision and Control) Act No. 16 of 1975 provides for the same requirement. Cementing his argument, the Counsel cited the case of **Godfrey Kimbe vs. Peter Ngonyani, Civil Appeal No. 41 of 2014 CAT DSM**. According to him the provision supporting this application allows the court only make declaratory orders on the rights of parties in the main case not in this application.

Concerning the submissions by the applicant that there are three conditions to be met for the temporary injunction to be granted, Mr. Kalenda admitted the fact. He went ahead by mentioning them in short being; proof of prima facie case, proof of irreparable loss and balance of inconvenience.

As for the first condition, Mr. Kalenda stated that in the case of **RAJUL MOTICHAND SHAH V. JONAS PRATICE POTEA & ANOTHER, Misc Land Application No. 20 of 2020, High Court at Arusha** two conditions must be proved. He said that, one of them is the relief sought in the main case must be capable of being awarded. On

this the Counsel said that the declaration that the applicant has already settled the amount indebted, as shown in their counter affidavit, does not carry weight as there is an outstanding amount of loan balance. The State Attorney added that, the said outstanding amount, its interest accrues daily as per the facility agreement until the loan is paid in full.

Further submitting on that ground, Mr. Kalenda stated that there must be an absence of rebuttable evidence that the applicant is entitled to the sought reliefs. To him, there is a rebuttable evidence against the applicant on it. He said that the evidence is found in the counter affidavit in the main suit in which the prima facie case alleged to have been there is not proved. Hence, as for the facts of the case there is no existence of serious question to be tried.

As for the second condition which is about irreparableness, Mr. Kalenda was of views that, the respondent is the one who is likely to suffer irreparable loss. He gave the reasons that, as the days go on the mortgaged property is devalued while the debt remains to be 25 billion plus interest. He made reference to the case of **CHAI BORA LIMITED V. ALVIC BUILDERS (T) LIMITED & ANOTHER, Misc. Civil Application No. 133 of 2021, HC at DSM** contending that, irreparable loss must be that which cannot be paid in monetary form. He

added that, as the debt still increases due to the continual increase of interest the mortgaged property becomes inefficient to repay the loan as per the facility. He thus prays for the court to intervene, as it is the respondent who will suffer irreparable loss.

As for the balance of inconvenience, Mr. Kalenda submitted that, as the 1st respondent is a lending institution, a delay to settle the debt leads to disable the institution, hence defeats the objective of security. He cited the case of **Christopher P. Chale V. CBA, Misc. Civil Application No. 635 of 2017, HC at DSM** contending that, when customers do not pay the loan, the Bank will run bankruptcy.

In rejoinder Mr. Mashole, Advocate stated that, he admits that the first respondent is a Government institution, yet he went ahead contending that, the word used in the Order XXXVII is "may" which means, the court has discretion to grant injunction even in absence of applicant's application. He again faulted the submissions that declaratory orders should be sought in the main application. He said that the said argument has no legal weight. He said that this being a separate applications cannot be sought in the main suit.

Concerning the establishment of a prima facie condition, Mr. Mashole stated that, they have not to go deeper on it, as in doing so it

can be regarded as determining the main case. To him, as long as the applicant sees that he is not indebted by the respondent, it suffices for the same to be regarded as the ground.

As for the collateral property Mr. Mashole was of the views that, contrary to devaluation, the property's value tends to increase daily. He added that, as the applicant is not indebted then when the collateral is sold, she is the one who will suffer the most.

As to the balance of inconvenience Mr. Mashole stated that, the case of **Christopher P. Chale V. Commercial Bank of Africa, Misc. Civil Application No. 635 of 2017, HC at DSM** is distinguishable. He said that, in that case the matter was inability to settle the outstanding loan while in this case, he said the whole debt has been settled.

That was the end of both parties' submissions.

I have earnestly gone through both parties' pleadings, authorities and taken full consideration of both parties' submissions. The issues for determination is whether the applicant's application is meritorious.

In this application there are some aspects which parties herein do not dispute. The first one is that the parties do agree that the conditions set in the case of **Atilio V. Mbowe** (supra) are the main determinants

of whether injunction should be granted or not. Secondly, the parties do agree that the first respondent is a Government institution and thirdly, that there is a pending case before this same court which is Civil Case No. 9 of 2021 between parties herein. On that account, my duty is to deal on the rival issues only which are; **one** whether the three conditions set in the case of **Atilio V. Mbowe** (supra) have been met or not, **two** whether this court may grant temporary injunction against the first respondent.

Temporary injunctions are governed by **Order XXXVII, rule 1 of the Civil Procedure Code [Cap 33 RE 2019]** which state that:

"Where in any suit it is proved by affidavit or otherwise-

(a) that any 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; or

(b) that the defendant threatens, or intends to remove or dispose of his property with a view to

defraud his creditors, the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of the property as the court thinks fit, until the disposal of the suit or until further orders:

Provided that, an order for granting a temporary injunction shall not be made against the Government, but the court may in lieu thereof make an order declaratory of the rights of the parties”

The rationale behind the grant of temporary injunctive orders was stated in **American Cynamid Co. V. Ethicon Ltd [1975] 1 All ER 504** at pg. 509 Per Lord Diplock) as cited in **Hotel Tilapia Ltd v. Tanzania Revenue Authority, Commercial Case No. 2 of 2000** (unreported). In the said case, Lord Diplock held that;

“... The object of the temporary injunction is to protect the plaintiff against injury by violation of his right for which he could not adequately be compensated in damages recoverable in the action if

the uncertainty were resolved in his favour on the trial.....” (at p. 509)

Also, as correctly submitted by both parties to the application, in our jurisdiction the criteria employed in determining applications for temporary injunction were elucidated by Georges, C. J. in the landmark case of **Atilio V. Mbowe** where it was stated that before granting prayers for temporary injunction the court must be satisfied that;

- i. There is a serious question to be tried on the facts alleged and the probability that the plaintiff will be entitled to the relief prayed.
- ii. The Applicant stands to suffer irreparable loss requiring the courts intervention before the Applicants legal right is established;
- iii. That on the balance, there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendant from granting of it.

However, for a temporary injunction to be issued, all three criteria must be proved as it was held in **Charles D. Msumari & 83 others v**

The Director of Tanzania Harbours Authority, Civil Appeal No.

18 of 1997 where this court stated that;

"Courts cannot grant injunction 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 stated principles. The courts should not be overwhelmed by sentiments, however lofty or mere high driving allegations of the applicants such as that the denial of the relief will be ruinous and cause hardship to them and their families without substantiating the same. They have to show that 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"

In the instant case, regarding the first condition, as alluded earlier, there is a pending suit between the parties herein. In this suit, Civil Case No. 9 of 2021, the parties herein contend over repayment of loan. What remains to be determined is whether the dispute between the parties constitutes a serious triable issue. The law is settled that, at this stage all what the applicant should demonstrate is just existence of a prima facie case (triable issue) between him/her and the respondent. As stated in **Colgate Palmolive V. Zakaria Provision Stores and Others, Civil Case No. 1 of 1997** it suffices at this stage for the applicant to demonstrate that he has a case worth consideration and that there is a likelihood of the suit to succeed.

Upon looking the affidavit and its annexures, I am convinced that the applicant has demonstrated that there exists a triable issue between her and the respondents. The same as to whether she has already repaid the loan in full to the respondent. I respectfully differ with the learned State Attorney's submission that this court is incapable of awarding the relief prayed by the applicant. He gave reasons that, there is rebuttable evidence that the applicant is not entitled to the reliefs sought, and that there is an outstanding balance of loan not paid by the applicant. In my strong view, this is actually what the court has been

called upon to determine in the main suit. That has been well asserted in the affidavit filed in support of the application.

Through the affidavit the applicant has demonstrated the loan amount that she has already repaid to the first respondent and the contravention on different accounts that were opened by the respondent without knowledge of the applicant which might be the source of the misunderstanding between the parties. This issue remains to be determined in the main suit, whether or not the applicant is still indebted by the first respondent. This question cannot be determined at this stage. It can only be determined after a full trial in the main suit. Regarding the view expressed by the learned State Attorney, it will undeniably amount to exaggeration of this legal requirement beyond proportional heights and would entail prematurely determination of the main suit. See **Suryakant D. Ramji V. Savings and Finance Ltd and others, Civil Case No. 30 of 2000 HC (Commercial Division) at DSM** (unreported).

Regarding the 2nd and 3rd conditions, this court is of the considered view that, through her affidavit, the applicant has demonstrated that the balance of convenience tilts heavily against her. The eviction impending the alienation of the mortgaged properties to the other persons, will

certainly have a heavy hurt on the occupier of such mortgaged properties (applicant) and will render the main suit nugatory.

To prevent such suffering and for the other reasons demonstrated above, I allow the application and subsequently declare that alienating the mortgaged properties to the other persons will be prejudicial to the applicant's interest/right which awaits to be finally determined by this court in the Civil Case No. 9 of 2021. Accordingly, the respondents are hereby restrained from alienating the mortgaged properties pending determination of the main suit.

In upshot the application for temporary injunction is hereby granted. Each party to bear its own costs.



S. M. KULITA
JUDGE
29/08/2023

DATED at **SHINYANGA** this 29th day of August, 2023.



S. M. KULITA
JUDGE
29/08/2023

