

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM SUB-REGISTRY)**

**AT DAR ES SALAAM**

**MISCELLANEOUS CIVIL APPLICATION NO. 323 OF 2023**

(Originating from Civil Case No. 162 of 2022)

**LEKUNI GENERAL ENTERPRISES CO. LTD ..... APPLICANT**

**VERSUS**

**NMB BANK PLC ..... RESPONDENT**

**RULING**

Date: 04/08 & 08/09/2023

**NKWABI, J.:**

This application is rooted under Civil Case No. 162 of 2022 which is still pending in this Court in which the plaintiff (the applicant herein) is entreating for the reliefs I reproduce below:

- a. Orders that the defendant claim of loan repayments from the plaintiff for the loan of T.shs 4000,000,000/= at the moment where the plaintiff has no operation is unjustified.
- b. An order declaring that the defendant cease to claim the loan repayments from the plaintiff pending the determination of Civil Case No. 97 of 2022, between Lekuni General Enterprises Company Limited v. Tanzania Breweries Limited, at the High Court, Dar-es-Salaam District Registry, at Dar-es-Salaam,
- c. Any other reliefs that this honourable Court deems fit and just to grant.

For the moment, as I have indicated above, the applicant has filed this application, under a certificate of urgency, in the mission that this Court, under the provisions of Order XXXVII Rule 1(a) and section 68 (c) (e) of the Civil Procedure Code, Cap. 33 R. E. 2019 issues the about to be specified orders in an inter-parte application:

1. That this honourable Court make an order to grant a temporary injunction to restrain the respondent and any other person, entity working or acting under their instructions from disposing the following properties in whatever manner until the final disposal of the suit:

- Plot No. 71, Block "F" located at Igunga Urban area issued with CT. No. 1710 LR Tabora, L.O. No. 580520 in the name of Felix Peter Msele;
- Plot No. 308, Block "L" Majengo Area, Nzega district, issued with CT. No.50881 LR Tabora L.O. No. 403942 in the name of Lekuni General Enterprises Company Limited;
- Plot No. 232, Block "V", Kitongo Nzega Urban Area, Nzega District issued with Certificate of Title No. 4537 Tabora L.O. 713023 in the name of Felix Peter Masele;

- Plot No. 146, Block "V" at Kitongo Nzega Urban area, Nzega District issued with CT. No. 4538 LR. Tabora L.O. No. 713024 in the name of Felix Peter Msele;
- Plot No. 224, 225 & 226, Block "V" at Kitongo area in Nzega District issued with CT. No. 4539 LR Tabora, L.O. No. 713025 in the name of Felix Peter Msele.

2. Costs of this application be provided for and,

3. Any other order this Honourable Court may deem fit and just to grant.

The chamber summons is supported by an affidavit of Felix Peter Msele, principal officer of the applicant. There is also a supplementary affidavit duly sworn by Felix Peter Msele. The respondent duelled the application through a counter affidavit duly sworn by Sharifa Karanda, principal officer of the respondent. There is also a supplementary counter-affidavit which is sworn by Consolatha Mosha, also principal officer of the respondent.

Beforehand, I make it clear that the application was argued by way of oral submissions. Mr. Benson Kuboja, learned counsel for the applicant, submitted in favour of the application while Mr. Frank Mwalongo assisted by

Mr. Mohamed Muya, learned counsel for the respondent, argued in opposition to the application. I am indebted to their strong submissions.

Mr. Kuboja adopted the contents of the affidavit and supplementary affidavit in support of the application together with the contents of the chamber summons as part of his submissions in chief. He stated that all the conditions/tests provided for in the case of **Atilio v. Mbowe** [1967] HCD No. 287 have been met for grant of the temporary injunction. The conditions for granting an injunction order indeed, are:

- i. There must be a serious question to be tried on the facts alleged, and the probability that the plaintiff will be entitled to the relief prayed.
- ii. That the court interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established.
- iii. That on the balance there will be great hardship and mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendant from granting it.

Mr. Kuboja addressed the Court in respect of the 1<sup>st</sup> condition on whether there is a prima facie case warranting for an injunction. He pointed out that there is Civil Case No. 162 of 2022. He brought to the attention of the Court paragraph 11 of the affidavit where the questions are outlined. Also, paragraph 3 of supplementary affidavit (the notice of auction while the bank statement shows the applicant has paid 260 million shillings (Paragraph 5 of the affidavit).

He added that they intend to include the development in the suit. He asked me to see section 127 (2) (d) of the Land Act which requires notice of 60 days then auction may follow. It is added that the defendant has failed to file written statement of defence and that the case has overwhelming chances of success. Mr. Kuboja exemplified **Gaudence Vicent Lyimo & 2 Others v. NCBA Bank Tanzania Limited**, Misc. Land Application No. 129 of 2022 HC Arusha.

In rebuttal explanation, the counsel for the respondent adopted the contents of the counter-affidavit and the counter-affidavit to the supplementary affidavit. Mr. Mwalongo maintained that the applicant has failed to establish a prima facie case. He pointed out that the reliefs in Civil Case No. 162 of

2022 do not challenge the amount which is sought to be recovered. He beefed up that there is a prayer out of context in Civil Case No. 162 of 2022 because in that other case, the respondent is not a party. He further explained that lack of operations cannot operate as a prima facie case and 60 days' notice is not part of Civil Case No. 162 of 2022. It is mere an afterthought, contended Mr. Mwalongo. He then referred me to **Benny Josephaty Mdesa & Another v National Microfinance Bank PLC (NMB BANK) & 3 Others**, Miscellaneous Land Application No. 8 of 2021 HC (unreported).

Mr. Mwalongo added that facts in the supplementary affidavit which are not in the plaint (60 days' notice) collapses. Also, payment of part of the loan collapses as it is not in the plaint. He stated that an annexure to the supplementary affidavit shows the amount which is indebted and in reply to the supplementary affidavit, has been answered. Therefore, Mr. Mwalongo pressed, an arguable case has not been established.

Mr. Kuboja's reaction to the reply submission is that the applicant has not admitted to have defaulted repaying the loan. He expounded that there was an agreement between the plaintiff and Tanzania Breweries Ltd. He asked

me to see paragraph 6 and 9 of the plaint. He stressed that their prayers are not out of context. He referred me to annexure LGT 1 and said that there is serious question to be determined. He further maintained that the properties are owned by guarantor. The applicant has the duty to protect what has been entrusted.

I have excitedly examined the rival arguments in respect of the 1<sup>st</sup> condition for the grant of temporary injunction. I am certain that the first condition is established by the applicant. In the circumstances of this case where there is a plaint filed and the defendant has not filed a written statement of defence further that the main case is ordered to proceed with ex-parte proof, the applicant has managed to exhibit that there is a serious question to be determined in this matter. I am persuaded by the position of this Court in **Christopher P. Chale v. Commercial Bank of Africa**, Miscellaneous Civil Application No. 635 of 2017 HC (unreported) where this Court quoted with approval the holding in **Hotel Tilapia Ltd v. Tanzania Revenue Authority**, Commercial Case No. 2 of 2000 (unreported) where Lord Diplock stated 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 ...”*

On irreparable loss or injury, Mr. Kuboja contended that that is shown under paragraph 8 of the affidavit. He added, it will be impossible to recover all five properties. He cited **Hussein Abdulkarim v. CRDB Bank Public Limited Company & 3 Others**, Miscellaneous Land Application No. 192 of 2022 HC Land Division (unreported).

In response, it is argued for the respondent that the five properties have been mentioned, only one is in the name of the applicant, the rest are not in the name of the applicant. Mr. Mwalongo went on to submit that, the guarantors are not parties to this application and that the applicant being a company, she cannot talk about family of the applicant. So, this is an erroneous application. Msele ought to be the applicant. He does not deserve any injunctive order. He was of the view that the submission in chief is thus out of context. He too pointed out that it is the respondent who will suffer irreparable loss as it has statutory power to recover. Section 126(d) and section 132 (1), (2), (3) and (4) of the Land Act vests the respondent with



power of sale. Mr. Mwalongo backed his views with the case of **Christopher P. Chale v. Commercial Bank of Africa**, Miscellaneous Civil Application No. 635 of 2017, HC (unreported) at pages 7-8. The applicant has acknowledged to have defaulted. So, irreparable loss has not been established, emphasized Mr. Mwalongo.

Mr. Kuboja, in rejoinder submission, maintained his position in submission in chief he had earlier made and said that the power of sale has not yet matured as per section 127 (d) of the Land Act which has not been met. He explained that the events happened while the plaint is in Court. The 60 days' notice is not an afterthought, urged Mr. Kuboja. He stated that the respondent has acknowledged none service of the 60 days' notice as it has not been signed.

He distinguished the other cases cited by his learned brother because the respondent has not filed a written statement of defence. On irreparable loss, selling all the mortgaged properties, the same will not be recoverable, beseeched Mr. Kuboja.

I have sharply inspected the arguments of both counsel. I am of the opinion that, the argument by the counsel for the respondent is correct. I subscribe to the view of this Court in **Chale's** case supra while I do not side with the

cases cited by the counsel for the applicant. As to the issue of notice, another notice may be issued, and no any injury would be occasioned to the applicant. The applicant may be compensated, it is, thus, not an irreparable loss if the properties are auctioned. After all, the respondent may auction one property after the other and is accountable to the applicant by adhering to the auction procedures.

In fact, the 60 days' notice has nothing to do with irreparable loss and the same could be reissued and would affect nothing. Afterall, ever since the notice was issued, more than sixty days have lapsed already. Consequently, I rule that the 2<sup>nd</sup> test has not been manifested in this application.

Eventually, the last condition which is the balance of convenience which is found at paragraph 14 of the affidavit, Mr. Kuboja explained that the bank is still in custody of certificates of titles. He was of the view that the guarantor's families will suffer more hardship than the respondent. He then prayed the application be granted.

Answering the submission in respect of the last condition, Mr. Mwalongo was of the view that it is the bank which will be greatly inconvenienced as there

is already a default. He fortified his argument with **Chale's** case (supra). He then prayed the application be dismissed with costs.

In refutation however, the counsel for the applicant stressed, in rejoinder submission that the applicant will have more hardship than the respondent. He prayed that the application be granted.

I have considered the addresses made by the counsel for both parties on the last condition. I am of the firm view that the applicant has not placed any material to show that the respondent will suffer less inconvenience than the applicant. Having the title deeds in possession does not help the business of the respondent grow. They are just intended as security, but the respondent is not doing business on them. There is nothing in the Court record that proves that the applicant, who is a company has a family or families which will suffer hardship. Otherwise, the applicant has only one property which is the subject of this application. Further, the applicant is a company thus having only legal personality, so it has no family. The claim that the applicant's families will suffer is a sham claim. It is rejected. In the premises, the submission by the counsel for the applicant is ruled unacceptable while the argument by the learned counsel for the respondent is accepted. In my

decision, I hope, I am well guided by **Aliseo Peter Nditi v. KCB Bank (T) Limited**, Misc. land Application No. 13/2013 at page 5 where it was ruled that:

*"That temporary injunctions are discretionary remedy is well settled. Courts cannot grant them even when it is convenient to do so. If the applicable principles enumerated above have not been fully met."*


The applicant, therefore, fails on the 3<sup>rd</sup> condition as well for the grant of the temporary injunction.

To wrap it all up, I rule that this application is untenable because the 2<sup>nd</sup> and the 3<sup>rd</sup> conditions as stated in **Atilio's** case (supra) have not been established by the applicant. As a result, the application is dismissed with costs.

I so order.

**DATED** at **DAR-ES-SALAAM** this 08<sup>th</sup> day of September, 2023



  
J. F. NKWABI

**JUDGE**