IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 395 OF 2023

(Arising from Civil Case No. 134 of 2023)

THE REGISTERED TRUSTEE OF CORNELIUS CHRISTIAN AID TO CHURCHES AND THE NEEDY FOUNDATION..... APPLICANT

VERSUS

EQUITY BANK (TANZANIA) LIMITED..... RESPONDENT

RULING

Date of Last Order: 07/09/2023

Date of Ruling: 15/09/2023.

E.E. KAKOLAKI, J.

Under certificate of urgency and by way of chamber summons, the applicant herein instituted the instant application beseeching this Court to issue injunctive Order restraining the respondent, her agents, workmen or assignees from selling the pledged securities over Plot No. 175 Block 'D' Kunduchi area, within Kinondoni Municipality Dar es Salaam- Tanzania, with certificate of title (CT) No. 43260 and Plot No. 537/1 Block 43 Kijitinyama area, Kinondoni Municipality within Dar es salaam region with CT No. 90127, pending hearing and final disposal of the suit, in Civil Case No. 134 of 2023,

pending for hearing before this Court, costs of the application and any further reliefs as the Court deems fit and just to grant. The application has been preferred under Order XXXVII Rule 1 (a), 1(b) and 2 (1), sections 68 (c) and 95 of the Civil Procedure Code [Cap 33 R. E 2019] (the CPC) and supported by an affidavit of **Peter Auzebio Kivamba,** board member of the applicant's company accounting for reasons for the grant of the application.

When served with the application, the respondent filed a counter affidavit duly sworn by **Dorothea Joseph Rutta**, respondent's principal officer vehemently challenging merit of the application.

It is gathered from the applicant's affidavit that, sometimes in 2014, the respondent issue a facility letter to the applicant (annexure NCA-1 collectively), extending loan of Tshs. 700,000,000/- to her, the facility which was secured by the two plots above named and deeds of assignment of rental income receivable from buildings erected on property Plot No. 175 Block D, Kundichi area Kinondoni, now housing a Secondary School named Cornelius Girls Secondary School located at IPTL area and Plot No. 537/1 Block 43, Kijitonyama area Kinondoni, Dar es salaam to be executed in favour of the respondent. It is contended that, prior to creation of the mortgage

deeds referred in the facility letter in annexure NCA-1, parties had executed a lease agreement for a term of ten (10) years from the date of execution for rent of USD 25 per square meter for a total of 441 square meters payable on annual basis in which the applicant opened and operated account No. 3006211148800 for respondent's rent payments. It is further contended that, it was one of the terms of loan agreement in annexure NCA-1 that, all rental income over Plot No. 573/1 Bolock 43, Kijitonyama area – Kinondoni where the respondent had rented were to paid by the respondent on due dates into the loan account to off-set loan repayments instalments effected into applicant's loan account No. 300751108766 and any remaining balance to be deposited into rent account No. 3006211148800.

It appears during the tenor of the said loan facility between the parties, in September, 2017 the said loan was rescheduled and the loaned sum increased to Tshs. 725,876,773/- which was to be charged from annual to quarterly basis. The applicant asserts in the due course of performance of the said agreement, the respondent defaulted effecting rent payments in the applicant's loan account on due dates the result of which the applicant fell into default of repayment of the said loan thereby attracting interest and penal interest at the respondent's fault to honour her contractual obligation

in the lease agreement. Following that default it is averred, the respondent without reason refused to either remove the interest caused by her default or heed to the request by the applicant for reconciliation of loan account in order to benefit from his own wrong before holding a partial reconciliation in July, 2021 in which she later on refused to conducted the final one to date despite of several demands by the applicant. It is further averred that, while the respondent maintains that up to 25th June, 2021 the loaned amount stood at Tshs. 511,607,819/-, the applicant claims to be less than Tshs. 186,100,000/- upon reconciliation done and penalties removed as allegedly exhibited in the copies of correspondences and attempted reconciliation sheets annexure NCA-2. According to the applicant, following misunderstanding between parties on need of conducting final reconciliation, the respondent's claims were later on enhanced to Tshs. 556,546,503 allegedly accruing from interest of 18% and 6% penal interest rate until full payments as depicted in the demand letter annexure NCA-3.

Following that pending loan outstanding amount it is contended by the applicant that, the respondent commissioned the court broker to dispose of the securities as since 21/07/2023 the interested buyers are surveying the two plots including the school premises thereby causing disruption to

students' attention housed in Plot No. 175 Block 'D' Kunduchi area Kinondoni, who are preparing for their form four examines. And further that, with ill motive has advertised in newspaper plying Zanzibar for sale by tender the pledged securities hence exposing the applicant to suffer miscarriage of justice if this application is not granted. It is from that threat Civil Case No. 134 of 2023 was preferred by the applicant followed by this application.

In response the respondent disputed applicant's claims contending that, to the contrary it is the applicant who breached both facility agreement of 3rd July, 2014 for the purpose of liquidating two outstanding loan facilities she had with CRDB Bank amounting to Tshs. 700,000,000/- that created assignment over rental income from the two landed properties as per annexure EBTL-1 and the Loan Facility of 15th September, 2017 that varied terms of former facility by removing one property and assigning rental income to one property only in Plot No. 175, Block 'D', Kunduchi area Kinondoni as evidenced in annexure EBTL -2. Hence the respondent is entitled to impose penalty for default in repayment of loan as well as exercise its security rights to dispose of the two mortgaged properties as provided in the deed of mortgage EBTL-3 after issue of default notices as evidenced in annexure EBTL-4. It is the respondent's averment that, the applicant has

been filing frivolous application and suits namely Land Case No. 241 of 2022 and Land Case No. 289 of 2022 which were thrown out by this Court with costs hence invitation for this Court to find no injustice will be caused to the applicant if the application is dismissed. The applicant though granted with leave to file the reply to the counter affidavit waived that right as non was filed.

Hearing of this application was done in writing, as all parties were represented, whereas applicant had representation of Mr. Daniel H. Ngudungi, while Ms. Eugenia M. Shayo, represented the respondent, all learned advocates. The submission were filed in time as per the scheduled court orders.

I had ample time to travel through both applicant's affidavit and counter affidavit by the respondent as well as the contending submissions. Undisputedly 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 conditions are established by her. The principles as submitted by Mr. Ngudungi are detailed in the cases of **Atilio Vs. Mbowe** (1969) HCD 284 and **OTA Edward Msofu & Company Vs. Equity Bank Tanzania Limited and 4 Others**, Misc. Civil

Application No. 681 of 2020. See also the cases of **EDU Computers (T) Ltd Vs. Tanzania Investment Bank Ltd**, Commercial Case No. 38 of 2001, **Christopher P. Chale Vs. Commercial Bank of Africa**, Misc. Civil Application No.136 of 2017 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 (all HC-Unreported).The said principles are *Firstly,* there must be a serious question to be tried by the court and the probability that the plaintiff will be entitled to the reliefs prayed for (in the main suit), *Secondly*, if injunctive order is not issued the applicant would suffer irreparable loss that cannot be atoned in monetary terms and *thirdly*, that on the balance of convenience greater hardship and mischief is likely to be suffered by the applicant if the grant of the application is withheld than it would do to the respondent if it is granted.

The objects of granting injunctive orders have been given a prolonged and a more sophisticated postulation in several decisions. For instance, in the case of **Abdi Ally Salehe Vs. Asac Care Unit Ltd & 2 Others,** Civil Revision No. 3 of 2012, the Court of Appeal of Tanzania held thus:

> "***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)

From the above authorities one key message is brought forward in that, an injunctive order should only be granted in a fitting circumstance. Guided with the above cited principles and having sincerely considered the evidence in both affidavit and counter affidavit and accorded the deserving weight both parties' submission, I am now prepared to determine this application by

examining whether the applicant has demonstrated existence of each of the three principles.

Submitting in proof of the first principle, Mr. Ngudungi argued that, in the instituted Civil Case No. 134 of 2023, applicant's claim is for an order declaring the respondent in breach of the loan agreement and an order for reconciliation of the loan account between the parties after the respondent failed to honour part of their agreement that attracted interest and penal interest due to her inaction as reflected in paragraphs 3,4.5,6,7,8,9,10,11 and 12 of the affidavit. According to him, respondent's refusal to conduct final reconciliation and their disagreement on the difference in the claimed outstanding loan amount in which the respondent claim to be Tshs. 511,607,819/- while the applicant asserts to be less than Tshs. 186,100,000/=, in itself constitute prima facie case as the Court is invited to establish the true balance of loan amount due. Thus the 1st condition or principle is satisfied Mr. Ngudungi stressed and so submitted.

In rebuttal Ms. Shayo contended that, the applicant has failed to demonstrate that prima facie case exist in this matter. Relying on the commentary by Justice P.S. Narayan in his book, **Law of Injunction**, 9th Ed (2005) at page 85, she argued when determining application of this nature

it is inevitable for the court to examine the merits of the case and consider the likelihood of the suit being decreed. And that, the depth of investigation which the Court pursue may vary from one case to another. She said, in the case of **Pertolux Service Stations Ltd Vs. NMB Bank PLC and Another**, Misc. Land Application No. 59 of 2020 (HC-unreported) this Court ruled that non annexing of the bank guarantee agreements which formed the basis of the controversy denied the Court with an opportunity to scrutinize whether there existed triable issues in that particular matter.

In this application she submitted, the Court is invited to find that refusal to conduct reconciliation despite of difference of figures in account constitutes triable issues, while one of the agreement forming the basis of payments in the said account which is the lease agreement is not annexed to the affidavit to avail the Court with time to ascertain the controversy and make a finding that, prima facie case is established. She added that, even when the same was to be annexed the jurisdiction of this Court would be called into question as the said lease agreement ousts it. In view of the above this Court was called to dismiss the application with costs.

In a short rejoinder, Mr. attacked the submission by Ms. Shayo that, applicant's alleged entitlement of final reconciliation of Loan and Rent

Account is misconceived, contending that the same is misleading as it is indicated in the respondent's letter of 28th December annexed as NCA-4 to the affidavit that there was direct inaction of the respondent that suffered the applicant charge of interest and penal interest for 48 days thereby raising for need of reconciliation of account before resort to the recovery measure is employed. To him, the need so arises following respondent's claim of the outstanding loan amount of Tshs. 511,607,819/- now raised to Tshs. 746,688,459.23, contrary to what is known to the applicant which is less than Tshs. 186,100,000/- as averred in paragraph 10 of the affidavit. Concerning the case of **Pertolux Services Station Ltd (supra)** relied by the respondent's counsel and the argument that the applicant has failed to annex the lease agreement executed by the parties he submitted that, the same is distinguishable from the facts of this case as in that case, the document not annexed was relevant to the matter unlike in the matter at hand since the lease agreement does not form basis of the dispute but rather the bank statement since there was initial reconciliation already conducted in which the respondent refused to complete the final one. According to him the respondent's submission is out of context as the dispute is on the figure reflected on the bank accounts and not lease agreement.

Having keenly revisited and considered the averments in the affidavit, counter affidavit as well as the submissions from both parties in support and against the first principle, I tend to agree with Mr. Ngudungi that, in this matter is not the lease agreement whose availability is demanded by Ms. Shayo for determination whether denial of final reconciliation by the respondent constitute triable issue or prima facie case but rather the figure reflected in the bank accounts which forms the basis of controversy. Undoubtedly, the triable issue or prima facie case in this matter can only be established by availing this Court with opportunity to examine the record forming the basis of controversy and consider whether there is likelihood of the suit being decreed as rightly commented by Justice P.S. Nayan in his book, **Law of Injunctions**, (supra) at page 85, the commentaries which this Court finds persuasive and adopt them as good law. The learned author had this to say:

> *"When the Court is called upon whether the Plaintiff has prima facie case for the purpose of granting temporary injunction,* ***the court must perforce examine the merits of the case and consider whether there is likelihood of the suit being decreed*** *and the depth of investigation which the court pursue may vary with each case." (Emphasis supplied).*

It is worth noting that, in considering as to what constitutes triable issues the Court has to look on the materials presented before it and whether there exists a right which has apparently been infringed by the opposite party calling for an explanation or rebuttal from the latter. In this test I find inspiration from the Kenyan case of **Mrao Vs. First American Bank of Kenya and Two Others** [2003] KLR 125, which though persuasive, is very relevant to the fact in issue, more particularly when the Court is deliberating on what might constitute a prima facie case or arguable case 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."*

It is settled law that, it is not conclusive evidence which is required in proving whether there is a serious question for determination by the court, but rather the facts as disclosed in the plaint and the affidavit. Meaning, at this stage the court has to examine whether there is a bonafide contest of right between the parties and serious questions to be tried by the Court that cannot prejudice the case of either party or that can record a finding on the

main controversy involved in the suit. 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).

Applying the principle in the above authority to the facts of this case the materials worth consideration by this Court in determining whether there is trial issue or not as submitted by Mr. Ngudungi are found in paragraph 10 of the affidavit. I find it incumbent to reproduce the same for the purposes of clarity:

> *10. The parties in july, 2021 held a partial but not final reconciliation and each one held horns on his side thus the loan account stands unreconciled to date, the respondent has refused to reconcile to establish the true state of affairs on the loan account and maintain that the outstanding balance on loan account is Tzs 511,607,819/= by 25th day of June, 2021 while the applicant's position is that one reconciliation is done and penalties removed the true balance on account is less that Tzs 186,100,000/=. Copies of correspondences and attempted reconciliation sheets are hereto attached and marked as NCA-2 forming part of this affidavit.*

Upon perusal of all annexures to the affidavit, this Court was unable to find the alleged annexed correspondences and attempted initial reconciliation sheets referred in annexure NCA-2, for examination so as to satisfy itself

regarding to the applicant's contention that, there was partial reconciliation of loan account justifying the claimed true loaned amount of less than Tshs 186,100,000/- and not Tshs. 511,607,819/- as claimed by the respondent, the fact which would in my view entitle the applicant to demand for final reconciliation allegedly denied by the respondent, the materials which would constitute triable issues or prima facie case as Mr. Ngudungi would want this Court to believe. Again I passed a deep eye to the letter of 28th December, 2021 allegedly annexed as NCA-4 collectively but unfortunately was unable to unearth any fact to the effect that, there was partial reconciliation of loan account subject of dispute in the present matter. I am alive to the fact as alluded to above and well spelt in **Surya Kant D. Ramji** (supra) that, it is not conclusive evidence which is required to establish existence of serious question or triable issue or prima facie case for determination by the Court in the main suit but rather contest between parties on the subject matter. In this matter applicant's failure to annex to the affidavit the alleged copies of correspondences and attempted intial reconciliation sheets that would put to light the contesting figures by parties in the loan account, I find denied this Court with an opportunity to examine and scrutinize the materials put before it and see whether there was violation of applicant's right as it was

stated in **Mrao case** (supra) before concluding that, the alleged denial of final reconciliation of loan account constitutes triable issue or prima facie case or not. In view of the above this Court is convinced that, the applicant had failed to demonstrate that there exist triable issue or prima facie case calling for determination by the court in the main case, warranting this court exercise its discretion to grant the sought prayers.

Next for consideration is the second principle as to whether court's interference is necessary to rescue the applicant from suffering irreparable loss. Mr. Ngudungi is of the submission that, if the respondent is allowed to dispose of the suit property in Plot No. 175 Block 'D' Kunduchi area – Kinondoni Municipality, the applicant will not be able to recover similar properties. And further that, since the said property is housing Cornelius Girls Secondary School the respondent's frequent visits to the premises with prospective buyers through the broker creates interruptions to smooth running of student's training and is likely to suffer them psychological injury especially to form four students who are due to sit for their national examinations. He relied on the case of **American Cynamid Company Vs. Ethicon Ltd** (1975) AC 396 as cited in the case of **National Chicks Corporation Limited, Isaaack Bugali Mwamasika Vs. National Bank**

of Commerce Limited and Comrade Auction Mart, Misc. Application No. 22 of 2017 (HC-unreported) to bring home a point on what a Court should consider when determining the principle of irreparable loss. According to him, if this application is not granted chaos will be created to the students something which the respondent will not even be in a position to compensate the applicant.

On the contrary Ms. Shayo for respondent argued that, applicant's claims that frequent visits by the respondent to the suit premises will suffer students psychological injury lacks clarity on how unrelated students or third party to the loan agreement or mortgage deed would suffer irreparable loss. To him, it is the respondent who would suffer irreparable loss as she is entitled to exercise contracted security enforcement rights over Plot No. 175, Block 'D' Kunduchi area in which the applicant is trying to protect and yet continue to earn income without any sign of intention to repay the loan. As regard to Plot No. 573/1, Block 43 Kijitonyama area, Kinondoni she informed the Court that, the applicant throughout her submission has failed to not only submit on it but rather establish to the Court's satisfaction on how she might suffer irreparable loss or injury, if the application is withheld as the object of the security is to provide source of satisfaction of the debt covered by it thus

banking business should be protected. To fortify her stance the Court was referred to the cases of **Thomas A. Mbega and Another Vs. Lipina Michael Mrema t/a Basic Stop Shop, National Bank (T) Ltd**, Misc. Land Application No. 2 of 2018 (HC-unreported), **General Tyre East Africa Ltd Vs. HBSC Bank PLC** [2006] TLR 60 and **Peace Makers Express Co. Ltd Vs. Mkombozi Commercial Bank Ltd**, Misc. Land Application No. 13 of 2019 (HC-unreported).

In rejoinder Ms. Ngudungi almost reiterated his submission in chief and added on the submission by the respondent in respect of Plot No. 573/1, Bolck 43 Kijotonyama area Kinondoni that, it was not submitted on that plot as the respondent initiated recovery processes in respect of Plot No. 175 Block 'D' Kunduchi area, Kinondoni Municipality only when advertised it as exhibited by annexure NCA-4. To him therefore the applicant established loss likely to suffer if the application is withheld as all cases cited by the respondents are distinguishable under the circumstances of this case.

Having considered the fighting submission by both parties on the second principle, I entirely subscribe to Ms. Shayo's contention that the applicant has failed to substantiate on how she will suffer irreparable loss should grant of this application be withheld. The reasons I amso holding are not far-

fetched. **One**, there is no truth in Mr. Ngudungi's submission that, applicant will not be able to recover similar properties if the application is not granted as the properties are capable of being valued and compensated in monetary value. It is so because the respondent being a financial institution has financial muscles to compensate the applicant in case the main suit is found in her favour. Further to that, banks which are conducting lending business need to be protected otherwise are risking to collapse as it was correctly stated in the case of **General Tyre East Africa Ltd** (supra), where the Court observed thus:

> *"…if banks were not allowed to recover the loans due to court interference, the banking system will collapse in Tanzania."*

Second, the students who are claimed to be in preparations of form four examinations and therefore likely to suffer psychological injury or loss in which the respondent is not in a position to compensate the applicant, are the third party to the loan agreement or mortgage deed. Being third party to the said loan agreement or mortgage deeds between parties in which recovery measures of securities are sought to be employed upon default of loan repayment, I hold are incapable of suffering irreparable loss as the law is settled under the second principle that, it is the applicant and not third

party who has to demonstrate to the Court that, withholding of grant of temporary injunction order will suffer him irreparable loss incapable of being atoned by monetary value. I therefore find this principle is also not established by the applicant.

Finally, is the third principle stating that, on the balance of convenience who will suffer more or be in hardship than the other? It is Mr. Ngudungi's submission that, in the intended disposition of suit property it is applicant who would suffer more than the respondents would do as she will lose trust to society and the students will not only be distorted but also disturbed while in preparation of their final form four examination. Relying on the case of **State of Assam Vs. M/S M.S Associates** Air 1994 GAU 105, on the need to consider public interest or policy in addition to the three ingredient, he argued interference of student's attention or concentration in their preparation for form four exams also touched public interest hence should be considered in determination of this application. In response, Ms. Shayo countered that, apart from the general claim that applicant will suffer more than the respondent, there is no proof that she will so do than the respondent. She added that, much as the issue at controversy arises from the loan account stemmed on two agreements one of which is not annexed

to the application and the other one if so appended would oust jurisdiction to this court to entertain any claim arising therefrom, then this application be dismissed. In rejoinder Mr. Ngudungi had nothing material to add than stressing that, on the balance of probabilities it is the applicant who was to suffer more than the respondent and prayed the Court to grant the application.

After weighing both parties' arguments in this principle as well as the findings in the first two principles above, I am persuaded that in totality of the evidence the balance of scale tilts on the respondent's side. My findings is premised on the fact that, the school which is housed in the said plot No. 175 Block 'D' Kunduchi area, Kinondoni Municipality plus its students are third party to the loan agreement and therefore cannot form reason for the applicant to suffer more than the respondent who is entitled to recover from the securities as contracted in the loan agreement would do, in case this application is granted, as the applicant has also fail to exhibit to the Court that she is likely to suffer irreparable loss if this application is withheld as ruled in the second principle. Regarding to the issue of public interest as held in the case of **State of Assam** (supra), I find is not applicable in the circumstances of this case. As there is no any materials advanced by the

applicant demonstrating that, it is the applicant who will suffer more than the respondent, I persuaded that the third principle is not established by the applicant to entitle this Court grant him the sought prayers.

It is trite that, 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. See also the case of **Christopher P. Chale Vs. Commercial Bank of Africa**, Misc. Civil Application No. 635 of 2017 (HC-unreported). In this application since the applicant has failed to prove all the conditions this Court therefore refrains from exercising its discretion in her favour, the resultant consequence is to dismiss the application with costs, which I hereby do.

It is so ordered.

Dated at Dar es Salaam this 15th day of September, 2023.

E. E. KAKOLAKI

JUDGE

15/09/2023.

The Ruling has been delivered at Dar es Salaam today 15th day of September, 2023 in the presence of Ms. Benadetha Fabian, advocate for the

applicant, Ms. Anastela Selestine, advocate for the respondent and Mr. Oscar Msaki, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
15/09/2023.