

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 470 OF 2023

(Originating from Civil Case no. 168 of 2023 between Intercity Builders Limited Versus
Akiba Commercial Bank PLC)

INTERCITY BUILDERS LIMITED APPLICANT

VERSUS

AKIBA COMMERCIAL BANK PLC..... RESPONDENT

RULING

13rd Nov & 17th Nov. 2023

KIREKIANO, J.:

This is an application for temporary injunction. The brief background is that in 2018 the applicant obtained a loan facility from the respondent; it appears on 26th June 2020 the same was restructured at Tshs 629,615,287.71 to be paid in (48) months. It appears that the collateral in respect of this loan was plot No. 675 Tanganyika area Kinondoni District, Dar es Salam City), Low Bed Trailer with registration numbers T. 984 DAH and T. 423 DBV SDLG Road Roller.

It is contentious between the parties on how the applicant honoured her side of the bargain in servicing the loan. According to the respondent, the applicants defaulted on paying the loan. In August 2023

the respondent took possession of what is stated to be part of the collateral of the loan i.e Low Bed Trailer with registration numbers T. 984 DAH and T. 423 DBV SDLG Road Roller acting on the right to take possession following the applicant's default to pay Tshs 61,400,000. The details and correctness of the above are *subjudice* before this court in a suit filed by the applicant and the counterclaim by the respondent in a suit pending in this court.

It is this state of affairs which triggered the applicant's application under Order XXXVII Rule 2(1), Order XLIII Rule 2 and Section 68 (c) of the Civil Procedure Code, Cap 33 [R.E 2019] praying for the following orders;

- 1. That this Honourable Court may be pleased to restrain the respondent herein, its servants, employees, counsel, agents and workmen temporally restrained from disposing by public auction the applicant's properties namely, (Plot No. 675 Changanyikeni area Kinondoni District, Dar es Salaam City), Low Bed Trailer with registration numbers T. 984 DAH and T. 423 DBV SDLG Road Roller pending hearing and final determination of the main case before this Honourable Court;*
- 2. That this honourable Court be pleased to restrain the respondent from the application of the interest on the loan pending the hearing and final determination of the main case before this honourable Court;*

3. Costs of the application.

4. Any other order(s) that this honourable Court may deem just to grant.

This application is supported by an affidavit sworn by Claude Shikonyi contested by the Counter affidavit of one David Mwasonga, Litigation Manager of the Respondent.

During the hearing, all parties were represented, whereby Mr. Willson Edward Ogunde (Learned Advocate) appeared for the applicant while the respondent enjoyed the service of Miss Winfrida Hombee (learned Advocate). Hearing of this application was by way of written submissions which were timely filed.

Submitting in support of the application Mr. Ogunde adopted prayers in the chamber summons together with an affidavit of the applicant. According to him, this court on 06/09/2022 made an order granting temporary injunction on the same dispute but the main case civil case no 371/2022 was later struck out. He generally submitted that the same circumstance which made this court grant a temporary injunction still exists. In this application he focused his submission on three points thus; the existence of the triable issue, irreparable loss on the part of the applicant and balance of convenience as enumerated in the decision of **Atilio v. Mbowe (1969) HCD, No. 284.**

Firstly, on a triable issue, he submitted that he disputes the manner of computation of interest that there is serious disagreement between the applicant and respondent with regards to the unilaterally increase of the loan and also disputes that the items seized are not part of the security to the facility.

Secondly, on the irreparable loss he argued that he argued that the applicant operates on Plot No. 675 Tanganyika and if a temporary injunction won't be issued all the securities will be sold including the said plot to a third party the same cannot be claimed back in event he succeeds in his claims.

Thirdly, on balance of convenience, he submitted that the applicant stands in a more disadvantaged position than the respondent if this application is not granted. He submitted that Plot No. 675 Changanyikeni Area is an immovable property with high value, so in case the applicant fails in the main suit, the respondent will be in a position to recover the principal sum, interest and penalty if any, but if not granted the securities sold the applicant will not be able to get back some properties and structures.

In her reply, Miss Hombee adopted the counter affidavit of the respondent and went on to submit that this application for a temporary

injunction cannot be determined based on the applicant's counsel argument that the applicant had initially filed a civil case No. 147 of 2022 and Misc. Civil application no. 371 of 2022 before this court.

She argued that the case at hand is Civil Application no. 470 of 2022 with its main civil case no. 168 of 2023. Hence it is a fresh application, thus it is upon this court to make a decision based on the circumstances of the case at hand. To support her argument, she referred to the case of **Charles Matonya Vs. Meleya, Land Appeal No. 21 of 2021 (unreported)** where **Kagomba J. at pg. 10** held that;

"I stated earlier that each case is to be decided according to its own set of facts and obtaining circumstances".

She also submitted that the applicant's affidavit contains false statements and other facts which cannot be acted upon as evidence. She argued that the applicant has failed to establish three conditions to be granted with temporary injunction.

Responding to the first test, she argued the applicant has failed to demonstrate that there is an arguable case as the application is intended to delay the respondent from exercising her right to recover measures over the mortgaged property.

With regards to the 2nd test, she argued that the applicant has shown no evidence in her affidavit on how she will suffer the loss if the injunction is not granted instead, it is the respondent rather than the applicant who stands to suffer more hardships if she does not recover the monies from the applicant.

She cited the case of **Christopher P. Chale Versus Commercial Bank of Africa, Misc. Civil Application No. 635 of 2017, (unreported)** where Hon. Mwandambo J. at pg. 08 citing with approval the holding in the case of **Agency Cargo International Vs. Eurafrican Bank (T) Ltd. HC (DSM) Civil Case No. 44 of 1998 (unreported)**, it held that: -

"The object of security is to provide a source of satisfaction of the debt covered by the respondent to continue being in the banking business must have funds to lend and which as to be repaid, debtors. If a bank does not recover its loans, it will seriously be an obvious candidate for bankruptcy. It is only fair that banks and their customers should enforce their respective obligations under the banking system."

On the third test on the balance of convenience, Miss Winfrida submitted that the law must assist and protect successful rights to enjoy the benefits of their contracts. The applicant did not make any submission to show how the balance of convenience is in his favour. She submitted that

it is the respondent who stands to suffer more inconvenience. She argued further that the outstanding amount has continued to eat up the core capital of the bank which is on the verge of being undercapitalized and eventually closure.

She submitted that the person who is likely to suffer if the injunction is granted is the respondent who is doing the business of lending money, as a failure of the respondent to conduct recovery measures over the mortgaged property. It was argued, that the respondent is likely to go bankrupt and the business of lending could be closed down. She cited the case of **Benny Josephat Mdesa & and another Vs. National Microfinance Bank Plc. And 3 others.**

In rejoinder, the applicant submitted that beyond 31/07/2019 the alleged amount of loan Tshs 651,276,152.24 was never credited to the applicant. He also argued the restructuring of the loan discharged the Low Bed Trailer T. 984 DAH the subject of this application. The divergence of parties on this and the bank statement proves that there is a triable issue.

About the affidavit, the applicant submitted that paragraphs 12 to 15 of the affidavit of Claude the deponent has disclosed the source of information as required by law under order XIX rule 3 (1) of the Civil

Procedure Code. He argued that the respondent's submission that the properties are only valued at Tshs. 100 million and thus the same can be compensated by money is not supported by evidence of valuation.

Having carefully read the party's affidavits and submission, the main issue for determination is whether the applicant has established sufficient grounds to warrant this court to exercise its discretion to grant the orders of temporary injunction as sought.

It is noted here that the applicant made two prayers which seek **one**, restraining the attachment of properties named and **two** restraining application of interest on the loan. While resolving the conditions these prayers will be considered separately.

This court's power to grant an injunction is predicated upon the applicant meeting requisite conditions. In this application, the yardstick is the test set in the celebrated case of **Atilio Vs. Mbowe (1969) HCD 284** also referred to in the cited case of **Cosmoss Property Limited Vs. Exim Bank of Tanzania**, Miscellaneous Civil Appeal No. 584 of 2021 (unreported), and **Christopher P. Chale Vs. Commercial Bank of Africa** (Misc. Civil **Application No. 136 of 2017 [2018] TZHC 11**. The said conditions are:

- 1. Whether there is a serious issue to be tried,*

- 2. The temporary injunction sought is necessary to prevent some irreparable loss by the applicant.*
- 3. Balance of convenience, proof of greater hardship and mischief suffered by the applicant if the injunction is not granted than will be suffered by the respondent from granting it.*

Starting with the first condition, it is undisputed that there is a pending case in respect of the properties which is yet to be determined by this court. This is a Civil Case No. 168 of 2023. I have perused the applicant's claims in the suit as attached in the affidavit. What is alleged is the disputed computation of interest which is whether the same was a straight line or ought to be reduced interest as basis of default in servicing the loan. As such there are claims whether the property attached which is a Low Bed Trailer with registration number T. 984 DAH was part of the security.

There is also a dispute on the amount of loan disbursed to the applicant where the parties dispute the alleged 651,276,152.24, that is the applicant states the same was 641,111,096.54. I have considered that the parties' disagreement on the area above is enough to say that there is a matter to be determined. The merit or otherwise of this matter will depend on the evidence during adjudication of this matter.

On the second condition, courts will only grant injunctions if there is evidence that there will be irreparable loss which cannot be adequately compensated by an award of general damages and where the particulars of such irreparable loss are demonstrated. In other words, the consideration is whether a temporary injunction is necessary to prevent irreparable loss by the applicant.

Mr. Ogunde submitted that the applicant operates on Plot No. 675 Tanganyika. It is the applicant's view that if a temporary injunction will not be issued all the securities will be sold and unrecoverable from the bona fide purchaser. It is also stated in the affidavit that part of the property attached is not part of security thus if disposed the same may not be recovered from the bona fide purchaser. There was no deposition on the part of the second prayer on a charge of interest.

This is not the only risk assessed. The other risk considered as submitted by the respondent is failure to conduct recovery measures over the mortgaged property, which is likely to make the respondent bankrupt and the business of lending could be closed down. I agree with the respondent's deposition that the respondent bank reserves the right to exercise the recovery measures as also stated in the cited case of **Agency Cargo International**. The distinguished circumstance in this

application is the party's point of departure on whether part of the properties attached are among the properties enlisted as security that will entitle the respondent to dispose of them. This is an issue which will be determined in the main suit and thus should the answer be negative the applicant cannot be adequately compensated for in damages.

Conversely, the question of order on restraint on the application of the interest on the loan as prayed by the applicant although it is also an issue to be decided has not been substantiated by the applicant. It is agreed fact that interest is banks' bedrock for survival, interest serves several crucial functions in bank operations, in principle it is presumed that consumers consume more in the present as long as they will pay interest.


I find that the second test has not been met concerning the prayer on restraint on application of interest.

The third condition on balance of convenience. I have demonstrated above that if the disputed properties were to be disposed of and a different decision is issued on the same, it would be more difficult for the applicant to recover the same. On the other hand, the respondent may recover the outstanding penalties and shall still exercise the right to sell. On the second prayer on restraint on the application of interest having ruled that the applicant failed to meet the second condition, I shall not labour much

on this because the conditions are cumulative. In the end, the application is partly granted to the extent that,

1. Respondent, servants, employees, counsel, agents and workmen are restrained from disposing by public auction the applicant's properties namely, (Plot No. 675 Changanyiken area Kinondoni District, Dar es Salaam City), Low Bed Trailer with registration numbers T. 984 DAH and T. 423 DBV SDLG Road Roller pending hearing and final determination of the main case.
2. The prayer to restrain the respondent from the application of the interest on the loan is dismissed
3. Each party to bear its costs




A. J. KIREKIANO
JUDGE
16/11/2023

COURT: Ruling delivered in the chamber in absence of the applicant and in presence of Miss Vaines Mola, advocate for Respondent.

Sgd: A. J. KIREKIANO
JUDGE
16/11/2023