

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA**

MISC. CIVIL APPLICATION NO. 1662 OF 2023

(Arising from Misc. Application No. 149 of 2023, Originating from Civil Case No. 11 of 2021)

MSK REFINERY LTD.....APPLICANT

VERSUS

**THE ATTORNEY GENERAL..... 1st
RESPONDENT**
**TIB DEVELOPMENT BANK LTD.....2nd
RESPONDENT**
SPLIT DECISIONS COMPANY LTD.....3rd RESPONDENT

RULING

29th February, 2024

ITEMBA, J.

This application is made by MSK refinery Limited. Under the certificate of urgency, she is moving the court for an order that *status quo* on land property including plant and machines located at Plot no. 82 Block 'A' Nyashishi area, Usagara Trading Centre, Misungwi District in Mwanza region with Tittle no. 60050 LR (*the suit property*) be maintained pending hearing and determination of Misc. Civil Application no. 149/2023 and Civil Case no. 11/2021. The application is supported by the affidavit of Yohana Mswahili

Masasa, Principal Officer and Managing Director of the applicant and it is opposed by Lameck Merumba State Attorney.

The gist of this application is from the fact that in 2021, the applicant sued the respondents for breach of mortgage contract by the second respondent. The applicant was claiming among others, TZS 13,592,318,432/= for the alleged breach. In the said contract, the collateral was the suit plot. The respondents also filed a counter claim. In the course of hearing, the applicant's claims were dismissed for want of prosecutions and the court proceeded with hearing of counter claim. The applicant made an application for restoration of the main suit which is still pending before this court, and it also necessitated pendency of hearing of the counter claim. Now, the applicant is moving this court to issue the orders of maintenance of *status quo* upon learning that the 3rd respondent is intending to sell the suit property.

At the hearing, the applicant was represented by Mr. Eric Katemi learned counsel while Ms. Subira Mwandambo learned Senior State Attorney represented the 1st and 2nd respondents. The third respondent did not show up despite being duly served.

The 1st and 2nd respondents had raised 2 points of preliminary objection but Ms. Mwandambo rightly informed the court that they will drop the preliminary objection and proceed with hearing of the application.

For the application Mr. Katemi adopted the affidavit told the court that the 3rd respondent has advertised through *Habari Leo* newspaper, to sell the suit property. That, according to paragraph 7 of the affidavit, the applicant will suffer irreparable loss and the cases which are before the court will be rendered nugatory. That, the title deed of the collateral is in the possession of the 2nd respondent therefore there is no harm if the status remains as it is. He went further that, Order XXXVII rule 1(a) of the **Civil Procedure Code** Cap 33 R. E 2019 empowers this court to issue an order to secure a property which is at a risk of being disposed. That the *proviso* thereof, states that if the Government is involved, the court won't issue injunction but declaration of rights. Further to that, section 68(e) of CPC empowers this court to issue interlocutory orders. Therefore, he prays for the *status quo* be

maintained in a sense that the 3rd respondent should not sell the suit property pending determination of the mentioned 2 cases.

In reply, Ms. Mwandambo opposed the application. She adopted the counter affidavit and submitted that, *status quo* based on Balck's Law Dictionary means '*the situation that is currently existing*' while *Status quo ante* means '*the situation that existed before something else occurred*'. She agrees that there is a main case and an application pending before the court and that the existing *status quo* of both cases give rights to the respondent to exercise legal and contractual rights on the collateral subject to this application. Therefore, to her, this being the *status quo* and there is a publication of intending to sell the property on 1/3/2024 nothing can be stopped.

She went further that; the bank does not own any money to lend but the money is public. I was referred to the case of **MATEX Supplies Ltd. V another v Euro Bank Limited** EALR 216 [2008] and **Ahmen Soud Hilal and another v Independent Agencies Court Broker** and another. Misc. Application no.69 of

2023 (unreported). Therefore, she argued that, the one who will suffer irreparable loss is the respondent.

She added that, based on the fact that the applicant does not dispute to have loan, an injunction should not be an issue. She referred to the case of **BATES NATIONAL Ltd v TIB DEV Bank** and another Misc. Civil Application no. 112 of 2023 (unreported).

In rejoinder, it was submitted that, the cited cases refer to temporary injunction while they are praying for maintenance of status quo. According to Mr. Katemi *status quo ante* is granted to restore the situation which existed, if the 2nd respondent had exercised his rights and sold the suit property, they would have prayed for *status quo ante* instead.

Having considered the rival submissions from both parties, I will now determine whether the court was properly moved to grant an order maintaining *status quo*. As correctly submitted for the 1st and 2nd respondents' counsel, *status quo* means the situation that is currently existing. The *status quo* which is existing is that there are pending two matters for determination

by this court, that is, Misc. Application No. 149/2023 and Civil Case 11/2021. Also, the other recent existing fact is that the applicant's properties, the suit property have been advertised by the 3rd respondent to be sold in public auction.

The application was made under order XXXVII (1) (a) of the CPC which provides that;

*1. 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 of 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) N/A*

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 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.** (emphasis supplied)*

Therefore, when the government is involved, declaratory orders are issued in lieu of temporary injunction. In issuing the same, conditions for temporary injunction need be met by the applicant. These conditions were stated in the celebrated case of **Atilio v Mbowe** [1969] HCD 284 that;

- i. *there must be a serious question to be tried by the court and a probability that the plaintiff will be entitled to the reliefs prayed for (in the main suit);*
- ii. *the temporary injunction sought is necessary in order to prevent some irreparable injury befalling the Plaintiff while the main case is still pending; and*
- iii. *on the balance of convenience greater hardship and mischief is likely to be suffered by the Plaintiff if temporary injunction is withheld than may be suffered by the Defendant if the order is granted.*

As I have stated herein above, parties herein have no dispute that, their rights are pending for determinations before this court in Civil Case 11/2021. The 2nd respondent's counter claim is yet to be determined against the applicant herein. Having

raised a counter claim, the 2nd respondent has some reliefs against the applicant which are yet to be adjudged and the applicant also has the right to defend herself. Therefore, justice dictates for the respondents to wait the outcome of their counter claim before they exercise their right to sale the suit property.

Regarding the second condition, having raised a counter claim, the 2nd respondents' right are uncertain until the judgement is rendered. Therefore, in my view allowing the respondent to dispose of the property before determination of the counter claim, the applicant might face some irreparable loss.

As for the third condition, it was the submission of the respondent that they stand to suffer more because the applicant does not deny to be indebted. The applicant on other hand, is of the view that they stand to suffer more because there are pending cases to be determined. On my view, things would have been different if the applicant was the one whose main case is pending before the court. In this matter at hand what is pending is the counter claim by the respondents therefore on balance of convenience, regardless of the debt which is yet to be realized,

the 2nd respondent's claims which are to be recovered by sale are yet to be determined.

Regarding the *status quo*, it is differentiated from *status quo ante*. In support of the Black's Law dictionary meaning provided by the learned senior state attorney, in terms of **Raymond Focus Mlay v KCB Bank Tanzania and 4 others** Misc. Land Application no.498 of 2021, HC, Land Division, DSM, the explanation to that definition is that; *status quo* involves maintaining a situation in its current state, while the *status quo ante* returns parties to the original state as it was before the dispute. Applying this analysis, it was revealed in the pleadings that, the 3rd respondent is yet to sale the suit property. Therefore, by maintaining the existing status it means the respondent is restrained from selling or disposing the suit property. The advertisement made by the 3rd respondent was only a notice to sale. Therefore, the applicant was correct to pray for an order maintaining *status quo* pending determination of Misc. Application No. 149/2023 and Civil Case 11/2021.

In upshot, I hereby make declaration that the suit property including plant and machines located at Plot no. 82 Block 'A' Nyashishi area, Usagara Trading Centre, Misungwi District in Mwanza region with Tittle no. 60050 LR, should not be sold by the 3rd respondent until final determination of Civil Case 11/2021.

No order as to costs as the determination is largely by the court.

It is ordered.



L. J ITEMBA
JUDGE

29/2/2024