

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 245 OF 2024

(Originating from Civil Case 731/ of 2024 between Sospeter Gallus Ommollo Vs Equity Bank Tanzania Limited and three others)

SOSPETER GALLUS OMMOLO..... APPLICANT

VERSUS

- 1. EQUITY BANK TANZANIA LIMITED1st RESPONDENT**
- 2. COPS AUCTION MART7 COURT BROKER LTD.....2nd RESPONDENT**
- 3. MUSA MUSA TRADING COMPANY LIMITED.....3RD RESPONDENT**
- 4. MUSA PAULO.....4TH RESPONDENT**

RULING

18th & 22nd January 2024

KIREKIANO, J.;

The applicant herein through the service of Nassoro & Co. Advocates seeks this court under Order XXXVII Rule 1(a), rule 4, section 68 (e) and 95 of the Civil Procedure Code Cap 3 [RE 2019] to grant an order of temporary injunction against the Respondents.

The order seeks to restrain respondents or their agent or any other person acting under them or working for them from executing the terms and conditions of the mortgage contract of the loan facility vide a contract

letter with ref no. EBL/HO/ZANZIBAR/3014211543299 dated 2nd April 2020.

This facility forms part and parcel with a mortgage contract dated 8th April 2020 and a variation of the mortgage contract dated 19th March 2021.

The application is under a certificate of urgency supported by an affidavit sworn by the applicant.

For coherence purposes, I find it fitting at this stage to recap in substance, the facts leading to this application as can be gathered from the applicant's affidavit. The applicant owns a house situated on plot no. 102 Block 1, Mwanagati area, Ilala Municipality, Dar es salaam. On 8th April 2020, the applicant as a guarantor entered into a mortgage contract with the first respondent to secure a loan facility to the third respondent worth Tshs. 300,000,000/= . As such on 19th March 2021, the applicant consented to a variation of the said mortgage contract from the initial facility of Tshs. 300,000,000/= to another loan facility of Tshs. 300,000,000/= plus USD 238,000.00.

Following the allegation of default in servicing the loan, on 25th November 2023 the second respondent acting under the instructions of the first respondent entered into the applicant's house (the collateral) on plot no. 102 Block 1, Mwanagati area, Ilala Municipality, Dar es Salaam, and then auctioned the said house to the fourth respondent.

According to the applicant, the first respondent did not extend to the third respondent the agreed USD 238,000.00 as per the terms and conditions of the contract. He also claims that there was a misrepresentation by the first and third respondent that the earlier loan was fully paid leading him to consent to guarantee the second loan to the third respondent. He also blames the first respondent for failure to monitor the payment of the monies to the supplier of the goods to the third respondent which was the object of the loan.

He thus prays the sought order as indicated above.

The applicant had the service of Mr. Juma Nassoro learned advocate. Noting that this court is still in the end-of-year vacation and considering that the application was brought under a certificate of urgency, all respondents were duly served and were ordered to file counter affidavits (if any) and appear for a hearing on 18/01/2024.

The first and second respondent did not appear nor file a counter affidavit, the third respondent appeared and indicated that they would not file a counter affidavit. The fourth respondent appeared represented by Mr. Hamza Matongo learned advocate.

Now, in this application for the court to grant the orders sought, it is upon the applicant to establish material facts which if carefully considered

this court will exercise its discretion in favor of granting the order. In so doing, the principle is in three tests as articulated in the famous case of **Atilio versus Mbowe (1969) HCD, 284** thus;

- (i) *There must be serious questions of facts or issues to be tried and the likelihood of the Applicant to succeed.*
- (ii) *The Applicant will suffer irreparable loss which cannot be adequately remedied or attained by damages.*
- (iii) *Balance of inconveniences; that the Applicant will suffer a greater loss than the respondent if an order for temporary injunction is not granted.*

It is also important to note here that, the three tests are cumulative and must be established by facts. Consensus or convenience of the parties will not, in the sound administration of justice warrant a grant of the application.

In a bid submission to make the applicant's case, Mr Nasoro appreciated the above tests; he submitted categorically thus;

On the first condition; he has instituted a main suit which is pending in this court. According to him in that suit the applicant alleges misrepresentation on the part of the first and third respondent in securing his consent, he alleged a breach of contract that is a failure on the part of

the first respondent to discharge its contractual duty in the mortgage contract in monitoring the supply of goods to the third respondent. Given this, Mr Nassoro submitted that there is an arguable case between the parties.

On the second condition on irreparable loss, he said the applicant's property will be lost and he will be personally held responsible for paying the loan. He added in his submission that, the applicant's house which is collateral in the loan had been auctioned by the second respondent to the fourth respondent and the second respondent had issued another notice to repeat the auction.

Lastly, on the balance of inconvenience, Mr. Nassoro was brief stating that the respondent will not suffer if the application is granted. According to him, this will pave the way for this court to determine the questions in controversy.

Mr. Matongo for the fourth respondent without assigning facts meriting the three tests stated that the fourth respondent was not objecting to the application. According to him, the fourth respondent as a successful bidder had purchased the collateral in the contract, this was on 25.11.2023 but he is yet to pay the consideration because the second respondent has not supplied him with the account number to pay the consideration.

When impelled to assist this court whether based on the facts before this court the conditions in **Atilio Vs Mbowe**, have been met for this court to grant the application, he maintained his stance position that he was supporting the application.

Having heard the parties' submissions, I have examined the parties' affidavits and submissions and the law on the issue of temporary injunctive orders. Before going to the merits of the application regarding the test as I have endeavoured to indicate above, I find it pertinent to address the following aspects;

Firstly, on the affidavits of the applicant. Several decisions have emphasized general rule governing affidavits. In the same spirit, the standard was also stated in the decision by the Court of Appeal of Tanzania in **Juma Busiga V Zonal Manager TPC (Mbeya), Civil Application No 8 2004 CA** held that;

*"As the general rule of practice and procedure, an affidavit for use in, court, being a substitute for oral evidence, should only contain statements of facts and circumstances to which **the witness deposes either his knowledge** or such an affidavit should not contain extraneous matter by way of objection or prayer or legal argument or conclusion." [emphasis added]*

As such, on the aspect that an affidavit should contain matters in the knowledge of a witness, it is the position that an affidavit that mentions another person becomes hearsay unless that other person swears as well. See **NBC Ltd V Superdoll Trainer Manufacturer Co Ltd Civil Application No 31 of 2000,**

In this application, the applicant's affidavit in paragraph 6 indicates that the first respondent did not release funds of USD 238,000.00 to 3rd respondent. As such in the 8th paragraph, it is alleged the 1st respondent did not monitor the payment of money to the supplied of goods which was the object of the loan to the 3rd respondent. There is no affidavit of either the first or third respondent in these depositions. This deposition becomes hearsay and offend the principle of affidavit.

In the case of **Phantom Modern Transport (1985) Limited vs D.T. Dobie (Tanzania) Limited (Civil Reference 15 of 2002)** [2002] TZCA 6the Court held that: -

"Where defects in an affidavit are inconsequential, those defective paragraphs can be expunged or overlooked, leaving the substantive parts of it intact so that the court can proceed to act on it.

Being so guided, I consider the affidavit to be not wholly offending thus I have ignored in this application the offending part in the first applicant affidavit and proceed to consider the surviving parts of the affidavits.

Secondly, the applicant seeks to restrain the execution of the contract. In substance, the applicant's deposition in the submission and facts in the affidavit is the allegation of breach of contract. This application to be specific is pegged under order XXXVII Rule 1(a) of the Code. Restraining of breach of contract is under rule 2 of the code. The appropriate provision together with the cited one ought to be Rule 2 of Order XXXVII the Civil Procedure Code. Considering that this court is vested with jurisdiction to grant the orders sought, I consider the anomaly in the citation of enabling provision not fatal.

Now on the first aspect of the triable issue, the applicant stated in his affidavit that he would seek to avoid the contract claiming misrepresentation. I have examined the plaint as annexed in the affidavit; he also claims a breach of contract. Whether the applicant's consent to guarantee the second loan was obtained by misrepresentation and whether there was a breach of contract on the part of the first respondent will be an issue that can be answered in the trial of the main suit pending in this court. I thus find that the first test has been met.

The test of irreparable loss means that even if loss is occasioned the same cannot be compensated by money or damages. The applicant prays that this court suspends the temporary performance of the contract on the loan facility. In his submission, he pointed out that the applicant's property would be lost. The collateral is not the only term or condition in the contract. There are other aspects of the performance of the contract on the rights and duties of all parties.

I have thus asked myself, if the contract is found voidable or if the first respondent is found in breach of contract, can the applicant's claims be remedied by compensation or damages.

When considering this aspect, I had the aid of this court decision in **Kaare Vs General Manager Mara Cooperation Union (1924) Ltd [1987]** TLR 17 Mapigano, J (As he then was) held,

" By irreparable injury, it is not meant that there must be no physical possibility of repairing the injury but merely that the injury would be material e.g. one that could not be adequately remedied by damages.

I have examined the terms of the contract but also the prayers made in the plaint filed by the applicant. I am of the considered view that, if the applicants' claims are proved the same can be remedied by compensation.

In the upshot, I thus find that the applicant has failed to meet the second test to warrant a grant of the application.

The last aspect is the balance of inconvenience. The applicant in his affidavit and submission just mentioned that the respondent would not suffer if the order was to be granted. While considering the aspect of balance of inconvenience, I have taken into account the magnitude of the sought order having regard to all terms of the contract and the effect it will have on all parties.

I have considered that, if this court was to give an order restraining the execution of the terms of the contract this would also include suspending the interest on the loan but also may jeopardize the first respondent's ability to conduct recovery measures over the mortgaged property. This is an apparent fact that finds its expression in the terms of the loan contract.

Going by what is contained in the applicant's affidavit, the first applicant and her agent second applicant are in the process of enforcing the contract to recover the debts. This triggered the applicant's claims of breach of contract and misrepresentation. His interest and rights if proved may be remedied as prayed in the main suit.

Conversely, the first applicant as a lending party may also suffer inconveniences if the interest and property subject of collateral in the loan is jeopardized. It is an undeniable fact that interest is banks' bedrock for survival serving several crucial functions in bank operations. Considerations of banks' right to charge interest and security of collaterals are important considerations when evaluating the balance of inconvenience in the application of injunctive orders.

My view is fortified by this court decision in **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:

If a bank does not recover its loans, it will seriously be an obvious candidate for bankruptcy.

In view of the foregoing, I find that the third test is not established, Given the foregoing, the applicant has not established the three principles outlined for the grant of an order of temporary injunction. The application is hereby dismissed. Considering that the application was uncontested, I shall make no order as to costs. Order accordingly.



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AJ KIREKIANO

JUDGE

22.01.2024

Ruling delivered in presence of the applicant and Mr Juma Nassoro for the applicant and in absence of the 1st and 2nd respondents and in presence of A. Suleman Musa for 3rd respondent and Mr Hamza Matongo counsel for forth respondent.

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AJ KIREKIANO

JUDGE

22.01.2024

