IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB-REGISTRY OF MWANZA

AT MWANZA

MISC. CIVIL APPLICATION NO. 2978 OF 2024

(Originating from High Court Civil Case No. 1925 of 2024)

RAHA OIL LTD ....APPLICANT

VERSUS

1. **THE ATTORNEY GENERAL**
2. **TIB DEVELOPMENT BANK**
3. **YONO AUCTION MART** **....................................... RESPONDENTS**

RULING

12th May and 7th June 2024

CHUMA, J.

The applicant lodged this application seeking this court for a grant of temporary order to refrain the third respondent from auctioning the applicant's property located on Plot No 1222 Block KK with title No 27956 Nyakato Mwanza pending the hearing and determination of Civil case No 1925 of 2024. But also, a declaration of rights in respect of the suit property above pending the hearing and determination of Civil case No. 1925 of 2024.

The application is preferred under order XXXVII Rule I (a) and section 68 (e) of CPC RE: 2019 supported by an affidavit of Masoud Ally.

During the hearing, Mr. Katemi Learned counsel for the applicant at first prayed to adopt the affidavit to form part of his submission and court proceedings. He went on to submit that it is well-settled law that for a temporary order to be sustained three ingredients have to be established as per the case of **Atilio Vs. Mbowe HCD 1969 no. 284** where it was held that there must be inter-alia triable issues for determination. He stated that in paragraph 3 of the applicant's affidavit, the triable issue has been raised, that is breach of fundamental terms in the loan facility letters by the second respondent and the intended auction of the applicant's property by the third respondent without justification.

The second condition is on establishment of irreparable loss. This condition according to him was met under paragraphs 5, to 7 of the applicant's affidavit in which if the property is auctioned cannot be atoned by monetary compensation because the premises are subject to be challenged in the main suit will be overtaken by event and the main suit will remain useless or rather rendered nugatory.

His third criterion was on the issue of balance of convenience which again he contended that it is reflected in paragraphs 6 to 8 that until now

the title deed of the applicant is in possession of the second respondent hence if the order is issued no miscarriage of justice will occur. It was his final word that the instant application met all requisite conditions to warrant this court to issue the sought order.

In response, Mr. Allen Mbuya State Attorney for the respondent submitted that the applicant's advocate cited **Atilio Mbowe's case** which provided for elements to rely upon in seeking the sought order and of which in the said case referred to it was held that the applicant should not only establish primafacie's case but must satisfy existence of serious primafacie's case enough to be tried upon on the alleged facts and with a probability of decree to be issued in favor of the applicant. The applicant has shown only the issue of breach of fundamental terms of the loan facilities. But para 4 of the counter affidavit challenged this and argued that it is the applicant who breached such terms that up to 22 February 2024, the outstanding debt was tsh 6,073,887,506 which includes principal amounts, interest, and penalties accrued, and that it still accrues and that the applicant failed to settle the debt which constitutes default and breach of the credit facility agreement. More Mr. Allen Mbuya stated that there is nowhere the applicant challenged this debt be it in an affidavit or the plaint in the main suit. He also argued

that the applicant was served with several reminders to pay the debt but failed to do so and as a result led to past dues and accrues of interest and penalties hence the respondents' disposition of the suit property is justifiable because the property was pleaded as security during execution of loan agreement such as credit facility agreement and mortgage deed which specifically stipulated the party's remedies in case of default. Because of that the prima facies case is not justified for them to secure the sought order, because the applicant is the one who is in breach of the loan agreement and hence cannot benefit from their own wrong, and in his view, the 2nd respondent is just exercising the legal remedies well known by the applicant.

Regarding the second ground on irreparable loss, He contended that in para 5 of the applicant's affidavit, the applicant alleges that he will suffer loss which is true but went on to say that the respondent will also suffer if the order is granted because it will be as good as restraining the second respondent to exercise its legal and contractual rights. He referred to the position discussed in the case of **General Tire EA V. HSBS Bank PLC TLR 2006** in which the court held that the laws are that banks or lenders and their customers or borrowers must fulfill and enforce their contractual obligation under various lending or securities agreement entered into by the

parties. To restrain the respondent from exercising contractual rights is not only unreasonable but contrary to contractual terms of the agreed terms by the parties.

Mr. Mbuya State Attorney for the respondents regarding the issue of irreparable loss went on arguing that the applicant failed to establish it because the applicant has been knocking on court doors since 2016 with similar arguments but always failing to establish or show irreparable damages and on the other hand, it is the respondents who are likely to suffer loss once the order is granted because the applicant failed to repudiate the loan and neglected the notices and reminders from the second respondent since the first breach in 2013. As a result, the applicant's account has past dues, interests, and penalties.

On the third point regarding the balance of convenience, the respondent's counsel submitted that the applicant's argument is baseless because the second respondent conducts business among others being lending expecting the landed money to be paid back as per terms. Hence holding a title and selling of property is not the business conducted by the respondent but rather the consequences of failure of the business conducted

by a certain party and the only way is to sell the property. And it is because one party is in breach that's why the respondent opts so and withholding the rights by the applicant jeopardizes the respondent’s business. He invited this court to the case of **Dr. Millka Kalondu Mrema V Arusha and 6 others MSc Land application 226/2014** which discussed the said point.

He also stated that the second respondent is a government lending Institution hence public money is involved. The outstanding debt is huge hence if the order is issued it will jeopardize the respondent because if the bank does not recover the loan in time, the business will suffer financial difficulties for both the Government and regulator BOT as Non-performing Loans are the red flags per any financial institution whereas the applicant not only intends to halt the recovery property for their benefit as they have been doing so since 2016 when they defaulted to repay the loan but also are trying to use court process as tactics to delay the respondent's rights. This court in 2016 condemned this tendency in the case of **Bates International LTD V AG and two others Misc Civil application No 144/2022**. Therefore, he argued that the instant application is not worth the grant of injunction due to a lack of serious issues to be tried on as discussed in the case of **Leopard Net Logistics Company Ltd v. Tanzania Commercial**

Bank Ltd and four others Misc Civil application No 585/2022. It is the respondent's prayer that this application be dismissed with cost for want of merit.

In his brief rejoinder Mr. Katemi contended that, despite a long submission by the respondents, his stand is still that the application met three requisite conditions the fundamental terms were breached by the second respondent as per para 3 of the applicant and 6 paragraph in counter affidavit hence is serious factor or issue to be determined. But also, the alleged outstanding debt of Tsh 6,073,887,506 is contested in the main suit hence it is not true that the issue of debt was not challenged. Even in the counterclaim, the very point has been contested and there was no 60-day default Note ever issued to the applicant.

Having gone through the rival submissions for and against this application by both parties, I will now consider whether the instant application has merit. The law states clearly that an Injunction is granted when justice so requires. As appropriately submitted for the applicants, the order will be given if three conditions stated in the celebrated case of **Atilio vs Mbowe** (supra) are met.

I will therefore consider whether this application meets the said requisite standards.

Starting with the first condition, the applicant needs to prove that there is a serious question for determination by the court and a probability that the plaintiff will be entitled to the reliefs prayed in the main case. If I may go further to satisfy the Court by the applicant on the first limb, the law requires the applicant to show two things; **first,** that the relief sought in the main suit must be one that the court is capable of awarding, and **second** the Applicant should at the very minimum show in the pleadings, that in the absence of any rebuttal evidence, the applicant is entitled on the said relief see the case of **American Cyanamid V Ethicon** [1975] I All E.R 504. In the same vein Hon Nsekela J (as he then was) in the case of **Agency Cargo International V Eurafrican Bank (T) Ltd**, Civil Case No.44 of 1998 (unreported) stated that;

> *" It is not sufficient for the applicant to file a suit with claims, the applicant must go further and show that he has a fair question as to the existence of a legal right which he claims in the suit".*

In the instant matter, the applicant claims to have triable issues on fundamental breach of the terms of the loan facility by the second

respondent. This fact is contested by the respondent who also alleges that the breach is on the applicant. As submitted by Mr. Katemi who argued that there is a prima facie case in the main suit as evidenced by paragraph 3 of the affidavit, but unfortunately, I have not come across from the submission by the learned advocate which at least suggests or explains the very minimum show in the pleadings, that in the absence of any rebuttal evidence, the applicant is entitled to the relief claimed in the main suit.

A mere submission that the applicant has raised serious questions in the main suit, is not sufficient for this Court to be satisfied on the first condition as filing a suit with claims is not enough rather the applicant must go ahead and show that he has a fair question as to the existence of a legal right which he claims in the suit something which is missing on the condition under scrutiny. In this circumstance, the first condition has not been met.

Reverting to the second condition, the law clearly states that the applicant has to prove that it is necessary to grant the reliefs sought to prevent some irreparable injury. The injury which the applicant shall suffer must be irreparable and cannot be atoned by the award of damages as stipulated in the case of **Abdi Ally Salehe vs. Asac Care Unit Limited**

and 2 others, Civil Revision No. 3 of 2012 (unreported) where it was held that

> *"The applicant is expected to show that, unless the court intervenes by way of injunction, his position will in some way be changed for the 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 or minor, illusory, insignificant, or technical only. The risk must be in respect of future damage…"*

More so the injunction is aimed at preventing the status quo pending the determination of the main suit. However, it should be noted that an injury capable of being compensated by money is not an irreparable one as it was held in the case of **Noormohamed Janmohamed V Kassamali Virji Madhani,** (1952) 19 EACA 8.

It was the submission of the appellant that the loss of a physical house cannot be compensated by monetary compensation. On the other hand, Mr. Mbuya State Attorney argued that the respondents' disposition of the suit property is justifiable because the property was pleaded as security during the execution of loan agreements such as credit facility agreement and

mortgage deed which specifically stipulated the parties' remedies in case of default.

In the instant matter, there is no dispute that the applicant was advanced with a loan by the 2nd respondent. It is also not in dispute that the applicant has defaulted in repaying the said loan which is secured by the landed properties intended to be sold. The question remains if the applicant will suffer irreparable loss and un compasated in monetary form in case the properties are sold. Mr. Katemi's advocate relying on Paragraphs 5 to 7 of the affidavit has attempted to disclose the condition, however, the conditions have not been explained exhaustively on how the applicant will suffer irreparable loss if an order is refused. The Court expected the explanation that the irreparable loss suffered by the applicant will not be compensatory by monetary which the same has not been elaborated on and exhausted during the hearing. The applicant has another forum of suing the bank and the loss if any will be atoned by money or nullification of sale. I proceed to find that the second condition test has not been met as well.

Regarding the third and last condition, in determining this third condition for an injunction, the court needs to consider principles as stated in the case of **Abdi Ally Salehe** (supra) where it was said that

"The question of balance of convenience, what it means is that, before granting or refusing the injunction, the court may have to decide whether the plaintiff will suffer greater injury if the injunction is refused than the defendant will suffer if it is granted"

In this application it was the submission of Mr. Katemi advocate for the applicant that the title deed of the applicant is in possession of the second respondent hence there would be no effect if the injunction order is granted. Mr. Mbuya State Attorney for the respondent said that the second respondent is a government lending Institution hence public money is involved. The outstanding debt is huge hence if the order is issued it will jeopardize the respondent because if the bank does not recover the loan in time, the business will suffer financial difficulties.

In the present matter, the applicant does not deny to be indebted to the 2nd respondent the loan which is yet to be fully repaid. Having given due consideration to the submission made by the parties during the hearing, I have not come across any submission highlighting the circumstances that indicate the type of loss, hardship, and damage or injury that may likely be suffered by the Applicant rather than the respondent. Therefore, the third

condition was not justified by the applicant. In the final analysis, I find this application is devoid of merits and hence dismissed with costs.

DATED at **MWANZA** this 7th day of June 2024.

W. M. CHUMA

JUDGE

Ruling delivered in court in the presence of Mr. E. Katemi, Advocate for the Applicant and in the absence of the Respondents this 7th day of June, 2024.

W. M. CHUMA

JUDGE