

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(SONGEA SUB-REGISTRY)**

AT SONGEA

MISC. CIVIL APPLICATION REF: NO. 0000061 of 2024

JULIUS ARON MASHAURI.....APPLICANT

VERSUS

CRDB BANK PLC.....RESPONDENT

RULING

Dated: 3rd April & 13th June, 2024

KARAYEMAHA, J.

This ruling stems from the Applicants' application for temporary injunction. The application was by way of chamber summons supported by an affidavit deponed by Julius Aron Mashauri, the Applicants, in which grounds for the prayers sought are laid out. The applicant's main grounds of contention are averred in paragraphs 3, 4, 5, 6, and 7 of the said affidavit.

The application has been fervently opposed by the respondent. Through a counter-affidavit sworn by John Bado, the respondent's principal officer, contentions by the applicants have been discounted.

The genesis of the application is rooted in the loan facility amounting to TZS. 350,000,000/= where by the plaintiff signed the director's guarantee on 9/9/2022. It appears though not confirmed,



AMNEC Company Limited guaranteed by the applicant failed to pay back as agreed. On 5/8/2023, the respondent issued a statutory notice to the plaintiff personally requiring him to pay a total of TZS. 191,320,855.84 within 60 days. In case of default the respondent would sell the plaintiff's properties with title No. 2007 RVM with LO No. 1141512 Plot No. 121 Block AA Lusaka Mwembe Mbinga Urban Area and title No. 19078 RVM LO No. 781452 Plot No. 82 Block B Lusaka Mwembe Mbinga Urban Area.

It is the applicant's averment that the respondent's act of issuing the purported statutory demand notice to the applicant was unlawful as at no point in time has the latter provided the personal guarantee. Similarly, the applicant challenges the legality of the respondent issuing a statutory notice to him. These factors, among others, are what ignited a battle between parties in the main case.

In order to rescue his properties from being sold, the applicant has enlisted the intervention of this court through this application. Parties were represented by learned advocates. Whereas the applicant enlisted the legal services of Mr. Eliseus Ndunguru and Ms. Naomi John Ngoga learned advocates, the respondent was represented by Mr. Rainery Songea and Ms. Radhia Luhuna, learned advocates.



Parties are contesting for and against grant of temporary injunction. But being an equitable remedy, temporary injunction is provided for under Section 68 (c), and Order XXXVII Rule 1 and 2 of the CPC [Cap 33 R.E. 2019] which depict as follows:

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 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) that the defendant threatens, or intends to remove or dispose of his property with a view to defraud his creditors.

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.

Deducing from the foregoing Provisions of the law, it categorical that the major intention of temporary injunction order is to preserve the *status quo* of the property in dispute until parties' rights in the main suit have been fully determined. See **Cosmoss Properties Ltd v Exim Bank Tanzania Ltd**, Misc. Civil Application No. 584 of 2021 (unreported) HC-DSM. In order a party seeking for injunctive orders to succeed, he must satisfy conditions discussed in array of authorities but



all referring to the landmark case of **Atilio v. Mbowe** (1969) HCD 284.

These conditions are:

1. The applicant must show a *prima facie* case with probability of success.
2. The applicant is likely to suffer irreparable injury.
3. When the court is in doubt, it will decide the application on the balance of convenience.

I have keenly examined the pleadings and submissions orally made before me. These plus the facts set forth in the application will assist me in scrutinising whether the prominent requirements/conditions for grant of temporally injunction have been met as introduced in **Atilio v. Mbowe** case. Repeating myself, grant of temporally injunction is not a matter of empathy. It is to preserve the property in dispute in *status quo* until the question triggering a battle in the main case is finally determined.

Reverting to the first condition, the question is whether the applicant has established that there is a *prima facie* case with probability of success. It is gathered from the applicant's affidavit that he challenges the legality of the respondent issuing the statutory notice



requiring him to pay TZS. 350,000,000/= and selling of his properties mentioned above. He is contending further that the pending main Civil Case No. 9 of 2023 challenges the legality of the mortgage which is subject of the impending sale.

The respondent is fervently opposed to these dispositions and avers that the default notice was issued to AMNEC Company Limited who is only a party to the main suit not to this application.

I have gone through the default notice and noted the following. **Firstly**, it was addressed to the applicant. **Secondly**, it was informing him that AMNEC Company Limited he guaranteed failed to pay the sum of TZS. 191,320,855.84. **Thirdly**, the notice of default required him to pay the entire sum, and interest accrued within 60 days. According to Mr. Eliseus no property was mortgaged hence the respondent has no automatic right to sell the applicant's property through public auction. According to him this constitutes a *prima facie* case with probability of success.

Mr. Songea had a different view. He contended referring to the pleadings filed in court that no any serious issue was raised in court. He referred to the case of **Christopher P. Chale v Commercial Bank of Africa**, Misc. Civil Application No. 635 of 2027 HC-DSM to bolster his



view. His basis was that the affidavit contradicting itself, particularly paragraphs 3 and 6. He also said that the affidavit does not support Civil Case No. 9 of 2023 because it raises new facts. He contended further that the plaintiff does not reveal a cause of action and were forced to raise a point of objection to that effect.

I have considered parties arguments. Be it as it may, there is a tag of war on who must be served with a default notice. Was it AMNEC Company Limited or her guarantee. The respondent avers in her affidavit in paragraph 4 that the notice was issued to the former and the latter. This is not true because as highlighted above it was only addressed to the applicant.

Furthermore, all factors considered and having regard to the pleadings, without going into their merits, it is gauged that a *prima facie* case has been established with likelihood of success in the main suit because the loan was extended to AMNEC Company Limited as per the loan agreement. There is no any evidence that AMNEC Company Limited was confronted and failed to pay before crucifying the applicant. I don't wish to traverse in the merit of the main case, not at all. My intention is to show that there is a case to be answered by the respondent on why



she specifically issued a default notice to the applicant and intends to sell through public auction his properties.

There is an argument that the plaint does not disclose the cause of action. Assuming this is true. The law has it that failure to state clearly the cause of action, the remedy is not to dismiss it or struck it out. In its recent decision the Apex Court of the land speaking through Mashaka, JA in unreported Civil Appeal No. 291 of 2020 between **Rose Roezer & 3 others v. National Insurance Corporation of Tanzania Limited & another**, guided that:

"In the light of the above legal position, our focus will be on Order VII rule 11(a) and its proviso. The provision is self-explanatory that once the Court is satisfied that the plaint did not disclose the cause of action it may reject the plaint or order the plaintiff to amend the same. The discretionary powers embrace the overriding objective principle for the purposes of timely adjudication of disputes. In the instant appeal, the High Court after being satisfied that the plaint did not disclose the cause of action, it struck out the suit. We subscribe to the submission of all learned counsels that the trial judge strayed into the error to strike out the suit instead of allowing the plaintiffs to amend the plaint."

Therefore, even if the preliminary objection will be sustained, the remedy is to allow the applicant to amend his plaint. In a nutshell



therefore, the argument that the *prima facie* case has not been established because no cause of action is revealed has no legs to stand.

Turning to condition two, advocates for both parties unanimously agreed that injunction will be granted if there is evidence that there will be irreparable loss which cannot be adequately compensated by award of general damages. It is a trite law that the court's interference is necessary to protect the applicant's from the kind of injury which may be irreparable before the legal right is established. The court must be satisfied that the damage which the Applicants will suffer will be such that mere money compensation will not be adequate. The applicant has averred in paragraph 7 of the supporting affidavit that the houses in dispute are used by him and his family for residential purposes and commercial purposes, respectively. The respondent on the other hand, deponed in paragraph 8 of the counter affidavit that the respondent is in a financial status to compensate the applicant in case he wins the main case whatever the amount this court will grant. It is averred further that the respondent will suffer more compared to the applicant if the extended loan is not circulating and that the money loaned belongs to the public.



As much as I agree with the Mr. Songea's submission and the gist of the counter affidavit, in my view, it must be proved that the loan must be serviced by the applicant. If it is AMNEC Company Limited then the applicant is discharged at this stage. Leaving the details aside, the respondent's lone conduct will not only cause the house to fall in the hands of any purchaser who will have his desires on how the house should look like but also re-allocation of the family. It is my considered view that, I doubt if mere money compensation will be adequate to bring to shape what will have happened to the houses, disturbance and mental anguish of the family members. It is my judgment therefore, that there is evidence establishing the second condition.

The affirmative answer in the third condition leads me to the consideration of the question on which part the balance of convenience tilts. Whether there will be greater hardship and mischief suffered by the applicant from withholding the injunction order than will be suffered by the respondent from granting of it. The applicant's advocate calls me to hold that the applicant will suffer more if the court declines to make the order sought because the mortgage deed is not attached. And if it exists, the respondent will recover her principal sum, interest and penalties.



Mr. Songea holds a different view and resists the submission by contending that the respondent will suffer than the applicant. He explained that money given to the applicant and AMNEC is the public money. It is his submission that if not in a commercial rotation, the respondent is the one suffering. He invited this court to visit the decision in **Agency Cargo International v Eurafrikan Bank (T) Ltd, HC-DSM**, Civil Case No. 44 of 1998 (unreported) and **State of Assam v M/S M.S Associates Air (1994) Gau 105** which added the condition of public interest or policy.

I am very much attracted to Mr. Songea's submission and the condition of public interest or policy. However, I am prepared to agree with Mr. Eliseus more so because I have already held that the loan agreement is between AMNEC Company Limited and the respondent. As unanimously agreed by both parties, the applicant was a guarantor. This has propped up throughout the pleadings and all annexures thereto. The default notice requires the applicant to pay the debt and emphasized by paragraph 2, 3, 4 and 5 of the written statement of defence. It is stated therein that the statutory notice was a recovery measure of the unpaid loaned money. A close examination of the WSD reveals that the loan was granted to AMNEC Company limited. More-so, it is not stated that

after the latter had defaulted, recoverable measures had been taken against it.

My understanding of the security being a pre-condition for granting a loan is to provide a source of recoverable of the debt covered by it. This factor keeps the bank into the game of lending money to other people or institutions. As correctly held by Mr. Songea if a bank does not recover loaned money, plainly it will be a graduate of bankruptcy. It goes without saying therefore that in its move to enforce recovery measures, the bank must make sure that it gets on the target. In this application, it is gathered in all pleadings that loan was extended to AMNEC Company Limited and guaranteed by the applicant. Nevertheless, no proof that AMNEC failed to repay the loaned money. Likewise, the statutory notice was addressed to the applicant and no statement in it is indicating that AMNEC was approached and refused or neglected to pay.

Therefore, in my view, the applicant stands to suffer greater hardship if this court declines from granting the injunction order than the respondent.



In the event, I find and hold that there is merit in the application which is accordingly granted with costs.

It is so ordered.

DATED at **SONGEA** this 13th day of June, 2024



A handwritten signature in black ink, appearing to be "J. M. Karayemaha", is written above a horizontal line.

J. M. KARAYEMAHA

JUDGE