

UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

BUKOBA SUB REGISTRY

AT BUKOBA

ORIGINAL JURISDICTION

MISC. CIVIL APPLICATION NO. 3352 OF 2024

(Arising from Civil Case No. 3168 of 2024 of the High Court of Bukoba)

MORITIES CORPORATION LTD APPLICANT

VERSUS

CRDB BANK PLC 1ST RESPONDENT

CITY GROUP TANZANIA LIMITED 2ND RESPONDENT

RULING OF THE COURT

Date of last Order: 04/03/2024

Date of Ruling: 21/03/2024

BEFORE: G.P. MALATA, J

To recover the advanced loan to the applicant as per the loan agreement and in discharge of obligations under the Deed of Settlement dated 20/09/2018 entered between the applicant and 1st respondent in Civil Case No.3 of 2018, and following alleged non-performance of the same, the 1st respondent-initiated loan recovery process by appointing the 2nd respondent to sale the mortgaged



properties. The recovery process is evidenced by existence of public auction advertised by the 2nd respondent via Zanzibar Leo Newspaper dated 07/02/2024 with view of disposing the applicant's mortgaged properties.

Having noticed the disposal of mortgaged properties by public auction, on 13/02/2024 the applicant herein filed Civil Case no.3168/2024 and on 20/02/2024 filed the present application seeking interim injunction restraining the respondents and all his agents from selling the applicant's advertised properties pending determination of civil case no.3168/2024 before the High court of Tanzania involving the parties herein. The claimed amount by the 1st respondent is **TZS. 877,795,950/=**

The application is supported by an affidavit sworn by **Anatory John Aman**, the Managing Director of the applicant. The evidence presented through affidavit in support for order of interim injunction is hereunder reproduced.

AFFIDAVIT

- 1. I am the Managing Director of the Applicant hence conversant with the facts deposed hereunder as follows;*
- 2. That, the Applicant is the Registered Company under the Laws of the Land with Registration No. 47389 and the legal the owner of properties advertised for the intended Auction by the 2nd Respondent to wit properties in Plot No.*



189 & 190, block "A" CT No. 16375 – LR Mwanza, LO No. 218029, Kiteyagwa Area, Bukoba Township.

- 3. That, the herein Applicant entered into Banking facility Agreement with the 1st Respondent one CRDB Bank Plc for provision of credit facility, term loan amounting to TZS. 877,795,950/= by mortgaging the aforementioned properties for the tenor of nine years for which the same amount have already been discharged by the herein Applicant.*
- 4. That, to the Applicant's surprises, on the 7th February, 2024 in the Zanzibar Leo Newspaper at page 7, the 2nd Respondent under the 1st Respondent's instructions advertised for sale of Applicant's properties by auction without any colorful right or justifiable reasons to the Applicant herein. The Applicant has already furnished the whole amount of loan advanced with the 1st Respondent therein involving the attached properties claimed to be mortgaged as the security to the claimed loan by the 1st Respondent. **A copy of advertisement paper is annexed hereto and marked K-1 and leave is craved to form part hereof.***
- 5. That, as soon as such notice came into the Applicant's notice, the herein applicant instituted Civil Case against both Respondents to wit Civil Case No. 3168/2024 which is still pending for assignment before the trial Judge.*
- 6. In the event that, Respondents proceeds to mark and intend to sell by auction the aforementioned education facility which its mortgage is not by*



anyway acknowledged any longer by the applicant it will amount into irreparable loss to the applicant while Respondent has nothing to lose.

- 7. That, if a temporary injunction is granted as prayed pending the determination of the application stated above the respondents stands to lose nothing and the safety, security and or proper condition of the premises will at least be guaranteed during the pendency of that application.*
- 8. That it is for the interests of justice that temporary injunction on the grounds stated above be granted and the status quo be maintained till the above-mentioned application is finally determined and the rights of each party in the matter are finally settled and declared by the court.*

The respondents opposed the application by filing counter affidavit detailing evidence on what transpired in countering the applicant's affidavit. The respondents stated that;

COUNTER AFFIDAVIT

(As per the order of this Hon. Dated 22nd February, 2024)

I, MANASE MBAGA a Christian and a Tanzanian residing at Bukoba within Bukoba Municipality DO HEREBY swear and states as follows: -

- 1. That, I am the Branch Manager of the 1st respondent based at Bukoba Branch with capacity to swear on behalf of the respondents hence dully conversant with the facts to be deponed upon.*



2. *That, the contents of paragraph one of the affidavit are normal and not disputed.*
3. *That, the contents of paragraph two of the affidavit are noted save that the same properties were deposited to the 1st respondent as a security for the secured loan, the subject matter of this dispute.*
4. *That, the contents of paragraph three of the affidavit are contested on entering into Banking facility agreement, the 1st respondent avers that the gist of the said amount of Tshs. 877,795,950/= was the Deed of Settlement entered by the applicant and the 1st respondent to settle out of court the (HC) Civil Case No. 3 of 2018 which has never been honoured by the applicant. The 1st respondent avers that the allegations contained therein of having already discharged the mortgage responsibility by the applicant are fabricated ones. An alleged discharge has no any proof and the applicant has not attached any pay in slip or any means of depositing such amount to any of the Bank Accounts. A copy of the Settlement Deed is hereby attached with Counter Affidavit and marked as **Annexure "JRA1"**.*
5. *That, the unpaid outstanding loan of Tshs. 877,795,950/= is clearly described by three Bank statements one being of the personal Bank Account of the applicant which is A/C No. 01J1056524700 in the names of the applicant (MORITIES CORPORATION LTD) the account which is operated by the Applicant and Accounts No. 01C056524707 having termed as 016M1-*



*Term loan – corporate Manual which is normally operated by the Bank (1st respondent) and the account that was created for the recovery of the agreed amount. Another Bank account is the Account No. 01Q0000043920 in the names of DEFAULT SYSTEM SUSPENSE which deals with CHARGE OFF BP of the chronic outstanding loan as the existing one of the applicant as per internal regulations by the Bank of Tanzania. The copies of the said bank accounts' statements are hereby attached with this counter affidavit and marked as **Annexure "JRA 2" collectively**)*

- 6. That, the contents of paragraph four of the affidavit are disputed since the applicant is aware of the outstanding loan, there is no any surprise rather than the 1st respondent to pursue her rights of recovery of the unpaid loan through the 2nd respondent by auctioning the deposited securities. And the allegations therein have no any proof.*
- 7. That, the contents of paragraph five of the affidavit are strongly disputed, the respondents are not aware with the pending Civil Case No. 3168/2024.*
- 8. That, the contents of paragraph six and seven of the affidavit are contested since the applicant has unpaid secured loan from the 1st respondent by depositing the loan security and such security remains as security unless discharged therefrom. In case of failure to repay the secured loan, the said security has to be auctioned as intended and the 1st respondent will suffer*

irreparable loss if such injunction is issued rather than the applicant who is still enjoying the unpaid loan.

9. That, the contents of paragraph eight of the affidavit are unfounded to the extent that since there is no justifiable reason to have discharged the loan in full, an intended temporary injunction should not be granted to allow the 1st respondent to pursue her legal rights to recover an outstanding loan from the applicant.

In short, the respondents stated that, the applicant has defaulted obligation under the loan agreement which triggered for institution of Civil case no.3 of 2018 before the High court. That after negotiation the parties signed Deed of settlement, **Exhibit JLA1** of which the applicant admitted liability and committed to pay **TZS. 877,795,950/=** as outstanding loan facility. That the applicant had to pay the said sum of **TZS. 877,795,950/=** within 108 months.

Additionally, the respondents stated that, the applicant was required to pay monthly instalment in settlement of the same but failed to do so, thus breach of Deed of settlement entered between the applicant and 1st respondent herein. They attached the Deed of Settlement showing what they really agreed and particularized the breaches, thence recovery measures from the applicant's mortgaged properties. Paragraph 8 of the of Deed of Settlement, **Annexure JRA1** depict that;

"THAT, the parties covenant further that, the plaintiff is obliged to pay every single instalment envisaged in the loan facility letter executed on 28th May, 2018 in the event fails to do so that will amount or treated as breach of Deed of Settlement and the defendant will be at liberty to exercise its powers over the mortgaged properties for recovery of the loan without further notice and without seeking any court order."

The applicant did not file a reply to counter affidavit to contradict what the respondents raised in the counter affidavit.

On 04/03/2024 this application came hearing. Mr. Scarius Bukagile learned counsel appeared for the applicant whereas Mr. Abel Rugambwa learned counsel appeared for both respondents.

Submitting in support of the application, Mr. Scarius Bukagile learned counsel started by adopting the affidavit by Anatory John Aman, Managing Director of the applicant. He submitted that, the applicant is the legal owner of the properties in Plot No. 189 and 190 Block A with Certificate of Title No. CT No. 16375LR Mwanza and with right of occupancy No. 218029 Kiteyagwa area Bukoba Township.

The applicant secured loan from the 1st respondent **TZS. 877,795,950** and placed landed properties subject to sale to secure the said loan in 2008.

Following the agreement, the applicant paid all the secured loan by 31/1/2019.

On 7/2/2024 through Zanzibar Leo Newspaper, the 2nd respondent advertised to sell the applicant's properties in questions without any colour of right on the properties listed in "**annexture K1**" refers.

The applicant has knocked the door of this court by filing civil suit No. 3168/2024 which is pending for trial before **Mr. Justice Ngigwana**.

While the case is pending for hearing, the respondents want to sell the properties of the applicant unjustifiably and before determination of the main case stated herein above.

He further submitted that, it is a legal principle that, for temporary injunction to be granted there must be pending case before the court. He referred this court to principles harbingered in the case of **Atilio Vs. Mbowe** [1969] HCD No. 284. The court set circumstances for grant of injunction these are, **one**, existence of prima facie case, **two**, balance of convenience, **three**, applicant stands to suffer irreparable loss.

The applicant has discharged obligation of established the same via paragraph 4 of the affidavit. Parties are not in agreement on whether the amount was paid or not thus there is trouble issues.

Furthermore, the applicant stands to suffer more irreparable loss if injunctive order will not be granted. He thus prayed for grant of the sought orders.

In reply thereof, Mr. Abel Rugambwa learned counsel started by adopting the respondents' counter affidavit. He submitted that, the applicant has failed to repay the loan as per the loan agreement and Deed of settlement (**Annexure JRA1**). The dispute navigated to 2018 whereby the applicant instituted Civil Case No. 3 of 2018 which resulted to amicable settlement as stated in paragraph 4 of the counter affidavit. That the applicant has not discharged any contractual obligation and no proof whatsoever that, he has discharged the same to date.

He submitted that, the money so agreed has not been paid to date, that is **TZS. 877,795,950** as stated in paragraph 5 of the counter affidavit **JRA 2 collectively**, confirm on the bank statement of the applicant's account No. 01J1056524700 showing the outstanding amount. The allegation by the applicant that, the amount was paid on 31/1/2019 is unfounded for want of attachment of document demonstrating when and where he deposited the said **TZS. 877,795,950** claimed by the 1st respondent.

To reinforce his submission, he referred this court to the case of **Starcom Consumer Healthcare Ltd and Henry Absalum Vegula Vs. Diamond Trust Bank (DTB) & 3 Others**, Misc. Land Application No. 08 of 2023 (unreported) where the court ruled that in the absence of any proof that, certain steps has been taken by the applicant to pay the date, this court cannot be used to defeat justice from being done by granting the sought orders.

In the present case there is no proof how the applicant discharged his duty of paying the said loan.

Finally, he submitted that, the applicant has failed to discharge his duty to lay down circumstances for grant of the injunctive order. He thus prayed that, the application be rejected with costs.

Having assembled the gist of both submissions for and against grant of injunction, this court indebted to point out that any restrain order is granted by the court discretionally based on tangible evidence adduced by both parties. Due consideration is as well taking into account that, the court is not used to issue orders under the pomposity of justice delivery while injuring the innocent party. This being an equitable remedy must take cognizance of prevailing circumstances of each particular case.

In that regard, before a temporary injunction is granted, courts must be satisfied that; **one**, existence of prima facie case, **two**, balance of convenience, irreparable loss, **three, four**, danger of refusing the sought interim orders, **five**, applicant has clean hands on the matter, **six**, the court is not used as tool to deny or delay attainment of one's rights under the contract of which parties consented to, **seven**, in case of refusal to grant the order, the applicant's sufferance cannot be attorned by way of damages and **eight**, public interest and/or public policy court cannot be used as an instrument to cause injury to society, and or loss to



community by exercising equitable jurisdiction to give benefit to somebody the large interest cannot be sacrificed, this principle is gathered in the case **State of Assam Versus M/S M.S Associates Air [1994] Gau 105**

"While granting a temporary injunction not only three ingredients' must be observed but in addition to it public interest and/or public policy also will have to be considered. The Court cannot be used as an instrument to cause injury to society, and or loss to community by exercising equitable jurisdiction to give benefit to somebody the large interest cannot be sacrificed"

The above legal principle has been adopted and used by our courts through numerous cases, to wit **Misc. Civil Cause No. 54 of 2000 between Alhay Muhidin A. Ndolanga and Alhay Ismail Aden Rage Versus the Registrar of Sports and Sports Association and others unreported** where the Court held.

"It is trite law, as well as trite learning, that in granting or not granting injunction public interest, or Public Policy, has to be considered, so that the Court makes sure, that it is not used as an instrument or tool, to cause injury to society, or loss to community. Thus, in the courts exercise of its equitable jurisdiction to give benefit to somebody the large interest of the

community cannot be sacrificed. In the event, balance of convenience, must always be in favour of the public. In summary therefore, with only one principle satisfied the injunction cannot stand on one foot like a Masai in the grazing grassland”.

and **nine**, consideration of any other compelling circumstance put forward by the applicant necessitating the issuance of equitable reliefs. Some of the above principles were celebrated in the case of **ATILIO V. MBOWE (1969) HCD 284** as submitted by both parties.

This court is also guided by the decision in the case of **Christopher P. Chale vs Commercial Bank of Africa, Misc. Civil Application No.635 of 2017** where **Hon. Mr. Justice Mwandambo** as then was High Court Judge principled that;

"It is also the law that the conditions set out must all be met and so meeting one or two of the conditions will not be sufficient for the purposes of the court exercising its discretion to grant an injunction."

Besides, the applicant is obliged to demonstrate other ingredients that; **first**, in the event of withholding the relief of temporary injunction he will suffer an irreparable injury, **second**, in the event of his success in the suit in establishing his alleged legal right, the encroachment whereof is complained against, he will not have the proper remedy in being awarded adequate damages, **third**, in taking into consideration the comparative mischief or inconveniences to the parties, the

balance of convenience is in his favour, or in other words, that his inconvenience in the event of withholding the relief of temporary injunction will in all events exceed that of the defendant in case he is restrained.

This condition can, under these circumstances, be so adjusted as not to deprive either party of the benefits he is entitled to in the event it turns out that the party in whose favour the order is made shall be in the wrong, by imposition of terms on one party or the other as condition of either granting or withholding the injunction and **forth**, the plaintiff must show a clear necessity for affording immediately protection to his alleged right or interest which would otherwise be seriously injured or impaired. These four ingredients are also discussed by **Sohol's Law of Injunctions, Second Edition, 2000** at pages 116-117.

This court has repeatedly gone through the applicant's application to ascertain and satisfy itself, if it really raised points fulfilling the above legal requirement for this court to exercise its discretionary supremacies and grant what is asked for. What it assembled from paragraphs 1 to 8 of the applicant's affidavit is that, in paragraph 3 he stated that, he took loan from the 1st respondent and the same has been fully discharged. The applicant stated in paragraph 3 that;

That, the herein Applicant entered into Banking facility Agreement with the 1st Respondent one CRDB Bank Plc for provision of credit facility, term loan amounting to TZS. 877,795,950/= by mortgaging the aforementioned

*properties for the tenor of nine years for which the **same amount have already been discharged by the herein Applicant.***

This was vital information to be taken by the court in considering the prayer before it. However, the applicant has not gone beyond by at least mentioning; **one**, when did he pay **TZS. 877,795,950** claimed by the 1st respondent in discharge of the obligation under the loan facility and Deed of Settlement **Annexure JRA1**, **two**, he did not state where or through which account was the money disbursed to, **three**, he did not mention the date, month and year when such transaction was effected, **four**, he did not attach any document at least to persuade and place the court with picture. The document can be, cheque, bank statement, account number where the money was deposited. The above stated documents could have established that, the applicant has really discharged his contractual obligation under the Deed of Settlement, **Annexure JRA1**, thus he is litigating with clean hands.

The court was left in dilemma if the applicant version carries some truth on it by mere stating that, he has discharged his obligation without providing for any evidence at least providing highlights on the same. It is trite law that, an affidavit is substitute to sworn oral evidence, as such, it should be self-contained kind of evidence as nothing will be added thereto. In the circumstances, this court was expecting such affidavit to provide conclusive evidence in particular on the four areas stated in the foregoing paragraph proving when did he pay, how did he pay,



where did he pay and proof of such payment. The applicant therefore was required to go beyond not mere assertion that he has paid without any attempt to produce documentary evidence place the court to the said picture.

Paragraphs 1, 2, 4 and 5 of the applicant's affidavit are just narrative evidence on what transpired and steps taken. Paragraph 6 the applicant's affidavit is just a statement that, the applicant will suffer irreparable loss but no further particulars or information on the loss as against the respondent. It is well settled principle of law that, such applicant has to go beyond not mere assertion. The above position gets back up from the court of appeal stand established in the case of **Tanzania Cotton Marketing Board Cogecat Cotton (Cosa) [1997] TLR 63**, where the Court of Appeal stated that;

- i. the Applicant had not gone beyond, mere assertion that it would suffer great loss and that its business would be brought to a standstill. Unless details and particulars of the loss were specified was no basis upon which the Court could satisfy itself that such loss would incur.*
- ii. the applicant had further more failed to indicate, beyond the vague and generalized assertion of substantial loss, that the loss would be irreparable. Any loss which the Applicant was likely to suffer to could be adequately compensated for by an award of damages.*

Furthermore, what is stated in paragraphs 7 and 8 of the applicant's affidavit are just opinion and prayer which has nothing to do with factors to be established for the grant of temporary injunction as stated herein above.

Elsewhere, the evidence by the respondents presented through counter affidavit was not controverted by the applicant by filing a reply to counter affidavit. The effect of not contradicting evidence of the other party is a presumption that one has nothing to say thus, what is stated remain the position on the matter. The above position is echoed by the previously decision by this court stated in the case of **East African Cables (T) Limited vs Spenco Services Limited, Misc. Application Case No. 42 of 2016** (unreported) where Hon. Mr. Justice Mruma principled that;

*"In law affidavit and or counter affidavit (as the case may be) is evidence. It is a voluntary declaration of the facts written down and/or sworn to by the declarant before an officer authorized to administer oaths. Unlike pleadings (plaint and written statement of defence and other pleadings), affidavit and counter affidavit are prima facie evidence of the facts stated therein. **When a fact is stated on oath, it has to be controverted on oath and this gives the court an opportunity to weigh which fact is probably true than the***

other. When the fact sworn to or affirmed is not controverted then it is deemed to be admitted. When a person swears or makes a sworn declaration of a fact, the best way to challenge him/her is to swear a fact which tends to show that what he sworn to was false. Putting him to strict proof of the fact without giving your side of the story which you want to be believed, amount to admission of the fact."

Similar position is boomed by the court of appeal in the case of **Inspector Sadick and two others Vs Gerald Nkya**, Civil Application 8 of 1996, where it was stated that;

"First, Mr. Songoro, as a very senior legal officer, ought to have known better that the proper way to contradict the contents of the counter -affidavit of the respondent was not by making statement from the bar but was by filing a reply to the counter -affidavit."

In the present application, the applicant did not present evidence depicting how he will be; **one**, inconvenienced, **two**, suffer irreparable loss, **three**, establishment of prima facie case, **four**, facts that, in case of refusal thence damages will not be atoned by way of compensation, **five**, there is neither facts nor evidence particularizing any loss or hardship likely to occur in case of refusal of the said equitable order, **six**, there is no facts that the applicant stand with high

chances of sufferance as opposed to the respondents, **seven**, no evidence demonstrating how innocent or honest the applicant is in the transaction bearing in mind the 1st respondents is enforcing his rights under the Deed of Settlement following the applicant's failure to discharge his contractual obligations.

In other words, the applicant presented allegations instead of evidence establishing existence of the above factors for consideration by the court in granting injunction. It should be remembered that, allegations, however strong do not justify for grant of injunction. Additionally, mere allegations that, if injunction is not allowed complications will arise is no ground to grant injunction.

It is trite law that, interim or injunctive orders are only granted by the court in the exercise of court's discretionary supremacies. The discretion must be exercised judiciously, in the sense that, there must be grounds and evidence presented by the applicant satisfying the court to exercise its discretional supremacies and grant what is asked for. Short of that, the court will have nowhere to rely upon, as it will be like deciding a case without evidence.

Besides, courts can grant injunction if there is evidence that there will be irreparable loss which cannot be adequately compensated through damages (See: **American Cynamid Co. V. Ethicon Ltd** [1975] 1 All ER 504 at p.509 Per Lord Diplock) followed in Various Cases in Tanzania including **Hotel Tilapia Ltd v.**

Tanzania Revenue Authority, Commercial Case No. 2 of 2000 (unreported).

Lord Diplock stated:

"... The object of the temporary injunction is to protect the plaintiff against injury by violation of his right for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favour on the trial..." (at p.509)

Since, there is no evidence establishing existence of prima facie case, no inconvenience pleaded and proved, no irreparable loss established save for mere allegations, this court therefore has nowhere to rely upon and exercise its discretionary supremacies and granting what is asked for.

Guided by the decision in the case of Agency **Cargo International v. Eurafrican Bank (T) Ltd**, HC (DSM) Civil Case No. 44 of 1998 (unreported) whereby the balance of convenience test was adumbrated in an application for injunction against the bank's move to enforce recovery measures as it is in the present application. This Court (speaking through Nsekela, J as he the then was) stated that;

"... The object of security is to provide a source of satisfaction of the debt covered by it The Respondent to continue being in banking business must have funds to lend and which [h] as to be repaid by its 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."

The above position echoes what Lord Wheatley stated in the case of **Duchess of Argyll Vs Duke of Argyll and others (1965) 2 WLR 790**, when he stated that;

"A person coming to equity for relief and this being an equitable relief which the plaintiff seeks must come with clean hands, but the cleanliness required is to be judged in relation to reliefs that is sought"

This court cannot be used to cause injury or deny a contractual right of an innocent party unless there are compelling cogent reasons for so doing.

Parties are duty bound to discharge their contractual obligations. Courts will always not be used by the defaulting party to grant injunction restraining the innocent party from realizing its contractual accrued rights.

In the circumstances, since there is no evidence establishing compelling circumstances for grant of what is asked for, this court has nowhere to rely upon in granting the sought orders. It should be understood that, the mere fact that, there is a pending suit before the court is not in itself an an open cheque for grant of injunctive order, unless the ingredients stated in the above plethora of authorities are discharged by the applicant.

In the event, I am unable to agree with the applicant's stand on the matter based on the afore stated ration decident.

On the other hand, I am inclined to agree with the respondents' position that, the applicant has failed to meet ingredients for grant of injunctive orders as required by law.

Consequently, I hereby hold that, the applicant's application is with no merits for failure to meet the legal requirement upon which, this court can exercise its discretionary supremacies. As such, the applicant's application stand dismissed with costs.

IT IS SO ORDERED.

DATED at **BUKOB**A this 21st March, 2024.



G.P. MALATA

JUDGE

21/03/2024

RULING delivered at **BUKOB**A this 21st March, 2024.



G.P. MALATA

JUDGE

21/03/2024