IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO 78 of 2010

CONSTATINE KALIPENI.....APPLICANT

AZANIA BANK LTD.....1ST RESPONDENT

VIOVENA AND COMPANY LTD..... 2ND RESPONDENT

RULING

DATE OF FINAL SUBMISSION:22/02/2011

DATE OF RULING:23/03/2011

BUKUKU, J:

Contemporaneous with filing a suit against respondents, the applicant proceeded and filed a Chamber Summons under the provisions of order XXXVII Rule 1(a), Order XLIII rule 2 and section 95 of the Civil Procedure Code, Act Chapter 33 R.E 2002, praying:

EX-PARTE:

(i) That the Honourable Court be pleased to issue an interim Order to restrain the first and second respondents or their agents, servants, assignee, or whomsoever will be acting under their instructions or authority from auctioning and or selling the applicants' landed property described as plot No.324 Msasani, L. O. 161745, CT No.46616 Dar Es Salaam pending hearing and determination of the application for temporary injunction inter parties.

INTER PARTIES:

(ii) This Honourable Court be pleased to make an order of temporary injunction to restrain the first and second respondents or their agents, servants, assigns or whomsoever will be acting under the instructions or authority from auctioning and selling the applicant's landed property described as plot No.324 Msasani, L.O. 161745, CT No.46616 Dar Es Salaam pending hearing and final determination of the suit.

(iii) Costs of this application be provided for by the respondents.

(iv) Any other orders as this Honourable Court deems just and fit to grant.

Facts leading to the application include the following. On the 29th day of October, 2007, the applicant entered into a mortgage loan contract with

the first defendant for an amount of Tshs.195,000,000/=. The said loan was secured with a legal mortgage registered in favour of the first respondent on plot No.324 Msasani, L.O. 161745, CT No.46616 Dar Es Salaam. The said loan is repayable in 120 months from December 2007 to 30th November, 2017 attracting an interest of 18% per annum and in case of default, a penal interest of 4% per annum.

In support of the application, both by the affidavit and the oral submissions, Counsel for the applicant submitted that this matter has been ignited by a notice of default issued by 1st respondent on 31st March, 2010 and received by applicant on 8th April, 2010. Counsel for applicant submits further that, the notice in question referred to the loan repayment status as of 3rd December, 2009, which according to the applicant, it was cured. Having cured the default, as it is alleged, applicant continued with servicing of the loan.

That notwithstanding, on 10th of September, 2010, the second respondent, acting under the instructions of the first respondent, issued a notice of public auction in the local newspaper. The second respondent informed the public that he intends to sell by public auction applicants' mortgaged property. The sale was to be conducted on 2nd October, 2010 at 10.00 am. This instigated the applicant to file the present application. The applicant swears in his affidavit that, since the default was cured within the sixty days counting from the date of default which was 30th December,

2009, the intended sale so advertised by the second respondent, is actually tainted by ill motives.

Expounding further, Counsel for the applicant maintained that, the notice of default ignored transaction that transpired between 30th December 2009 and 31st March 2010, whereby applicant made deposits amounting to Tshs.18.omln. The said payment cured the default of Tshs.14.9 million to which the said deposits were not disputed by Respondents. That, the default notice referred to by Respondent is not the one in issue. The one in issue was cured and repayment of the loan stood well until June, 2010.

Counsel for applicant submitted that, in the event the mortgaged property is sold via public auction, it will cause great inconvenience and loss which cannot be adequately compensated by way of damages. Considering that the process to reverse the sale is extremely involving as there will be other parties involved, other that the first and second respondents, the sale will put him into extreme hardship, and will be irreparably disastrous to the applicant. On top of that, Counsel for applicant made reference to the case of **Nicholas Lekule V. IPTL & another. 1997 TLR 58** wanting to impress the Court, on balance of convenience as between the applicant and 1st respondent, as to who will suffer more in case the property was sold.

Finally relying on the case of **Tanzania Breweries Ltd. V. Kibo Breweries Ltd. & ano.1999 Vol.1 EALR 340**, Counsel for applicant submitted that, though it was premature to determine at this stage, the facts contained in the affidavit indicate triable issues which constitute a good ground for trial. He therefore prayed that the order for injunction be granted as prayed.

On the other hand, Mr. Mugira, arguing and voicing a reply on behalf of the respondents, forcefully retaliated by first charging that, according to the repayment schedule of the Loan Agreement, applicant was supposed to pay the sum of T.shs.3.8 million every month being principle plus interest. Applicant did not comply. He has not been paying the loan regularly. He maintained that, respondent had granted applicant indulgence severally for him to regularize payment of the loan to no avail.

Counsel for Respondents maintained that, it was after several reminders that on 31st March, 2010 a notice was issued to the applicant who was required to cure the default. That, the 60 days notice was to expire on 7th June, 2010, and that applicant was to cure the default in totality and not the Tshs.14.9 million only. He further submitted that, due to the failure of applicant to cure the default, 1st respondent exercised his rights under section 132 of the Law Act (as amended) by Act No.20 of 2004 read together with Act No.26 of 2008, which gives respondent a right of sale of a mortgage property in the event of default. It is this right which

made 1st respondent to appoint 2nd respondent, an auctioneer to sell the mortgaged property.

In conclusion, Counsel for respondent submitted that, according to section 139 of the Land Act, which was amended by Section 17 of the mortgage Finance Act, 2008, a person seeking an order of either suspending or stopping sale of a mortgaged property, has to prove to the satisfaction of the Court that he/she is able or willing to cure the default. Similar to that, the applicant has to prove that the mortgaged property has sufficient value in the event he fails to cure the default, the mortgagee will be likely to get the amount by sale of the property. Counsel averred that, applicant has not been able to prove any of these grounds to warrant a prayer of injunction and therefore prays to this Court that the application for injunction be dismissed with costs.

The applicant is represented by Mr. Frank Mwalongo, while Mr. Mugira defended the respondents' plight. The application was argued orally inter-parties.

Now, let us turn to the merits.

The principles governing the granting of temporary injunction have aptly been enunciated in various decisions by the Courts. **First**, *prima facie case* – the Court must be satisfied that there is bona fide dispute raised by the applicant, that there is a strong case for trial which needs investigation

and a decision on merits and on the facts before the Court, there is a probability of the applicant being entitled to the relief claimed by him.

Second, *irreparable injury* the applicant must satisfy the Court that he will suffer irreparable injury if injunction as prayed is not granted, and that there is no other remedy open to him by which he can protect himself from the consequences of apprehended injury. **Third**, *balance of convenience* – That, Court must be satisfied that the comparative mischief, hardship or inconvenience which is likely to be caused to the applicant by refusing the injunction will be greater than that which is likely to be caused to the opposite party by granting it.

The above principles and guidelines have been tested by the Courts in various cases. Such celebrated cases include **Giella Vs. Cassaman Brown & Co. Ltd (1973) EA 358; Atilio Vs. Mbowe (1969) HCD 284;** and **Agency Cargo International V. Eurafrican Bank (T)(HC)DSM, Civil Case No.44 of 1998** (unreported), to mention just a few.

We should now subject the facts before us to the said principles. I should however start by reiterating that, at this point we don't have the full evidence before us. What we are relying upon is the plaint, the affidavit as filed in support of the application and the Counsels' submissions and therefore the standard of proof required would be somehow below that which is generally required upon full trial.

As I said earlier on, what is basic to be determined now is whether there is in existence a serious triable issue between the parties; a looming danger of irreparable injury to the applicant, and on the balance of convenience the existence of more sufferings by the applicant if the injunction is refused than would be the case with respondent if granted.

The applicant's allegation is that, having cured the default and continued servicing the loan, the default notice issued by the 1st respondent on 31st March, 2010 is defective and invalid, and so is the advertisement by the 2nd respondent to auction the applicant's mortgaged property in question, unlawful. Both parties do not dispute the fact that there is an outstanding loan, rather the dispute is whether failure of the applicant to cure the default within sixty days entitled the 2st respondent acting under the instructions of 1st respondent, to auction the applicant's mortgaged property.

On his part, Counsel for the 1st respondent does not dispute the fact that between the date of notice, that is 30th December, 2009 and the date of expiry of the default notice, that is 7th June, 2010, applicant has deposited loan repayment installments to the tune of T.shs. 18,000,000.00 which remedied the default, rather, 1st respondent laments that, the applicant did not deposit sufficient funds to cure the default and that the loan was not paid according to the repayment schedule.

I have carefully considered the facts, the submissions and the law. I have also considered the three principles governing the issuance of temporary injunctions. It is evident that, the suit raises some triable issues namely; whether or not the applicant has cured the default as per the default notice issued on 31st March, 2010. Each party alleges that it is the other party who is at fault. It is therefore important that such allegations are adjudicated upon by a Court of competent jurisdiction.

In so far as the second principle is concerned, it is apparent that the 1st respondent is intending to dispose of applicants' mortgaged property by way of sale, in satisfaction of the outstanding debt. The loan which is supposed to be serviced by applicant is not disputed. Justice requires therefore that the property in question be protected, at least temporarily, until the suit is finally determined.

If injunction is not issued and the 1st respondent enforces its security, the mortgaged property will be disposed of and the applicant will suffer greater irreparable loss, whereas, if injunction is granted the only party that may suffer injury will be the 1st respondent for late enforcement of its security but this can easily be atoned by damages.

Having weighed the conflicting probabilities in this application, I am of the opinion that the balance of convenience is in favour of the applicant. I refer to **American Cyanamid Co. V. Ethicon Limited (Supra).** Between the two, the applicant stands to lose more if the injunction is refused. Which takes us to the third principle.

Having analysed the facts and shown the category in which the applicant's case fall, and since it appears that the relationship between the applicant and the respondents have soured, I will grant a temporary injunction as prayed. No order as to costs. It is so ordered.

JUDGE

23/03/2011

Ruling delivered in Chambers this 23rd day of March, 2011, in the presence of Mr. Mwalongo, Learned Counsel for the Applicant and Mr. Mugila, Learned Counsel for Respondents.

JUDGE

23/03/2011

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