

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC. COMMERCIAL CASE NO. 62 OF 2018**

**(Originating from Commercial Case No. 40 of 2018)**

**JOHN PASCAL SAKAYA**

.....

**APPLICANT**

**VERSUS**

**AZANIA BANK LIMITED**

.....

**RESPONDENT**

**RULING**

*Date of the Last Order: 29/05/2018*

*Date of the Ruling 22/06/2018*

**SEHEL, J.**

This is a ruling on application for temporary injunction brought Order XXXVII Rule 1 (a) of the Civil Procedure Act, Cap. 33 (hereinafter referred to as "CPC").

The applicant is moving the court to issue a temporary injunction against the respondent from continuing with the intention

to sell the applicant's properties (houses) pending determination of the suit.

The application is supported by an affidavit of John Pascal Sakaya wherein the applicant stated that on 2010 and 2013, he loaned money from the respondent for the purpose of purchasing properties at Plot No. 1 and No. 7 Kijitonyama, Kinondoni Municipality with an understanding that rents collected from thereof will be used to service or repay the loans. He further averred that in 2013 the house situate at Plot No. 7 got blazed with fire thus all tenants had to vacate it. The applicant further deponed that he had an insurance arrangement with the respondent which imposes obligation on his part to nominate the insurer and deposit with the respondent premium needed for the insurance policy. He deponed that he arranged, deposited and appointed Jubilee Insurance Company but the respondent fail to arrange for the insurance thus the applicant had to use his own money to renovate the house of which he used eight good months to do it. The applicant further deponed that during this eight months, the applicant failed to repay the loan

thus on 5<sup>th</sup> November, 2017 the respondent issued him with a default notice and demanded the repayment of money. The applicant stated that from December, 2017 to March, 2018 the applicant repaid the loan but the respondent proceeded to instruct auctioneers to sell his mortgaged properties.

At the hearing counsels Benedict Alex and Muguna Mwakipesile appeared to represent the applicant while advocate Kennedy Lyimo appeared to represent the respondent.

In trying to impress the court as to why temporary injunction should be issued, Counsel Alex submitted that the applicant has met all the three conditions set in the case of **Atilio Vs Mbowe** (1996) EA 284. He contended that the applicant has preferred Commercial Case No. 40 of 2018 in which one of the contentious issue is who is responsible in securing the insurance policy. Therefore to him there is a triable issue. He also submitted according to the facts stated in the affidavit the applicant will suffer irreparable loss and on balance of convenience, greater hardship and mischief is likely to be suffered by the applicant than the respondent.

Counsel Lyimo replied that the applicant took a loan and mortgaged his properties and it was the duty of the applicant to complete a transfer of the titles for the respondent to insure the properties. He argued the respondent followed all the procedures by issuing various reminders and notices but the applicant ignored/failed therefore the respondent decided to appoint an auctioneer to sell the mortgaged properties. He contended the applicant does not deserve to get an injunction because he has failed to satisfy the three conditions set in **Atilio's Case** (Supra). He contended the applicant by agreeing to place its properties as security then he is bound to adhere to his contractual obligation. In support of his submission he cited the case of **Agency Cargo International Vs Euro African Bank Limited**, Civil Case No. 44 of 1998 cited in the case of **Said Salum Lipwelele Vs Azania Bank Ltd**, Misc. Land Case Application No 52 of 2017 (unreported- H.C) where it was held that "...loss of a house after one has defaulted to pay back a loan is a fair and just loss". He therefore prayed for the application to be dismissed with costs.

It was rejoined by counsel Alex that the applicant did respond to the reminder as can be seen at Paragraph 13 of the affidavit where the applicant stated that he deposited Tshs. 70m after a reminder and that the applicant will suffer more as he was repaying his loan therefore each case must be taken according to its circumstances. He further contended that it is the respondent who is not respecting its contractual obligation. It was further added by counsel Muguna that there are issues to be tried which cannot be determined at this stage. They therefore reiterated their prayer for temporary injunction.

From the submissions of the counsels, they are in agreement that for the court to issue temporary injunctions, three conditions at in **Atilio's case** (supra) must be satisfied by the applicant. These conditions are;-

- (1) There must be serious questions to be tried on the fact alleged, and probability that the plaintiff will be entitled to the relief prayed.

- (2) The court's interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established; and
- (3) That on the balance of convenience there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendant from granting it.

In that respect this court has to assess according to the facts presented as to whether the above conditions have been satisfied by the applicant.

For the issue of a serious question to be tried, it is on record and upon hearing the submissions of counsels that parties are at tag of war on the issue of insurance policy. Applicant argued, he has done what is all required to be done by him but respondent contended that the applicant failed to effect transfer for the properties of the respondent to arrange insurance policy.

It is further contended by the applicant that he has been repaying his debt. The respondent, on the other hand, disputed the

allegation that the applicant was repaying his debt. From these two opposing submissions, I find there are serious questions to be tried in the main suit. However, at this stage i am not in a position to state with certainty that the suit has great chances of success. The likelihood of success has been discouraged by the Court of Appeal. In the case of **Robert Edward Hawkins and Another Vs Patrice P. Mwaigomole**, Civil Application No. 60 of 2005 (unreported – CAT) Hon. Ramadhani, JA (as he then was) stated:-

*"..... I am always uncomfortable with this submission and I rarely take it in because it is not easy to assess the outcome of litigation".*

Futher in **Alnoor Shariff Jamal Vs Bahadur Ebrahim Shamji**, Civil Application No. 86 of 2008 (unreported – CAT) Hon. Bwana, JA (as he then was) when dealing with the issue of stay of execution and when he was invited to determine as to whether there is great chances of appeal, he had this to say:-

*"..... Even if there are glaring irregularities and shortcomings on*

*the face of the record thus, leading to the "problematic nature" thereof as claimed by the applicant herein, that perse would not lead to pre conceived conclusion that the appeal stands a chance of success".*

I subscribe to those views, with the limited information I have received I am not in a position to state the suit has a great chances of success. It thus suffice to state that there are serious questions to be tried.

On the question of irreparable loss, it is the law that the injury which the applicant shall suffer must be irreparable injury which cannot be atoned by award of damages as held in the case ***Fatuma Mukangara and Another Vs Administrator General***, Civil Application No. 169 of 2007 (unreported – CAT).

In the instant application, parties are not in dispute that the applicant took a loan and pledged his properties, as security. It is also not in dispute that the and pledged securities are the ones used to service the loans, it also not in dispute that the pledged securities

are used for business transactions. A mere fact that the properties are not matrimonial properties does not defeat the strong argument advanced by the applicant that the properties are the sole source of funds to service the loan which he had been repaying it.

In ***Scandinavia Tours Limited Vs CRDB Bank Limited***, Commercial Case No. 115 of 2005 (unreported – HC) this court held that loss of business cannot be compensated by way of monetary. Further ***in Fatuma Mukangara*** (Supra) it was held that the livelihood and destruction of valuables items such as animals, crops and other structures on the land belonging to the applicant cannot be atoned by award of damages, despite the fact that the applicant is not residing in the disputed land. Therefore, any attempt by the respondent to dispose the secured properties will cause irreparable loss to the applicant.

As to the balance of convenience, the argument that the applicant placed his properties as security does not hold water due to the facts and nature of this application. The disposal of pledged properties can be done after the conclusion of the main suit and

obviously the respondent will not be disadvantaged by the grant of temporary injunction. As such according to the facts of this application, the applicant stands to suffer greater hardship than the respondent from withholding of the temporary injunction.

In conclusion, the application for temporary injunction is hereby granted. This order of temporary injunction is valid for six months from the date of delivery of this ruling or until the main suit is finally determined, whichever expires first, shall extinguish this order. Costs shall be in the main suit. It is so ordered .

DATED at Dar es Salaam this 22<sup>nd</sup> day of June, 2018.



B.M.A Sehel

JUDGE

22<sup>nd</sup> day of June, 2018.