IN THE HIGH COURT OF UNITED REPUBLIC OF THE TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
MISC.COMMERCIAL APPLICATION NO.70 OF 2020

AMANA BANK LIMITED.....APPLICANT

VERSUS

OMAR MOHAMED OMAR .....1ST RESPONDENT

ALI MOHAMED BAHDELA.....2ND RESPONDENT

BAHDELA CO. LTD.....3RD RESPONDENT

ABUBAKARI ALI BAHDELA.....4TH RESPONDENT

ACCESS LOGISTIC EAST AFRICA LTD .....5TH RESPONDENT

RULING

Date of Last Order: 03./08/2020
Date of this Ruling: 04/9/2020

NANGELA, J.,:

This ruling is in respect of an application filed in this Court on 20th May 2020. The application was filed under a certificate of urgency and by way of a Chamber Summons together with an affidavit in support, affirmed by one Ayoub Omari Korogoto. The Applicant, Amana Bank, preferred this application under section 68 (d), Section 95 and Order

XXXVIII Rule 1 (a) and (d) of the Civil Procedure Code, Cap.33 [R.E.2019] and all other enabling provisions.

The application was made *ex-parte* as well as *inter-parties*. The prayers were, thus, as hereunder:

EX-PARTE:

1. THAT, this Honourable Court of Justice may be pleased to appoint the Applicant as a receiver of a property situated on Land Office No.153900, Plot No.51, Buguruni Industrial Area, including (i) a covered warehouse measuring 7,920m^2, (ii) a paved and open yard measuring 14,580m^2 and, (iii)two storey office block and any additional buildings, facilities, fences, roads or other permanent constructions or improvements thereon (collectively the "Facility") located within Ilala Municipality in the City of Dar-Es-Salaam, for collection of the rent and profits thereof pending full determination of the main suit.
2. Costs of this application to follow event.
3. Any other or further relief(s) this Honourable Court may deem fair and just to grant.

INTER-PARTIES:

1. THAT, this Honourable Court of Justice may be pleased to appoint the Applicant as a receiver of a property situated on Land Office No.153900, Plot No.51, Buguruni

Industrial Area, including (i) a covered warehouse measuring 7,920m^2, (ii) a paved and open yard measuring 14,580m^2 and, (iii) two storey office block and any additional buildings, facilities, fences, roads or other permanent constructions or improvements thereon (collectively the "Facility") located within Ilala Municipality in the City of Dar-Es-Salaam, for collection of the rent and profits thereof pending full determination of the main suit.

Given the nature of the application and the circumstances surrounding it, when it came up for orders on the 1st June 2020, this Court made an order that, it would not be prudent to entertain the *ex-parte* prayers. As such, it was ordered that, the application should be heard *inter-partes*. In view of that order, the Respondents were granted leave to file their counter affidavits and the matter was set for oral hearing on 16th June 2020. On that appointed date, Mr. Nsajigwa Ngemela, learned counsel, appeared for the Applicant while Ms Aziza Msangi appeared for the 2nd and 3rd Respondent and Mr. Kephas Mayenje, learned counsel as well appeared for the 4th and 5th Respondents. The 1st Respondent was absent on the material date.

It came to the knowledge of the Court that, although the 2nd, 3rd, 4th and 5th Respondents had served the Applicant with their counter affidavits, the 1st Respondent was yet to serve his counter affidavit to the Applicant. He prayed, therefore, that, service should be effected

and the matter be scheduled for hearing on another appointed day. This Court ordered the Applicant to serve the 1st Respondent with the counter affidavit within 7 days. The 1st Respondent was also required to file his counter affidavit on or before 30th of June 2020. Hearing was set to be on 3rd of August 2020. However, on 30th July 2020, the parties appeared before me because, on 22nd July 2020, the Court received a certificate of urgency filed by the 3rd Respondent regarding a refusal by the 5th Respondent to pay rent. Although the Court wanted to hear the parties, wisdom dictated that all issues raised in the certificate should be brought up and argued before this Court on the 3rd of August 2020, as earlier scheduled.

On the 3rd of August 2020, the parties appeared before this Court. On that day, Ms. Josephine Safiel, learned counsel, appeared for the Applicant. On the other hand, Mr. Thobias Kavishe, learned counsel, appeared for the 1st Respondent and Mr. Samson Mbamba, learned counsel appeared for the 2nd and 3rd Respondents. As for the 4th and 5th Respondents, these enjoyed the services of Mr. Mong'enza Mapembe and Mr. Benson Kisamarwa, respectively.

In her submission, Ms Josephine informed the Court that, according to the averments in the affidavit of Mr. Ayoub Korogoto, the gist of this application, is the need for orders of this Court appointing the Applicant as a receiver of a property situated on Land Office No.153900, Plot No.51, Buguruni Industrial Area. The said "property"

(collectively known as the "Facility") is comprised of (i) a covered warehouse measuring 7,920m^2, (ii) a paved and open yard measuring 14,580m^2 and, (iii) two storey office blocks and any additional buildings, facilities, fences, roads or other permanent constructions or improvements thereon located within Ilala Municipality in the City of Dar-Es-Salaam, for collection of the rent and profits thereof pending full determination of the main suit.

Ms Josephine submitted that, on 7th September 2015, the Applicant extended a "**Murabaha Facility**" to the 1st Respondent amounting to **USD 1,700,000/-.** It was her submission that, the facility was secured by a mortgage guaranteed by the 2nd Respondent. She submitted that, the mortgage was registered and its copy is annexed to the application as "**Annexure AMANA 2**", while the mortgage Deed was annexed as "**Annexure AMANA -3**". The house mortgaged to secure the facility belonged to the 2nd Respondent, who, together with the 4th Respondent are directors of the 3rd Respondent, the later are being the one who had the mortgaged house leased to the 5th Respondent. The Lease was attached to the Affidavit of Mr. Korogoto as "**Annexure AMANA 7**".

It was further submitted that, under the **Murabaha Facility**, the 1st Respondent was obligated to purchase building materials and sell them to the 2nd Respondent. Ms Josephine also submitted that, up to the time of filing the application, the 1st Respondent, as a borrower, had

failed to repay the facility to the extent that the facility's outstanding amount stood at **USD 1,612,310.23.** Ms. Safiel contended that, as shown in annexure 6 to the affidavit, although the Applicant has demanded a full repayment of the outstanding amount, the 1st Respondent has never heeded to such demands.

It was a further submission of Ms Safiel that, according to section 126 of the Land Act, Cap.113 RE 2019, where a mortgagor is in default of payment, the mortgagee may exercise his rights to appoint a receiver of the income derived from the mortgaged property. In her views, under clause 3.02 of the Mortgage Deed, the Applicant is given power as a mortgagee, to take possession and collect rent from the mortgagor.

Ms Safiel contended that, since the premises that are subject to the facility are under a lease and the 2nd, 3rd and 4th Respondents have been receiving rent from the 1st Respondent, as a guarantor to the credit facility, the 2nd Respondent has an obligation to ensure that the loan is fully repaid. For that matter, she submitted that, the Applicant is requesting this Court under Order 38 rule 1(a) and (d) to appoint the Applicant as the receiver of the property and confer the applicant powers to collect rent and profits thereof, pending the full determination of the main suit. She also asked for costs of this application.

As for his part, Mr. Kweka who appeared for the 1st Respondent and Mr. Mapembe who appeared for the 4th Respondent were in support of the application. As such, they did not file counter affidavits. On the other hand, Mr. Benson, appearing for the 5th Respondent, requested that the 5th Respondent be removed from this Application, arguing that, he sees no reason why he was made a party. Even so, he did not oppose the Application. I think the 5th Respondent was a necessary party to the matter since the orders sought will have impact on how that Respondent is to behave in relation to where payable rent should deposited. As such, the prayer that the 5th Respondent should be dropped out in these proceedings is rejected.

The only respondents who opposed this application are the 2nd and 3rd Respondent. Mr. Mbamba, who appeared for these Respondents, was vociferous in opposition to the granting of the prayers sought by the Applicant. He submitted that, it is trite law that all applications which are filed for orders pending hearing of a main suit, are interlocutory in nature. He contended that, the purpose for such applications is to preserve the *status quo* existing at the time of the filing of the suit.

To buttress his submission, Mr. Mbamba referred to this Court the Court of Appeal decision in the case of **Abdi Ali Salehe v Asac Care Unit Ltd & 2Others, Civil Rev.No.3 of 2012 (unreported)**, which, at page 8 of its decision cited the case of **Giella v Cassman**

Brown & Co Ltd, [1973] EA 358 (CA), to the effect that, the object of such an equitable relief was to preserve the status quo. He also relied on the case of **CPC International Inc v Zanzibar Grain Millers Ltd, Civil Appeal No. 49 of 1995(unreported).**

Mr. Mbamba submitted that, in the present case, the 2nd and 3rd Respondents have a dispute with the alleged existence of a Murabaha Facility, and its validity, if it at all exists. He contended that, there has as well been issue regarding fraud in the acquisition of the said facility (such facility existed). He contended also, that, there is an issue of validity of the alleged mortgage and that, at the end of the day, all these are the issues which this Court will be called upon to examine.

It was a further contention that, if the answer to them will be in the affirmative, one of the reliefs of the mortgagee is the appointment of a receiver of the mortgaged property. Referring to section 126 of the Land Act, Cap.113 [R.E.2019], which had been cited by Ms. Josephine, Mr. Mbamba contended that the section refers to the relief once a mortgagor is found to be in default. He further argued that, even under section 42(d) of the Civil Procedure Code, Cap.33 [R.E.2019] an appointment of a receiver is one of the modes of executing a decree.

Mr. Mbamba argued, however, that, since the purpose of an interlocutory application is the maintenance of the *status quo*, the current application is bent to disturb this well established principle, as it seeks not to maintain the *status quo*, but to disturb it. He contended,

therefore, that, it will not be proper for the Court to entertain that kind of a prayer given that the Applicant is not seeking a prohibition order but seeks to enforce the terms of an agreement which is the subject of dispute in the main suit and its validity is a matter to be decided in the main suit. In his view, such are the orders to be given at the end of the day when the main suit is determined.

As regards his second point of argument, Mr. Mbamba submitted that, the Applicant's prayer to receive rental proceeds does not have any regard to the other beneficiaries. He argued that such proceeds are an income to the 3rd Respondent and subject to taxation and for other operational use and repair of the premises which needs to remain habitable. He contended that, if the order sought is to be granted, it will disable the 3rd Respondent who will not be able to meet other demands such as payment of taxes. It was Mr. Mbamba contention that, granting the prayers sought will be tantamount to punishing the 3rd Respondent before determination of the main suit and issues involved therein.

The last point argued by Mr. Mbamba was the allegation that if the application will not be granted the Applicant will suffer irreparable loss. Mr. Mbamba argued that the loss referred to is monetary loss which, according to various judicial pronouncements, is remediable by way of seeking for damages in the form of payment of compensation, if it is established. To buttress his submission, he referred to this Court the

case of **Dr. William F. Shija v Dr. Fortunatus Masha, Civil App. No.1 of 2002 (unreported).** He prayed, therefore, that, this application be dismissed with costs since, the orders sought are orders that are to be issued after the determination of the main suit as regards the rights of a mortgagee.

In a brief rejoinder, Ms. Josephine opposed what Mr. Mbamba submitted and reiterated her submission in chief. She argued that, even if the 2nd and 3rd Respondents have obligations to discharge, it should be recalled that the Applicant has been receiving part of the payment of the loan from the rent proceeds as per the lease agreement. She argued, that, this is the final year of the lease agreement, and, that, if the Applicant does not become the appointed receiver of such rent, being a financial institution, the Applicant will be expose to the risks of not being paid back the outstanding amount. She contended further, that, because payments from the leased properties have been used to service the loan, and, such payments are now due, there is a reason to grant the application.

Ms Josephine contended further, that, the kind of loss which the Applicant is likely to suffer is irreparable and cannot be atoned by way of compensation. She argued, referring to paragraph 12 of Mr. Kirogoto's affidavit, that, the Applicant is a financial institution charged with the duty of developing and supporting entrepreneurs. She argued, for that reason, that, it is the duty of the Applicant to ensure that

monies extended to defaulters are recovered so that it may be extended to other entrepreneurs. She argued, that, if the Applicant will be put into the risk of losing the entire amount of monies advance to the 1st Respondent and secured by the 2nd Respondent through the lease agreement, the Applicant will be at risk of not being able to recover the issued facility.

Ms Josephine contended further, regarding the reliefs sought in the main suit, that, what is being sought in that main case is a declaratory order that there has been breach of the *Murabaha Facility* and immediate payment of the whole amount. There was as well an alternative prayer, that, an order for receivership of the property be granted. In the end, she rejoined further that, this application was also prompted by the fact that the lease between the 3rd and 5th Respondent is coming to an end.

Having carefully listened and summarised the rival submissions made by the learned counsel for the parties, the only question to be examined in this application is whether it is appropriate to grant it. As correctly pointed out and agreed by all parties, this is an interlocutory application. It is a settled law, that, an interlocutory order is a form of an equitable remedy which is granted upon the exercise of Court's discretion. Any decision granting or refusing to grant such a relief involves the exercise of the Court's discretion. In that regard, the law calls for judicious exercise of the Court's discretionary powers.

Because this Court is to be governed by the principles of equity, the applicant must demonstrate that it has a legal right, there is invasion to it and will suffer irreparable detriments if the Court will not intervene. Such a position was authoritatively expounded by this Court, Mapigano, J., (as he then was) in the case of **T.A. Kaare v General Manager Mara Cooperative Union (1984) Ltd [1987] TLR 17 (HC).**

In that case, the Court was of the view that, there are certain conditions which must be fulfilled when a court is called upon to grant a relief an interim nature. The Court had the following to say, that:

> "the power to grant such an application has always been discretionary, to be exercised judicially by the application of certain well -settled principles. The first such governing principle, as indicated supra, is that the court should consider whether there is a bona fide contest in between the parties. Secondly, it should consider on which side, in the event of the plaintiff's success, will be the balance of inconvenience if the injunction does not issue.... Thirdly, the court should consider whether there is an occasion to protect either of the parties from the species of injury known as "irreparable" before his right can be established, keeping it in mind that by "irreparable injury" it is not meant that there must be no physical possibility of repairing the injury but merely that the injury would be material, i.e., one that could not be adequately remedied by damages.."

In the instant application, there is no doubt that the first point, and even as it will be seen in the main case, is well established. There is indeed a pending case which is a real contest between the parties herein. As regards the balance of convenience, in my opinion I find that,

it is on a fifty-fifty scale. However, what needs to be looked at, in my view, is whether if this Court refuses to grant the application the Applicant will suffer an irreparable loss as argued by the Applicant.

Mr. Mbamba has contended that the loss which the Applicant is referring to as an irreparable one is not at all of that nature and can be remedied. He has cited the case of **CPC International Inc v Zanzibar Grain Millers Ltd, (supra)** to support his contention. In that case, the Court of Appeal stated as follows:

> "In this application no such particulars of irreparable injury have been given as pointed out by Mr. Rutaisire. However, I said in **Deusdedit Kisisiwe v Protaz B. Bilauri, Civil Application No. 13 of 2001 (unreported**:
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> > 'The attachment and sale of immovable property will invariably, cause irreparable injury. Admittedly, compensation could be ordered should the appeal succeed but money substitute is not the same as the physical house. That difference between the physical house and the money equivalent, in my opinion, constitutes irreparable injury.'"

From the above authority, it is indeed clear to me, that, monetary loss is at all times remediable. In the case of **T.A. Kaare v General Manager Mara Cooperative Union (1984) Ltd** (supra) this Court stated that the injury must be "material, *i.e.*, one that could not be adequately remedied by damages." That being said, is it correct to argue, in the instant case, that, if the application is refused and the Applicant happens to suffer loss, such loss will be irreparable?

In my judgment, the answer to the above is in the negative. The kind of loss, if it will at all occur to the Applicant, is not an irreparable

loss but, as rightly stated by Mr. Mbamba, it will be of financial nature and that can be quantified and adequately remedied by claim for damages. The Applicant has not been able to prove that loss, if any, cannot be atoned or compensated in damages.

In his submission Mr. Mbamba also raised a point which I would wish to address here. The point raised was whether it is appropriate to grant reliefs which ought to be granted at the end of the day, i.e., having heard the parties in the main case. He argued that, the orders sought are a relief which cannot be granted at this time since doing so will amount to prejudging the main case.

I think Mr. Mbamba has a point in his submission. Whether or not the Applicant is to be appointed as a receiver of the rent and profits from the mortgaged properties, is an issue which should not be adjudged in this application but in the main suit. Adjudging that issue at this time is analogous to gun jumping during a marathon rally. It will amount to the trying of the main suit at a stage which had not been reached. The Court of Appeal in the case of **Abdi Ali Salehe v Asac Care Unit Ltd & 2Others (supra)** raised a red flag against such an act and set aside the ruling which was the subject of discussion before the Court.

In the upshot, this Court hereby denies the applicant the orders sought in this application. The Application is dismissed and costs will be costs in the cause.

Order accordingly.

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DEO JOHN NANGELA
JUDGE,
High Court of the United Republic of Tanzania
(Commercial Division)
04 / 09 /2020

Ruling delivered on this 04th day of September 2020, in the presence of Ms Josephine Safiel, Advocate for the Applicant and Mr. Thobias Kavishe, Advocate for the 1st Respondent, Mr. Samson Mbamba and Ms. Msangi, Advocates for the for the 2nd and 3rd Respondents, Mr. Mong'enza Mapembe and Benson Kisamarwa, Advocates for the 4th and 5th Respondents respectively.

THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION

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DEO JOHN NANGELA
JUDGE
High Court of the United Republic of Tanzania
(Commercial Division)
04 / 09 /2020