IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCISL APPLICATION NO.160 OF 2020

(ARISING FROM COMMERCIAL CASE NO.105 OF 2020)

STATE OIL TANZANIA LIMITED ..... APPLICANT

VERSUS

EQUITY BANK TANZANIA LIMITED ..... RESPONDENT

Date of Last Order:05/11/2020

Date of Ruling: 10/12/2020

RULING

MAGOIGA, J.

Under the provisions of Order XXXVII Rule 1(a), Order XLIII Rule 2 and section 68 (e) of the Civil Procedure Code, [Cap 33 R.E.2019] the applicant is praying for an order of temporary injunction to restrain the respondent or their agents, servants, assigns, or whomsoever will be acting under their instructions or authority from selling any collateral and from taking any step towards recovering USD.19,625,316.00 from the applicant resulting from the banking facility dated 21st November, 2018 and Facility Agreement dated 12th December,2018 pending the hearing and final determination of the Commercial Case No.105 of 2020, costs of the application and any other orders as this honourable court deems just and fit to grant. The application

was supported by the affidavit of Mr. ANIL NILESH SUCHACK, the managing Director of the applicant stating the reasons why this application should be granted as prayed.

Upon being served with the chamber summons and the accompanying affidavit, the respondent, through Mr. Heri Saburi, the Principal Officer of the respondent filed a counter affidavit opposing the prayers sought in the chamber summons.

The applicant filed a reply to counter affidavit further insisting for the grant of the prayers as prayed in the chamber summons.

It should be noted that this application was preferred under certificate of urgency and had both ex-parte prayers and inter party prayers. As usual in my dealing with ex-parte prayers, I declined to entertain ex-parte prayers because the other party's address (respondent) showed was within reach, as such I ordered that, the respondent be served and will only deal with inter parties prayers. However, when the matter was called on for orders inter parties, I ordered status quo be maintained pending the hearing of the application.

At first the respondent had the legal services of Mr. Godwin Nyaisa, learned advocate, but when the application was called on for hearing of the substantive application, the respondent was advocated by Mr. Delip Kesaria. On the other hand, the applicant at all material time is enjoying the legal services of Mr. Frank Mwalongo, learned advocate.

Mr. Mwalongo in support of the application prayed to adopt the chamber summons and supportive affidavit and extensively elaborated the history of the relationship between parties in their business deals. Mainly, the learned advocate for the applicant invited this court to be guided by the case of ATTILIO v. MBOWE [1969] HCD 284 and that of GYELA v. KASSIMAN BROWN [1973] EA 358 all of which echoed the three principles for grant of the temporary injunction which are that;

i. Prima facie case that there are triable issues.

ii. Irreparable loss.

iii. Balance of inconveniences.

Guided by the above principles, Mr. Mwalongo cited several cases to support his stance and eventually concluded that, given the facts as stated in the

affidavit, all three principles have been met in this application and humbly urged this court to grant the prayers as prayed in the chamber summons.

On the other hand of the respondent, Mr. Kesaria seriously opposed the prayers in the chamber summons on reasons that the three cumulative principles as set out in the long celebrated case of ATTILIO v.MBOWE (supra) are not met. According to Mr. Kesaria, if one is missing, then, no injunctive order can be given. It was the learned advocate for the respondent's view that, the three principles are not met in the instant application. In this, he pointed out that, no single paragraph on irreparable loss was stated in the affidavit. Mr. Kesaria further pointed out and argued that, according to the nature of the transaction, the suit or application cannot be maintained without Equity Bank Kenya which is a financier of the transaction in dispute. To buttress his point cited the case of STANSLAUS KALOKOLA v. TBA AND MWANZA CITY COUNCIL, CIVIL APPEAL NO. 45 OF 2018 (MWANZA) CAT (UNREPORTED).

On that note, Mr. Kesaria urged this court to dismiss this application with costs.

In rejoinder, Mr. Mwalongo took it that, since the counsel for respondent has raised an issue of Equity Tanzania being an agent, then, it must have a agency license to do the business on behalf of the Kenyan bank. According to Mr. Mwalongo, that by itself raises a triable issue in the main suit. On the argument that failure to join Equity Kenya renders the application not maintainable, it was the reply of Mr. Mwalongo that is not true because the prayers that are being sought have nothing to do with Equity Kenya but Equity Bank Tanzania Limited alone. In the fine the learned advocate for the applicant maintained that the three principles are met in this application.

I have seriously gone through and considered the affidavit, counter affidavit and reply thereto, rival arguments of the learned trained minds of the parties, the cases cited for and against merits and demerits of this application, but with all respects, I am of the considered opinion that all taken on board and dutifully considered, I am inclined to grant this application. The reasons I am taking this stance are not far to fetch. **One,** given the nature of the transaction and the prayers as contained in the main suit, no doubt it raises seriously triable issues for this court to determine inter parties. **Two,** if the triable issues cannot be determined first, I am sure both parties will be hanging on balance of inconveniences and they may render the triable issues

not well captured before the successful party is allowed to enjoy fruits of justice. **Three,** the kind of securities pledged some require notices and some not, therefore, non-issuance of notice alone is not a reason for denial to use and cause more inconveniences to the applicant.

On the argument by Mr. Kesaria that, without Equity Kenya bank that this application will be a nullity as held in case of STANSLAUS KALOKOLA v. TBA AND MWANZA CITY COUNCIL,(supra), I have had time to read the said judgement but I find it distinguishable from the facts we have in that it is not absolute that non-joinder of the party renders every application or suit nullity but depends on the party in question. In cases where Attorney General is involved and is not joined may necessarily affect the jurisdiction of the court while this does not apply to every part to a suit. Therefore, a mere non-joinder of Equity Kenya Bank alone in this suit, if any, do not fetter the jurisdiction of this application.

That said and done, this application must be and is hereby granted as prayed and the respondent or their agents, servants, assigns or whomsoever will be acting under their instruction or authority are hereby restrained from selling the collateral and from taking any steps towards recovering USD.19,625,316.00 resulting from banking facility dated 21st November, 2018

and Facility Agreement dated 12th December,2018 pending the hearing and determination of the Commercial Case No. 105 of 2020. Costs abide the result of the main suit.

It is so ordered.

Dated at Dar es Salaam this 10th day of December,2020.

S.M. MAGOIGA

JUDGE

10/12/2020