IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 184 OF 2020

(Originating from Commercial Case No. 130 of 2020)

SCI (TANZANIA) LIMITED ..... APPLICANT

VERSUS

GULAM MOHAMED ALI PUNJANI..... 1ST RESPONDENT

PRISTINE PROPERTIES LIMITED ..... 2ND RESPONDENT

RULING

ISMAIL, J.

12th, &15th October, 2021

The applicant in this application is the plaintiff in the main case i.e. Commercial case No. 130 of 2020, in which a refund of the sum of United States Dollars three hundred thousand (USD 300,000.00) is claimed. The sum was allegedly advanced by the plaintiff to the 1st defendant, following the latter's fraudulent inducement that he intended to build a multi-storey building. The plaintiff's further contention in the statement of the claim is that, based on the 1st defendant's assurance, the plaintiff effected a direct

transfer of the sum constituting the subject matter of the claim, only to learn, later, that the project had been abandoned by the defendants without any notice to the plaintiff. The defendants' alleged undertaking to the plaintiff was that the plaintiff would be allocated a prime apartment in another high-end multi-storey building in Sea View Area, Dar es Salaam, but to no avail.

In the instant application, the plaintiff's (applicant) prayer is for issuance of a temporary injunction which will restrain the respondents, their agents or persons working under their instructions, from disposing of any of their movable or immovable assets pending determination of the main suit. The application is supported by an affidavit Shabir Abji, the applicant's principal officer, setting out grounds on which the prayer for the restrain order is craved. The averment is that the respondents are in the process of disposing of their assets with the intention of defrauding the applicant. The deponent further averred that conditions requisite for granting of temporary injunctive orders exist in this case.

The application has been valiantly opposed to by the respondents. Through a counter-affidavit affirmed by Kika Ali Mzige, the respondents' counsel, averments by the applicant have been perforated. Besides denying that there existed any contractual arrangements for the alleged

partnership arrangement, the deponent avers that the application does not warrant a grant of injunctive reliefs. This is partly due to the fact that there are no serious questions to be determined by the Court to entitle the applicant the relief sought.

Hearing of the application was conducted orally, and it pitted Mr. Marcelly Kanoni, counsel for the applicant, against Mr. Kika Mzige, counsel for the respondent. Kicking off the discussion, Mr. Kanoni argued that grant of temporary injunction is governed by three principles enunciated in the celebrated case of ***Attilio v. Mbowe*** (1969) HCD 284. He argued that all of these principles exist in this case. These are: existence of *prima facie* case; existence of irreparable loss; and balance of convenience.With respect to *prima facie* case, the contention by Mr. Kanoni is that there is a pending suit in this Court for refund of the sum advanced to the 1st respondent who is in the process of disposing of the building to third parties. He took the view that on the basis of all this, there is a *prima facie* case worth determination.

Regarding irreparable loss, the counsel's argument is that the intended sale will inflict an irreparable loss on the applicant if allowed to proceed as there is no way the applicant will be refunded the sum advanced. On the balance of convenience, the applicant's take is that,

quite clearly, the respondent's interests will be prejudiced if the prayer for injunction is not granted.

Submitting in rebuttal, Mr. Mzige argued that the application is vague because the applicant has not highlighted the property in dispute as the law requires. He further contended that the applicant has not demonstrated that there is a danger of any damage to, alienation from and waste, or dissipation of value of the property. The counsel argued that Order XXXVII rule 1 of the CPC requires the applicant to specifically provide for what kind of property is in dispute. Mr. Mzige contended that the affidavit in support neither describes the property in dispute nor does it demonstrate any notice of sale.

With respect to the main suit, the respondents' counsel argued that what comes out is that the relief sought is a reimbursement of the sum allegedly advanced, and that no property has been described as being in dispute. It is simply a claim for refund of the money allegedly injected in the project.

Reacting with respect to the criteria as spelt out in ***Attilio v. Mbowe*** (supra), Mr. Mzige's take is that the application has no attachment to the property, and that the same does not exist. He argued that the prayer for

injunction cannot be issued *in rem,* without categorically describing the property in the suit. He prayed that the application be dismissed with costs.

In his brief rejoinder, the applicant's counsel argued that the identity and description of the property has been done in paragraph 3 of the supporting affidavit. He submitted that the construction has stopped, and that the property that was financed by the applicant exists. This is why the respondents are challenging the application. The counsel maintained his position and prayed that the application be granted.

These submissions distil one critical question. This is as to whether conditions for grant of temporary injunction exist in this matter.

The position of the law, as it currently obtains, is to the effect that temporary injunction is an equitable relief. It is granted, before or during trial, for the sole purpose of preventing an irreparable loss or injury from occurring before the court has a chance to decide the case (See: ***Black's Law Dictionary***, 8th ed., pg. 800). The just cited definition brings the impression that a "temporary injunctive order is a conservatory restraint order that is intended to maintain the current state of affairs as the disputants battle out in the substantive matter that is pending in court. It is, therefore, granted upon satisfaction by the court that the applicant has a concluded right capable of being addressed through the injunctive order."

(See: ***Registered Trustees of Kanisa la Wabaptist Tanzania v. Nicholas LuseleleNzela& 7 Others***, HC-Misc. Civil Application No. 126 of 2020 (unreported)).

The position in the cited decision traces its origin from an Indian case of ***Agricultural Produce Market Committee v. Girdharbhai Ramjibhai Chhaniyara***; AIR 1997 SC 2674. The Supreme Court of India held in the said decision as follows:

> *"a temporary injunction can be granted only if the person seeking injunction has a concluded right, capable of being enforced by way of injunction."*

As correctly alluded to by Mr. Kanoni, the holding in ***Attilio v. Mbowe*** (supra) remains to be the trend setter, as far as grant of a temporary injunction in this country is concerned. Subsequent decisions have built on the fabulous foundation set in that case. These include the Court of Appeal of Tanzania's decision in ***Abdi Ally Salelhe v. Asac Care Unit Ltd & 2 Others***, CAT-Civil Revision No. 3 of 2012 (unreported), in which it was held:

> *"The object of this equitable remedy is to preserve the pre-dispute state until the trial or until a named day or further order. In deciding such applications, the Court is only to see*

a prima facie case, which is one such that it should appear on the record that there is a bonafide contest between the parties and serious questions to be tried. So, at this stage the court cannot prejudice the case of either party. It cannot record a finding on the main controversy involved in the suit; nor can genuineness of a document be gone into at this stage.

Once the court finds that there is a prima facie case, it should then go on to investigate whether the applicant stands to suffer irreparable loss, not capable of being atoned for by way of damages. There, the applicant is expected to show that, unless the court intervenes by way of injunction, his position will in some way be changed for worse; that he will suffer damage as a consequence of the plaintiff's action or omission, provided that the threatened damage is serious, not trivial, minor, illusory, insignificant or technical only. The risk must be in respect of a future damage (see ***Richard Kuloba Principles of Injunctions*** *(OUP) 1981).*

And on the question of balance of convenience, what it means is that, before granting or refusing the injunction, the court may have to decide whether the plaintiff will suffer greater injury if the injunction is refused that the defendant will suffer if it granted."

See also: ***Anastasia Lucian Kibela Makoye& 2 Others v. Veronica Lucian Kibela Makoye & 4 Others***, CAT-Civil Appeal No. 46 of 2011 (unreported).

Gauging from the parties' submissions, there can hardly be any dispute that a suit is pending, involving the parties herein. At stake, however, is a refund of the sum of USD 300,000.00 which, as stated earlier on, was allegedly advanced to the 1st respondent. This is captured in paragraph 4 of the plaint which states as hereunder:

> *"That the Plaintiff's claim against the defendant is for failure of the defendant to perform their part of the Agreement after fraudulently inducing the plaintiff to depose (sic) a sum of United States Dollars Three Hundred Thousand ($300,000/-) as investment to develop a multistory building in Sea view area in Ilala District, within Dar es Salaam Region and wrongfully withholding the said amount belonging to the plaintiff without lawful justification."*

This allegation is summed up by the plaintiff's prayer under item (a) in which a refund of the said sum is sought. This is what constitutes the fair question for determination awaiting a trial and decision by this Court. It is what is meant by *prima facie,* case which must be demonstrated by the

applicant of the injunctive order, as amply emphasized in the commentaries by ***Sarkar on the Code of Civil Procedure***, 10th ed., Vol.2 p.2011. In their words, the learned authors posited as follows:

> *"In deciding application for interim injunction,* ***the court is to see only prima facie case, and not to record finding on the main controversy involved in the suit prejudging issue in the main suit,*** *in the latter event the order is liable to be set aside."* [Emphasis added].

See also: ***Colgate Palmolive v. Zacharia Provision Stores & Others***, CAT-Civil Appeal No. 1 of 1997 (unreported); and ***Kibo Match Group Ltd v. H.S. Impex Ltd*** [2001] TLR 152.

It should be noted, however, that the need to do that should consider the fact that the condition precedent for granting restrain orders is that the property whose disposal is sought to be restrained should constitute the subject matter of the pending suit. And this begs the following questions: What is the subject matter of the suit registered as Commercial Case No. 130 of 2020? Is it connected to what the applicant seeks to restrain? In my unflustered view, the answers to these questions are in the negative. A claim for refund of the sum advanced cannot be realized through a restraint from having the building and movable assets

sold or disposed of in any different way. If, as stated in the affidavit and amplified in the oral submission, the applicant's apprehension stems from the fact that she stands to suffer an irreparable loss and may end up getting an empty and ineffectual judgment, then this is not the purpose of a conservatory order such as a temporary injunctive order.

With regards to irreparable loss, the applicant is under the legal requirement to ensure that the loss to be prevented is evidently or manifestly irreparable. Moreover, the loss should be serious, not trivial, minor, illusory, insignificant or technical only, consistent with the emphasis showered by Lord Diplock who held as follows, in ***American Cynamid Co. v. Ethicon Ltd*** [1975] 1 All E.R. 504 (at p. 509):

> *"Evidence that there will be irreparable loss which cannot be adequately compensated by award of general damages."*

The foregoing reasoning is in sync with the exposition made in the Indian case of ***Best Sellers Retail India (P) Ltd. v. Aditya NirlaNuvo Ltd.***, (2012) 6 SCC 792, in which it was guided as follows:

> *"Yet, the settled principle of law is that even where prima facie is in favour of the plaintiff, the Court will refuse temporary injunction if the injury suffered on account of refusal of temporary injunction was not irreparable."*

My scrupulous review of the depositions made by the applicant do not convince me, one bit, that this imperative requirement has been fulfilled. Nothing, in the supporting affidavit, brings out any sensible feeling that sale of the said building and/or any other asset belonging to the respondents would constitute an irreparable harm that is sought to be forestalled through the temporary restraint orders sought by the applicant.

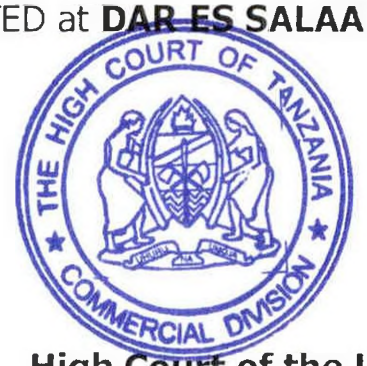
Reverting back to the possibility of obtaining a judgment that will be empty and ineffectual, should the respondents be allowed to alienate the property, I hold the bold view that the appropriate recourse in that respect is not to ask for an injunctive order. The applicant would be in a proper footing if she applied for attachment of the respondents' property before judgment under Order XXXVI Rule 1 (a) (iii) of the CPC. This would ring fence the property and serve as an insulation against any possible avoidance by the respondents to honour a decree that may be passed in her favour. I take the view that the quest for an injunctive order in the circumstances of this case is nothing short of a misuse or abuse of the Court's discretionary powers. It is abhorrent and unacceptable.

I am hardly persuaded that the depositions in the affidavit and the oral submission made in support of the application have brought out a

credible case that meets the threshold for the grant injunctive orders. In consequence, I dismiss the application, and the respondents have to have their costs

Order accordingly.

DATED at **DAR ES SALAAM** this 15th day of October, 2021.



M.K. ISMAIL

JUDGE

High Court of the United Republic of Tanzania
(Commercial Division)
15/10/2021