

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC.CIVIL APPLICATION NO. 10 OF 2021

(Arising from commercial case no. 10 of 2021)

MORGAN AIR & SEA FREIGHT LOGISTICS

KENYA LIMITED

APPLICANT

VERSUS

SERENGETI FRESH LIMITED

RESPONDENT

RULING OF THE COURT

K.T.R. MTEULE, J.

07/10/2021 & 26/10/2021

The applicant **MORGAN AIR & SEA FREIGHT LOGISTICS KENYA LIMITED** made this application for temporary injunctions under Order XXXVII Rule 1(b) and Section 68(e) and 95 of the Civil Procedure Code [CAP 33 R.E 2019] praying for an order for maintaining status quo and to stop the respondent or his agents' servants or workmen, assignees and or any person under his instruction from selling the assets of the respondent apart from their products pending hearing of Commercial case No. 10 of 2021 pending before this court between the parties herein.

In the above-named Commercial Case No. 10 of 2021 the Applicant is the plaintiff, claiming against the defendant, the instant respondent for payment of alleged outstanding amount of USD 126,438.00 being credit service for transportation of goods to the defendant. It is further claimed in the plaint for an interest of 21% per annum on the outstanding amount from the date it became due to the date of full payment of the said sums.



In the affidavit sworn by Mr. **HASSAN S. RUGHWANYA** counsel for the Applicant to support the application, it is deponed that it came to the applicant's attention that the respondent wants to sell his valuable assets which are 3 trucks, and a packhouse with intention to defraud the applicant. On the other hand, the respondent's Counter affidavit was sworn by the respondent counsel, Mr. **VIVIANUS VALENTINE RUGAKINGIRA** in which the substantial facts and allegations in the affidavit have been disputed.

Upon hearing of the application by oral submission, Mr. Rughwanya having adopted the applicant's affidavit as part of his submission, reiterated the contents of the affidavit and stated that if the named respondent's assets are disposed of, the applicant will be deprived of some interest because he has a claim against the respondent. He stated that this court interference is necessary to protect the injury the applicant might suffer if the assets are sold.

According to Mr. Rughwanya the injury likely to be suffered will be more serious on the part of the applicants compared to the respondent. To support his contention he cited the case of **Attilio vs Mbowe, High Court Digest 1959, 284.**

In response, Mr. Lugakingira the learned Advocate for the respondent having adopted the contents of the Counter Affidavit as part of his submission stated that it is not true that his client is in a process of disposing of the valuable assets as claimed by the mere thought of the applicant. He submitted that there is no evidence such as an advertisement to show the intention of the respondent to sell its valuable assets of three (3) trucks and a packhouse.



On the other line of argument, Mr. Lugakingira submitted that if the injunction shall be granted the modus operandi of his client's business will be limited as it will be negatively affected. He submitted that the applicant has not proved how they will suffer irreparable loss which is among the fundamental element of the order of injunctions as elaborated in the case of **Atilio vs. Mbowe 1969 HCD 284** that there should be irrepealable loss which cannot be adequately awarded by general damages.

Mr. Lugakingira further argument is premised on the point that since Covid 19 Pandemic has affected many businesses, he don't see what will be wrong with his client if he opts to dispose of some of his properties to raise capital. He stated that if the respondent will be limited in the manner of running his business, he will be likely to fail to effect any decretal payment shall the court decide the main case in favour of the plaintiff. He therefore prayed for this application to be dismissed.

In rejoinder Mr. Rughwanya argued that if the respondent doesn't have the intention to dispose of the assets it pre-supposes that there will be no problem with this court to grant the order of temporary injunction. He rejoined further that the operation of the respondent's business depends on agricultural products while the current application intends to restrain the respondent from selling his valuable assets which shall not affect Agricultural production.

Mr. Rughwanya insisted on the existence of applicant's interest in the properties about to be sold. In his opinion, if commercial case number 10 of 2021 is decided in favor of the applicant, there will be no assets to attach which will be a loss to the applicant.



Having analyzed all the submissions made by the parties together with their sworn statements in the affidavit and counter affidavit, the issue before this court is **whether the applicant has established sufficient cause to warrant grant of temporary injunction against the Defendant.** To answer this issue, a consideration has been made to the existing guiding principles which provide for factors to be considered prior to granting an order for temporary injunctions. Several of these factors have been a subject in various cases within and outside our jurisdiction. In **Sigori Investment (T) Limited and Another vs Equity Bank Tanzania Limited and Another, Misc. Land Application No. 56 of 2019,** my learned sister Hon. Leila Mgonya J has explored various cases and summed up 3 factors to be considered in deciding granting of injunction. These factors are;

- (1) That there must be a serious question to be tried on the facts alleged and probability that the plaintiff will be entitled to the relief prayed for.
- (2) That the court interference is necessary to protect the plaintiff from suffering irrepealable losses before his alleged right is established
- (3) That on the balance of the 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 of it.

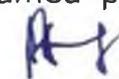
Hon. Mgonjya J derived the above principles from the cases of **Atilio Vs. Mbowe [1969] HCD 284; Suryakant D. Ramji Vs. Sa Vings And Financeltd & 3 Others; High Court Commercial Division, Dar Es Salaam, Civil Case No. 30 of 2000 (Unreported); E. AS Industries Ltd Vs. Trufood Limited [1972] E A . 420; Giella Vs. Cassman**

Brown [1973] E.A 358; Colgate Palmolive Company Vs. Zakaria Provisional Stores & 3 Others, High Court, Dar Es Salaam, Civil Case No. 1 of 1997; and CPC International Inc. vs. Zainabu Grainmillers Ltd Civil Appeal NO. 49 OF 1999 [CA].

With reference to the above laid principles, whether there is a serious question to be tried on the facts alleged is not in dispute amongst the parties. Accordingly, I will presume that there is such an issue triable before this court. What remain to be tested are:

- (1) Whether the court interference is necessary to protect the Applicant/plaintiff from suffering irrepealable loss before his alleged right is established in the main suit.
- (2) Whether on the balance of the convenience there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction that will be suffered by the defendant from granting of it.

The above two named sub issues will be analyzed collectively. I will start with the issue as to whether there will be irrepealable loss if the named respondent's assets are disposed of. In her affidavit and oral submissions, the applicant attempted to demonstrate the loss likely to be suffered if the named assets are sold. This loss according to the applicant is the effect of rendering **nugatory** the pending Commercial case number 10 of 2021 if the named properties are sold. This is so stated in paragraphs 6 and 10 of the applicant's affidavit and in the applicant's submission. In response, the respondent stood on two lines of arguments, one completely denying any respondent's intention to sell the named properties and another position



being more loss on the part of the respondent incase the intended sale is prohibited.

At this point the conceptual and contextual meaning of irreparable loss is not a new notion in our jurisprudence. In short, it is simply measured by an injury which cannot be recovered by way of damages or if recoverable, not sufficiently or adequately. **(See Kaare vs. General manager Mara Cooperation Union [1924] Ltd (1987) TLR 17).**

When a party obtains a judgment which he cannot executed, it goes to the defeat of ends of justice for their being a useless litigation. This is the essence of Section 68 (e) of the CPC which is among the provisions under which this application is brought. It provides:-

"68. In order to prevent the ends of justice from being defeated the court may, subject to any rules in that behalf-

(e) make such other interlocutory orders as may appear to the court to be just and convenient."

From the essence of Section 68 (e) of the CPC as quoted above, it is apparent that rendering of the fruit of judgment nugatory by failure to find a property to be attached during execution amounts to justification of irreparable loss. Thus, a question follows as to whether the applicant's facts as narrated in the affidavit have been sufficiently substantiated to show likelihood of occasioning a nugatory judgment.

I have taken note of the requirement of the provision of **Order XXXVII Rule 1 (b) of the CPC** which is among the provisions under which this application is preferred. This order requires for an element of fraud to be

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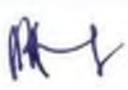
established along with the intention to sell the property for there to be a justifiable ground to issue injunction. It provides:

"1. Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit or suffering loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree; or

(b) that the defendant threatens, or intends to remove or dispose of his property with a view to defraud his creditors, the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of the property as the court thinks fit, until the disposal of the suit or until further orders:

Provided that, an order granting a temporary injunction shall not be made against the Government, but the court may in lieu thereof make an order declaratory of the rights of the parties."

From the above provisions the word "*with a view to defraud his creditors,*" calls for respondent's fraudulent intent to be shown by the applicant. In my view, the spirit of this provision is to protect the creditors from sustaining absolute loss shall the applicant sell the property with view to defraud. In the instant application, the bad intent would be expected to target the result of a nugatory judgment. 

In the instant application the Respondent refused any intention of selling the named assets at the moment. In my view, the applicant ought to have provided any tangible evidence to substantiate firstly the intention to sell, and then to secondly, build from there to establish further intent to defraud the creditors by aiming towards attaining nugatory judgment. This is not vivid in the entire applicant's application going through the affidavit and the submissions. In short of this, there can be no proved likelihood of suffering irreparable loss due to gaining a nugatory judgment or decree.

While considering this argument I asked myself a question as to why the applicant is worried about the disposal of the applicant's assets? Actually, there is no statement which indicates that the assets are the only property ever belonging to the respondent. It is neither not shown that there is a possibility of having the respondent's directors to personally escape or disappear if decree is entered in favor of the applicant. In my view, there are various modes of executing decrees including by a way of attachment of any other property of the judgment debtors apart from the alleged properties planned to be sold. Execution can as well be done by even arresting the judgment debtors. The applicant has not shown why she is planning to adopt only an execution modality of attaching only the park house and the trucks and not other properties or not arresting the judgment debtor. If the sale can occasion any loss, the applicant has not given sufficient explanation of how the loss will be irreparable if the defendant won't run away. The applicant has not stated as to whether the named assets are the only property belonging to the Respondent. 

From the above, I see no sufficient ground established by the applicant to indicate irreparable loss on the part of the applicant. If no such irreparable loss, there can be no comparable factors to consider the probability of who will suffer more between the applicant when the injunction is not granted and by the respondent if the injunction is granted.

I therefore hold that there is no sufficient ground to substantiate the granting of injunction to restrain the defendant from selling the named assets. In the upshot this application for temporary injunction is hereby dismissed. No order as to costs. It is so ordered.

Dated at Dar Es Salaam This 26th Day of October 2021



KATARINA T. REVOCATI MTEULE

JUDGE

26/10/2021

