IN THE HIGH COURT OF UNITED REPUBLIC OF THE TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
MISC.COMMERCIAL APPL. NO. 110 OF 2021
(Arising from an Arbitration under the Arbitration Act Cap.15 R.E 2020 and UNCITRAL Rules (as amended in 2010) between Herbert Eliezar Liwali vs.Bay View Properties Limited before Sole Arbitrator Hon. Mihayo J (rtd))

HERBERT ELIEZAR LIWALI .....APPLICANT

VERSUS

BAY VIEW PROPERTIES LIMITED .....RESPONDENT

Last order: 24th December2021
Judgment: 15th February 2022

RULING

NANGELA, J:.,

The Applicant has brought this application by way of a chamber summons under section 68(e), 95, Order XXVII Rule 1 and Order XXXVI Rule 6(1) of the Civil Procedure Code, Cap.33 R.E 2019 and any other enabling provision of the Law. The chamber summons, which was filed together with a certificate of urgency, is supported by an affidavit of Mr Hebert Eliezar Liwali, the Applicant, who seeks for the following prayers:

1. That, pending the enforcement of the Final Award dated 4th April 2020 rendered by Sole Arbitrator Hon. (Rtd) Judge Thomas Mihayo, this Honourable Court makes interim orders barring or restraining the Respondent, its

servants and or agents from assigning, diminishing, transferring, disposing, alienating, operating or deal with any rentals arising out of the suit property from any of their bank accounts in any Bank in Tanzania.

2. That, this Honourable Court be pleased to make orders for opening of an escrow account into which the monies from the rentals collected by the Respondent be deposited pending enforcement of the Award.
3. That, this Honourable Court be pleased to grant any other relief(s) that it may deem fit to grant.
4. That, costs of this application be provided for.

When the parties appeared before this Court, an order was made that the Respondent should file her counter affidavit on or before 19th August 2021 and a reply thereto should be filed on or before 26th August 2021. The matter was set for a mention on the 30th of September 2021.

On the material date, the Applicant enjoyed the services of Ms Violeth Mipawa, learned advocate, holding

brief for Ms Madelaine Kimei, learned advocate. Ms Ruwaida Manji appeared, holding brief for Advocate Shehzadha Walli, for the Respondent. Ms Mipawa informed his Court that all pleadings were complete and prayed that the matter be disposed of by way of written submissions. Ms Ruwaida seconded the prayer and I granted it. A schedule of filing of written submissions was issued and I am glad that the learned advocates for parties duly complied with it.

Submitting in support of the application, Ms Kimei adopted the affidavit of the Applicant filed in support of this application to form part of her submissions. She submitted that, the rationale for the interlocutory orders sought by the Applicant is to protect the Applicant against substantial loss of value and alienation resulting from the Respondent's abuse of right, for which he could not be adequately compensated in damages recoverable in action if the uncertainty were resolved in his favour at the impending suit challenging the Final Award.

To support her submission, Ms Kimei relied on the cases of **Giella vs. Cassman Brown & Co. Ltd** [1973] E.A 358; **American Cyanamid Co. vs. Ethicon Ltd** [1975]A.C 396 and **Gujarat Bottling Co. Ltd vs. Coca Cola Company** 1995 (5) SCC 545.

Ms Kimei submitted further that, in line with the decision of this Court in **Atilio vs. Mbowe** [1969] H.C.D

No.284, if an injunctive relief is to be granted, the following factors must be satisfied, namely: existence of a *prima facie* case, imminent irreparable loss incapable of being atoned by way of damages and balance of convenience.

As regards the existence of a *prima facie* case, she submitted that, the Applicant has demonstrated such a case as there is a Final Award dated 4th April 2020 which awarded against the Respondent. She submitted, therefore, that, that Final Award is "final and binding" on the parties and becomes enforceable at the behest of the party for whose benefit the award inures.

Ms Kimei further contended that, upon the Respondent's failure to heed to the Applicant's demand to comply with the Award, the Applicant herein has proceeded to file the Final Award for purposes of enforcement under **Misc. Commercial Cause No.27 of 2021,** which was filed on 25th May 2021.

According to Ms Kimei, technically, the pending challenge has not sought annulment of the awarded sums and that, such proceedings could result into either the Final Award being struck out or remitted back to the arbitrator. She contended, therefore, that, the existence of the **Misc. Commercial Cause No.27 of 2021** indicates that the Applicant is entitled to the reliefs in the Award, hence, a vivid existence of a *prima facie* case.

To further support her submissions she further relied on the cases of **Milo Construction Co Ltd vs.NBC Limited and Sadock Dotto Magai,** Commercial Cause No.105 o 2003 (unreported), **Tanzania Tea Packers Ltd vs. The Commissioner of Income Tax and Another**, Commercial Case No.5 of 1999 (unreported), and **Abdi Ally Salehe vs. Asca Care Unit Ltd, and 2 Others,** Civil App. No.3 of 2012, (CAT) (unreported).

As regard the issue of irreparable loss, it was Ms Kimei's submission that, irreparable loss as per the **Blacks Law Dictionary,** 9th Edn, at 477, means:

> "damages that cannot easily ascertained because there is no fixed pecuniary standard of measurement."

Referring this Court to the Court of Appeal decision in the case of **Haruna Mpagaos and Others vs. Tanzania Portland Cement Co Ltd,** Civil Ref.No.3 of 2007, CAT (unreported), she contended that, an irreparable loss is loss of such a nature that it cannot be atoned by way of damages regardless of whether they are compensated or not.

It was a further contention by Ms Kimei that, the Applicant is at risk of incurring such a loss as the Respondent being in full control of the suit property, may, among others, attempt to transfer all monies earned from

it or fraudulently craft up a scheme aimed at defrauding the Applicant.

Besides, it was Ms Kimei's submission that, the contract of lease, which is subject of the parties' dispute, has not been terminated and the Applicant fears that the Respondent harbours ill intentions to misuse the property in a manner that is irreversible and/or alienate the owner of the landed property.

Finally, as regard the aspect of balance of convenience, Ms Kimei relied on the case of **Abdi Ally Salehe** (supra) and submitted that, owing to the nature of the impending suit, the Applicant is a weaker party in whole the balance of convenience will demand that the application be granted in his favour.

She submitted that, the Respondent is in control of all affairs and management of the developed property, including the leasing agreements, financial records and bank accounts in which the rentals are paid. As such, she contended that, if the orders to maintain *status quo* are denied, there is a risk that records may be falsified.

To support the above submissions, she relied on the case of **Valence Simon Matunda (via a Power of Attorney of Musa Yusuf Mamuya vs.Saddallah Phlip Ndossy and 3Others**, Msisc. Land Appl.No.55 of 2019 where this Court, Masabo J, held that:

> "Scrutiny of the prayers in this application and the main suit dictates that it is the Applicant who is likely to suffer more than the Respondent if the Application is withheld."

She concluded, therefore, that, considering the above reasoning by Hon. Masabo, J. this Court should also take into account the Applicant's prayers and the reliefs from the Final Award as *prima facie* evidence that the Applicant is the one who stands to suffer more than the Respondent if this application is denied.

Responding to the Applicant's submissions, the learned counsel for the Respondent, one Shehzada Walli adopted the counter-affidavit of Shergia Feizi and submitted that, the Applicant has not been able to demonstrate how the property is in danger by it being under the control of the Respondent. For that reason, she urged this Court to decline the prayers for an order of temporary injunction.

Relying on the case of **Atilio vs.Mbowe** (supra), the Respondent's learned counsel submitted that, the Applicant has failed to demonstrate that he has a *prima facie* case which is the first requirement if the prayers are to be granted. The Respondent's counsel contended that, Commercial Cause No.27 of 2021 is being contested by Commercial Cause No.35 of 2021, and, for that matter, it

is the Respondent who should be said to have a probable case.

As regard the 2nd requirement of there being the risk of irreparable harm, the learned counsel for the Respondent maintained that, the Applicant has as well failed to demonstrate that requirement. It was submitted that, if there is any loss, it is one that can be reimbursed in monetary form.

Lastly, it was submitted, as regards balance of convenience requirement, that, the mere fact that the Applicant is a natural person and the Respondent an artificial or legal person does not suffice as a legal requirement to grant an injunctive relief.

The Applicant has made a reply which I will also consider in the course of my deliberations. It is sufficient to state that, those are the submissions made by the learned counsels for both parties and I do appreciate for their research on that matter and well prepared submissions.

The question I am called upon to address, therefore, if whether I should grant the prayers sought by the applicant or refuse them. In the first place, it is worth noting, that, an injunctive order, be it permanent or temporary injunction is an equitable remedy. It may be for a range of purposes from that of retraining certain actions from being taken, to prevention of interferences

of some kind, to furnish preventive relief against irreparable injury or the maintenance of the *status quo*. See the case of **Abdi Ally Salehe vs. Asca Care Unit Ltd, Ayoub Salehe Chamshama and Kenya Commercial Bank,** Civil App. No.3 of 2012, (CAT) (unreported).

In the case of **SIGORI Investment (T) Ltd and Another vs. Equity Bank Tanzania Limited and Another,** Land Case No.56 of 2019, (unreported) it was pointed out that, if an application of the like nature is to succeed, the following elements must be established, namely, that:

(i) on the facts alleged, there must be a serious question to be tried by the Court and a probability that the Plaintiff/Applicant will be entitled to the relief prayed for (in the main suit);

(ii) the temporary injunction sought is necessary to prevent some irreparable injury befalling the Plaintiff /Applicant while the main case is still pending; and

(iii) on the balance, greater hardship and mischief is likely to be suffered by the Plaintiff/ Applicant if the temporary injunction is withheld than may be suffered by the

Defendant/Respondent if the order is granted.

(See also **Giella vs. Cassman Brown** [1973] EA 358).

In the cases of **Atilio vs. Mbowe** (supra), **Edu Computres (T) Ltd vs. Tanzania Investment Bank Ltd,** Commercial Case No.38 of 2004; as well as **Charles D. Msumari & 83 Others vs. The Director General T.H.A,** Civil Case No.18 of 1997 (unreported), it was emphasized that, the above key elements which govern the granting of the kind of orders sought by the Applicants herein, must be considered conjunctively and not disjunctively.

In the instant application, the Applicant has contended that the above noted elements exists and laboured to demonstrate them. On the other hand, the Respondent has contended that, the Applicant has failed to demonstrate the existence of such key elements. From those dichotomous submissions; the question that needs to be tacked is **whether such elements have been established by the Applicant.**

It is clear, in my view, and from a general observation of the pleadings, that, the first element which requires that there must be a *prima facie* question of law to be tried by the Court and a probability that the Applicant will be entitled to relief in the main suit, has been established.

In the case of **Mrao vs. First American Bank of Kenya and Two Others [2003] KLR 125,** the case which I consider to be instructive and persuasive regarding what a *prima facie* case is all about, the Court observed that:-

> "a prima facie case in a civil application includes, but is not confined to, **a genuine and arguable case.** It is a case which, on the material presented to the court a tribunal properly directing itself will **conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.**" (Emphasis added).

In the instant application, the fact that there is pending in Court the **Commercial Cause No.27 of 2021** (and also the **Misc. Commercial Cause No.35 of 2021**), does, in my view, suffice to establish the first element. Those pending matters have issues of law for which parties are called up to address.

As regards the second element, as look at the pleadings, I am of the view that, the requirement that there must be an irreparable harm which cannot be mitigated by damages is also satisfied. As I stated herein above, an injunctive relief, as the one sought in this

application, may be for a variety of reasons, including, but not limited to prevention of interferences of some kind, to furnish preventive relief against irreparable injury or even need to maintain the *status quo.*

In this present application, the Applicant is seeking to not only protect the suit property from being squandered by ensuring that the *status quo* of the property and its associated accounts and business transactions are maintained, but also that, the same is not misused and the property is kept in a manner that is irreversible and/or which does not alienate the owner of the landed property.

The last point is about the balance of convenience. In a ruling recently handed down by this Court, in the case of **Afriscan Construction Company Ltd and Another vs. Afriscan (T) Group Ltd and 2Others**, Misc. Commercial Application No. 182 of 2020, (unreported), this Court made it clear that, the granting of the prayers sought in an application like the present one is also propelled by interest of justice and fairness. In that regard, the interest of justice demands that, the Courts should protect the oppressed or the disadvantaged party who may stand to suffer if the orders sought are not granted.

From the above premise, and considering that the relief sought is an equitable relief, the interest of justice

and fairness would demand that, this Court weighs on the one demand against the other and determine where the '**balance** of **convenience**' lies.

Understandably, this application arises from the main suit, the **Commercial Cause No.27 of 2021.** The suit seeks to enforce an award obtained from an arbitral process while this application is an interim and relates also to the main suit and the properties that were and are subject to it.

From that premise, I find the reasoning of the Indian Court in the case of **Dirk India Pvt. Ltd. vs. Maharashtra State Power Generation Co. Ltd**, 2013 (GGLS) (AHC), quite instructive and helpful in determining where the balance of convenience lies. In that case, the Court (Charachund & Sayed, JJ) held that:

> "When an interim measure of protection is sought .... after an arbitral award is made but before it is enforced, the measure of protection in intended to safeguard the fruit of the proceedings until the eventual enforcement of the award. Here again the measure of protection is a step in aid of enforcement. It is intended to ensure that enforcement of the award results in a realisable claim

and that the award is not rendered illusory by dealings that would put the subject of the award beyond the pale of enforcement."

In applying the concept of "balance of convenience" the Court makes all endeavours to protect the interest of the parties by evaluating their interests and how such are to be affected and who will be prejudiced or suffer most. In this instant application, I have no doubt that the Applicant stands to suffer most if the prayers are not granted.

It is from the totality of the above I find that, the factums of *prima facie* case, irreparable loss and injury, and balance of convenience, have been all found to be in favour of the Applicant herein. In view of that, this Court settles for the following orders:

1. That, the Application is hereby granted.
2. The Respondent, its servants and or agents is hereby barred or restrained, from assigning, diminishing, transferring, disposing, alienating, operating or dealing with any rentals arising out of the suit property from any of their bank accounts in any Bank in Tanzania.

3. That, this Court hereby orders the Respondent and the Applicant to jointly and within a month from the date of this ruling, open an escrow account into which the monies from the rentals collected by the Respondent be deposited pending the finalization of all proceedings regarding the enforcement and or challenge of the Award.
4. That, costs of this Application to be borne by the Respondent.

It is so ordered.

DATED at DAR-ES-SALAAM, THIS 15TH DAY OF FEBRUARY 2022

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HON. DEO JOHN NANGELA
JUDGE