

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 20 OF 2023

(Arising from Commercial Case No. 14 of 2023)

NEW MSIMBAZI KEROSENE LIMITED APPLICANT

VERSUS

NATIONAL BANK OF COMMERCE LIMITED RESPONDENT

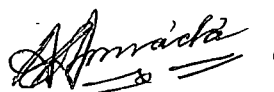
RULING

A.A. MBAGWA J.

This is an application for temporary injunction order pending hearing and determination of the main suit namely, Commercial Case No. 14 of 2023.

The applicant, New Msimbazi Kerosene Limited, by way of chamber summons made under Order XXXVII rule 1(a) and 4, Order XLIII rule 2 and section 68 (c) & (e) of the Civil Procedure Code, has brought the application praying for the following orders;

- (i) This Honourable Court be pleased to make an order of temporary injunction to restrain the respondent or their agents, servants, assigns or whomsoever will be acting under

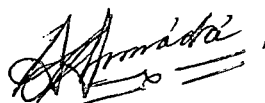


their instructions or authority from selling any collaterals and from taking any step towards recovering TZS 20, 870, 317, 068.10 and any interests and penalties therefrom, from the applicant resulting from the banking facilities between the applicant and the respondent pending hearing and final determination of Commercial Case No. 14 of 2023.

- (ii) Costs of this application be provided for by the respondent
- (iii) Any other orders as this honourable court deems just and fit to grant

The application was supported by an affidavit affirmed by Mohamed Salim Bahashwan, the director of the applicant company. The deponent states that the applicant had customer-banker relationship since 2007 and from 2014, the applicant received various credit facilities from the respondent bank. It was further stated that the applicant deposited various securities amounting to Tanzania shillings seventy billion to secure the said facilities. The applicant continued that the respondent is about to dispose of the collaterals to recover the outstanding debt. According to the applicant, the respondent has exaggerated the alleged outstanding debt.

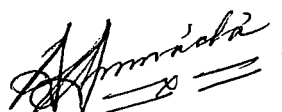
In contrast, the application was strenuously opposed by the respondent through a counter affidavit sworn by Edward Lyimo, the principal officer



of the respondent bank. Mr. Edward Lyimo vehemently disputed the applicant's claims on the exaggeration of the outstanding loan amount.

When the matter was scheduled for hearing, counsel made brief oral submissions in addition to the skeleton arguments which they had filed in court earlier on. The applicant was represented by Frank Mwalongo, learned advocate whilst the respondent had the services of Dr. Onesmo Kyauke, learned advocate.

Submitting in support of the application, Mr. Mwalongo adopted the skeleton arguments which were filed in advance and the affidavit of Mohamed Salim Bahashwan. He said that the issue of irreparability of loss which the applicant is likely to suffer is addressed under page 4 to 7 of the skeleton arguments. He lamented that the recovery process which is already in motion is intending to dispose of collaterals worth over 70 billion in an attempt to recover twenty billion. The counsel continued that five properties which were valued at the respondent's instances are worth Tanzania shillings seventy seven billion as per the valuation reports attached to the application. Mr. Mwalongo warned that there is a danger of losing 50 billion if the recovery process continues. Finally, the applicant's counsel was opined that the application is meritorious given

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that the injunction order is an equitable remedy and existence of the loan itself is questionable.

In rebuttal, Mr. Kyauke, like his counterpart, adopted the respondent's skeleton arguments which had been filed in court and the counter affidavit sworn by Edward Lyimo. The respondent's counsel submitted that a lender is entitled to several remedies including appointment of receiver. He elaborated that there is nowhere the respondent said that the only remedy is to sell the collaterals.

Regarding the value of the collaterals, Mr. Kyauke said that there are some rules governing sale of collaterals. He proceeded that there are about eleven collaterals thus if the respondent sells say, only three and the twenty billion is recovered, it cannot proceed selling other properties. He submitted that the applicant's counsel's argument would have held water if there were one huge collateral. Moreso, the counsel submitted that the respondent can still lease the properties in order to recover the loan amount as sale is not the only recovery measure. The respondent's counsel criticised that there is nothing in the applicant's affidavit showing that there would be irreparable injury or loss. He said that the applicant's argument that this matter can be fast tracked so that the aggrieved party

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may appeal, is without merits as the grounds for grant of injunction are clearly established in law.

Regarding the principles of equity, the respondent's counsel submitted that the court can apply them if there is a serious triable issue. He lamented that as recent as January, 2020, the applicant admitted the existence of loan and requested for restructuring and since then there has never been a complaint from the applicant but after service of default notice, the applicant came up with the defence of disputing some transactions made seven years back. The respondent's counsel was thus opined that there is no serious matter for this court to apply the principles of equity to grant temporary injunction.

Finally, Mr. Kyauke told the court that the application is without merits as it does meet the three principles established in the case of Atilio Mbowe. He prayed the court to dismiss it with costs.

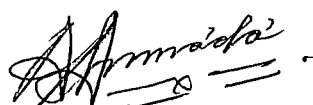
In a brief rejoinder, Mr. Mwalongo, while countering the respondent's counsel's argument that even if the case is fast tracked still there will be an appeal, Mr. Mwalongo emphasized that at least at that time, each party's rights will have been determined by this court.

Having considered the rivaling submissions both oral and written and depositions filed by the parties the central issue for determination is

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whether the application is meritorious. In the case of **Atilio vs Mbowe** (1969) HCD No. 284 it was held that in order for the court to grant temporary injunction order, the applicant(s) must satisfy three conditions namely, irreparable loss, balance of convenience and prima facie case or overwhelming chance of success. All the above three tests should be established by the applicant in order to secure an injunction order. See the case of **Hamad M. Hamad and 94 others vs Tanzania National Roads Agency (TANROADS) and others**, Land Case No. 191 of 2011, HC at Dar es Salaam.

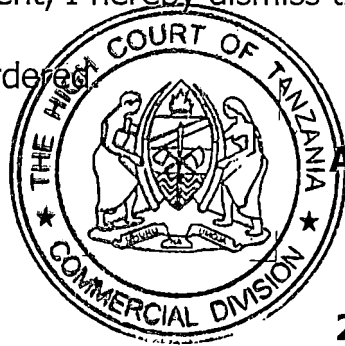
In the case of **Mwakeye Investment Limited vs Access Bank Tanzania Limited**, Misc. Land Application No. 654 of 2016, High Court, Land Division at Dar es Salaam, it was held that a loss which can be compensated in monetary form, does not qualify to be irreparable loss. In this application, the applicant failed to demonstrate how irreparably will it suffer should this court decline to grant an injunction order. Further, there is nowhere in the affidavit the applicant stated that intended sale, as she contends cannot be compensated in monetary form. I am thus convinced that should the court decide Commercial Case No. 14 of 2023 in favour of the applicant, she would still be capable of being compensated in monetary form hence no irreparable loss would be occasioned.

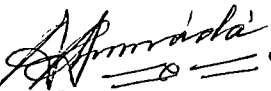
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I have keenly scanned the applicant's deposition but I could not find the conditions enunciated in **Atilio Mbowe** (supra). In the event, I am of the unfeigned view that the applicant has failed to establish the three conditions required for this court to grant an injunction order. As such, this application is found without merits.

In the event, I hereby dismiss the application with costs.

It is so ordered.




A.A. Mbagwa

JUDGE

27/04/2023