IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO.24 OF 2023

(ARISING FOM COMMERCIAL CASE NO.16 OF 2023)

CONTINENTAL RELIABLE CLEARING (T) LIMITED……APPLICANT

VERSUS

EQUITY BANK TANZANIA LIMITED……1ST RESPONDENT

EQUITY BANK KENYA LIMITED……2ND RESPONDENT

RULING

Date of Last Order: 09/03/2023
Date of Ruling: 28/04/2023

AGATHO, J.:

Under certificate of urgency the applicant, CONTINENTAL RELIABLE CLEARING (T) LIMITED by way of chamber summons made under the provisions of Order XXXVII Rule 1(a) & 4, Order XLIII Rule 2 and Section 68(c) & (e) of the Civil Procedure Code, Act [CAP 33 R.E 2019] instituted the instant application against the above-named respondents jointly and severally praying for the following orders, to wit:

EX-PARTE

i. That the honorable Court be pleased to make a finding that sufficient grounds exist to dispense with the notice requirements

ii. That the honorable Court be pleased to make an interim order to restrain the respondents 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 USD 10,139,664.95 which is over TZS 20,000,000,000/= and any interests and penalties there from, from the applicant pending hearing and determination of the application inter parties

iii. Cost be in the main application

INTER PARTES

i. This honorable Court be pleased to make an order of temporary injunction to restrain the respondents 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 USD 10,139,664.95 which is over TZS 20,000,000,000/= and any interests and penalties there from, from the applicant resulting from the banking facilities between the applicant and the respondents pending hearing and final determination of the Commercial Case No. 16 of 2023

ii. Costs of this application be provided for by the respondent

iii. Any other orders as this honorable Court deems just and fit to grant

The chamber summons was accompanied by the affidavit sworn by Abdallah Abri a director of the Applicant setting out grounds on which the prayer of restrain order is craved stating the reasons why this application should be granted. Upon being served with chamber

summons accompanied with affidavits the 1st and 2nd respondents opposed the grant of the application through counter affidavit deponed by Ms. Dorothea Rutta for 1st and the 2nd Respondents and they filed a joint supplementary counter affidavit deponed Mr. Rober Gatimu Kibiti both stating the reasons why this application should not be granted.

Before we delve into the determination of the application, it is worthwhile to sketch the background of the application albeit briefly as gathered from the records. It is alleged that sometimes in early 2013 to 2017 the 1st and 2nd Respondents being co-lenders entered into loan agreement with the applicant. The said credit facilities were secured by mortgage, debenture and chattel mortgages. The Applicant failed to adhere to the terms and conditions of the agreement and was in breach of the contract. The 1st and 2nd respondents issued letters of demands and default notices as recovery procedure to be paid the unpaid USD 10,139,664.95. That state of affair culminated into institution of Commercial Case No 16 of 2023 for declaration that the plaintiff has cleared all its credit facilities and the declaration that the demand of payment of the USD 10,139,664.95 as an outstanding loan balance is invalid. Now he has come to this court armed with the instant application seeking for injunctive order to restrain the respondents from disposing the applicant's mortgaged properties pending determination of the Commercial Case No 16 of 2023 hence, this ruling.

On 27th day of February 2023 this application as noted above was preferred among others, under certificate of urgency, was brought to my attention and on that date, I refused to entertain ex-parte prayers instead I ordered that the applicant to immediately serve both respondents, and if wish, to file a counter affidavit. However, considering the application and interest of justice, I ordered parties to maintain status quo pending the hearing of this

application inter-parties as such the application by consensus was scheduled for hearing inter-parties and on 9th March, 2023 and the court ordered the application be argued by way of written submissions. The parties' counsel complied with the scheduled order of filing written submissions for and against, paving way for this ruling. On 9th March, 2023 when the application was called for hearing, the applicant had legal services of Mr. Frank Mwalongo, learned advocate, and the respondents had the legal services of Messrs. of Mr. Mpaya Kamara and Emmanuel Daniel Saghan, learned advocates.

Submitting in support of the application Mr. Frank Mwalongo reiterated the provisions under which the application is pegged and prayed to adopt the contents of the affidavit to form part of the submission. He argued that for the application of this nature to be granted the applicant must prove three principles enunciated in cerebrated case of **Atilio v. Mbowe (1969) HCD 284**, these are:

i. existence of prima facie case,
ii. Applicant may suffer irreparable loss
iii. Balance of convenience for the applicant.

Expounding on the three conditions Mr. Mwalongo, had it that the three conditions have been met and urged this court to grant the order as prayed in the chamber summons. Submitting in respect of prima facie case, Mr. Mwalongo was of the view that there are triable issues which need to be determined by the court in Commercial Case No 16 of 2023 because there is breach of customer and Bank duty which need to be determined by the court, the facility dated 29th May,2018, 3rd November,2021 and 19th January,2022 are null

and void because the said amount of USD 900,000 are fictitious and does not exist, the 2nd Respondent is not licensed to carry banking business in Tanzania and that funds were not disbursed. Expounding on the above allegation the learned counsel insisted that the applicant is seeking court intervention so that it could declare that banking facilities dated 29th May,2018, 3rd November,2021 and 19th January,2022 are null and void, a declaration that all mortgage executed in favour of the respondents are null and void for want of specific approval. To cement his argument, he cited the case of **State Oil Tanzania Limited vs Equity Bank Tanzania Limited and Equity Bank Kenya Limitec, Commercial Case No 105 of 2020 (unreported)** in which the court held that, for the second defendant to be secured by mortgage there should be specific approval from the commissioner of land which is not there in this case. He took the view that on the basis of all this, there is a prima facie case worth determination.

Submitting in respect of irreparable loss, the counsel's argument is that the intended sale will inflict an irreparable loss on the part of applicant if allowed to proceed as there is no way the applicant will be refunded and hence stands to suffer irreparable loss because the 2nd respondent will recover and move to Kenya which is outside the jurisdiction of this court. In the circumstance the applicant will not be able to retrieve the funds from Kenya. Submitting further the learned counsel submitted that, the respondents have not shown how the loan amount arose stage by stage as such the said outstanding amount remains vague. In addition to that the learned counsel for the applicant submitted that, the respondents have issued 60 days' notice in which if the application is not granted the applicant will be evicted from the property the act which cannot be compensated in

monetary terms. To cement his argument, he cited the case of **Bhoke Selemani & 21 others v Attorney General and another Misc. Land application No 92 of 2021** in which the court held that, selling of residential house will cause irreparable loss to those residing on it and it cannot be compensated by money.

Submitting on balance of convenience, the learned counsel's take is that the applicant is the one who stand to suffer more than the respondents if the application for temporary injunction is not granted. Mr. Mwalongo stated that it is more convenient to restrain respondents from selling collateral which includes 300 trucks, tankers and trailers than to allow sell of the said collateral to recover vague loan facilities. It was his view that it is more convenient to restrain sell of collateral in any event collateral are there and the respondent is assured to recover from the whole if sell takes place, but the applicant and its guarantors will have no assurance of recovering them. On the strength of the above submission, Mr. Mwalongo stated that under the said circumstances, the applicants have managed to establish all three conditions in support of their application. He urged this court to grant the applicant's application with costs.

To counter the application Mr. Emmanuel Daniel Saghan fiercely opposed the grant of this application and having adopted the contents of counter affidavit and supplementary counter affidavit as part of his submission stated that in respect to the criteria as spelt out in **Attilio v Mbowe** (supra), there is no triable issue between the parties because looking at the affidavit and counter affidavit the existence of loan is undisputed save only for the denial of indebtedness to the 2nd respondent. He reasoned that the applicant submission on indebtedness to 2nd defendant is nothing but a lie because under paragraph 6 of the affidavit

and para 9(2) of his submission applicant has established the existence of the so disputed facility. In addition to that he submitted that, the applicant does not dispute that the sought properties to be disposed are the one which were pledged as securities. According to the respondents what the applicant is doing now is seeking refuge under the umbrella of this application so that the respondents should not recover their money while the applicant is aware that, the respondents under terms and condition of the agreement are entitled to demand for immediate payments. The learned counsel for the respondents submitted further that, the reasons advanced by the applicant under paragraph 13 and 14 of the affidavits are insufficient for grant of the application because this court cannot be used as an avenue to prevent the respondents from exercising her contractual and statutory rights to recover the money advanced to the applicant. He added that, the applicant has breached its obligation under the agreement and therefore, he cannot seek judicial remedy while knowing that he has defaulted to repay the facilities. To bolster his argument, he referred this court to the case of **Zabi Import& Exports v Crown Finance & Another** which was quoted with approval in the case of **Lucy Annastazia Mkopoka v Allan Peter Mkopoka and others Misc. Land application No. 15 of 2015** (unreported).

According to the learned counsel for respondents the applicant prayers are mainly coercive in nature, misleading and a way to escape liability to repay the loan as agreed. He stated that the applicant has failed to establish that there is a serious question need to be determined by the court because all reasons advanced for grant of the application on the first pre - conditions are afterthoughts.

Submitting in respect of irreparable loss, the learned counsel for the respondents submitted that, there is no evidence or document to justify that the applicant will suffer loss if the application is not granted in fact the respondents are the ones who stand to suffer irreparable loss if the application will be granted because the respondents have issued several facilities which are still in possession of the applicant. The learned counsel added that there is no foreseeable danger which has been pleaded by the applicant and even if is there, it can be compensated by monetary as it was stated in the case of **General Tyre East Africa LTD V. HSBC Bank PLC [2006] TLR 60,** where the court held that the facts put forward do not show any irreparable injury which the applicant will suffer for which damages are not sufficient as a remedy. According to the respondents since the applicant does not point out irreparable loss arising out of the act of the respondents, the applicant has failed to meet this condition and therefore the application should not be granted. To cement his stand referred this court to the case of **Giella V. Cassman Brown & Co LTD [1973] EA 358.**

Submitting on balance of convenience, the learned counsel submitted that, the applicant is required to show that, the applicant is in position to suffer a greater mischief than the respondents if the application is denied. The learned counsel stated that the respondents are in danger of losing the whole of their outstanding facilities if the applicant continues to transact business through the collaterals particularly the 300 trucks, tankers and trailers. He added that the respondents are now hardly trying to recover the outstanding amount from the applicant then if this application is granted the applicant will escape the liability at the expense of the respondents. The learned counsel for the respondents had it

that, the nature of loss likely to suffer by the applicant can be compensated by way of damages. To cement his argument, he cited the case of **Vodacom Tanzania Limited V. Planetel Communications limited Misc. Commercial Application No 15 of 2015.**

Concluding his submission, the learned counsel had it that, having gone the affidavit supporting the application and the submission they found that the instant application does not show any prima facie case, irreparable loss and balance of convenience as required to be established principles before injunctive order is granted. On that note he prayed the instant application be rejected.

In his brief rejoinder, Mr. Mwalongo started by clarifying the issue of supplementary counter affidavit which has come up with a completely new counter affidavit and reiterated the prayer for striking out the supplementary affidavit of Robert Gatimu Kibiti save for paragraph1 and 3 which has corrected the counter affidavit of Dorothea Rutta. Regarding the three conditions of a temporary injunction, Mr. Mwalongo reiterated his submission in chief and added that the respondents are partly demanding the applicant to prove the main case which is misdirection because the applicant is only required to demonstrate that there is an issue which require decision of the court. He stated that mismanagement of the loan, undisbursed loan, trading without business license these are sensitive issues for determination. It was the learned counsel's view that the applicant has established all three conditions for temporary injunction.

Having heard the submissions of both learned counsels, I should state at the outset that, the objection raised by the applicant's counsel with regards to counter affidavit

was inappropriate as it was raised in the submissions. Back to the issue for determination is whether conditions for temporary injunction exist in this matter. It should be noted that a 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 chances to decide the case. And it is granted upon satisfaction by the court that the applicant has right capable of being addressed through the injunctive order.

Now back to the application, I noted that, parties' learned counsel joins hands that, as per **Atilio v Mbowe** (supra) in order for the court to grant the temporary injunction, the applicant has to prove three key principles for grant of injunctions namely: one, triable issues or prima facie case; two, irreparable loss; and three, balance of conveniences. It should further be noted that, the three key principles must co-exist to warrant the grant of the orders sought. Now looking at one principle after the other, I will start with the first principle that is there must be triable issue as one of the key considerations for grant of the temporary injunction, I have gauged from the parties' submissions it is not disputed that Commercial Case No 16 of 2022 is pending before this court also I have perused the applicants' affidavit specifically paragraphs 13 , 14 and the submission of Mr. Mwalongo I found that the applicant is alleging that the facilities dated 29th May,2018,3rd November,2021 and 19th January,2022 are non-existing because funds were not disbursed. These prayers are summed up by the applicant in his plaint and are the one which constitute the main claim of the applicant in Commercial Case No 16 of 2022. It is my finding that the affidavit in support of the application discloses facts which brings some triable issues, in particular the issue pertaining to the credit facility agreement under which the suit is based

on. As I have pointed out earlier in this ruling and as rightly submitted by Mr. Mwalongo that the applicant is alleging mismanagement of loan, undisbursed loans, trading without business license, in my view these are sensitive issues for determination by the court. It should decide the main suit and rule out on the existence/ non- existence of the credit facility and the status of the 2nd respondent as co-lender of the loan because this is what constitute the question for determination awaiting a trial and decision by this court. Thus, allowing the respondents to dispose the said securities on non-existing loan may defeat the very purpose of Section 68 of the Civil Procedure Code which provides that in order to prevent end of justice from being defeated, the court may make such other orders of interlocutory.

Based on the above observation, it is my respectful view that the applicants have established a prima facie case because there is an arguable ground before this court as to whether the 2nd respondent advanced the loan to applicant and whether the mortgage properties were properly perfected according to the law and whether the 2nd respondent was trading without license. Therefore, the first condition has met the test of the application.

Regarding the second condition, the applicant is claiming that if the application is not granted, she will suffer irreparable loss. The applicant claim that in the event the application is not granted the 2nd respondent will dispose of the 300 tankers and move to Kenya as such applicant will suffer irreparable loss as she will not be able to recover the loss from the 2nd respondent because after recovery she will move to Kenya which is outside the jurisdiction of this court. In the circumstance the applicant will not be able to retrieve the funds from Kenya. As submitted by Mr. Mwalongo, that rendering the fruits of the judgement

nugatory which cannot be executed amount to irreparable loss. Moreso properties in dispute are worth a lot of money whereas the irreparable injury could not adequately be compensated by an award of damages. Also, since there is a dispute on the creation of mortgage it is possible for the applicants to suffer irreparable loss. It should be noted that the object of a temporary injunction is to protect the Applicant against injury by violation of his right for which he could not adequately in damages recoverable in the action if the uncertainty were resolved in his favour of the applicant on the trial. Much as I would agree with Mr Mwalongo, but I ask myself can't the foreseen loss be compensated in monetary terms? If it can then injunction cannot be granted. In my view the fact that the 1st and 2nd respondents are co-lenders, and as long as the 1st respondent resides and has assets in Tanzania that mitigates the risk of loss contemplated by the applicant. I have also noted that there is no concrete evidence to support the alleged irreparable loss. I have equally not been impressed with the submission on lack of licence or approval in lending business. That in my view is superfluous because it is a matter for the trial.

Next for consideration is the last condition that on a balance of convenience the applicant stands to suffer more than the respondent if the injunction is not granted. Reading the affidavit, counter-affidavit, and the submission made by both learned counsels, I have to say it is difficult to say from the outset that the applicant will suffer more compared to the respondents. That is because at the moment the properties issued as collateral are in the applicant's hands. However, the respondents may dispose them off as recovery measure. Therefore, speaking on a comparative basis, I do not subscribe to the learned counsel for the applicant's view that the applicants are the ones who are likely to suffer

greater hardship if the temporary injunction is not granted. It is evident that the Bank will also suffer loss. I fully subscribe to respondent's submission that the Bank being in the Banking business must have funds to lend and which have to be repaid by its debtors. In the circumstance of this case, both parties may suffer, and yet for the applicant there is room for monetary compensation should she succeed in her suit. Moreover, there is no concrete evidence that the applicant will really suffer the anticipated loss.

In my view therefore, there is no foreseeable danger which has been pleaded by the applicant and even if is there, monetary compensation may be sufficient as rightly held in the case of **General Tyre East Africa LTD V HSBC Bank PLC [2006] TLR 60,** where the court held that, the facts before me do not show any irreparable injury which applicant will suffer for which damages are not sufficient as a remedy. I also agree with the respondents since the applicant does not point out irreparable loss arising out of the act of the respondents, the applicant has failed to meet this condition and therefore the application cannot be granted. That was also amplified earlier on in the case of **Giella V. Cassman Brown & Co LTD [1973] EA 358.**

In the upshot, I find the application lacking pre-requisite merit. It is dismissed with costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 28th day of April, 2023.

U. J. AGATHO

JUDGE
28/04/2023

Date: 28/04/2023

Coram: Hon. U.J. Agatho J.

For Applicant: Frank Mwalongo and Shaba Mtunge, Advocates

For Respondents: Ashura Mansoor Advocate, also holding brief of Mr. Mpaya Kamara, Advocate

C/Clerk: Beatrice

Court: Ruling delivered today, this 28th April 2023 in the presence of Frank Mwalongo and Shaba learned counsel for the Applicant, and Ms. Ashura Mansoor, Advocate for the first Respondent, also holding brief of Mr. Mpaya Kamara, Advocates for the 2nd Respondent.

U. J. AGATHO

JUDGE

28/04/2023