

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. LAND APPL. NO.890 OF 2017

**FULGENCE PANTALEO KAVISHE t/a
DOUBLE WAY AUTO PARTS.....APPLICANT**

VERSUS

TANZANIA POSTAL BANK.....RESPONDENT

RULING

Date of last order: 09/05/2018

Date of Ruling: 25/05/2018

S.A.N. WAMBURA J:

The applicant **Fulgence Pantaleo Kavishe t/a Double Way Auto Parts** filed this application under Order XXXVII Rule 1(a) of the Civil Procedure Code Cap. 33 R.E 2002, praying for the following orders;

(a) That this Honourable Court be pleased to issue a Temporary Injunction to restrain the Respondent, its agents, and or workmen from selling, leasing entering into, appointing a receiver or in any way dealing with the Applicant's landed property, Plot No. KND/SNZ/SINE 12/38 Block E Sinza Area, Dar Es Salaam, comprised

of Residential Licence No. 006488, pending hearing and determination of the main suit.

(b) Cost be provided for.

The application was supported by the affidavit sworn **Fulgence Pantaleo Kavishe t/a Double Way Auto Parts** the applicant.

The applicant was represented by Mr. Enock Advocate whereas the respondent enjoyed the legal services of Mr. Elisai learned counsel.

Supporting the application, Mr. Enock contended that the applicant paid part of the loan but later failed to facilitate the loan. That the respondent issued a 60 days' notice which upon its expiry the respondent wanted to attach and sale the mortgaged property. He stated that the applicant has paid Tshs. 5, 000,000 in relation of the receiving balance and have not been allowed by the respondent to repay the debt. He therefore prayed for the application to be granted as prayed.

In rebuttable, Mr. Elisai challenged the applicant's application on the ground that the applicant has failed to honour the

contractual obligation and did not follow the repayment schedule. He contended that the respondent is empowered to revoke the whole amount or sell the property as was held in the case of **Abdallah Yusuph Vs Peoples Bank of Zanzibar and Another (2004) TLR 339**.

Mr. Elisai was of the view that it is the respondent who would suffer the loss. To cement his argument, he referred to different authorities one among them is the case of **GENERAL TYRE EA LTD VS HSBC BANK PLC [2006] TRL 60** where the Court held that the parties must fulfil their contractual obligation and the court is not allowed to interfere with the contractual obligation of the parties.

He further referred this court to the case of **NBC VS DSM EDUCATION AND OFFICE STATIONERY (1995) TLR 276**. He therefore prayed for the dismissal of the application with costs.

In reply Mr. Enock averred that since the respondent admitted in his submission that the contractual agreement extends to 2019 then the applicant be permitted to repay the balance up to

2019. He therefore prayed to this court to grant the applicant's prayers as prayed.

An injunction may be granted to protect a party from an irreparable infringement of or on his rights as well as when it is just and convenient to do so. It is aimed at preventing irreparable injury which is substantial and cannot be adequately remedied or atoned for by damages.

The court's powers to grant temporary injunctions are governed by the provisions Section 68 (c) and Order XXXVII, Rules 1 and 2 of the Civil Procedure Code Cap. 33 R.E 2002, which have been interpreted and elaborated so succinctly in a number of decisions including that of Georges, CJ. (as he then was) in the case of **Atilio v Mbowe (1969) HCD 284**.

It is generally agreed that there are three conditions which must be satisfied before such an injunction can be issued; that is:-

- (i) *There must be a serious question to be tried on the alleged facts and a probability that the plaintiff will be entitled to the relief prayed,*

- (ii) *That the court's interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established and,*
- (iii) *That on the balance there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendant from the granting of it."*

Temporary injunctions are a discretionary remedy but which ought to be used judicially. Courts cannot grant them even when it is convenient to do so if the applicable principles enumerated above have not been fully satisfied.

Upon reading the applicant's affidavit and arguments there is nowhere the applicant established that the three criteria for temporary injunction was met for this court to interfere and grant the application. Mr. Enock only narrated on how the applicant defaulted to repay the loan as scheduled. He did not state much on why it is necessary for this court to exercise its discretionary power and grant the application.

As correctly submitted by Mr. Elisai the applicant must fulfil his contractual obligation to pay the loan as agreed and since the agreement was a contractual agreement between the applicant and the respondent, the court is not allowed to interfere with the contractual obligation of the parties as it was held in the case of **GENERAL TYRE EA LTD VS HSBC BANK PLC [2006] TRL 60.**

More so the applicant's arguments does not indicate any irreparable loss that cannot be compensated by damages. After all the bank being the financial institution is capable of indemnifying the applicant if he will succeed in the suit. It is in a better position of paying damages to the applicant if he succeeds, compared of the applicant.


Having had due regard to the submissions of the learned counsel for the applicant, I find that the applicant has failed to establish the principles for granting injunction as laid down in the case of **Atilio vs Mbowe.**

In order to secure an order for temporary injunction the Applicant has to establish in whole the three co existing requisites as was held in the case of **Tanzania Breweries Limited versus Kibo Breweries Limited and Another (1998) EA 341**.

From the above reasons, I am assuredly that the facts before me do not meet the three principles for granting a temporary injunction. I thus decline to exercise my discretion in favour of the applicant. I can only state that he be allowed to repay the debt as expected.

The application for temporary injunction is hereby dismissed.

Costs in due course.


S.A.N. WAMBURA
JUDGE
25.05.2018