

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPL. NO. 222 OF 2017

NATIONAL CHICKS CORPORATION LIMITED.....1ST APPLICANT

ISAACK BUGALI MWAMASIKA.....2ND APPLICANT

VERSUS

NATIONAL BANK OF COMMERCE LIMITED.....1ST RESPONDENT

COMRADE AUCTION MART.....2ND RESPONDENT

R U L I N G

P.M. KENTE, J:

This application has been brought under Order XXXVII Rule 1 (a), (4), and Section 68 (e) and 95 of the **Civil Procedure Code [Cap 33 R.E. 2002]**. The applicants are seeking an order of temporary injunction to restrain the respondents, National Bank of Commerce Ltd and Comrade Auction Mart Co. Ltd, from disposing of and/or alienating the mortgaged property i.e Plot No. 1028, Block "G" Boko Area, Kinondoni Dar es salaam City with CT No. 7963, and Farm/Plot No 777 Located in Rungwe District, Mbeya and in Ndaga Villages, Mbeya Region with CT No. 7484- MBYLR. The temporary injunctive order is sought pending hearing and determination of Land Case

No. 88 of 2017. The application is supported by an affidavit sworn by the 2nd applicant, one Issack Bugali Mwamasika.

In support of the application, Mr. Matunda, counsel for the applicant submitted that, the applicant has sufficiently shown in the pleadings that there is a prima facie case with chances of success. He submitted that the applicant has a cause of action and the suit against the defendant is not frivolous or vexatious. On the likelihood of an irreparable injury, to his clients, if the injunction is not granted, Mr. Matunda was of the view that the injury that the applicants are asking to be protected against is of the nature such that it is irreparable and the applicant cannot be easily or fully compensated by money. He added that the 1st and 2nd respondents are in the process of disposing of the 2nd applicant's mortgaged properties and upon success to sell the said properties, the applicants, will suffer not only the loss of their landed property which is located in a prime area within the city of Dar es salaam and whose value is more than Tshs 24,000,000,000/=but also the applicant will lose their business that is, the hatchery project and the dairy business which are solely carried out on the respective premises.

As to the balance inconvenience, Mr. Matunda submitted that the balance of convenience is in favour of the applicants as the respondents have nothing to loose because the loan is fully secured by the mortgaged properties which accelerate in value with time. The applicants have also contended that the 1st respondent is therefore fully secured now and in the future. It is submitted that no new hardship will be caused to the respondent if the injunction is granted because, the 1st respondent has already opted to recover the alleged outstanding monies through a suit which, though dismissed by the Commercial Court, there is a pending **Civil Appeal No. 25 of 2015** in which the 1st respondent are fighting to recover its alleged credit facilities.

In rely, Mr. Nyika submitted that the applicants have not satisfied the requisite conditions for the order sought to be granted. His submission based on the celebrated case of **Attilio Vs. Mbowe [1969] H.C.D. No. 284** and **Giella Vs. Casman Brown &Co. Ltd [1973]E.A. 358** where the principles governing the courts in granting temporary injunction were set down.

Mr. Nyika submitted that the applicant has not disclosed any triable issues in the pending suit which would require to be determined by this court. He added that the ruling of Nyangarika, J. (as he then was) did not exempt the applicants from discharging their liability to pay the outstanding amount nor did it bar the 1st respondent from exercising the right of sale under section 132 of the **Land Amendment Act No.2 of 2004** read together with section 127 of the same **Act**. It is submitted that, the dismissal of the 1st respondent's case for want of jurisdiction does not bar the 1st respondent from exercising the power of sale. He added that, a mortgage can only be discharged by way of payment of the outstanding amount or when the mortgage is declared null and void.

On the irreparable loss, Mr. Nyika submitted to the effect that the applicants are not going to suffer any kind of irreparable loss as a result of the sale and eviction because, as borrowers and guarantors, they fully knew the consequences of failure to live up to the mortgage deed and the loan agreement. He further contended that the damage that the applicant claimed to be likely to occur to them if injunction is not granted, is expected and consensual.

Submitting on the balance of convenience, Mr. Nyika maintained that the 1st respondent would suffer greater hardship if the restraining order is issued. This is because according to Mr. Nyika, the borrower defaulted in paying the facility given to him and the bank wants to recover the outstanding amount. The grant of the order will put the bank in a difficult position as it will not be able to conduct its business properly if any person who defaults to pay is let away scot free. To support his argument Mr. Nyika cited the case of **Pelican Investment Ltd Vs. National Bank of Kenya Ltd [2002] 2 E.A.488**, where it was held that:-

".... A court should not grant injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under mortgage."

In rejoinder, Mr. Matunda learned counsel for the applicant repeated his submission in-chief and went on submitting that the applicant has sufficiently established the existence of a prima facie case in view of the serious triable issues that are involved in the main suit. He said that the applicant will suffer irreparable loss and the balance of inconvenience are in favor of the applicants. He added

that the cases cited by the counsel for the respondents are distinguishable from the present case.

Having gone through the submissions made by both counsel, it is clear that the main issue for consideration here is whether the applicants have made a strong case as to warrant the grant of the orders sought in the chamber summons. It is a cardinal principle that in order for this court to grant an interim injunction, there must be three criteria as laid down in the famous case of **ATILIO VS MBOWE [1969] 284**. These are:-

- 1. A prima facie case with a probability of success,**
- 2. That irreparable injury which could not adequately be compensated by an award of damages would be occasioned.**
- 3. Where there was a doubt, that the balance of convenience favored the applicant.**

It should also be noted that injunctions are granted when the court is satisfied that first, unless immediate action is taken, the applicant may suffer irreparable damage and second, denying

temporary injunction in favor of the applicant may in the end, make the main dispute in the case nugatory.

Upon reading and considering the relevant law and the principles on interim injunctions, together with the affidavital deposition, I think it is not irrelevant to recall that in 2011 the 1st respondent extended an overdraft of Tshs. 1,180,000,000/= and a term loan facility of 3,668,637,000/= to the 1st applicant for purposes of financing the completion of the farm building, acquisition of hatchery, milling plant and motor vehicles for the hatchery project in Dar es salaam.

On the 12th February, 2014 the 1st respondent instituted a summary suit i.e Commercial Case No. 11 of 2014 against the applicants and three others for payment of Tshs 2,424,507,855.42 as monies due to the credit facilities aforesaid. The 1st respondent sought, in alternative, appointment of receiver manager with powers to sell the mortgaged properties and an order for vacant possession of the mortgaged properties. The applicants filed a written statement of defence containing a preliminary objection and a counter claim. The suit was dismissed for want of jurisdiction.

Aggrieved by the dismissal of Commercial Case No. 11 of 2014 the 1st respondent lodged a Notice of Appeal to the Court of Appeal of Tanzania and at the same time advertised to sell the disputed properties. The applicant successfully sought and obtained a temporary injunction pending hearing of the counter claim.

On 23rd October, 2015 the 1st respondent instituted Civil Appeal No.129 of 2015 against the dismissal of its suit by the High court. On 20th March, 2017 the supplicants were surprised to learn that the 1st respondent had appointed the 2nd respondent to conduct auction in respect of the house in dispute and the said auction was advertised through Mwananchi News Paper of 2nd March, 2017 which showed that the auction would take place on the 22nd March, 2017. The applicant has filed a suit against the respondents for a declaration that the realization of mortgage is illegal and unlawful. He also challenges the appointment of the 2nd respondent. On the other hand, the respondents have denied this allegation and contended that the applicants are not entitled to the orders sought in the plaint. The respondents were of the view that the dismissal order did not bar the 1st respondent from exercising his right of sale

over the mortgaged properties nor did it give the applicants the right to escape from paying the outstanding loan balance.

In the light of the above controversy, I am of the view, that indeed there is a prima facie case to be determined by this court. From the pleadings, I am satisfied that the applicant has managed to establish that there is a serious triable issue in the main suit which will be considered and determined by this court and therefore the suit against the defendant is, by any standards, not frivolous or vexatious.

On the second requirement that is whether the applicants will suffer an irreparable loss if an injunction is refused, I am guided by the principle enunciated by Lord Diplock in **American Cyanamid Company Vs. Ethicon Ltd [1975] AC 396** thus:-

"The Court should first consider whether, if the Plaintiff were to succeed in the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant continuing to do what was sought to be enjoined between the time of application and the time for the trial. If the

damages in the measure recoverable at common law would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should be granted, however strong the Plaintiff's claim appeared at this stage."

In the circumstances, obtaining in this case, and on the strength of the above cited authority I am settled in mind that the applicants have been able to pass through the second test which calls for the interference of the court to protect the applicants from the kind of injury which may be irreparable before their legal rights are established. In the present application, the applicants have been able to specify the losses that they are likely to suffer if injunction is not granted. It is stated in the affidavit that the applicant property is in the imminent danger of being disposed by the 1st respondent and if they succeed in doing so, the applicants will suffer irreparable loss because the applicants will lose their property which is located in a prime area valued at 24 billion and they will lose their businesses that is carried on the respective premises. In my observation, these losses may be irreparable and incapable of being atoned to in monetary compensation.

On the last test, that is the balance of convenience, it is stated in law that the balance of convenience should be taken in parallel with the rights of the parties and the legal principles. Moreover, Sir John Donaldson M.R. had made an exposition on this situation in the case of **Francome Vs. Mirror Group Newspapers [1984]1 WLR 892**. He said at P. 898:-

"I stress once again that we are not at this stage concerned to determine the rights of the parties. Our duty is to make such orders if any as are appropriate pending the trial of the action".


It should be noted that an injunction should not operate as a Judgment and execution before trial. The purpose of it is only to avoid injurious consequences which cannot be repaired under any standard of compensation.

In the present application, it suffice to say that since there is a pending appeal in the Court of Appeal in Civil Appeal No.25 of 2015 which the respondents are fighting to recover their alleged credit facilities, I think it will be prudent enough to grant injunction so as to

avert the injuries that are likely to be suffered by the applicant. In my observation I am convinced by the applicants that the 1st respondent will not suffer greater hardship because the alleged credit facility is secured.

In the premise, I find that the applicants have managed to establish the three conditions in support of the instant application. In the ultimate event, this application is granted. Costs shall be in the cause.

Dated at Dar es Salaam this 9th day of August, 2018.


**P.M. KENTE,
JUDGE**

Date: Hon. A. Teye – DR

For 1st Applicant: } Absent

For 2nd Applicant : }

For 1st Respondent: } Ms. Arwa Yusuf Adv.

For 2nd Respondent: }

RMA: Carolina Aloyce.

Court: Ruling read and delivered in the presence of counsel for the Respondent one Ms. Arwa Yusufali today this 24/8/2018 by the Deputy Registrar.



A.TEYE,
Deputy Registrar,
24/8/2018.