

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

MISC. LAND APPL. NO.604 OF 2017

**ABLA ESTATE DEVELOPERS & AGENCY
COMPANY LTD.....APPLICANT**

VERSUS

KCB BANK TANZANIA LTD.....RESPONDENT

RULING

Date of last order: 20/03/2018

Date of Ruling: 13/04/2018

S.A.N. WAMBURA J:

The applicant **Abla Estate Developers & Agency Company Ltd** filed this application under Order XXXVII Rule 1(a) and (b), Section 68(e) and 95 of the Civil Procedure Code Cap. 33 R.E 2002, together with any other provisions of the law praying for the following orders;

- (a) That this Honourable Court be pleased to grant temporary injunction against the respondent, its agents, workmen and all those who act on its behalf from selling and/ or disposing off the mortgaged property pending hearing and determination of the main suit.*
- (b) Cost of this application be provided for.*
- (c) Any other relief(s) the Court may deem fit and just to grant.*

The application was supported by the affidavit affirmed one **NASSORO KHALIFA** the Managing Director of the Plaintiff's Company.

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

Supporting the application, Mr. Nkelemi prayed to this court to adopt the grounds of affidavit to form part of his submissions. He further submitted that there is a serious issue to be tried and there is an overwhelming chance of success on the applicant's part.

He contended that the applicant had sought for a report but he had not been supplied with the same. That the respondent refused to issue a default notice without specifying the extent of the default while knowing that if the property is sold, it can not be received by way of any award of the court. He was of the view that the applicant will suffer irreparable loss which can not be compensated.

It was Mr. Nkelemi's further contentation that if the injunction will not be granted, the applicant will suffer more as they are not sure of the

extent of the default. He therefore prayed for the application to be granted as prayed.

In rebuttable, both Mr. Malimi challenged the applicant's application on the ground that the applicant has failed to prove the three criteria of being granted an injunctive order as stated in the case of **ATILIO VS MBOWE (1969) HCD 284**.

He submitted that the respondent is a financial institution hence it can be able to compensate the applicant if they would be awarded compensation. He referred this court to the case of **NATIONAL FURNISHERS LIMITED AND ANOTHER VS EXIM BANK LIMITED & 2 OTHERS** Misc. Land Application No. 1002/2016 where this court held that there must be conclusive evidence to indicate that the bank cannot pay.

Mr. Malimi was of the view that it is the respondent who would bare the most inconvenience if the application will be granted because the property in dispute is a mortgaged property which was offered by the applicant himself as security. That the applicant was aware that upon failure to repay the debt, then the security will be realized. That the

applicant had an obligation to repay the debt. Failure to do that amounts to a breach of contract entered between him and the respondent. To cement his argument, Mr. Malimi referred to the case of **GENERAL TYRE EA LTD VS HSBC BANK PLC [2006] TRL 60** where the Court held that restricting the respondent from exercising its contractual obligation is wrong.

He further referred this court to the case of **HOTEL PAN AFRICA LTD VS N.B.C LTD** Civil Case No. 52 of 2002 HC DSM Registry which held that since the applicant was granted a loan which had to be repaid, he had a primary obligation to repay the loan. That the applicant's allegation that the respondent failed to supply a proper statement of account does not exonerate the applicant from payment of the loan.

Mr. Malimi further stated that the application and the plaint do not suggest that there is a good case or probable arguable case therefore he prayed for the dismissal of the application with costs.

In reply Mr. Nkelemi reiterated his earlier submission in chief and further contended that there is a triable issue to be determined by this

Court as stated in paragraph 9 of the plaint. He therefore prayed to this court to grant the applicant's prayers as prayed.

The purpose of issuing an order for an interim relief is to evolve a workable formula to the extent called for by the demands of the situation, keeping in mind the pros and cons of the matter and striking a delicate balance between two conflicting interests, such as injury and prejudice likely to be caused to the parties if the relief is granted or refused.

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.

That position was much stated by Rutakangwa, J (as he then was) in **Charles D. Msumari and 83 others v The Director of Tanzania Harbours Authority, Civil Appeal No. 18 of 1997**, High Court of Tanzania, Tanga District Registry (unreported), Where Justice Rutakangwa J.A had this to say;

"Courts cannot grant injunctions simply because they think it is convenient to do so. Convenience is not our business. Our business is doing justice to the parties. They only exercise this discretion sparingly and only to protect rights or prevent injury according to the above stated principles. The courts should not be overwhelmed by sentiments, however lofty or mere high driving allegations of the applicants such as that the denial of the relief will be ruinous and or cause hardship to them and their families without substantiating the same. They have to show that **they have a right in the main suit** which ought to be protected or **there is an injury (real or threatened) which ought to be prevented by an interim injunction and that if that was not done they would suffer irreparable injury and not one which can possibly be repaired".**

[Emphasis is mine]

In the requirement to show a *prima facie* case or a serious issue, it is now settled that a *prima facie* case does not necessarily mean that the plaintiff/applicant will win the case or obtain a decree against the defendant. It means that he/she has a cause of action and the suit against the defendant is not frivolous or vexatious. Therefore, the strength or the probability of success of a case should not be based on the evidence and documents tendered in the suit.

In the case of **Colgate Palmolive Vs Zakaria Provision Stores And Others** Civil case No. 1 of 1997 (unreported), Mapigano J (as he then was) held that;

*"I direct myself that **in principle the prima facie case rule does not require that the court should examine the material before it close it and come to a conclusion that the plaintiff has a case in which he is likely to succeed, for to do so would amount to prejudging the case on its merits, all that the court has to be satisfied of, is that on the face of it the Plaintiff has a case which needs consideration and that there is likelihood of the suit succeeding.**"*

[Emphasis is mine]

What ought to be looked at in this test/ principle is the cause of action. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre- existing cause of action.

In the light of the pleadings before me, it is crystal clear that there is a triable issue to be determined by this court.

The second principle, is whether the applicant will suffer irreparable loss. According to the applicant's affidavit and arguments if this court will not grant this application, the applicant will suffer the irreparable

loss which would not be compensated by an award of damages and there will be greater hardship and mischief suffered by the applicant from withholding of the injunction than will be suffered by the respondent by granting it.

The applicant's arguments that he will suffer irreparable loss if the order of injunction will not be granted, 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 good position of paying damages to the applicant if he succeeds, compared of the applicant.

On the last test, which is on balance of convenience, I am of the opinion that the balance of inconvenience tilts on its favour that to the contrary the applicant may not be able to compensate damages that the respondent has already suffered and those it will continue to suffer in case the suit is determined in its favour.

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 an 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**.

Due to 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.

The application for temporary injunction is hereby dismissed.

Costs to be in due course.


S.A.N. WAMBURA
JUDGE
13.4.2018