IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 73 OF 2020

AUTO MECH LIMITED.....APPLICANT

VERSUS

TIB DEVELOPMENT BANK LIMITED.....1ST RESPONDENT

YONO AUCTION MART & CO. LTD.....2ND RESPONDENT

FARAJ ASAS.....3RD RESPONDENT

THE ATTORNEYS GENERAL CHAMBERS.....4TH RESPONDENT

RULING

I. MAIGE, J

In this matter, the applicant is calling upon the Court to grant an order allowing her an access to and thereafter restraining the respondents from evicting her from the landed property at plots no. 31/2 at Tabata Relini, Mandela Road in Ilala with Certificate of Title No. 47866 ("the suit property") pending expiry of 90 days notice of intention to sue the first respondent and join the Government. The application is made under section 2(3) of the Judicature and Application of Laws Act, Cap.358, R.E.,2002 ("the JALA") and is founded on the affidavit of **Ramesh Patel**, the principal officer of the applicant ("the affidavit") which

contains the factual grounds in support thereof. It has been opposed by the counter affidavits of **Menson Ngahatilwa,** the principal officer of the first respondent and **Herman Majani Lupogo**, the advocate of the third respondent, (together, "the counter affidavits)".

Aside from counter affidavits, the first, second and fourth respondents have also questioned the maintainability of the application on legal grounds. First, for contravening Order XXIII Rule 1(3) of the **CPC**. Two, for being preferred under wrong provision of the law; and three, for being supported by a defective affidavit. In essence, the third respondent has, in his notice of preliminary objection, raised more or less the same points save for one different point that, the application does not disclose any cause of action against him.

While the preliminary objection was argued by oral submissions, the substantive application was by written submissions. Initially, I was prepared to dispose of the preliminary issues first. However, after examining the affidavit, counter affidavits and the submissions on preliminary issues, I, for the reason which shall be evident herein, found it prudent to consider both the legal and substantive issues in the final ruling.

Both parties were in this matter duly represented. Right from the beginning, Mr. Edwin Enosy, learned advocate, represented the applicant whereas the first, second and fourth respondents were

represented by Mr. Tango, learned principal state attorney. Mr. Herman Lupogo, also learned advocate represented the third respondent.

With the above brief narration, it is suitable to determine the issues raised in the application. I propose to start with legal issues. In support of the first point, Mr. Tango submits that, the application contravenes Order XXIII rule of the **CPC** in so far as it is identical to Misc. Land Application No. 54 of 2020 which was, on 14th day of February 2020, withdrawn without a liberty to refile. The application, the counsel further submits, was withdrawn along with the pending Land Case No. 25 of 2020. He concludes therefore that, since the withdrawal was without a liberty to refile, the applicant was barred, under the provision just referred from filing a fresh proceeding. To support his claim, the counsel referred me to the case of **CRDB Bank PLC and Another vs. Aziz Mohamed Aboud and Another, Misc. Commercial Cause No. 277 of 2015 (High Court, Commercial Division, Unreported),** among others.

On the second point, it is the counsel's submissions that, in the absence of the relevant received law, section 2(3) of the **JALA** cannot move the Court for the grant of temporary injunction. Reference was made to the decision of my Lord Kihiyo in **Freeman Aikael Mbowe vs. Dar Es Salaam Regional Commissioner and Others, Misc. Civil Application No. 9 of 2017 (High Court, DSM, Unreported).**

On the third point, Mr. Tango submits that paragraphs 11,13,14,15,18 and 19 of the affidavit to the extent that they are argumentative and conclusive contravene Order IX rule 3 of the **CPC**. He therefore prays that the same be expunged from the affidavit. His prayer is founded on the principle in **Juma vs. Busiyah vs. the Zonal Manager (South) Tanzania Post Corporation, Civil Application No. 8 of 2004, (CAT, Mbeya, Unreported)**

On his part, Mr. Lupogo abandons the first point of preliminary objection and joins hand with Mr. Tango on his submissions. In addition, he attacks the jurat of attestation in the affidavit for not being clear as to whether the deponent thereof is known to the attesting advocate or has been identified. This, in his understanding, is violative of section 8 of Notaries Public and commissioner for Oaths Act and section 10 of the Oath (Judicial Proceedings) and Statutory Declarations Act. His contention is premised on the decision of the Court of Appeal in **Seth Japhet vs. Nicholaus Mero Misc. Civil Application No. 457/05 of 2017.**

Section 68 and 95 of the CPC, the counsel further submits, cannot, as held in **Mary Emmanuel Mmari vs. James Christian and Another,** by themselves move the court for an application. He prays therefore that, the application be dismissed with costs.

Refuting the proposition that the application offends order XXIII rule (1) (iii) of the **CPC,** Mr. Edwin informed the court, the two proceedings are not substantially similar. He assigns two main reasons. First, the instant application is not sought pending an existing suit but an intended one. He submits therefore that, in the absence of a pending suit, this Court cannot decide what would be the claim in the intended suit. Second, while in the previous proceeding the applicant sought to prevent the sale of the **suit property**, in the intended suit, the applicant seeks to challenge the manner in which the **suit property** was sold.

On whether the Court has been properly moved, Mr. Edwin submits that since there is no specific provision covering temporary injunction in the absence of a suit, section 2(3) of **JALA** is the appropriate provision. He substantiates his view with the decision of this Court in **Tanzania Sugar Producers Association vs. The Ministry of Finance of the United Republic of Tanzania and the Attorney General, Miscellaneous Civil Case No. 25 of 2003, High Court Commercial Division- Unreported (Kalegeya, J)**.

On defectiveness of the affidavit, it is his contention that the attacked paragraphs of the affidavit are merely factual contrary to the claim by the respondents. In the alternative, he submits, the impugned paragraphs can be expunged from the affidavit without affecting the substance of the same.

On attestation, he submits that, the dash in the attestation clause suggests that the deponent was identified. He submits further that the Oath (Judicial Proceedings) Act covers declaration and not affidavits. In his opinion, affidavit and declaration have different connotation.

Let me start with the issue of whether section 2(3) of **JALA** can in its isolation move a court for temporary injunction in the absence of the suit. Guided by the authority in **Freeman Aikael Mbowe vs. The Dar Es Salaam Regional Commissioner (supra)**, Mr. Tango thinks that unless it is accompanied with the relevant received law, it cannot. I have taken time to read the authority. The principle of law set out therein is that section 2(3) of **JALA** does not act by itself as an enabling provision for proceedings which are not governed by local legislation but it is a justification for resorting to substances of received laws. In his own words, His Lord Kihiyo remarks at pages 9 and 10 of the ruling as follows;

> *All what we said in that decision is that section 2(3) empowers the Court to exrcise its jurisdiction in given circumstances rather than the section being an enabling provision for proceedings which are not governed by the **local legislation**. What we gathered from a reading of the section and the cases referred to it is that section 2(3) acts only as a justification for resorting to the substance of common law, doctrine of equity and statutes of general application in force in England on the reception date rather than being an end in itself.*

In his decision, it would appear to me, His Lordship was inspired by the decision in **Hashim Jongo and 28 others vs. Attorney General and Tanzania Revenue**, **HC Civil Application No. 32 of 2008 (Unreported)** where His Lordship Massati, JK, (as he then was) held that:-

> *In the present case, although section 10 of the Law Reform Act is silent as to the powers of the court to extent time, and although the Chief Justice has not formulated any rules thereunder, with a little effort and research, the learned counsel would have discovered that the applicable law is the Crown Office Rules, 1906 as applied/ received through section 2(3) of the Judicature and Application of Laws Act, Cap. 358, R.E., 2002. In the present case* ***failure to cite the statutory link in the chamber*** *summons removes the legal basis of the application.*

I understand the clause "*failure to cite statutory link in the chamber summons*" in the last sentence of the quoted passage to mean failure to cite section 2(3) of the **JALA**. I say so because unlike in the instant matter, in the said application, the applicant had cited section 14 of the Law of Limitation and section 93 of the **CPC**. His Lordship was saying at pages 8 and 9 of the ruling that:-

> *Mr. Ngowi, had sought to rely on S. 14 of the Law of Limitation Act, and S. 93 of the Civil Procedure refuge to Ss. 95 of the Civil Procedure Code Act (Cap.33) in support of the application for enlargement of time. Since I have found that the applicable law is the practice and procedure followed by the High Court in England and the 1906 Crown Office Rules, the applicability of S. 46 of the Law of Limitation Act is excluded in such proceeding under S. 46 of the Law of Limitation Act.*

*As to S. 93 of the Civil Procedure Code, it has been judicially held, and even from unambiguous wording of the section, that provision only applies to periods set by the courts in their judicial capacity. (See **PATEL v. SINGH** (1956 EACA 209). The period of six months set in S.19 of the Law Reform Act is set by statute and not by the court. So the court cannot enlarge time under S. 93 of the Civil Procedure Code.*

Mr. Ngowi, had also sought refuge to S. 95 of the Civil Procedure Code, and "any other enabling law". The position of the law is that S. 95of the Civil Procedure Code Act, cannot be used to defeat limitation (see **AUTO GARAGE LTD v. MOTOKO** *(1971) H.C.D 338) nor, where there is a specific provision/ remedy provided by law"*

While in the decision just referred, section 2(3) of the **JALA** was not cited, in the decision by His Lordship Kihiyo, it was cited. That notwithstanding, His Lordship held that;

In the circumstance, since the relevant law or rules received through section 2(3) of the JALA were not cited together with the said section 2(3), the applicant's application is not supported by proper provisions of the law and is held to be incompetent.

Under section 2(3) the **JALA**, Tanzania received three substances of English law in force in England on 22/07/1920 namely; statutes of general applications, common law and principles of equity. Out of the three, it is only the statutes of general applications which are codified. The principles of common law and equity are propounded in judicial pronouncements. Just as one cannot cite the famous case of **Attilio vs.**

Mbowe as an enabling provision in an application for temporary injunction, he cannot in the same way cite an English case law.

Much as I agree that section 2(3) of **JALA** cannot *ipso facto* confer jurisdiction to the Court, I, with all respects, differ with my brother Kihiyo on the relevancy of citing the received law in the Chamber Summons. The reason being that, while the practice in Tanzania has been that only statutory laws would be cited, most of the received laws are case law. In my view therefore, where the applicant cites section 2(3) **JALA** as a statutory link for the application of received law, the existence or non-existence of the relevant substance of the received law becomes a question of fact to be established in the hearing of the substantive application.

In this matter, Mr. Edwin has referred me to the authority in **Tanzania Sugar Producers Association vs. The Ministry of Finance of the United Republic of Tanzania and the Attorney General, *(supra)***. In the said case, His Lordship Kalegeya, like in the instant matter, was dealing with an application for temporary injunction pending expiry of 90 days notice to sue the Government. The Court having considered the *mareva* jurisdiction rule propounded in the cerebrated English case of **Mareva Compania Naviera S.A. v International Bulk Carriers SA (1980) 1 All E.R. 213**, held that "the court has jurisdiction to issue interim order where there is no suit pending". In reaching to such a decision, His Lordship was persuaded by the decision in **Tanganyika**

Game Fishing and Photographic Ltd vs. the Director of Wildlife and others, Miscellaneous Civil Cause No. 42 of 1998 wherein His Lordship Kaji, J, (as he then was) made the following remark, which I also entirely subscribe to;

> *Since courts in England used to issue injunction orders before institution of the main suit under S 25(8) of the Judicature Act, 1873, and since the Act was in force in England on 27/07/1920 and would appear to have been of general application in England at that time, I am satisfied that under S.2(2) of the Judicature and Application of Laws Ordinance Cap. 453, in a proper case this court can grant such order notwithstanding its peculiar name of Mareva. Suffice to call it an interim order before institution of the main suit.*

In **Mareva case** *supra*, Lord Denning deducted the Mareva jurisdiction principle from the a broader interpretation of the provision of section 25 of the Judicature Act, 1873 by His Lordship Jessel, MR in **Beddow v Beddow, 1878 9 Ch. D at 93 (Jessel MR)**, where he held that under the respective provision, the court had 'unlimited power to grant an injunction in any case where it would be right or just to do so".

I am however aware that S. 25(8) of the Judicature Act, 1873 was repealed and replaced by section 45 Supreme Court of Judicature (Consolidation) Act, 1925 and the latter repealed and enacted by the Supreme Court Act, 1981. For the reason of being enacted subsequent to reception date, the two laws cannot be said to have been received under section 2(3) of the **JALA**. However, the position of law as I understand it is that, the relevant substance of the received law does

not cease to have a force of law in Tanzania for the mere reason that it was subsequently repealed or amended. On this, I am stirred by the commentary of learned jurist Allott in **New Essays in African Law, 1970, London Butterworth** where he remarked at page 50 as follows:-

> *"The existing learning on statutes of general application may be summarized in series of categorical propositions. An English statute will only qualify as "of general application" as follows:*
> *(1)It must be a public general Act of the English or United Kingdom legislature (as the case may be): local and private Act of whatever date are excluded.*
> *(2)The Act must be in force in England at the relevant date.* ***The fact that it has, subsequent to the date, been amended or repealed does not affect its application in the receiving country"****. (emphasis supplied)*

Therefore, since the decision in **Mareva case,** *supra* was based on the broader interpretation of section 25 of the Judicature Act of 1873 in the old case of **Beddow v Beddow, 1878 9 Ch. D at 93 (Jessel MR)**, the mareva rule is still part of received laws. The objection is thus overruled.

I now move to the first point as to whether the instant application is barred by order XXIII rule 1 (III) of the **CPC**. There is no dispute that the rule under the respective provision is such that, where a suit is withdrawn without a liberty to refile, the claimant cannot subsequently refile the same. Parties are also in agreement that, the rule applies to suits as much as it applies to non-suit proceedings. The question is

whether the Miscellaneous Application No. 54 of 2020 and the instant application are similar. The answer should perhaps be gathered from comparison of the chamber summons and affidavits initiating the two proceedings together with their annexures.

In the previous application, the order sought was to restrain the respondent from disposing of the **suit property** pending determination of the main suit. In the main suit whose plaint has been attached and marked TIB-8 in the counter affidavit of the first, second and fourth respondents, the applicant was challenging the intended sale of the suit property on account that it was in breach of the contract. Conversely, in the instant matter, the applicant is praying to be afforded an access to the suit property and thereafter an order restraining the respondents from evicting her from the **suit property** pending expiry of 90 days notice and institution of the intended proceeding. Though the intended suit is yet to be filed, the applicant was expected to demonstrate what would be the cause of action in the intended suit. In the affidavit, the applicant has attached a copy of the 90 days notice of the intention to sue the respondents. Perhaps, the *prima facie* elements of the intended suit, can be implied therefrom. At paragraph 14 (i) and (ii), the intended cause of action is explained as follows:-

14. That, we have full instructions from our client that;

(i) The suit premises be free from any interference so that our client can get access to them in order to settle some bills with her potential clients and employees who are currently on strike.

(ii) *The public Auction conducted on 14.02.2020 be nullified for it was conducted illegally and procedurally.*

Since a preliminary objection has, in accordance with the principle in **Mukisa Biscut Manufacturing Company Ltd vs. West End Distributors Ltd, (1969) EA 696** to be determined on assumption that what is pleaded in the plaint (affidavit for the purpose of this case) are true, I do not think that it is proper by this Court to, at this stage, doubt the correctness of the express statement in the affidavit and its annexures. It is on that account that I will view the preliminary objection premature. It is so held.

Let me wind up with the last issue as to defectiveness of the affidavit in support of the application. The specific contents of the affidavit in controversy are paragraphs 11,13,14,15,18 and 19. I will start with paragraph 19. From the face of it, the respective paragraph appears to be argumentative and contains conclusion and opinions. It is accordingly struck off. Paragraph 18, I have read it, is factual and I see no merit on its objection. It is accordingly overruled. Equally so for paragraphs 15, 14 and 13. Paragraph 11 is no doubt argumentative and contains legal point by way of conclusion. It is accordingly expunged from the record. The expurgation of the respective paragraphs notwithstanding, the affidavit can still have a leg to stand on.

There was also a contention that the jurat of attestation is defective for not being specific as to whether the deponent is known to the attesting advocate or identified. The objection was not raised in the notice of preliminary objection. It was raised and argued during the hearing of the preliminary objection. The applicant's counsel however was afforded an opportunity to respond thereto by way of a rejoinder submissions. It can thus be said with certainty that the applicant was not denied a right to be heard. The objection appears to be valid, but in the nature of this case I view the defect to be so trivial that it can be tolerated under the overriding policy objection without causing injustice to either of the parties. I hold so.

There was also an issue of the religious affiliation of the deponent of the affidavit. In the affidavit in support of the withdrawn application, it is apparent, the deponent of the affidavit represented himself as a Hindu whereas in the instant application as a Muslim. To Mr. Tango, the discrepancy affects the credibility of the affidavit in as much as it entails falsity. On his part, Mr. Edwin views the representations of the deponent as credible and as an expression of his freedom of religion. He submits that, although at the time of deposing the previous affidavit, the deponent of the affidavit was a Hindu, subsequently thereafter he converted into Islam. This issue should not detain me. The deponent of the affidavit has represented himself on affirmation to be a Muslim. However, in the affidavit filed in support of the withdrawn application, he represented himself as a Hindu. This alone cannot justify for an

inference that the deponent was telling lie on oath. For, religious belief being part of mental element and free private affair, the deponent of the affidavit is the best one to know which religion he belongs. Regard being had on the fact that religious status of a person is not necessarily static. It is on that account that I will not accept the submission.

Let me now direct my mind on the substance of the application. The three notorious conditions precedent for the grant of temporary injunction appear not be doubted by the counsel in their submissions. The contention, it seems to me, is whether or not the same have been met. Obviously therefore, the duty that I am bound to discharge is to find out if the conditions have been satisfied. In accordance with the famous case of **Attilio vs. Mbowe, HCD, 1969,** the following three conditions must be established for temporary injunction to be granted. First, existence of a *prima facie* case. Two, establishment of the necessity of the grant in preventing irreparable loss. Three, balance of convenience. It may perhaps be worthy to observe that, temporary injunctive orders are equitable and the trial court enjoys a wide discretion to grant or not provided that the discretion is exercised reasonably, judiciously and on sound legal principles.

Without spending much time, I will start with the first condition as to existence of a *prima facie* case. Before directing my mind on the issue, I find it inevitable to narrate, albeit briefly, the factual background that gives rise to the application. The first respondent is a holder of a

mortgage created by the applicant in its favour in respect of the **suit property** herein prescribed. The mortgage was created to secure a loan advanced to the applicant in the form of credit facility. Upon default to service the loan, the first respondent issued a statutory demand as a necessary step for realization of the security. She thereafter issued a 14 days notice of sale of the **suit property**. Before the notice had expired, the applicant filed a suit at this Court (Land Case No. 25 of 2020) seeking, for among others, declaration that the intended sale of the **suit property** was null and void. The applicant also filed an application for temporary injunction to restrain the first and second respondents from disposing of the **suit property** pending determination of the suit. For the reasons better known to herself, the applicant through her advocates Kelvin Mituani assisted by Simon Mkwizu, withdrew both the suit and the application without a liberty to refile. That was on 14th February 2020. It is also on the same day that the **suit property** was sold in a public auction.

In the counter affidavit, the first, second and fourth respondents have attached and marked TIB-1 a copy a bid form under which the **suit property** was sold and TIB-5, a copy of the advisement for sale of the **suit property**. They have also attached and marked TIB-4 a statutory demand in terms of section 125 of the Land Act. In his written submissions, Mr. Edwin for the applicant, contends with all forces that, while in accordance with the advertisement for sale, what would have been sold was the mortgaged property. in the public action intended to

be faulted, both the mortgaged property and the applicant's movable properties including heavy and light machineries have been sold. In his humble view that was on the face of it illegal.

In paragraph 12 of the counter affidavit deposed on behalf of the first, second and fourth respondents, it is averred that " *the movable and immovable properties formed part of the security as per the Credit Facility Agreement and as were stated in Default Notice which was issued to the Applicant".* The credit facility agreements attached in the counter affidavit on face of them suggest that beside being secured by a mortgage on the suit property, the loan was secured by debenture on present and future fixed and liquid assets of the applicant. In paragraph 2.10 of his written submissions, Mr. Hangi, Chan'ga, learned state attorney reiterated the statement.

On his part, the third respondent through his counsel Patrick Sanga, submits that the action against him cannot stand because the **suit property** was not sold to him in his individual capacity but to ASAS Transporters Company Limited. In his notice of preliminary objection, it would seem, he raised it as the first point of preliminary objection. For the reason better known to himself, he abandoned. He has raised the same in the counter affidavit however. Mr. Edwin submits that he has sued the third respondent because he was actively involved in the public auction. In the circumstance of this matter and considering the nature of the orders sought, I do not think that it is appropriate at this juncture

to determine whether the respondent's alleged involvement in the auction of the suit property was in his individual or representative capacity. In any event, the facts deposed in the affidavit and counter affidavits do not suggest that the transfer process of the suit property is complete.

In my understanding of the law, what I am supposed to do at this stage, is to consider if there demonstrated a *bonafide* claim in the intended suit. I am not expected at this stage to resolve complicated issues of facts and law as that would be prejudicial to the pending suit. On this, the instructive comment of this Court in the **Colgate Palmolive V. Zakaria Provision Store and Others, Civil Case No. 1 of 1997** referred at page 158 in **Kibo Match Group Ltd, vs. Impex Limited, 2001, TLR 152**, may be pertinent. It was remarked as hereunder:-

> *I direct myself that in principle the prima facie case rule does not require that the court should examine the material before it closely 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 merit. 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*

In view of the above discussions, I am satisfied that the affidavit demonstrates *bonafide* contentions between the parties in the intended suit. One of such contentions is whether or not the sale under discussion

was in respect of the **mortgaged property** alone or together with the movables. In my opinion therefore, the first condition has been satisfied.

This now takes me the second condition. It requires the applicant to establish the necessity of the grant in preventing irreparable loss. Before I decide whether the condition has been established, it may be necessary to consider the nature of the orders sought. Two successive orders have been requested. First, an order affording the applicant access to the suit property. Two, an order restraining the respondents from evicting the applicant from the **suit property** pending expiry of the 90 days notice and institution of the suit.

The first order, it would appear to me, is in the nature of mandatory injunction. This form of injunction which mandates a specified course of conduct, is rarely granted at interlocutory stage with a view to restoring the *status quo*. Although there is no direct provision under the **CPC** providing for mandatory temporary injunction, it is my considered opinion that where there is compelling circumstances, the same can be granted. It would be pertinent on this aspect, to make use of the instructive comment of the learned scholar Takwani, C.K. in his **Civil Procedure with Limitation Act, 1963, 7th Edition, Eastern Book Company, Lucknow, 2014 at page 157** where he puts it as follows:-

> *In appropriate cases, temporary mandatory injunction can be granted by a court but such relief can be granted only in*

exceptional and compelling circumstances where injury complained of is of immediate and is likely to cause serious prejudice to the applicant which cannot be compensated in terms of money. In other words, mandatory injunction at an interlocutory stage can be granted in rarest cases. Again, mandatory injunction can be granted only to restore status quo and not to establish a new state of things.

I take it to be the law that, for mandatory temporary injunction to be granted, the applicant has, in addition to the "triple test" set out in **Attilio Mbowe** ***supra***, to establish that the irreparable injury sought to be protected is of immediate effect.

In accordance with paragraphs 12 and 13 of the affidavit, the first order is sought so as to enable the applicant to access her official documents, transfer immovable properties and settle employment benefits of her terminated employees. To substantiate her claim, the applicant has attached in the affidavit and marked JCL-7 a copy of an extract from Sunday News dated 19th February 2020 purporting to show some employees in strike. It may perhaps be worth of note that, although the strike in question happened on or before 19th February 2020, on 24th February 2020, the applicant withdrew the Misc. Land Application No. 54 of 2020 in which she was seeking for an order retraining the first two respondents from evicting her from the **suit property**. Just as it is in this application, the applicant did not assign reason why did she opt to withdraw the same.

That aside, as the dispute between the applicant and her employees on terminal benefits and other dues have not been doubted in the counter affidavits and submissions, it can be reasonably inferred in the circumstance that, if she is not allowed access to her official documents in the suit property with a view to settling the claims of her terminated employees, the applicant may suffer irreparable loss. I have no doubt also that the irreparable loss sought to be protected is of immediate effect.

The access to the suit property has also be sought with a view to enabling the applicant to transfer her movable properties from the suit premises. In the affidavit and counter affidavits by the first, second and fourth respondents, whether the first respondent was entitled to sell the mortgaged property and the movables was seriously contentious. While the applicant claims that the sale involved only the mortgaged property, the first, second and fourth respondents, relying on the Facility agreements in annexures **TIB-2** and **TIB-3** to the counter affidavit, contend that the first respondent was entitled in terms of the debenture instrument to sell both the immovable and movable properties. Who is right and who is not, is a matter which in my view cannot be determined without affecting the merit of the intended suit. Therefore, as the question of the validity of the sale of movables is the theme of the intended suit and in so far as the applicant is expressly admitting default to service the loan, the irreparable injury sought to be protected cannot

be said to be of immediate effect and the grant of the order shall be prejudicial to the intended suit.

In the second place, the applicant seeks for an order to restrain the respondents from evicting her from the **suit property**. In accordance with paragraph 12 of the affidavit, I do not think that a restraint order can maintain any *status quo*. As observed by the learned author Vishwas Shridhar Sohoni in his **Law of Injunctions**, the observation which I fully subscribe to, neither of the parties would be ready to disclose a *status quo* which would be against his case. It is therefore, the duty of the court, before granting the order, to determine what is the real *status quo*. At page 226, the learned author has the following to say:-

> *It is no doubt true that parties are well aware of the real state of things as they exist. But when they are fighting with each other, in courts of law, advancing cases diametrically opposed to each other, neither of them can be expected to meekly reconcile to the situation and stop interfering with the possession of the opposite party even if that is the real status quo. Invariably, the immediate consequence is that the party who is not in possession would attempt to get into possession by asserting that he had been in possession already and on the date of the 'status quo' order he was in possession with the result that there would be a clash between the parties leading to intervention by police and criminal proceedings. There is no justification whatsoever for a Civil Court driving the parties to criminal proceedings by passing an order of status quo without indicating what the status quo is. This is nothing but a grave of fact. The court is bound to decide prima-facie on the materials available, whether the Plaintiff is in possession or the defendant is in possession. (***Premier Publishing Co. Allahabad, 2013,***)*

From the foregoing examination of the affidavit, it cannot be said that the *status quo* is such that the applicant was, on the date of filing this application, in possession of the **suit property** so as to be entitled a restraint order from being evicted therefrom. The prayer could have perhaps been tenable if the access to the **suit property** sought in the first order was with a view to carrying out daily businesses.

Lastly, I will examine the application in relation to the third condition as to balance of convenience. Since the second condition has only been established to the extent of an order allowing the applicant access to the suit property to access official documents with which to settle employment claims, I will only limit my consideration to that extent. What amounts to balance of convenience was considered by the Court of Appeal in **Salehe vs. Asac Care Unit Limited, Ayoub Salehe Chamshama and Kenya Commercial Bank, Civil Revision No. 3 of_2012, DSM (CAT, DSM-Unreported)** at page 9 thereof, in the following words:-

> *And on the question of balance of convenience, what is means is that, before granting or refusing the injunction, the court may have to decide whether the plaintiff will suffer greater injury if the injunction is refused than the defendant will suffer if it is granted*

The official documents for which the applicant prays access to the **suit property** is not part of the dispute. There is nothing in the counter affidavits to the effect that either of the respondents will suffer loss if the applicant is allowed access to the suit property to collect her official

documents. As a matter of common sense therefore, the respondents will not suffer any loss if the applicant is afforded access to the **suit property** to access her official documents for the purpose of settling the claims of her terminated employees. On that account therefore and to the extent as afore stated, I find that the third condition has also been established.

Before I wind up, let me make a comment on an issue of the representation of the applicant which was raised subsequent to the hearing of the application. While the chamber summons and affidavit in support of this matter was drawn by G & G Attorneys, throughout the proceedings, the applicant has been represented by advocate Edwin Enosy. On 13th March 2020, a complaint letter at the instance of G & G Attorneys was written to the Hon. Registrar to the effect that though the applicant happened to be their client, she never instructed them to take the conduct of the instant matter on her behalf. Further lamented in the complaint letter was the fact that, the advocate who prepared, signed and filed the application never belonged to the firm. After hearing from the complainant and the counsel for the applicant and upon having comments from the counsel for the respondents, I found that the issue, contentious as it was, and in the manner it was presented, was not within my jurisdiction at that particular stage. I thus declined from dealing with it and advised the complainant to refer the same to the Advocates Commitee.

In the final result the application partly succeeds to the extent as afore stated. It is accordingly ordered as follows:-

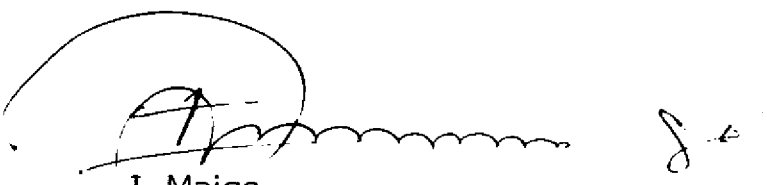
(1) The applicant is hereby granted 14 days access to the **suit property** for the purpose of collecting her official documents with a view to settling the claims of her terminated employees.

(2) For the avoidance of doubt, the collected documents shall not include any document of title of any movable property in the suit property or any document envisaged item –a- of the Security clause in the credit facility agreement attached and marked TIB-2 in the counter affidavit of Menson Ngahatilwa.

(3) The collection of the official documents shall be under the supervision of an independent court broker who shall be appointed by the Hon. Deputy Registrar.

(4) Each party shall bear its own costs.

It is so ordered.



I. Maige

JUDGE

14/04/2020

Date: 14/04/2020

Coram: Hon. C. Tengwa - DR

For the Applicant: Absent

For the 1st Respondent

For the 2nd Respondent Hang Changa SA, Vivian Method SA

For the 3rd Respondent: Herman Lupogo, Advocate

For the 4th Respondent

RMA: Adventina

COURT: Ruling delivered in the presence of the Respondents.

C. Tengwa
DEPUTY REGISTRAR
14/04/2020