IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 661 OF 2020

(Arising from Land Case No. 185 of 2020)

ANNA INVESTMENT CO. LTD..APPLICANT

VERSUS

NATIONAL MICROFINANCE BANK PLC

LTD (NMB) BANK)..1ST RESPONDENT

STARCOM HOTEL LIMITED...2ND RESPONDENT

ADILI AUCTION MART LIMITED.......................................3RD RESPONDENT

RULING

I. MAIGE, J

By a chamber summons supported by the affidavit deposed by her Managing Director one ANNA JEREMIAH KAAYA (the affidavit), the applicant calls upon the Court to restrain the respondents and/ or their agents of any kind from entering, trespassing unto, selling or order to sell by auction, the Farm No. 596 under CT No. 6358, Mahenge Village, Iringa Municipality in the name of Starcom Hotel Limited, Plot No. 1036 under CT No. 125005 Block E Sinza, Dar Es Salaam in the name of Anna Jeremiah Kaaya, Plot No. 376 under CT No. 84645 Block 43 Kijitonyama, Dar Es Salaam in the name of Anna Jeremiah, Plot No. 233 under CT No.

7949 Block A Ngusero USA River, Arusha in the name of Anna Jeremiah Kaaya and Farm No. 1845 under CT No. 19610 Ilikiurei Village Arumeru District Arusha in the name of Emmanuel Lugano Ngallah used as securities for the loan advanced to the applicant (together "the suit properties") pending determination of the main suit.

The application is premised on the provisions of Order XXXVII rules (1) (a) of the Civil Procedure Code Act, Cap. 33 RE, 2019.

The applicant and the first respondent has irrefutably a banker and customer relationship. As a security for loan advanced to the applicant by the first respondent, the **suit properties** were, by way of third party mortgages, pledged in favour of the first respondent.

In accordance with the facts deposed in paragraph 5 of the affidavit, the outstanding loan due and payable to the first respondent as of the date of the institution of the pending suit was TZS 3,560,000/=. As a result of what the deponent of the affidavit calls "*unpleasant and harsh business environment*", sometimes in 2019, she requested the first respondent to restructure the loan for the smooth servicing of the same.

It further claimed in the affidavit that, though the outstanding loan is TZS 3,560,000/-, the applicant has been served with a 14 days notice suggesting that, the outstanding loan amount is TZS 7,913,227,061.30/= or else the suit properties will be sold in realization of the outstanding loan.

In the counter affidavit deposed by its Principal Officer one CONSOLATHA RESTO, the first respondent maintains that; the outstanding loan is TZS 7,913,227,061.30/= and that, the applicant has failed to redeem the **suit properties** by repaying the same despite expiry of the statutory notice.

On the date of hearing, the applicant was represented by Mr. Mudhihiri, learned advocate and the first respondent by Mr. Ndano Emmanuel, learned advocate. Mr. Joseph Milumbe appeared for the second respondent while the third respondent was absent. With my direction, the application was argued by way of written submissions which were presented in due compliance with my order. I recommend the counsel for their very instructive submissions which have been duly taken into account in this my ruling.

Parties appear to share the same understanding on the tests involved in determining whether or not to grant a temporary injunction as enunciated in the notorious case of **Attilio vs. Mbowe, HCD, 1969.** Three conditions, according to the authority, must cumulatively be established. **First**, existence of a *prima facie* case. **Two**, necessity of the grant in preventing irreparable loss. **Three**, balance of convenience. It is also an elementary position of law that, temporary injunctive orders being equitable remedies, the trial court enjoys a wide discretion to grant or not provided that the discretion is exercised reasonably, judiciously and on sound legal principles.

In view of the foregoing therefore, my duty is to consider if the three conditions have been met. I will start with the first condition as to existence of a *prima facie* case in the pending suit.

In the affidavit, it would seem to me, the applicant has relied on three grounds to persuade the Court that a *prima facie* case has been demonstrated. The first one is the dispute on the quantum of the outstanding loan. While the first respondent claims that the same is **TZS 7,913,227,061.30/=,** to the applicant the outstanding balance is **TZS**

3,560,000,000/=. This is in accordance with the facts in paragraph 5 and 9 of the affidavit. The asserted less amount of the outstanding loan balance according to paragraph 5 of the affidavit, is accounted for in bank statement purportedly in annexure **AIC4** of the affidavit. Quite unusually, no such a statement is attached in the affidavit. It is not attached in the plaint as well though it is pleaded in paragraph 9 thereof.

To the contrary, the first respondent in her counter affidavit attached a bank statement to established the asserted amount. The applicant did not file any affidavit to comment on that. Neither did she, in her written submissions, remark on the omission to attach the alleged statement. In the absence of the bank statement, I submit, this Court has no factual basis upon which to imply the seriousness of the claim.

In addition, the facts in the affidavit as supported by its annexures, clearly suggest that, neither of the mortgages was pledged by the applicant. All of them were pleaded by third parties including the second respondent and the deponent of the affidavit in her individual personal capacity. She has, as a mortgagor, not been impleded as a party to the application. Neither to the pending suit.

As that is not enough, though the applicant expressly admits to have defaulted in terms of the facility and mortgage deeds, her readiness to repay the loan according to paragraph 12 of the affidavit, is not only conditional upon ascertaining the quantum of the outstanding loan but more so upon *"restructuring of the said facility applying currently prevailing interest rates in the market"*.

Yet, the applicant places reliance on inadequacy of the notice of default. She claims to have been served with 14 days notice instead of the statutory notice of 60 days. In counter affidavit, the first respondent claims to have served the statutory notice on the applicant before issuing the 14 days notice. In her submissions, the applicant did not comment on this point.

From the foregoing discussions, it cannot, by any standard, be said that a *prima facie* case for the purpose of the grant of a temporary injunctive order has been demonstrated. The first issue has thus not been established.

On irreparable loss, the factual deposition in the affidavit as amplified in the written submissions is that, the properties are located in prime areas

and therefore, if they are not protected, there is no way the applicant can recover the same properties. The counsel placed reliance on the authority of this Court in **NATIONAL CHICKS CORPORATION LIMITED VS. NATIONAL BANK OF COMMERCE, MISC. LAND APPLICATION NO. 22 OF 2017** in support of the view that, loss of a prime area can amount to irreparable loss.

The disposal of the suit properties before the conclusion of the case, it is further submitted, will occasion loss of profit and goodwill on the part of the applicant as the **suit properties** were used for commercial activities. Reference was made in the case of **SIGORI INVESTMENT (T) LTD VS EQUITY BANK TANZANIA LIMITED, LAND APPLICATION NO. 56 OF 2019** which supports the view that, loss of earning may amount to irreparable loss.

I have carefully gone through the affidavit in support of the application. The facts constituting the alleged irreparable loss is deposed in paragraph 14 of the affidavit which for clarity I will reproduce hereunder:-

> *14. That in the event the suit premises will eventually be sold in auction by the 1st Respondent through the service of the 3rd*

Respondent the Applicant will suffer irreparable loss as will not be able to recover the similar properties, and given the circumstances of this case, it is in the balance of probability that the applicant is the one who will stand to suffer more than the Respondents if the application is not granted.

Where the mortgaged properties are, have not been deposed in the affidavit despite the properties being multiple. Though the applicant claims that she will lose the properties if the injunctive order is not granted, she does not, in the affidavit or at all, state what among the seven mortgaged properties belongs to her. That is so, notwithstanding that on the face of them, neither of the properties is registered in the name of the applicant. She should have. Besides, there is no factual deposition in the affidavit of the use of either of the mortgaged properties by the applicant. In such a situation therefore, how can the applicant establish irreparable loss?

On balance, the applicant claims that, she is likely to suffer more if the injunctive order is not granted than the first respondent would suffer if the same was granted. The first respondent submits on the contrary. On my part, I am of the view that, the balance of convenience in the

circumstance lies in favour of the first respondent for the reason that I am going to assign gradually as I go on.

As I said above, the applicant admits indebtedness to the first respondent. That aside, her readiness to repay the loan is subject to the first respondent agreeing to restructure the loan. The first respondent is a banker who trade on money lending. As a matter of common sense therefore, restrictions on recovery of loan from her borrowers should not be easily allowed. This is so because a banker advances money which does not belong to her but belongs to depositors who have to be paid either on demand or on maturity after a certain period. If the money advanced is not recovered, the banker is likely to suffer loss and will not be able to balance liquidity and profitability. This, as correctly observed in **Agency Cargo International vs. Eurafrican Bank (T)Ltd, Civil Case No. 44 of 1998, HC (DSM) Unreported**, is likely to render the banker *"an obvious candidate for bankruptcy"* which is not healthy in the country's economy. It is in view of the foregoing that, I answer the third issue in favour of the first respondent.

In the final result and for the foregoing reasons therefore, the application is without merit. It is accordingly dismissed. I will not give an order to costs in the circumstance.

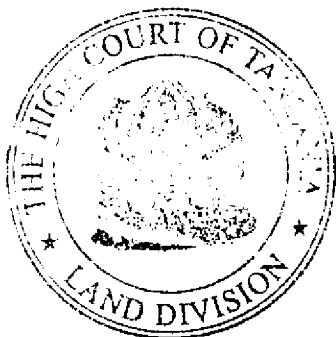
It is so ordered.

I. Maige

JUDGE

24/05/2021

Ruling delivered this 24th day of May, 2021 in the absence of the applicant, 2nd, 4th and 5th respondents and in the presence of advocate Mary Machira for 1st and 3rd respondents.



I. Maige

JUDGE

24/05/2021