

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 375 OF 2021

(Arising from Land Case No. 116 of 2021 in the High Court Land Division.)

SALVATORY CELESTINE RWABIZI

t/a THESA CONSTRUCTION COMPANY 1ST APPLICANT

AL KARIMO INVESTMENT LIMITED 2ND APPLICANT

VERSUS

INTERNATIONAL COMMERCIAL BANK (T) LTD.....RESPONDENT

RULING

Date of Last Order: 20/10/2021 &

Date of Ruling: 25/10/2021

A. MSAFIRI, J:

Pending in this Court, is a suit Land Case No. 116 of 2021 filed by the applicants, seeking for several orders including declaratory orders against the respondent International Commercial Bank (T) Ltd in which I will refer in this Ruling as "the Bank". Now, the applicants pursuant to Order XXXVII Rules 1 (a) and (b) of the Civil Procedure Code, Cap. 33 R.E 2019 have filed this application praying for the following orders, pending determination of their main claims in the suit:

- 1. This Honourable Court be pleased to grant a temporally injunction restraining the Respondent, her agents, workmen, assignees and or any person working under the Respondent's*

instructions from disposing off through sale and or anyhow tempering with the following properties; a piece of land known as Plot No. 827/22 City Center Floor II, Dar es salaam with CT.NO. 166900/1/25 in the name of SARAH INVESTMENT LIMITED; a piece of land known as Plot No. 1374/208 Central Area, Dar es Salaam in the name of Hyderali Fidahusseini Khaki with CT No. 186003/79 and a piece of land known as Plot No. 2429/208 Kisutu Area Dar es Salaam in the name of Mehbubali Fidahusseini Khaki with CT. No. 186003/81/2 pending hearing and determination of the main suit.

- 2. Stop deducting any amount of money from the Overdraft Facility Account AA No. 2019/036 in the name of Salvatory Celestine Rwabizi t/a These Construction Company, contrary to the purpose of which the Secured Overdraft (SOD) was sought and obtained, pending hearing and determination of the main suit.*
- 3. Costs of this Application be provided for.*
- 4. Any other relief (s) this Court deems fit and equitable to grant.*

The hearing of this application was conducted by way of written submissions. All submissions were drafted and filed by learned counsels. Mr. Mutakyahwa Charles, learned counsel appeared and argued the application on behalf of the applicants, while Mr. Richard Madibi, learned counsel, appeared for the respondent. Both learned counsels seems to recognize the principles for granting injunction as laid down in the famous case of ***Atilio vs Mbowe*** [1969] HCD 284.

In his submission for this Application, Mr. Mutakyahwa prayed the affidavit of one Hyderali Fidahusseini Khaki be adopted and form part of the submissions. According to his submission the 1st applicant was in need of USD 4.5 Million to finance the construction of the residential commercial building. He approached the respondent whereby the respondent was capable to grant USD 1.7 Million. Since the respondent was incapable of financing the project beyond USD 1.7 million, the appellant solicited additional financing from the Commercial Bank of Africa (T) Ltd(herein referred as CBA), to the tune of USD 4.5 Million and arranged to re-finance the respondent's loan facility and the remaining USD 2.8 Million would finance the 1st applicant's completion of project. The 1st applicant communicated the said agreement to the respondent who in turn assured the CBA of the satisfactorily running of the applicant's loan. The respondent also issued an overdraft facility of TZS. 690,000,000/= through the 2nd applicant to cover the costs in processing the loan by CBA and re-financing of USD 1.7 Million debt. However, despite the agreed arrangements, the respondent went further by placing the 1st applicant loan of USD 1.7 Million to Non-Performance Loan (NPL) resulting to CBA canceling their loan to the applicants. Furthermore, despite CBA cancelling the loan, the respondent without consent of the applicants, continue to deduct amount of money from the Overdraft Account amounting to TZS. 690,000,000/= which was secured by number of properties mentioned in the Chamber Application.

Mr. Mutakyawa submitted further that, a temporally injunction order is necessary for restraining the respondent from anyhow tempering with the securities to the above stated loan and restraining the respondent

from anyhow tempering with the overdraft facility account. The applicant has indicated the existence of serious issues to be determined based on the fact that the 1st applicant deployed the list of properties as collateral to the loan, disposing of the same by the respondent will occasion much hardship to the applicants. He stated further that it is the applicants who tend to suffer more if the injunction is not granted owing to the fact that the properties are likely to be sold by the respondent and money from the overdraft account be depleted adding unnecessary liability to the applicant. He concluded that the applicants are likely to suffer irreparable loss if the injunction will not be granted.

In reply to the above submission Mr. Madibi has responded to Mr. Mutakyahwa's submissions by arguing around the three principles of injunction as laid down in the case of ***Atilio vs. Mbowe (supra)*** and contented that the applicants did not adhere to the mentioned conditions necessary for the court to grant temporary injunction.

He contended that, there is no contractual proof between the applicants, respondent and the CBA for loan financing. Therefore, there is no triable serious issue which can lead the Court to grant an interim injunction. The applicants are still in default of their loan owed by the respondent. He added that, the respondent has issued notice of default to the mortgagors for purpose of selling the mortgaged properties and they have not complained about it and that is the reason they are not party to this suit.

He further submitted that there is no prima facie case against the respondent since applicants have failed to state their interest in the suit properties, they have failed to attach a copy of the certificate of title from

which they seek the order. The applicant are borrowers who have failed to pay their loan and the mortgaged properties over the said loan are owned by Hyderali Fidahusseini Khaki and Sarah Investment Limited who are not party to the main suit and this application. In his view, the applicants cannot be granted an interim injunction as they have no interest over the mortgaged properties. The guarantors are the one with the interest over the suit property and they have not raised any issue regarding the sale of the properties. He cited the High Court case of **Mariam Christopher vs. Equity Bank Tanzania Ltd & Christopher Edward Makundi**, Misc. Land Case Appl. No. 1070 of 2017.

As to whether the applicants will suffer irreparable injury, Mr. Madibi submitted that, they have failed to prove alleged loss as they do not have any interest in the suit property. The mortgagors have been served with statutory default notice and they have not objected in either way. He cemented his reasons by citing the case of **Christopher P. Chale vs. Commercial Bank of Africa**, Misc. Civil Application No.635 of 2017, High Court of Tanzania.

On the principle as to who is like to suffer great hardships and mischief, the learned counsel submitted that, it is the respondent who will suffer since the applicant defaulted the loan, the money lent is public money therefore the respondent needs to exercise the statutory remedies in the mortgaged suit to recover the same. The applicants will not suffer anything as they do not have any interest in the suit property. He prayed for the Application to be dismissed with costs.

In rejoinder, Mr. Mutakyahwa reiterated what has been stated in his previous submissions and responded that there is no written tripartite agreement between the applicants, the respondent and Commercial Bank of Africa, however, going through annexures 2,3 and 4 to the Plaint, the tripartite arrangement is well established and the respondent participated. He further added that, both borrower and the mortgagor have interest to protect regarding advanced loan agreement. The mortgagors being party to the proceedings is not the only way they can protect his/her interest as they can do so as witness.

In determining an application of this nature what the Court ought to consider is whether the applicants has managed to establish the three principles outlined in the celebrated case of **Atilio versus Mbowe (supra)**. The three principles outlined therein are: -

1. *That there is a serious question to be tried and the plaintiff is likely to succeed.*
2. *That the court's interference is necessary to prevent the applicant from suffering irreparable loss.*
3. *That on a balance of convenience there will be greater hardship on the part of the plaintiff if injunction is not issued.*

In interpreting the three principles, **Sarkar on Code of Civil Procedure, Ninth Edition, 2000 at page 1997** had this to say: -

"By irreparable injury it is not meant that there must be no physical possibility of repairing the injury all that is meant is that the injury would be a material one, and one which could not be adequately remedied by damages"

On the balance of convenience, the learned author stated that: -

"Where the plaintiffs are likely to suffer irreparable injury in case the injunction is refused and balance of convenience also lies in their favor, they are entitled to grant an interim injunction.

The learned author went on to elaborate that: -

"Before granting injunction the court is required to consider the existence of prima facie case which would also imply prima facie consideration of the jurisdiction of that court. There would not be a prima facie case if the court considering has apparently no jurisdiction to entertain the suit.

Therefore, in order to secure an order for temporary injunction, the applicants has to establish in whole the three co existing requisites (see the case of **Tanzania Breweries Limited vs. Kibo Breweries Limited and Another (1998) EA 341**).

On this foot, I will start with the first principle that, the applicant must establish that there is a prima facie case or there is a serious question to be tried and the applicant is likely to succeed. As stated earlier there is main Land Case No. 116 of 2021 instituted by the applicants. The applicants' claim in the main suit is for this court's declaration order that the defendant's act of categorizing the plaintiffs loan status as a Non Performing Loan (NPL) was a serious breach of special arrangements between the plaintiffs, the defendant and CBA and has caused damages to the plaintiffs. The reliefs prayed in the main suit is for this court to declare that the defendant was in breach of special tripartite arrangement

and that breach has caused gross economic loss to the plaintiffs. From this facts, I have failed to detect any serious triable issue in connection with this application, it is apparent that the main suit relates to breach of contractual obligations between the parties. I agree with the submission of counsel for the respondents that the applicants being borrowers, they have failed to state the interest they have in the suit properties.

On the second principle of irreparable loss, the applicant has to show that, if the order for temporary injunction will not be granted the applicant will suffer irreparable loss. (See the case of ***Kibo Match Group Limited vs H.S Impex Limited [2002] TLR 152***). My determination is that the applicants are not the owners of the suit properties and they have not established the interest they have in the said properties. The mortgagors who are the owners are not party to this matter. In his submission, counsel for the applicants has stated that, the applicants will suffer more if the injunction is not granted owing to the fact that the suit properties are likely to be sold by the respondent. However, the applicants have failed to give a clear account of the particulars of irreparable loss or injury they will suffer as they are not mortgagors or the owners of the mortgaged properties.

On the balance of convenience, since the applicants have failed to establish the first and second conditions, I will not dwell much on this. I wish to emphasize that, the discretion to grant injunction, like any other judicial discretion, must be judiciously exercised upon the court being satisfied of the existence of three conditions above. A court cannot grant an injunction simply because it thinks it is convenient to do so. As held in the case of **Charles D. Msumari & 83 Others vs. The Directors of**

Tanzania Harbours Authority, Civil Appeal No. 18 of 1977, HCT (Unreported) that;

"Courts cannot grant injunctions simply because 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... 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".

In the second prayer under chamber summons, the applicants prayed before this Court for the order to stop the deduction of any amount of money from the overdraft facility account AA No. 2019/036 in the name of Salvatory Celestine Rwabizi t/a Thesa Construction Company, contrary to the purpose of which the Secured Overdraft (SOD) was sought and obtained, pending hearing and determination of the main suit.

I am of the view that this are one of those unmaintainable prayers. It is so because the prayer does not fall under the jurisdiction of this Court. The prayer fall under a normal loan contractual obligation which does not

touch the land in disputes. The subject matter to this prayer is the transaction on the overdraft facility account whereas there is need by applicant for the court to intervene and stop the Bank from deducting the money from said account. This Court lacks mandate to determine the commercial transactions between the parties. I feel no need to dwell on this prayer and I reject it.

Having observed above, I can summarily conclude that the applicants in the instant case in respect to the first prayer in the chamber summons have not established a sufficient case worth the grant of temporary injunction as they have failed to meet the conditions set in the case of **Atilio vs. Mbowe** (supra). In the second prayer, this court has no mandate to entertain the same as it has no connection with the land matters. For the above reasons, this Application is hereby dismissed. Costs shall follow the event.

It is so ordered.

Dated at Dar es Salaam this 25th of October, 2021.



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A. MSAFIRI

JUDGE

