

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 17 OF 2023

GENOVEVA NDELIMBI MURO.....1ST APPLICANT

ALEX MASHISHANGA MAGANGA.....2ND APPLICANT

VERSUS

TANZANIA COMMERCIAL BANK PLC.....1ST RESPONDENT

AFRIMAX ENTERPRISES LIMITED.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

RULING

Date of Last Order: 23/03/2023

Date of Ruling: 29/03/2023

A. MSAFIRI, J

This application was brought under Section 2(3) of the Judicature and Application of Laws Act [Cap 358 R.E 2019] reading together with Section 95 of the Civil Procedure Code [Cap 33 R.E 2019] and filed before this Court on 11th day of January, 2023.

In essence, the application centres on the prayer for *mareva* injunction against the 1st and 2nd respondents and any other persons discharging any duty on their behalf by restraining them from doing any auction on the 14th day of January, 2023 or other similar acts on a Farm No. 94, sqm 33594, L.O No. 107043 (the landed property) registered in the name of the 2nd applicant pending expiration of ninety (90) days' notice of their intention to sue the 1st respondent.

Acts -

The present application is supported by the joint affidavit deposed by the applicants themselves and opposed through joint counter affidavit of the 1st and 3rd respondents and counter affidavit by the 2nd respondent.

On 23rd day of March, 2023 when this matter was scheduled for hearing, the applicants were represented by Mr Hashim Mziray, learned advocate, the 1st and 3rd respondents were serviced by Messrs. Francis Wisdom, and Meyiseyeki Msangi, learned State Attorneys and Mr Moris Mdahila, Marketing Officer for the 2nd respondent appeared on behalf of the 2nd respondent.

The hearing was conducted viva voce. Mr Mziray started his submission by praying to adopt the applicant's joint affidavit to form part of his submissions in chief.

He submitted that, in accordance to paragraph 16 of the joint affidavit which is in line with annexure 10, the applicants are awaiting for maturity of 90 days so that they can file a suit against the respondents.

He stated that, on 13th day of January, 2023, this Court [Hon. A. Mgeyekwa, J] issued the order of *maintenance of status quo* so as to stop the auction which was set to be conducted on 14th day of January, 2023 as per paragraph 15 of the joint affidavit.

He argued further, that, since this Court has granted the order of *status quo*, it was just and fair for this Court to grant for injunction that is being sought for the remaining eighteen (18) days prior to the expiration of the notice.

In rebuttal, Mr. Francis Wisdom and Mr. Meyiseyeki Msangi, objected the application. Mr. Wisdom maintained that, the application for

Atts.

injunction has to meet three conditions as postulated in the famous case of **Attilio vs. Mbowe** (1969) HCD No. 284. He referred this Court to the case of **Mwakeye Investment Ltd vs. Access Bank (T) Ltd** to buttress his position.

He contended that, looking at the affidavit of the applicants specifically paragraph 17, it states that the applicants will suffer irreparable loss, however, the said loss is not stated, so this Court is left in speculation of that loss. He referred again the case of **Mwakeye supra** at page 5.

He qualified that, it was necessary for the applicants to have revealed the irreparable loss that they were going to suffer. He said that, this was principled in the case of **Christopher Chale vs. Commercial Bank of Africa**, Misc. Civil Application No. 635 of 2017 at page 5.

Regarding paragraph 14 of the affidavit, he asserted that, there is no any attachment to prove the claims therein so as to show that the intended suit has chances to succeed. He stated that, the applicants admitted to have taken the loan and defaulted on repayment, thus, have failed to show that the case has likelihood of success.

As to the balance of convenience, he submitted that, paragraph 17 of the counter affidavit has shown how the respondents will suffer. He referred this Court to the decision of **Christopher Chale supra** at page 8 to fortify his submission.

He detailed that, the 1st respondent is a bank which depends on lending money business, so, if the loans are not repaid on time, the bank is in a position to suffer great loss than the applicants. To end, he prayed for the application to be dismissed. *Alls.*

Mr. Msangi added that, since the applicants are not disputing clause 3.1 of annexure 3, then the issue of interest rate is not a triable issue. He stated that, the applicants are still in debt of the outstanding loan of TZS. 712,288,421.08 to date. To back up his assertion, he cited the case of **Leopard Met Logistics Co. Ltd vs. Tanzania Commercial Bank Ltd & Others**. He too, prayed for the application to be dismissed with costs.

Mr. Moris for the 2nd respondent, also, objected the application. He prayed to adopt the contents of his counter affidavit as part of his submissions. He averred that, he has no more to add and prayed for this Court not to grant the application.

In rejoinder, Mr Mziray vehemently denied all the issues raised by the respondents in their submissions. He maintained that, the respondents did not respond on the order of maintenance of *status quo* by this Court on 13th day of January, 2023. He added that, this Court would not have issued the order of *status quo* if the three conditions were not met.

He specified that, on the three tests, if you read paragraphs 3, 4, 8 and 14 of the affidavit, you will see that there is serious triable issue whereby the loan has been paid. He referred this Court to annexure 2 of the affidavit, which shows that, the 1st applicant has already repaid the loan at coram 9.

On the issue of irreparable loss, he emphasised to have been incorporated at paragraph 17 of the affidavit, that, there is a threat of auctioning the plot in dispute, and if conducted, the applicants will suffer irreparable loss. He reiterated his prayers.

Adls.

This is an application for *mareva injunction*. The principle of *mareva injunction* was enunciated in the famous case of **Mareva Compania Naviera SA vs. International Bulkcarriers SA The Mareva** [1980] 1 All ER 213, Court of Appeal, Civil Division, Lord Denning observed and elaborated that:

“There is only one qualification to be made. The Court will not grant an injunction to protect a person who has no legal or equitable right whatever. That appears from North London Railway Co. vs. Great Northern Railway Co. But, subject to that qualification, the statute gives a wide general power to the Courts”.
(Emphasis supplied).

It is trite law that the cardinal principle of *mareva* injunction is a common law doctrine and its applicability in our jurisdiction is vide section 2(3) of the Judicature and Application of Laws Act [Cap 358 R.E 2019].

For such an injunction to be issued, the Court must satisfy itself that there is no pending suit rather it is an application pending obtaining a legal standing to institute a law suit.

However, despite the fact that this is a *mareva* injunction, since it is a specie of temporary injunctions, the principles in temporary injunction applications are also applicable to *mareva* injunctions. This means that the applicants has to establish all three conditions which are mandatory in the applications for injunctions.

Therefore, the pertinent issue here is whether the applicants has managed to meet all three conditions as set in the famous case of **Attilio vs. Mbowe (supra)**.

Attilio

In the said case, three essential elements for application of this kind were set whereas the applicant has to prove first; the existence of *prima facie* case, second; that there is irreparable loss and lastly; on the balance of inconvenience. This principle set in the said case has to be fulfilled even in the applications for *mareva* injunctions.

Having read the contents of paragraphs 3, 4, 8 and 14 of the joint affidavit of the applicant's, I agree that there is a triable issue regarding service of the loan facility. I am saying so, because, paragraph 9 of the joint counter affidavit by the 1st and 3rd respondents amplifies that, the amount of overdraft has increased to the tune of TZS 170,504,098.35/= plus the outstanding balance of TZS 354,736,944.34/= from the original loan facility, the principal amount, penalties and interest has accrued to the grand total of TZS 541,784,322.72/=. Further, the submissions by Mr. Msangi, revealed that, the applicants are still in debt of the outstanding amount of TZS 712,288,421.08/= to date, hence, prove existence of the *prima facie case* not only against the 1st respondent but also against the 1st applicant for her non-repayment of the loan facility. The 1st applicant has maintained that she had discovered later that the 1st respondent has restructured the interest rate arbitrarily.

In the case of **Abdi Ally Salehe vs. Asac Care Unit Limited & 2 Others, Civil Revision No. 3 of 2012, (CAT-DSM), (Unreported)** at page 8 held that:

"Once the court finds that there is a prima facie case, it should then go on to investigate whether the applicant stands to suffer irreparable loss, not capable of being atoned for by way of damages". - *Ally*

Having found that there is a prima facie case between the parties, I went on to determine the issue of irreparable loss. Paragraph 17 of the joint affidavit supporting the application is not clear on how the applicants have suffered loss or will suffer irreparable loss if this application will not be granted. The counsel for the applicants' stated that in his submissions, if the auction will be conducted, the applicants will suffer irreparable loss but such mere claims does not suffice to qualify the intended irreparable loss.

Since the joint affidavit of the applicants' do not clearly show whether and how the applicants' have suffered or will suffer such irreparable loss, this Court will rely to paragraph 17 of the joint counter affidavit of the 1st and 3rd respondents, that the 1st respondent will suffer the loss twice by continuous default in repaying the loan by the 1st applicant and its operating capital will be reduced. That, by signing the mortgaged deed the 2nd applicant was prepared to meet the consequence of default and not otherwise.

As a result, I find that, the applicants' have failed to establish the irreparable loss to be suffered by them rather the speculation thereof and thus, the same is unfounded in the premise.

On the balance of convenience, the applicants said nothing but Mr. Wisdom, counsel for the 1st and 3rd respondents referred this Court to paragraph 17 of the counter affidavit to cement on the position, and Mr. Mziray during his rejoinder did not reply to it, hence, the applicants again failed to meet this condition.

To put the records straight, it is not true as averred by the counsel for the applicants that, this Court would not have issued the maintenance

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of status quo if the three conditions were not met, so to say, the Court's record dated 13th day of January, 2023 is vice versa to his aversion and as such a blatant distortion of the truth. The order was issued ex-parte pending the hearing of this application. The issue of the applicants' meeting the three conditions did not arise as it was a short time order to maintain status quo to pave way for the pleadings in this main application to be completed.

In the upshot, this Court finds that the applicants have failed to meet conditions necessary for granting of the reliefs sought at the auspices of *mareva injunction*. Having found that, I hereby dismiss the application in its entirety with costs.

Order accordingly.

Dated at Dar es-Salaam this 29th day of March, 2023.



A. MSAFIRI
JUDGE
29/03/2023

