IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 473 OF 2023

HENROD YUSUPH KIKOTI ..... 1ST APPLICANT

JULIANA BALDOVINO MBATA ..... 2ND APPLICANT

KIKOKO ENTERPRISES ..... 3RD APPLICANT

VERSUS

TCB BANK PLC ..... 1ST RESPONDENT
ATTORNEY GENERAL OF TANZANIA ..... 2ND RESPONDENT
BROVITAS COMPANY ..... 3RD RESPONDENT

19/09/2023 & 29/09/2023

RULING

A. MSAFIRI, J

This is an Application for *Mareva Injunction* filed by applicants before this Court on 31.07.2023 under a certificate of urgency. The Application intended to move this Court to issue an order to restrain the respondents herein, their authorised agents, or any person claiming under them from disposing off by auctioning houses under dispute as described in the chamber summons in the Application, pending the expiry of Ninety (90) days statutory Notice period which has been served to the Attorney General in respect of the disputed property.

The Application was made under Sections 3A (1) and (2) and 95 and under proviso to Rule 2(1) of Order XXXVII (1) (a) and proviso to Rule 1(b), all of the Civil Procedure Code Cap 33 [R.E. 2019] (herein the CPC) and Section 2(3) of the Judicature and Application of Laws Act, Cap 358 [R.E. 2019] (herein the JALA). The Application was made by way of chamber summons supported by an affidavit of the applicant Henrod Yusuph Kikoti.

The hearing of the Application was conducted by way of written submissions whereby the submissions in support of the Application was drawn and filed by Mr Barnaba Luguwa, learned advocate for the applicant, while the reply submission contesting the Application was drawn and filed by Mr Stanley Kalokola, learned State Attorney for the 1st and 2nd respondents. The 3rd respondent was absent as he refused to receive summons and for the reasons known to himself, he never entered appearance in Court. The Court, having been satisfied that he was duly served, entered an ex-parte order against the 3rd respondent.

Mr Luguwa submitted that, the 1st applicant is the Managing Director of the 3rd applicant. That the 3rd applicant obtained a loan from the 1st respondent and the security for the said loan was houses in dispute.

He said that, as the time went on the business did not run smoothly due to the COVID -19 pandemic, hence the 1st applicant failed to repay the loan as it was scheduled. That as a result of failure to service the loan, the respondents are likely to dispose the applicants' properties, hence they have filed this Application to restrain the respondents from acting so pending the expiry of 90 days' Notice.

Mr Luguwa advanced that the reason for filing this Application is that some of the properties held by the respondents were not part of the loan agreement. That the matrimonial property of the guarantor was included in the loan security in the ignorance of the wife hence that the same need to be discharged.

He submitted further that the applicant and the respondent had made agreement during the mediation during Land Case No. 182 of 2020, to reschedule the mode of payment in which the Bank agreed to take the applicant's trees farm as a substitute of the former collateral. He was of the view that although the said agreement was not reduced into writing yet the Bank should not be allowed to depart from their arrangements.

He said that the applicants were surprised by an advert in the newspaper whereby their four houses were advertised for sale contrary to the agreements which was awaiting execution. That, the court broker

knew the whereabouts of the applicants but they did not serve the notice physically, hence the applicants did not know the date when the auction will take place, and that all this is being done while the respondents have in their possession the six Title Deeds of the applicants.

He argued that inability of the applicants to use the said six Title deeds to raise funds to boost their capital is an injury which cannot be ignored. He prayed that this Court be pleased to grant the Application pending the expiration of the ninety days' Notice.

In response, Mr Kalokola contended that the applicants have failed to demonstrate any sufficient reasons to be granted the Application. He said that the 1st respondent took every legal procedure to remind the Applicant to pay the loan but in vain. He added that economic hardship has never been sufficient reason for this Court to grant the Application. He argued that there was no lock down in Tanzania as alleged by the applicant.

Mr Kalokola further stated that since the applicants acknowledges to have obtained the loan from the 1st respondent and defaulted, then that the loan has to be paid back to the 1st respondent, and that the securities were legally held by the 1st respondent as per their mortgage deed.

To bolster his points he cited the case of **Private Agricultural Sector Support Trust & Another vs. Kilimanjaro cooperative Bank Ltd**, Consolidated, Civil Appeal No. 171 and 172 of 2019 where the Court of Appeal held that:-

> *'The parameters of a loan are pretty straightforward. If you borrow money, you must ultimately pay it back, in most cases with interest. There is no shortcut, even to JRT in this Appeal.'*

Mr Kalokola was also of the view that no order can be issued against the Government as per Order XXXVII (1) and (2) of the CPC. To bolster his point, he cited the case of **Mwanza City Council vs. Alfred Wambura,** Civil Revision No. 1 of 2020 High Court of Tanzania (Mwanza District Registry) (Unreported).

Mr Kalokola was of the view that the applicants have failed to demonstrate on how the 1st respondent has acted contrary to the loan agreement. And that the applicants have failed in all aspects to expound facts warranting grant of Mareva injunction.

On rejoinder, Mr Luguwa reiterated what was stated in the submission in chief and insisted that the parties had agreed in the alternative way to pay the loan.

Having gone through the submissions of the parties, the issue for determination is whether the Application is meritorious. And the merit of this Application can be established only if the applicants have managed to meet the three conditions set in the famous case of **Attilio vs Mbowe,** 1969) HCD namely; -

i. *Existence of prima facie case,*
ii. *Establishment of the fact that the applicants will suffer irreparable loss if the Application will not be granted,*
iii. *Balance of convenience by proof that the applicants are at the risk of getting greater loss compared to the respondents.*

I have noted that the in the affidavit deponed by the applicant and also in the submissions by the counsel for the applicants, he was not guided by the above three mandatory conditions. Since it is trite law that the applicant have to establish the existence of the said three conditions before the Court can grant his application, then I will be guided by that principle of law as I determine the merit of this Application.

Prima facie case was defined in the book of **C.K. Takwani**, **Civil Procedure with Limitation Act**, 1963, 7th Edition at page 347

'The court must be satisfied that there is a ***bona fide dispute raised by the applicant****, that there is an* ***arguable case for trial*** *which needs investigation and a decision on merits and on the facts before the court that* ***there is a probability of the applicant***

being entitled to the relief *claimed by him. The existence of a prima facie right and infraction of such right is condition precedent for grant of temporary injunction. The* ***burden is on the plaintiff*** *to* ***satisfy the court by leading evidence*** *or otherwise that he has a prima facie case in his favour.'(emphasis added).*

Despite the fact that the Applicant did not submit on the existence of a prima facie case against the respondent, the evidence advanced in the pleadings reveals that the 1st respondent advanced the loan to the applicant who later defaulted and came to this Court with this Application. There is no evidence that has been advanced as proof of the alternative agreement reached between the applicants and the respondent that the respondents have gone against. In that regard, I find that no prima facie case has been established by the applicants.

The applicants did not show how they will suffer irreparable loss if the Application is not granted. In the affidavit of the 1st applicant, he has just stated that he stands to suffer irreparable injuries as he stands to lose his properties. Taking into consideration that irreparable loss does not mean ordinary loss, it is obvious where one defaults in paying the loan and his security taken by the financial institution through legal procedures, the loss must be incurred, however, that cannot be called irreparable loss, Alls.

because the defaulter must bear responsibility as agreed in the mortgage agreement.

Having failed to advance the two above conditions, it is clear that the Application is bound to fail as it is the principle that the three conditions must be established cumulatively.

In upshot, I find that the Application lacks merit and it is hereby dismissed with costs.

It is so ordered.

A. MSAFIRI

JUDGE

29/09/2023

THE HIGH COURT OF TANZANIA
LAND DIVISION