IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS LAND APPLICATION NO. 550 OF 2023

BETWEEN

WILSON CHRISTOPHER TARIMO ....1ST APPLICANT

WAZIRI CHRISTOPHER TARIMO.....2ND APPLICANT

KIBO NATURAL WATER LIMITED.....3RD APPLICANT

VERSUS

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

ATTORNEY GENERAL..... 2ND RESPONDENT

MBUZAX AUCTION MART AND COMPANY LTD.....3RD RESPONDENT

RULING

21/11/2023 & 24/11/2023

A. MSAFIRI, J.

The applicants have brought this Application under Section 2(1) and 2(3) of the Judicature and Application of Laws Act, Cap 358, R.E 2019(JALA) praying for this Court to grant orders in the nature of *Mareva injunction* pending institution of the intended suit after expiry of ninety (90) notice which was served upon the respondents on 28th August 2023. That the Court be pleased to issue interim orders in the nature of temporary

injunction to restrain the respondents from taking possession, occupy, sale, lease, disposition or any dealings in respect of Plot No. 332, Block "B" with Title Deed No.49338 at Nyegezi, Mwanza City and Plot No. 88, Block "D" with Title Deed No. 44600 at Ilemela, Mwanza City (herein as suit premises) until the final determination of the intended suit to be filed after expiry of ninety 90 days' notice.

The Application has been taken at the instance of Star Chambers Advocates and is supported by the affidavit of Wilson Christopher Tarimo and Waziri Christopher Tarimo, the applicants. The Application was contested by the 1st and 2nd respondents through their joint counter affidavit which was deposed by Grina Mwakyoma, a Principal Officer of the 1st respondent. The 3rd respondent was absent despite the fact that it was duly served.

At the hearing which was conducted by way of written submissions, the applicants' submission in chief and rejoinder were drawn and filed by Mohamed Tibanyendera, learned advocate while the 1st and 2nd respondents' submission was drawn and filed jointly by Mr. Daniel Nyakiha, State Attorney and Tausi Swedi, also a State Attorney.

In submission in chief, Mr. Tibanyendera started by praying to adopt the contents of the applicants' affidavit and reply to the counter affidavit as part and parcel of his submission. He said that on 20/5/2014, the 3rd

applicant, Kibo Natural Water and the 1st respondent, TIB Bank entered into a Credit Facility Agreement. The agreement intended to finance the investment of the 3rd applicant in respect of facilitating the financial leasing of Tanzania Shillings equivalent to USD 343,562.00, a medium term loan of TZS 60,000,000.00 and an overdraft facility of TZS 150,000,000.00.

That, the credit facility agreement was executed and the 3rd applicant complied with all conditions, but the 1st respondent did not fulfil the conditions set out in Article 1- Section 1.01 in respect of medium term loan and the overdraft facility, thus, a total of TZS 210,000,000.00 was not made available to the 3rd applicant as agreed.

Mr. Tibanyendera submitted further that the 1st respondent managed to fulfil the conditions set out in Article 1- section 1.01 in respect of financial leasing only whereby a complete water processing machinery system was procured, shipped and installed at the premises agreed in the credit facility agreement.

He said further that following the conducts of the 1st respondent, there was an agreement for amending the credit facility agreement in 2017, but despite that amendment, the 1st respondent continued to behave in the manner that amount to breach of material conditions by failure to release the funds as agreed.

That following the 1st respondent's breach of conditions and terms of credit facility agreement and the Amendment, the 3rd applicant issued a notice of cancellation of the credit facility which was well received by the 1st respondent but not acted upon. That, instead of exercising her rights as stipulated in the credit facility agreement of repossessing the plant purchased in her own name and fixed at Moshi, the 1st respondent intends to dispose of the landed properties deposited as collaterals and guaranteed by the 1st and 2nd applicants.

That, on 13/8/2022, the applicants were shocked to read in Habari Leo Newspaper an advertisement published by the 3rd respondent acting on behalf of the 1st respondent of their intention to sell by auction, the suit premises.

Mr. Tibanyendera went on to point to this Court on why it should grant *Mareva injunction*. That the first reason is that the applicants cannot institute a suit against the 1st and 2nd respondents until the expiry of 90 days statutory notice which was issued on 28/8/2023. Second reason is that the respondents intends to sell the suit properties of the 1st and 2nd applicants prior to the expiry of the 90 days statutory notice. Third reason is that there is a serious triable issue between the parties which has been disclosed in the pleadings which has to be addressed and determined by the Court, fourth reason is that the 3rd respondent has already taken

action with view to dispose of by sale, the suit premises which if the Court will not intervene, it will prejudice the rights of the applicants.

The counsel for the applicants stated further that the act of the 1st respondent of failing to release the agreed funds has caused substantial loss and hardships on the part of the applicants as the said funds was necessary to facilitate the running of the water production and processing plant in Moshi. That the applicants have been forced to ensure security and protect the wellbeing of the industrial premises for more than seven years.

He added that the applicants stand to suffer more hardships if the prayers are not granted while the respondents will suffer nothing.

To bolster his arguments the counsel for the applicants cited several cases including the case of the **Board of the Registered Trustees of Magadini Makiwaru Water Supply Trust vs. Ruwasa Siha District and 2 others**, Misc. Application No.28 of 2021 TZHC.

He prayed for the Application to be granted with costs.

Mr. Nyakiha, counsel for the 1st and 2nd respondents prayed to adopt the contents of the counter affidavit of the 1st and 2nd respondents. He submitted in contest of the application that, in *Mareva injunction* Applications, the key principles in grant of injunction reliefs are also applied. He referred the three principles as set in the case of **Attilio vs.**

Mbowe (1969) HCD 284. That these three principles have to be considered before the grant of injunction. He named them as first, the existence of prima facie case i.e. there is a serious issue to be tried, second, irreparable injury which is likely to be suffered and the need for the court's interference, and the balance of convenience.

The counsel stated that all three principles must be met and meeting one or two of them will not be sufficient. He referred also the case of **Christopher Chale vs. Commercial Bank of Africa**, Misc. Civil Application No. 635 of 2017, HC (Unreported).

Mr. Nyakiha submitted further that the applicant have failed to meet the requirement of the law by failing to establish the said three principles. That, on the prima facie case, despite the fact that the applicant has expressed intention to file a prospective case, it is well beyond this court's jurisdiction to entertain the said case as the subject matter of the case is located in Mwanza while the orders are sought in Dar es Salaam. That it is trite law under Section 14(f) of the Civil Procedure Code (herein as the CPC) that a person is to file his suit in place where the property is situated. Hence there is no prima facie case before this Court.

On the second principle of irreparable injury, Mr. Nyakiha submitted that the counsel for the applicants have failed to provide facts or the circumstances which prove the existence of sufferance and expected

irreparable loss as required.

On the balance of convenience, Mr. Nyakiha argued that the applicants neither made nor provide any particulars of loss expected. That, it is true that the suit premises are subject to disposition because the applicants have deliberately failed to discharge the debt owed. He said the bankers are entitled to recover their money to the securities and the acts of the applicants to neglect to repay the loan has immensely affected the lending capacity of the 1st respondent to the extent that the Bank may be forced to close the business.

He pointed that it is the 1st respondent who will be irreparably damaged in terms of reputation and loss of business by losing the money that have been invested by the Government, something which cannot be atoned by award of damages.

He added that the applicants have not shown as to how the facts pleaded in the affidavit meet the legal requirements of the conditions which have to be met before granting an injunction.

He prayed for the Application to be summarily rejected with costs for want of merits.

In rejoinder, Mr. Tibanyendera reiterated his submissions in chief. He subscribe to the respondents' submissions on the conditions for the grant of Mareva injunction. He argued that the existence of prima facie case Adls.

does not mean jurisdiction of the Court but it is established from the affidavit of the applicants. He said that the prima facie case has been established in the Application.

He submitted further that the damage suffered by the applicants will be irreparable on the part of the applicants than that of the respondents as the respondents are still assured of their money by virtue of water production machinery and the collaterals which are still registered as securities to the credit facility extended to the 3rd applicant. He reiterated his prayers.

Mareva injunction is a common law remedy developed from the case of **Mareva Compania Naviera vs. International Bulkcarriers SA** (1980) 1 All ER 213. In our jurisdiction, this Court has jurisdiction to hear and determine such kind of Applications under Section 2 of the Judicature and Application of Laws Act, Cap 358 (R.E 2019), which supports the application of common law and the doctrine of equity.

Mareva injunction is usually granted in a situation where the Court is satisfied that there is no pending suit. It is an application pending obtaining a legal standing to institute a suit. It may be applied in circumstances where the applicant cannot institute a suit because of the existing legal impediment, for instance, where the law requires that a statutory notice be issued before the institution of the suit.

In the Application at hand, the applicants have established that, there is an existing legal impediment which is the 90 days' notice of intention to sue the 1st and 2nd respondents which was stated in the chambers summons to be issued on 28th August 2023 and is to be expired after 90 days from the date of service. Furthermore, the Application is brought under Sections 2(1) and 2(3) of JALA. Therefore this Application fits the requirements for filing for *Mareva injunction*.

Mareva injunction is a specie of temporary injunction therefore for the Court to grant this injunction, the applicants have to meet all three conditions of temporary injunction as stipulated in the famous case of **Attilio vs. Mbowe (supra)**. The three conditions are as was submitted by the counsel for 1st and 2nd respondents which are; first, the existence of prima facie case i.e. there is a serious issue to be tried, second, irreparable injury which is likely to be suffered by the applicants and the need for the court's interference, and third, the balance of convenience.

Having carefully considered the submissions and pleadings filed by both parties, the issue for determination is whether the applicants have established the three conditions set in the case of **Attilio vs. Mbowe** and many other cases of this Court and the Court of Appeal so as to warrant the grant of this Application.

Going through the affidavit, the applicants did not state directly on the

three conditions but basing on the facts and evidence, this Court will determine if the three conditions were met cumulatively as per the requirements.

In the joint affidavit of the applicants, it is stated that the 3rd applicant and the 1st respondent have entered a facility agreement intended to finance the investment of the 3rd applicant in respect of facilitating the financial leasing of Tanzania Shillings equivalent to USD 343,562.00, a medium term loan of TZS 60,000,000.00 and an overdraft facility of TZS 150,000,000.00. The financial lease from the 1st respondent to the 3rd respondent was guaranteed by the 1st and 2nd respondents who deposited the suit premises to secure the said financial lease.

The applicants claim that the 1st respondent has breached the terms of the facility agreement by failure to release the amount of funds as agreed in facility No. 2 and facility No. 3 of the credit facility agreement. That despite the repeated demands, the 1st respondent has remained adamant and refused to release the funds until to date.

On their part, the 1st and 2nd respondents vehemently denied the claims of the applicants. In their joint counter affidavit, the said respondents stated that according to the financial leasing facility, the 3rd applicant was in breach of conditions precedents that requires the 3rd applicant to deposit 20% as equity contribution of the approved financial leasing

amount which is USD 85,818 despite some commitments made by them. The respondents added further that the applicants have neglected their obligations to service their loan and the project was not implemented according to the financial plan despite the approval of the amendment of credit facility agreement.

Reading the contents of the affidavit, counter affidavit, reply to the counter affidavit and submissions by the parties before the Court, I am satisfied that there is a serious, arguable issue to be determined by this Court. There is an issue of breach of contract where each party of the facility agreement allege that the opponent has breached the credit facility agreement. This is an arguable issue which in my view, can be set to be heard on evidence and determined by the Court. Basing on that reason, I find that there is an arguable issue to be determined by the court hence the first condition has been met.

Before I move on, I feel obliged to determine the issue of jurisdiction of this Court which was raised by Mr. Nyakiha. In his submissions, he argued that this Court has no jurisdiction to entertain this matter as the subject matter of this case is located at Mwanza. According to Mr. Nyakiha, the applicants were supposed to institute this Application and maybe the intended main suit at Mwanza and not Dar es Salaam.

It is on evidence as per the affidavit of the applicants that they once

lodged a suit against the 1st respondent in the High Court of Tanzania at Mwanza District Registry which was marked as Civil Case No. 12 of 2019 but it was returned by this Court and ordered that the same be filed at High Court of Tanzania, Dar es Salaam where the respondent resides.

I have read the ruling of this Court in Civil Case No. 12 of 2019, **Kibo Natural Water Limited vs. TIB Development Bank,** HC Mwanza Registry. In the said case, the defendant counsel raised the preliminary objection to the effect that the suit filed was untenable in law for want of territorial jurisdiction. That the suit ought to be filed in Moshi, Kilimanjaro where the contract between the parties was executed or in Dar es Salaam where the defendant resides.

This Court, sustaining the raised preliminary objection, ordered that the Plaint which was wrongly filed in Mwanza Registry be returned to the plaintiff for him to present it for filing in the High Court Registry at Dar es Salaam.

In the Application at hand, the parties and subject matter are the same as they were in Civil Case No. 12 of 2019. In the latter case, the plaintiff is now the 3rd applicant, and the defendant is now the 1st respondent. The subject matter is the same suit premises located at Mwanza. In such circumstance I find that the issue of territorial jurisdiction has already been determined by this Court in 2019 where it was ordered that the suit

be instituted at Dar es Salaam where the defendant (1st respondent) reside. This is as it is provided under Section 18 of the CPC.

I therefore find that this Court has jurisdiction to entertain the matter.

On the second condition of irreparable loss, it is in the contents of the affidavit at paragraph 16 that the 3rd applicant has incurred costs which have not been utilized for a long period and that she is still incurring more expenses to ensure the safety of the water processing machinery system fixed at Hai, Moshi. It was alleged that such costs and loss of financial earnings anticipated to be earned from the water project at Moshi by the 3rd applicant is seriously affecting the applicants to the extent that she cannot service the credit facility agreement.

In the submission the counsel for the applicants stated that the failure of the 1st respondent to release the agreed funds has caused substantial loss and hardships on the part of the applicants which have been forced to ensure security and protect the wellbeing of the industrial premises for more than seven years without production. He added that it is necessary for the Court to grant the prayers sought to avoid injustices to be caused by the intended sale.

Basing on the above evidence, it is clear that the applicants have established that they have suffered the costs of keeping the industrial premises and have suffered financial loss by the purported acts of the 1st

respondent.

It trite law that the irreparable loss claimed should be the one which cannot be atoned by award of damages. See the case of **Christopher Chale vs. Commercial Bank of Africa (supra),** whereby the case of **American Cynamid Co. vs. Ethicon Ltd,** [1975] 1 All ER 504 was quoted with approval. In the latter persuasive case it was held that;

> *".....The object of the temporary injunction is to protect the plaintiff against injury by violation of his right for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favour on the trial..."*

In the present Application, the applicants have stated on how they have suffered financially by the actions of the 1st respondent, however, they did not state on how they stand to suffer irreparably by the intended sale. It is my view that the applicant have pleaded financial loss and costs of running the industrial premises for seven years without production but all these losses can be atoned by way of damages to be pleaded in the intended main case.

The applicants have said that they shall suffer irreparable loss leading to be deprived of their assets but they have failed to show how the intended acts of selling the mortgaged properties will cause hardship or suffering to the applicants which cannot be monetary atoned. I therefore find that the

applicants have failed to meet the second condition.

On the third condition on the balance of convenience, the applicants did not have much to say about this. In their affidavit, they stated that the applicants shall suffer irreparable loss leading to be deprived of their assets while the respondents will have nothing to lose as they are assured of the water production plant which has not been used by the applicants and still intact until today.

In their counter affidavit, the 1st and 2nd respondents have averred that despite several reminders, the applicants have neglected to repay the outstanding amount of loan, interest and penalty which has accrued to TZS 1,991,599,271 as of 06/9/2023. That, this figure is irreparably in the books of the Bank and it is the Government money. That if an injunction is entered in favour of the applicants then it will be jeopardizing the 1st and 2nd respondents and the Bank business stands to suffer.

In this, I find that the balance of convenience tilts in favour of the respondents. This is for the reason that the Bank which is an institution is in position of paying damages to the respondents if the intended case is decided in their favour more than the applicants' being capable of paying the respondents. It is my view that the applicants, again have not establish the suffering and hardship which they will incur more than the respondents which they owe the outstanding loan as shown hereinabove.

In the circumstances, it is my finding that although the applicants have established existence of an arguable issue between the parties which can be determined during the main case, they have failed to establish the two conditions as per requirement hence the Court cannot exercise its discretion and grant the Application.

For the above reasons, the Application is hereby dismissed with costs.

It is so ordered.

A.MSAFIRI

JUDGE

24/11/2023