IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 28245 OF 2023

ELYSAACK AND GENERAL CO. LIMITED.....1ST APPLICANT

PATROBA LUGULI MAGANILA.....2ND APPLICANT

VERSUS

DEPOSIT INSURANCE BOARD

(LIQUIDATOR OF FBME LTD).....1ST RESPONDENT

TAMBAZA AUCTION MART AND GENERAL BROKERS LIMITED.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

4th & 18th March, 2024

L. HEMED, J.

This is an application for *mareva* injunction brought under section 2(1) and (3) of the Judicature and Application of Laws Act [Cap.358 R.E 2019] and section 95 of the Civil Procedure Code, [Cap.33 R.E 2019]. In the instantaneous matter, the applicants, **Elysaack and General Co.**

Limited and **Patroba Luguli Maganila,** are before this court seeking for an order:-

> *"... That this honourable Court be pleased to grant an Order for temporary injunction against the Respondents restraining them, their agents or workmen to implement their intention of interfering with the assets of the Applicant pending the determination of the main suit..."*

The Application has been supported by the affidavits of **Ibrahim Marembo Yebete** and **Patroba Luguli Maganila**. According to the affidavits in support of the application the suit property is Plot No. 237 Block No.3 at Kisota Mji Mwema in Kigamboni Municipality comprising of CT No.70226. The Respondents who are **Deposit Insurance Board (Liquidator of FBME Ltd)**, **Tambaza Auction Mart and General Broker Limited** and **the Hon. Attorney General**, challenged the application through the counter affidavits of **Minesh Ratilal Ghella** and **Abdallah H. Abeid**.

The application was heard by way of written submissions by leave of this court granted on the 4th March 2024. All submissions have been filed as per the scheduling order. The applicants submissions have been duly drawn and filed by **Mr. Isaac Nassor Tasinga**, learned advocate, **Ms. Frida Molel**, learned State Attorney acted for the 1st and 3rd respondents, while 2nd Respondent was represented by its Principal Officer one **Abdallah H. Abeid**.

Before delving into the merits of the application at hand, I think it is apt to give a brief background pertaining to the matter as per the affidavits. The 1st Applicant is company incorporated in Tanzania under the Companies Act, Cap.212 while the 2nd Applicant is a natural person. Sometimes in 2009 the 1st Applicant obtained a loan of Tshs. 200,000,000/- from FBME Bank (now under liquidation) to run meat business.

The 2nd Applicant who is the registered owner of Plot No.237 Block No.3 at Kisota Mji Mwema, Kigamboni, C.T No.70226, guaranteed the said loan advanced to the 1st Applicant by pledging the suit landed property as security. Due to some reasons the 1st Applicant could not do the business as planned and hence never paid the loan as per the loan facility.

FBME Bank underwent through irrecoverable financial crisis. It was thus put under **DEPOSIT INSURANCE BOARD (the Liquidator)** for liquidation process. The Liquidator, through the 2nd Respondent, issued notice to the applicants for recovery of the debt which has raised up to Tshs, 1,031,317,917/=. The applicants, having received the said demand notice, have rushed to this court seeking for restraint orders against the respondents.

I have gone through the rival affidavits and submissions made by the parties herein. The question for determination is whether the application has merits and thus worth to be granted. It is settled law that in application for injunctive orders, including those brought under *mareva* applications, like the one at hand, must meet the conditions established in the famous case of **Atilio vs. Mbowe** (1969) HCD 284. The said conditions are as follows:-

i. There are must be serious question of facts to be tried (*Primafacie case*);

ii. The Applicant must show that will suffer irreparable loss which cannot be adequately remedied or attained by damages;

iii. On balance of inconveniences, it has to be demonstrated that the Applicant will suffer greater loss than the respondent (s) if an order for temporary injunction is not granted.

Starting with the 1st condition on existence of triable issues (*prima facie* case), the applicants' advocate listed five (5) items which in his view constitute existence of *primafacie* case. The said issues are as follows-

(a) Demanding the applicants to pay Tshs 1,031,317,917/= the money which is not supported by any banking evidence in terms of facility letter which could have shown the duration of the loan and the condition thereto, as well to deny the fact that most of FBME banking business were done verbally.

(b) The absence of mortgage deed which could have disclosed as what was covenanted by the parties.

(c) The act of reviving debts which was already abandoned by FBME for the period of more than 15 years.

(d) Absence of any default notice served by FBME to the applicants.

(e) The act of the respondents to commence the process of disposing the Applicants' properties without any valid notice and without following the procedures.

The learned counsel for the applicants was of the view that the above anomalies create an arguable case before the court. He opined that the above issues justify the grant of temporary injunction.

In response thereto, Ms. Molel, was of the contention that the application does not meet the 1st condition as the applicants have not demonstrated existence of *primafacie* case in either affidavits or submissions to support the application. She insisted that when the applicants admit to have obtained a loan facility from the bank secured by the suit premises and defaulted to repay, an act in which the bank has not occasioned such default, an act of the bank to enforce the loan does not constitute a triable issue. She fortified her argument with the decision in **Leopard Net Logistic Company Limited v Tanzania Commercial Bank Limited & others**, Misc. Civil Application No.585 of 2021.

I am aware that at this stage, all what is required is for the applicants to demonstrate that they have a case worth consideration as

was held by this Court in **Colgate Palmolive v. Zakaria Provision Stores and Others**, Civil Case No. 1 of 1997. I have gone through the affidavits deponed by **Ibrahim Marembo Yebete** and **Patroba Luguli Maganila** together with the submissions in support of the application and found that they admit that the 1st Applicant obtained an overdraft facility from FBME Bank and the suit property was pledged as a security for the said loan. I have also noted that the applicants do not dispute that they defaulted repayment of the said loan. It is also on record that the said loan has never been serviced even by a single instalment. The acknowledgement of indebtedness and total default of the credit facility extended to the 1st Applicant is a proof of none existence of triable issues in the instant matter. Therefore, the 1st condition for grant of injunctive order has not been met.

With regard to irreparable loss, it was the submission of Mr. Tasinga that if the application is not granted, the respondents will dispose the property of the 2nd Applicant to the third parties. According to him the sale of the suit property will result in irreparable loss on the part of the applicants. On their part, the respondents submitted that the applicants have failed to state any fact in their affidavits or submission that shows

how they will suffer irreparable loss in the event this court refuse to grant the application. It was asserted that the applicant's averment that there is irreparable loss without establishing the same is as good as the condition has not been met.

I am aware that in proving irreparable loss, the applicants are obliged to prove the possibility of occurrence of injury which cannot adequately be remedied by damages. It is an established law that an injury capable of being compensated by money is not an irreparable one. This was held by the Court of Appeal of Tanzania in **Abdi Ally Salehe vs. Asac Care Unit Limited & 2 others**, Civil Revision No.3 of 2021, that-

> *"...the Applicant is expected to show that, unless the Court intervenes by way of injunction, his position will someway be changed for the worse; that he will suffer damage as a consequence of the plaintiff's action or omission, provided that the threatened damage is serious, not trivial or minor, illusory, insignificant or technical only. The risk must be in respect of a future damage."*

Having ventured through the affidavits and submissions in support of the application, the only damage stated to be suffered by the applicants in case the court refrain from granting the application is that the suit premises will be sold. In my view, the sale of the mortgaged property is the consequence of default in payment of a loan. Therefore, mere sale of the property pledged as security for a loan cannot by itself constitute an irreparable loss. Likewise, the use of the word 'irreparable loss' in affidavits or submissions without providing the details of such loss, cannot be said to have established irreparable losses. In the instant case, the applicants have not stated what kind of irreparable loss they may suffer in case the property in dispute is sold. The fact that no irreparable loss has been demonstrated in the instant case, the 2nd condition is thus held to have not been met.

Let me turn to the 3rd and the last condition on balance of convenience. It was the submission of the counsel for the applicants that, the respondents who are intending to recover a loan which has never been paid for 15 years can be able to wait the final determination of the contemplated suit and if the matter will be decided in their favour, they will proceed to recover the property. It was the applicants view that it will

be different on their part, the 2nd Applicant in particular, if the property gets disposed to a third party.

It was the response of the respondents that the loan has not been paid for 15 years, then the 1st Respondent is the one who suffers irreparable loss. The learned state attorney cannot suffer any mischief of what they had consented in agreements entered, the effects of injunction against banks while enforcing its contractual rights to recover loans will prejudice the 1st Respondent.

I entirely agree with Ms. Molel that since the applicants have admitted to have not paid the loan for 15 years, then it is the 1st respondent who will suffer more hardship than the applicants if the application is granted. I have also thoroughly read the affidavits that support the application and I have failed to find facts stating how the applicants are going to suffer loss in case the court refuses to grant the application. From the foregoing, I join hands with what was said by Hon. Rutakangwa,J (as he then was) in **Charles D. Msumari & 83 Others vs The Director of Tanzania Habours Authority**, Civil Appeal No.18 of 1997, where he emphatically observed thus:-

"Courts cannot grant injunctions simply because they think it is convenient to do so...They only exercise this discretion sparingly and only to protect rights or prevent injury according to the...stated principles, court should not be overwhelmed by sentiments however, loft or mere highly driving allegations of the applicants such as the denial of the relief will be ruinous and or cause hardship to them and their families without substantiating the same."

In the final analysis, I find no merits in the application. The same is hereby dismissed with costs.

DATED at **DAR ES SALAAM** this 18th March 2024.

L.HEMED
JUDGE