

TANZANIA / JUDGMENT

20170427 TZHC Dar es Salaam

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TZHCDECIDED
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IN THE HIGH COURT OF TANZANIA DAR ES SALAAM DISTRICT REGISTRY AT DAR ES SALAAM
MISC. LAN.D)\PPLICATION NO. 144 OF 2016 ERICK OYOMBE AYILA
PLAINTIFF VERSUS EQUITY BANK TANZANIA LIMITED 1 ST DEFENDANT MBOGO
AUCTION MART & REAL AGENCY CO. LTD 2No RESPONDENT

RULING

MKASIMONGWA, J. ERICK OYOMBE AYILA applies for an order of the Court restraining the Respondents, EQUITY BANK TANZANIA LIMITED and MBOGO AUCTION MART AND REAL AGENCY CO. LTD, their agents, servants, workmen and any person purporting to act under their authority, instructions or approval from detaining and or alienating the suit property until the application is heard; costs and any other relief that this court will deem fit to grant. The Application is made by way of Chamber summons filed under Order XXXVII ... Rule/1 and 2 Sections 68 (e) and 95 of the Civil Procedure Code and it is supported by the affidavit of ERICK OYOMBE AYILA. The Application is opposed by the Respondents. The 1st Respondent filed a Counter Affidavit-sworn by one UWEZO NICHALAUS. On the date the matter came up to hearing before me, there appeared Mr. Ndunguru and Mr. Nyaisa, learned advocates, representing the Applicant and the Respondents respectively. In his submission the counsel for the Applicant contended that the applicant did sometime apply for Tshs. 120,000,000/= loan from the 1st Respondent so that he boosts his business and for repaying his loan with the Access Bank and the EFC. It was agreed that the loan would be repaid by installments of Tshs. 3,100,000/= per month and that the Applicant offered his three plots at Kipunguni, Dar es Salaam all valued at Tshs. 300,000,000/= as security. Out of the loan amount applied for the Applicant was given Tshs. 70,000,000/= which is only 58% of the loan sum. The amount was spent repaying the loans with the Access Bank and EFC and the remained sum of Tshs. 12,000,000/= could not therefore meet the purposes for having the loan. His prayer to the 1st Respondent to pay the remaining sum of Tshs. 50,000,000/= was turned down by the Bank which also denied the prayer to review the amount payable per installment to be Tshs. 2,000,000/= per month. Mr. Ndunguru submitted that the value of the properties provided and which are still the security for the loan is not proportional to the amount advanced to the Applicant. Despite this fact the 1st Respondent has served the Applicant with a Default Notice and using the services of the 2nd Respondent he has advertised sell of the properties through Jambo Leo Newspaper dated 12/11/2016. It is until the order sought is granted the properties will be sold. He prays

therefore that this application be granted. On the other hand Mr. Nyaisa, Advocate, adopted the contents of the Counter Affidavit in his submission. He added that in an application for injunction there must be equitable grounds for the court to grant it. He referred the court to the decision in the case of ATILIO V /S MBOWE (1969) HCD 284 which provides for grounds under which a temporary injunction can be granted. He mentioned the grounds as being the following:

1. That the court must be satisfied that there are triable issues with a probability of success by the Applicant.
2. That there will be irreparable loss on part of the applicant if the order for temporary injunction is not granted.
3. That the Balance of inconvenience shows that the Applicant stands to suffer more if the order as not granted. Again referring the court to the decision of the Court in Land Case No 71 of 2011 ABDUL ALLY SALEHE Vs. ASAC CARE UNIT LTD AND OTHERS, Mr. Nyasa 2 contended that in determining whether there are triable issues, the court is led by the genuineness of the pleadings and facts surrounding the pleadings. Going by the affidavit filed in support of the Application there is no proof of the fact that the Applicant applied for Tshs. 120,000,000/= loan out of which he granted a sum of Tshs. 70,000,000/=only. Annexure EBI, the Credit Facility Letter clearly shows on 18/2/2015 the Applicant signed for Tshs. 70,000,000/= loan. It does not state of the mount of Tshs. 120,000,000/= as it is alleged by the Applicant. Mr. Nyasa submitted that the pleadings filed in this matter are not genuine As to whether the Applicant will suffer irreparable loss if the order is not granted, Mr. Nyasa contended that the order sought by the applicant aims at protecting the applicant from injury that cannot be adequately be compensated. This has not been averred in the Affidavit nor did the counsel for the applicant address it to the court. He submitted that the Bank-customer relationship cannot result into irreparable loss. In case of breach of loan agreement terms the customer may go for damages and the Bank can go for the securities provided. He referred the court to the decision in the case of JANE PAUL MWIKABE, LAND CASE NO. 82 OF 2011. He contended further that the Bank does not have its own money. It is the public's money which should always be available when claimed back by the public. In this regard he referred the court also to the decision in the case of AGENCY GARCO INTERNATIONAL Vs. EURAFRIC BANK {T}, CIVIL CASE NO. 44 OF 1998 (HC - Dsm). The learned advocate added that the order sought by the applicant will have the effect of drying the money from the Bank. He concluded by contending that conditions for grant of the temporary injunction co-exist. In this matter the conditions have not been pleaded or even addressed in the applicant's submissions. He prays the court that it dismisses the application with costs for want of merits. In a short rejoinder, the learned counsel for the applicant submitted that it has been submitted by the Respondent's counsel that there is no evidence that the applicant applied for Tshs. 120,000,000 only to be paid Tshs. 70,000,000/=. Mr. Ndunguru contended that the complainant had complained in writing to the Respondent Bank but the latter did not respond to the letter. 3 I have considered the pleadings and submissions made by both parties in this matter. As it is rightly referred to by the

Respondent's advocate, it is my considered view that the decision in the case of ATILIO V/S MBOWE (1969) HCD 284 stands a good law guiding courts in determining whether or not to grant a temporary injunction. In an application for temporary injunction the court must consider the following:

1. Whether there are triable issues with a probability of success.
 2. Whether there will be irreparable loss if the order for temporary injunction is not granted.
 3. Balance of convenience: who stands to suffer more? As to whether there are triable issues, let me go back to the provisions of the law that empower the court to grant a Temporary Injunction. It is Order XXXVII Rule 1 of the Civil Procedure Code [Cap. 33 R.E 2002]. The Rule reads as follows:- "1. _Where in any suit it is proved by affidavit or otherwise:-
 - a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit or suffering loss of value by reason of its continued use by any party to the suit or wrongly sold in execution of a decree; or
 - b) that the defendant threatens or intends to remove or dispose of his property with a view to defraud his creditors the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of the property as the court thinks fit until the disposition of the suit or until further orders:- Provided ... " Again we have Section 68 of the Code which provides as follows: 4 "68 In order to prevent the ends of justice from being defeated the court may, subject to any rules in that behalf
- (a) .. .
- (b) .. .
- (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof as a Civil Prisoner and order his property be attached and sold" It is my understanding of the two provisions above that an application for temporary injunction is not for perpetual orders. As such it cannot stand by its own. It is an application for temporary injunctive orders pending determination of a dispute which is already brought before a competent body to determine it. Under Order XXXVII Rule 1 of the Civil Procedure Code [Cap. 33 R.E 2002] a temporary injunction order cannot be sought where there is no suit, nor can it be sought by a person who is not a party to the suit. It is from the pleadings of that suit, the court in an application for temporary injunction, determines whether there are triable issues or not. Therefore triable issues referred to by the court in the case of ATILIO V/S MBOWE (supra) are issues in the suit and not in the application itself. I have gone through the affidavit filed by the Application as well as the submission made by the parties. It is not shown therein if there is a suit pending in court to which the Applicant and the Respondents are the parties. It is no wonder therefore when the applicant prays:- "That this honourable court be pleased to issue an order restraining the respondent, its agents, servants, workmen and person purporting to act under its authority, instructions or approval from detaining or

alienating the suit property until the application is heard:- 5 . ' This like, applications in my view are not known in the eyes of the law for they do not show if there is a dispute between the parties and that the same is being dealt with by a body competent to dissolve. In that premises I find this application to be incompetent. The same is therefore struck out with costs. Dated at Dar es Salaam this 27 th of April, 2017. ~ .-:9~\f ii \ < ..: , . /co ~---.,. .. " °".•, /~, ,:,,,/" .; '!'~;, . -:»-/ E. J. Mkasimongwa 'i:~ J' !:; (.. ~r1.. ~ JUDGE \,,>.) 27/4/2017 .. • \, _ ~-.< •-,: . r ~- 6

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