

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM MISC. LAND
APPLICATION NO. 13282 OF 2024 BETWEEN JIT TRADING AND INSURANCE BROKERS
LTD..... 1st APPLICANT PETER OMAHE MEKERE..... 2nd
APPLICANT VERSUS DEPOSIT INSURANCE BOARD.....
1stRESPONDENT THE ATTORNEY GENERAL.....
2ndRESPONDENT ASCERICS LIMITED.....
3rdRESPONDENT

RULING

11/10/2024 & 25/10/2024 A. MSAFIRI, J, The Applicants have filed this Application under the Certificate of urgency seeking for the Court orders that the Court be pleased to enter an interim injunction to restrain the 1st, 2nd, and 3rd respondents from disposing off by sale, lease or mortgage to any person whatsoever of the suit property with all its developments on Plot No. 1206 Block 'E' Tegeta with Certificate No. 48133 pending the hearing and final determination of the main suit which is pending in the Court. i The Application was supported by an affidavit of Peter Omahe Mekere, the 2nd applicant who is also the Managing Director of JIT Trading and Insurance Brokers Limited (the 1st applicant). The application is contested by the 1st and 2nd respondents who filed their joint counter affidavit which was deponed by Acley Chaula, Principal Officer of the 1st respondent, conversant with the deposed facts. The Application was heard by way of written submissions. The applicant's submission was drawn and filed by Mr. Mohamed Tibanyendera, learned advocate while the reply submission by the 1st and 2nd respondents was drawn and filed by Mr. Edwin Joshua Webiro, State Attorney. The Application was heard in absence of the 3rd respondent who was served but failed to enter appearance of file a counter affidavit. I have gone through the affidavit, counter affidavit and written submissions of the parties and gathered the brief background of the dispute as that in April 2013, the 1st applicant executed an overdraft facility with the FBME Bank Limited (the Bank) whereby the 1st applicant obtained a credit facility to the tune of TZS 60,000,000/= from the Bank. The overdraft facility was secured with the 2nd applicant's property (now the suit property). According to the applicant's submissions, the 1st applicant has serviced the loan and complied with the terms and 2 conditions of an overdraft facility by effecting payments into the Bank account when due. According to the submission by the 1st and 2nd respondents, the 1st applicant defaulted repayment of the credit facility and by 23/9/2015, the unpaid balance was TZS 68,289,897.75. It is

in the evidence that the business of the FBME Bank was brought to an end by the Bank of Tanzania and the 1st respondent was appointed a liquidating agent. That the 1st respondent initiated the process of demanding the full payment of the loan released to the 1st applicant and that the applicants defaulted in payment hence the respondents have repeatedly threatened to dispose of the suit property without giving an opportunity to the applicants to settle the amount after a proper reconciliation process. That this act of the respondents has prompted the applicants to institute a main case and lodge the present application seeking for temporary injunction pending the hearing and determination of the main case. I have considered the submissions by the counsels for the rival parties but I have no intention of reproducing herein everything which was submitted. *Jw \ o • 3* Both counsels for the Applicants and the 1st & 2nd respondents agrees with the principle set in the famous case of *Attilio vs. Mbowe* (1969) TLR 284 which has also been reiterated and elaborated in the plethora of cases. The principle set three mandatory conditions which has to be satisfied cumulatively by the parties before the Court can exercise its discretion and grant the sought interim orders. The three conditions are briefly; first the existence of prima facie case, second, the proof of imminent irreparable loss, incapable of being atoned for by way of damages, third, the balance of convenience in favour of the party who will suffer greater inconvenience in the event the sought injunction is not granted. In determination on whether the applicants managed to establish the existence of a prima facie case between the rival parties, in the affidavit, the 2nd applicant admitted that the 1st applicant has executed an overdraft facility with the Bank way back in April 2013 at the tune of TZS 60,000,000/=. The 2nd applicant admitted that the security of an overdraft facility was the suit property. He admitted to have defaulted as at the end of October 2022, the applicants had paid a total of TZS 12,000,000/= In the affidavit, the 2nd applicant stated that the dispute arose between the 1st respondent and the applicants when the 1st applicant was served with a letter dated 15/8/2018 where by the 1st respondent stated that the balance of facility was TZS 91,567,799.54 as at a liquidation date of 08/5/2017, a fact which was strongly disputed by the applicants. The applicants believes that the since they have made the payments of TZS 12,000,000/= to the 1st respondent, then the outstanding debt is supposed to be TZS 56,289,897.75 which is payable to the 1st respondent. The counsel for the applicants submitted that the applicants expressed intention to reconcile the outstanding balance with the 1st respondent has proved futile as the 1st respondent has remained adamant without any positive response. The counsel for the applicants submitted further that the applicants have established a prima facie case against the respondents. He said that the amount claimed by the 1st respondent has remained the same without any justifiable cause as to what raised amount of overdraft facility of TZS 60,000,000/= to a claimed TZS 97,567,799.54. That the facts on how much was payable, what was due and any other argument are matters of proof which the respondents have not produced anything to the contrary. In contest, Mr. Webiro argued that the first condition of existence of prima 5 facie case has not been met by the applicants. He said that the applicants have conceded to the debt that they are in default. He said if the applicants admit that in 2015, the balance was TZS 68,289,897.75, it is clear that, in 2017 the balance has increased. The 1st & 2nd respondents through their counter affidavit and the submissions through their counsel maintained that as of 08/5/2017, the applicants' total outstanding balance was TZS 97,057,251.80 and not

TZS56,289,897.75/= as averred by the applicants. Mr. Webiro said further that on 15/8/2022, the 1st applicant paid TZS 3,000,000/= and the total outstanding amount as of now is TZS 91,567,799.54/=. Having gone through the rival submissions, I find that the applicants have met the first condition of existence of serious issue/question to be tried or existence of prima facie case. I base my findings on the facts which are contested by the parties, the applicants insists that the outstanding balance as of now is TZS 56,289,897.75 only, while 1st and 2nd respondents maintain that the outstanding balance as of now is TZS 91,567,799.54/=. In the case of Abdi Ally Salehe Vs. Asac Care Unit Ltd & 2 others, Civil Revision No. 3 of 2012, CAT at DSM (Unreported), the Court of Appeal 6 stated that at this stage the Court has to see only a prima facie case and that it cannot prejudge the case of either party and cannot record a finding on the main controversy involved in the suit. There being a contest on the outstanding balance, I see it as a matter which needs evidence for each party to prove their claims and show how much amount has been paid, how it was paid and the balance. On the second condition, in his affidavit, the applicant stated that the suit property constituting Plot No. 1206 Block 'E' Tegeta is a residential house where the 2nd applicant accommodates with his family thus allowing the sale of the suit property to take place will lead to serious hardships which money cannot restore. That the 2nd applicant will be rendered homeless with his family without any justifiable cause. In reply, Mr. Webiro stated that the injunction can be granted where it is established to the satisfaction of the Court that if it is refused the Applicant stands to suffer irreparable loss incapable of being atoned by damages. The counsel for the respondents stated that if the mortgaged property is disposed of and later on turns out that the matter is decided in favour of the applicants, they still can be compensated by way of damages as such the loss is reparable. In the second condition, I have been guided by the principle set in the case of Abdi Salehe (supra). The court of appeal has elaborated on the necessity of establishing what it called "minimal conditions" (the three conditions as set in the case of Attilio vs Mbowe). In the case of Abdi Salehe (supra), the Court of Appeal held thus; "When all the above minimal conditions are established, the court, before deciding one way or another should then consider other factors, such as the conduct of parties, delay, acquiescence, lack of clean hands, etc." In this, I agree with the counsel for the respondent that the applicants injury is not irreparable one and it is capable of being atoned if the applicants will succeed in the main case. I say so for the reason that first, the 1st respondent being a Government Institution, it is in a better position to compensate the applicant in the event he succeeds in the main case. Second, looking at the conduct of the applicants and delay, they all shows that the applicant acted negligent or careless such that he cannot hide under the veil of suffering irreparable loss. The evidence in both the affidavit and counter affidavit shows that the applicant obtained a credit facility from the Bank which was secured by the suit property. As per annexure JIT - 1 which forms part of the affidavit by the applicants, the applicants and the Bank entered a facility agreement on agreed terms and conditions as stipulated therein. The agreement shows at item 11 that the facility will mature and expire on 30/4/2014, it was one year duration. However, the applicants defaulted on payment and readily agreed to it that by 23/9/2015, the outstanding balance was 68,289,897.5 (refer at page 13 of affidavit). The 1st respondent also admits that as at 23/9/2015, the applicants unpaid balance was TZS 68,289,897.75. That this prompted the defunct Bank to issue the 1st Applicant with a demand notice on 23/9/2015 asking the 1st applicant to

make repayments. I have read the said Demand Notice which was attached to counter affidavit, it was a 21 days' notice issued by the Bank to the 1st applicant demanding the 1st applicant to pay the outstanding sum within 21 days. But it is clear that the applicants defaulted in repayments, the 1st applicant stated, he honoured the facility extended by the defunct Bank until the year 2017 when the said Bank was wound up, but in actual fact, the applicants has failed to honour the facility since they were supposed to have cleared the outstanding balance by the time the Bank was winded up i.e. in 2017. Therefore, by the conducts of the applicants and the delay in making repayments, this court is of the view that the applicants have failed to honour the agreed terms of the facility agreement and their obligations as borrowers. This court finds that the 1st respondent has justifiable cause to exercise the power of sale as it is clear that the applicants have breached the loan agreement. Having made that analysis, I conclude that on the condition of irreparable loss, the claimed loss is reparable since the 1st respondent being a Government Financial Institution is capable of paying damages if any to the Applicants if they will succeed in the main case. On the third condition, the 1st applicant at page 29 of the affidavit, he states that the 1st applicant stands to suffer irreparable loss in case the orders sought for in this Application are not granted by the court where by the respondents will continue to dispose of the suit property while they have nothing to lose. In the submission by the counsel for the applicants, he urged that on the third condition, the balance of convenience is in favour of the applicants. That the respondents have nothing to lose since they are still holding the certificate of title of the 2nd applicant in respect of the suit property. He maintained that the respondents have nothing to lose if the order of temporary injunction is granted. On the respondents side, the counsel for the respondents submitted that if the injunction order will be granted, it is the respondent that will stand to suffer a lot of inconvenience. He said that, the 1st Respondent is the liquidator of the Bank and is duty bound to collect the assets of the Bank and pay off creditors. He argued that the grant of injunction will halt the liquidation process and this will adversely affect the majority of the people who are the creditors of the Bank. In this, I agree with the counsel for the respondents that the respondents in the circumstances are likely to suffer more than the applicants if the application is not granted. I say so for the following reasons; First, the applicants have admitted to have defaulted on repayments since 2015 to the extent that they were served with the demand notice by the defunct Bank. Second, the applicants being the party to the agreed facility letter with its terms and conditions, knew that the consequence of failure to honour the facility terms is for the mortgagee to exercise the power of sale of the security to the loan as recovery measures. The applicants states that the respondents' intention to sell the suit property is unjustifiable. However, it is my view that the applicants have no justifiable reason to claim so since they have no clean hands coming to the equity since they failed to loan repayment as per the loan agreement (facility letter). MG- 11 It is my view that even if the Certificate of Title is claimed to be in the hands of the 1st respondent, the said Certificate of Title does not amount to the credit facility which was issued to the applicants by the defunct Bank. The credit facility was extended to the applicants since 2013, it was to expire in 2014 but until todate, still the applicants have not paid the whole amount as per the agreed terms and conditions. In the circumstances, I find that the 1st respondent as liquidator stands to suffer more than the applicants. In upshot, the applicants have failed to establish the two conditions out of the three conditions which

mandatorily have to be met cumulatively so that the court can exercise its discretion and grant interim injunction as sought. The application is dismissed with costs. It is so ordered. 25/10/2024
12

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