

TANZANIA / JUDGMENT

n j investment ltd vs international commercial bank tanzania ltd another 2023 tzhclandd 16416 28 april 2023

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM MISC. LAND APPLICATION NO. 179 OF 2023 (Arising from Land Case No. 84 of 2023) N & J INVESTMENT LTD..... APPLICANT VERSUS INTERNATIONAL COMMERCIAL BANK (TANZANIA) LTD....1st RESPONDENT MBUZAX AUCTION MART LTD..... 2nd RESPONDENT

RULING

Date of last Order: 28.04.2023 Date of Ruling: 28.04.2023 A.Z MGEYEKWA, J The applicants' application is brought under a certificate of urgency. The same is made under Order XXXVII Rule (1) (a),(b), and (2) sections 68 (c),(e), and 95 of Civil Procedure Code Cap.33 [R.E 2019], The application was accompanied by an affidavit sworn by Joseph Mgana, the applicant's 1 Managing Director. Opposing the application, the 1st respondent filed a counter affidavit sworn by Mr. Vitalys Evarist Salimu, Principal Officer of the 1st respondent. The 2nd respondent did not file a counter affidavit. When the matter was called for hearing on 28th April 2023, the applicant enlisted the legal service of Mr. Edson Kilatu and Emmanuel Hayuka, learned counsels. The 1st respondent had the legal service of Mr. Juventus Katikiro, learned counsel. The matter proceeded ex parte against the 2nd respondent who was duly being served to appear in court. The application is borne from the fact that there is a pending Land Case before this court whereas the applicant is praying for this Court to be pleased to maintain status quo restraining the respondents jointly and severally by themselves, their agents' workmen, and or servants from disposing of and or tempering with all that landed properties comprising of Certificate Titles No. 86341, No. 79674 and No. 132152 located in different areas in Dares Salaam as well as a motor vehicle make Toyota Hilux Registration No. T.638 DKW, motor vehicle make Toyota Fortuner Registration No.T.890 DJP and a Caterpillar, Motor Grader Registration No. T.240 DPK pending the hearing and determination of the main suit. 2 The learned counsel for the applicant started to kick the ball rolling. Mr. Kilatu urged this Court to adopt the applicant's affidavit to form part of his submission. He stated that in the case of Atilio v Mbowe [1969] HCD 284, the court established the 3 principles; prima facie case, irrecoverable injury or loss, and balance on inconvenience whether the applicant will suffer greater hardship compared to the respondents which must be

meet in granting a temporary injunction. On the first principle, whether there is a prima facie case, Mr. Kilatu contended that the court needs to determine whether there is any cause of action for the applicant to apply for an injunctive order. He went on to submit that the applicant in his affidavit specifically paragraph 13, is disputing the mortgage stating that the outstanding balance of the said loan is to the time of Tshs.600,000,000/= while the 1st respondent is claiming for outstanding amount to the tune of Tshs.1,116,525,888.162/=. Therefore, in his view, the applicant has established that there is a dispute which calls for the intervention of this Court. Submitting on the second principle, irreparable loss, Mr. Kilatu argued that the loss cannot be replaced by compensation. It was his view that the applicant in his affidavit specifically paragraph 20, listed several factors which 3 prove that in case this Court will not grant his application then he will suffer irreparable loss. Among the listed factors are; firstly, the mortgage by itself is at risk to be auctioned to a third party hence the applicant will not recover it. Secondly, the suit property is allocated in a prestigious location. Thirdly, the mortgaged assets will taint the goodwill of the applicant to the stakeholders and he cannot build the goodwill which he will lose. Fourthly, there is a pending case before this Court hence in case the injunctive order is not issued then the property might be sold and the suit will be not useful hence his right to defend himself will be defeated. Fifthly, auctioning of the properties which are residential cum-commercial will cause serious embarrassment and hardship for the applicant and his trust in his clients will be lost hence he will not be compensated. Supporting his submission, he cited the case of ABLA Estate Developers & Agency Company Ltd v KCB Tanzania Ltd, Misc. Land Application No. 504 of 2017. The learned counsel for the applicant continued to submit that the respondent's counsel has not opposed the paragraph which established irreparable injury is not opposed. He added that the counsel simply stated that the paragraph is argumentative and vague thus we submit that this. To fortify 4 his submission he cited the case of East Africa Cables Tanzania LTD v Spencon Service Ltd, Commercial Case No. 42 of 2016. As to the third principle, balance on inconvenience, Mr. Kilatu contended that in paragraph 21 of the applicant's affidavit, the applicant has laid his grounds that the 1st respondent loan can be repaid upon ascertainment of the real outstanding balance, the respondent is more secured because the interest will accrue and the value of the mortgaged premises being in the prestigious location its value is appreciating hence hedge further the respondent. Mr. Kilatu stated that the respondent did not oppose this principle. Supporting his submission, Mr. Kilatu referred this Court to the case of East Africa Cables (supra). In his submission, Mr. Emmanuel added that the principle of prima facie is well articulated in paragraph 22 of the applicant's affidavit, submitting on irreparable loss, the learned counsel referred this Court paragraphs 18 and 19 of the applicant's affidavit and the case of T.A Kaare v General Manager Mara Cooperative Union [1979] TLR 17, the Court stated that before granting an injunctive order, the court should consider the three issues; whether there is bonfide context, there is no any ill motive, the application is for the interest of justice hence the respondents will not be prejudice. He 5 stated that in SAKAR Code of Civil Procedure Code page 2011, it states that in Temporary Injunction, the court need to look only on prima facie, and the applicant has done so. He defended the applicant's application that it is reasoned. Fortifying his submission he cited the case of American Cyanamid v S Ethicone 1975 All ER 404. On the strength of the above submission, Mr. Emmanuel urged this Court the interest of the justice to issue

injunctive order pending the hearing of the main case. Responding, the learned counsel for the respondents' confutation was strenuous. Mr. Junvetus started by highlighting the governing principles as far as the interim injunction is concerned. The learned counsel for the 1st respondent subscribed to the three conditions which need to be considered before granting temporary injunctive; prima facie case, Irreparable injury likely to be suffered, and the balance of convenience, He urged this Court to adopt his counter affidavit to form part of my submission. Submitting on the first limb, counsel for the applicant contended that the applicant was required to state the dispute between the applicant and the respondent. He argued that the applicant is disputing the calculation of the loan but he did not object that on 4th March 2020, he renewed the contract 6 and endorsed to sign that he was in debt of Tshs. 1,230,000,000/=. To support his submission he referred this Court to the 'annexure NJ2' and paragraph 14 of the applicant's affidavit. He forcefully argued that the applicant has not given any explanation on the amount paid to date, instead, he has mentioned a vacuum amount. Mr. Juventus contended that the document had three loans; a secured overdraft facility, a term loan facility, and a short-term facility. He added that the applicant was well informed when to service the said loan and he signed the document, he went on to argue that in a term loan facility, he was given 36 months to pay the loan, in a short-term and secured loan he was given one year, however, to date the loans are yet to be served. He distinguished the cited case of ABLA (supra), the law requires all three principles to co- exist as stated in the case of Atilio v Mbowe (supra). In the irreparable loss, the learned counsel for the 1st respondent averted that as per annexure NJ2, the duration of the loan lapsed and the applicant has not paid any cent. He spiritedly argued that the Bank is to generate income by issuing loans and securing the loans by selling the collateral. It was his view, that in case an injunctive order is issued then the Bank will suffer more because they need to recover the loss through selling the 7 mortgaged properties. Supporting his submission, he cited the case of ABLA (supra), the court rejected to grant an injunctive order. He went on to assert that in the instant application, the applicant in paragraph 14 of his affidavit stated that the Chief Government Valuer prepared a Valuation report, thus, it was his view that in case the Bank sells the mortgaged property and the applicant wins the case, then he can recover his property because the same is approved by the Chief Government Valuer. He continued to argue that the 1st respondent attempted to call and remind the applicant to service his loan and he promised to make an initial payment but he did not make any payment. He valiantly argued that the applicant is praying to delay tactics restraining the Bank to recover the debts. As to the third principle, the learned counsel for the 1st respondent contended that comparing the applicant and the 1st respondent, the 1st respondent will suffer more because the duration of recovering loan ended, no any money is received and the applicant did not refute this fact by filing a reply to the counter affidavit. He spiritedly argued that after the lapse of the time limit, the 1st respondent has the right to recover the said loan. To fortify his submission, he cited the case of General Tire East Africa Ltd v HSBC Bank Ltd [2006] TLR 60 and 61. Mr. Juventus insisted that the borrower is required to fulfill the 8 conditions and terms of the loan. He forcefully argued that as long as the applicant has never serviced the loan, thus he does not deserve to be granted an injunctive order. To wind up his submission, the counsel for the 1st respondent valiantly contended that the principles stated in Atilio v Mbowe's case (supra) are not established and urged this Court to

dismiss the application with costs. In his rejoinder, Mr. Kilatu reiterated his submission in chief. He stressed that paragraphs 7 and 8 of the 1st respondent's counter affidavit are not related to irreparable loss. He insisted that at this stage, the applicant is required to establish a prima facie case and not to establish if the main case will succeed or not. He contended that the issue of cause of action will be determined by this court and the breach of contract cannot be determined at this stage. Ending, he urged this Court to grant injunctive order as prayed in the applicant's chamber summons. Having heard the submissions of both learned counsels for the applicant and the respondents. In determining this matter, I will be guided by the principle governing a temporary injunction. The Courts have tested the above principles in various cases such notable cases include; *Atilio v Mbowe*

(1969) HCD 284. *Agency Cargo International v Eurafrican Bank (T)* (HC) 9 DSM, Civil Case No. 44 of 1998 (unreported), and *Giella v Cassama Brown & Co. Ltd* (1973) to mention just a few. On the first condition, prima facie case, without wasting the time of this Court, it is vivid that the applicant has established that there is a triable issue by alleging that the mortgage in dispute is in regard to a loan facility and the amount owed as per the applicant is Tshs. 600,000,000/= while the 1st respondent is claiming an outstanding amount to the tune of Tshs. 1,116,525,888.162. In my view, I find that there is a dispute which attracts the attention of this Court. Thus, the first condition is established. On the second principle, the applicant who claims to be on the brink of suffering irreparable loss must not only establish that they will suffer irreparable loss but are duty-bound to demonstrate that, the kind of injury to be suffered cannot be atoned through monetary means. It is noteworthy that the balance of convenience should be parallel and tilt in the favour of the applicants. The applicant in his affidavit specifically in paragraph 20, has explained in length that he will suffer irreparable loss because the mortgaged assets which are potential will be wasted by being sold to the third parties to whom the applicant is not privy thus he will be unable to reverse the disposition, the prestigious location of the mortgaged houses, the disposition of the mortgaged assets will taint the good will of the applicant to the stakeholders the main case will be meaningless. However, on the other hand, the Bank owes the applicant an alleged outstanding amount to a tune of Tshs. 1,054,273,739/= and the applicant has not stated if he has even paid part of the alleged outstanding amount. The 1st respondent in paragraph 7 of his counter-affidavit stated that the Bank took efforts to demand loan repayment of the outstanding balance from the applicant but all efforts ended in vain. In his submission, Mr. Juventus cemented that the Bank will suffer more because they need to generate income. Based on the above submissions, it is my considered view that in case this Court will grant injunction order, the Bank also stands to suffer more irreparable loss compared to the applicant. I am saying so because the outstanding loan balance is part of the Banks capital. It is worth noting that the Bank's business depends on repayment of the loan for its business to prosper, such that repayment of the loans must be strictly adhered to so as to protect the bank's business which contributes much to the individual and nation's development. In the case of *Zak Import & Export Company Limited ii v Crown Finance & Leasing Ltd*, Civil Case No. 27 of

2000 HC at DSM, the Court held that: "The creditors must be protected from borrowers who are not committed to their obligations in paying the loaned money." [Emphasis added]. Applying the above authority in the matter at hand, it is vivid that, the second condition is not established. Regarding the third principle, on the balance of convenience. The applicant in his affidavit specifically paragraph 21 stated that the 1st respondent's loan can be repaid upon ascertainment of the real outstanding balance in the main suit and the 1st respondent has the advantage of the accruing interest in the loan thus the delays hedged accordingly and the value of the mortgaged houses being in the prima area keeps appreciating. The applicant is trying to convince this Court that the 1st respondent is not facing any inconveniences. However, as I have elaborated earlier, the bank stands to suffer more inconveniences because the applicant has not even tried to service the loan, and the claims that the applicant made an undertaking to pay the restructured loan as per the restricted terms cannot hold water because it was a long-standing unpaid loan. In paragraph 9, the 12 applicant alleged that he had to start with the initial payment of Tshs. 100,000,000/= without attaching any cogent evidence to prove that the said agreement was not adhered to by the bank. The overdraft was renewed on 4th March 2020 on terms to be repaid within 12 months, there is no proof that the applicant paid the loan until the loan ended and the applicant's counsel in their rejoinder did not dispute this fact. Thus, it is my considered view that from the facts quantified in the affidavit, it is hard to gauge that the applicant had taken efforts to service the alleged loan. For the aforesaid findings, it is clear that the applicant is required to service his loan, failure to do so will render the Bank unprofitable and might be a candidate for bankruptcy. See the case of Mohamed Iqbal Haji & Others v Zedem Investments Limited, Misc. Land Application No.05 of 2020. Based on the above reasons, I am hesitant to suggest that the balance of convenience is in favour of the applicant. The law requires the three conditions of the temporary injunction must all be met, meeting one or two of the conditions will not be sufficient for the court exercising its discretion to grant an injunction. See the case of Christopher P. Chale v Commercial Bank of Africa, Misc. Civil Application No.635 of 2017 (unreported). 13 In the upshot, I find that the applicant has failed to adduce sufficient grounds to warrant this Court to invoke its discretionary powers of granting an injunction, therefore, I proceed to dismiss the instant application. Costs to follow the event. Order accordingly. DATED at Dar es Salaam this 28th April 2023. A.Z.MGEYEKWA JUDGE 28.04.2023 pr n Ruling delivered on 28th April 2023 in the presence of Mr. Edson Kilatu and Emmanuel Okashu, learned counsels for the applicant and Mr. Juventus Katikiro, counsel for the 1st respondent. A.Z.MGEYEKWA JUDGE 28.04.2023 14

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