

TANZANIA / JUDGMENT

Ruling Sabo

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA THE SUB-REGISTRY OF
MWANZA AT MWANZA MISC. CIVIL APPLICATION NO. 8917 OF 2024 (Originating from Civil Case
No. 37 of 2023) SABO MANUGULILO SABO APPLICANT
VERSUS

1. EQUITY FOR TANZANIA LIMITED
2. JOACHIM CONSTATINE RESPONDENTS

RULING

9th & 20th September 2024 CHUMA, J. The applicant lodged this application seeking this court for a grant of temporary order a) compelling the respondents to stop using and selling the applicant's motor vehicle with registration number T.331 EBL pending the determination of the main suit. b) Alternatively, this court be pleased to order for motor vehicle with registration number T.331 EBL to be kept under a neutral ground on which they shall be under the court's control pending the determination of the main suit and cost of this application. The application 1 is preferred under order XXXVII Rule I (a)(4), section 68 (e), and section 95 of CPC RE: 2019 supported by an affidavit of Sabo Manugulilo Sabo. During the hearing, Mr. John Edward Learned counsel for the applicant at first prayed to adopt the affidavit to form part of his submission and court proceedings. He went on to submit that the reasons behind this application are such that, one there is a serious question to be determined in main suit No. 37/2023 which involves Motor Vehicle with Reg No.T.331 EBL. The applicant herein entered an agreement with the first respondent for equipment loan of the mentioned vehicle and their contract was 24 months beginning from 9th January 2023 to 9th January 2025. It was agreed that the applicant had to pay the initial amount which the applicant paid 48 million (Forty-eight Million). The first respondent confiscated the Vehicle while the time for agreement had not expired for about 19th months. Immediately he did sell the same to the second respondent. Under circumstances, court intervention is inevitable to prevent irreparable loss to the applicant because the Vehicle in dispute has been used by the second respondent, and according to para 7 of the affidavit, the applicant saw the vehicle around Mabatini area drugged by another vehicle 2 due to an accident. The situation clearly shows that the property in dispute is in danger and if left to be used by the second respondent is likely to be deteriorated. Mr. John Edward went on to argue that the applicants' probability to win the main case is of a high degree. But if the Vehicle remains with the respondents, winning a case will save

nothing when the property has deteriorated leading the applicant to suffer loss. He invited this court to a case of Atilio Vs. Mbowe [1969] TLR 284. which lays down principles to govern the instant application. He finally prayed this application to be granted as per chamber summons. In response, Mr. Martin Goyayi Advocate for the respondent after adopting the filed counter affidavit of the respondent contended that the application is misconceived against the first respondent and what has been prayed for cannot be granted for the following reasons; That the application is overtaken by the event as can be shown under paragraph five of the applicant's affidavit as the motor vehicle has been ready sold to the second respondent. Since the property is ready sold one cannot pray for an injunction order. 3 He however agreed with the submission of Mr. John Edward's advocate on the three conditions to be considered before granting the sought order. He differed with him on the existence of triable issues in the main case. He agreed existence of an agreement between the parties but it was not a loan agreement but rather a lease agreement. In that agreement, it was agreed that the applicant shall make equal monthly rent payment to the tune of TZS. 2,825,739,000/= as reflected in paragraph 2 of the applicant's affidavit and paragraph 3 of the first respondent counter affidavit reflecting close 15 party A to the agreement. Also, clause 23 A party B indicates the default clause. Under paragraph 2 of the applicants' affidavit annexed payment schedule or customers' account statement of which the applicants' default is indicated. The applicant was issued with a default Notice on 14th March, 2023, 9th May, 2023, and on 15th June, 2023 was issued with a seizure Notice annexed under paragraph 6 of the counter affidavit. Section 13 (2)

- (c) of the Financial Leasing Act Cap 5, 2008, the law allows to make repossession. What was done was then done in line with the law and as per the party's agreement. Hence there is no serious question to be triable by this court. This position was stated in the case of Issa Badru Ally and Lulu Luluu General Company Vs. Tanzania Postal Bank Misc. Land 4 Application No. 487 of 2020 on page 4. Since the applicant agreed he is stopped from claiming as he is trying to do as it was held in the case of Bytrade Tanzania Ltd Vs. Assenga Agroviet Company Ltd and another Civil Appeal No. 64/2018. on page 6. On the second condition on irreparable loss, there is no loss likely to be suffered by the applicant because, in the applicant's affidavit, that loss was not stated in what manner or mode the same will suffer. Also, as per the agreement, it is shown that what was agreed is a lease agreement that shows that the applicant is not the owner of the property. Under clause one the property shall continue to be the property of the first respondent. Clause 25 party A one of the rights of the first respondent shall include repossession and sale of the said equipment. Clause 14 party B it was agreed that the applicant shall not seek court injunction to restrain the first respondent to repossess the property upon default or breach of the terms. Because of default and breach of an agreement, he cannot suffer loss. The second condition is therefore not met. On Balance of convenience, it is not only that the same was not reflected in the applicant's affidavit but in his submission, he only mentioned 5 without showing how. It was his submission that the balance of convenience lies with the first respondent because this is the financial institution depending on its profit from the renting activities. And there is no dispute that the applicant defaulted payment. Hence continuing to use the vehicle the

applicant will continue inconveniencing the first respondent. To that end, it was his submission that all three conditions had not been met he then requested this application be dismissed with cost. In his brief rejoinder, Mr. John Edward's advocate argued that the application is not overtaken by event, because the second respondent is likely to dispose of the property. And that his prayer is for the courts' intervention to refrain the second respondent from selling the motor vehicle to the third party. On the issue of failure to make payment as per the agreement, Mr. John challenged it because at the beginning of the agreement, the applicant paid TZS. 48,000,000/=, and paragraph 11 of the agreement reflects and includes the earlier paid TZS. 48,000,000/= indented to cover some months of about 16th months ahead. Hence the said default on payment ought not to have been interpreted in the manner Mr. Goyayi tried to convince this court to believe so. That's why he was alleging that there was a serious question to be tried by this court. And that paragraph 26 of the agreement gave the applicant an option to buy the property for 5,000 only after completion of the payment. If the respondent could not interfere the applicant could have become the owner of that vehicle. The alleged irreparable loss as stated, the applicant intended to buy the vehicle in dispute. The cases cited by Mr. Goyayi are distinguishable here because there is no default by the applicant. He then insisted on the applicant's prayer as per the chamber summons. Having gone through the rival submissions for and against this application by both parties, I will now consider whether the instant application has merit. The law states clearly that an Injunction is granted when justice so require. As appropriately submitted by the Learned counsels for the parties, the sought order will be given if three conditions stated in the celebrated case of *Atilio vs Mbowe* (supra) are met that is the existence of a prima facie case, imminent irreparable loss, incapable of being atoned for by way of damages and balance of convenience. 7 I will therefore consider whether this application meets the said requisite standards. Starting with the first condition, the applicant needs to prove that there is a serious question for determination by the court and a probability that the plaintiff will be entitled to the reliefs prayed in the main case. If I may go further to satisfy the Court by the applicant on the first limb, the law requires the applicant to show two things; first, that the relief sought in the main suit must be one that the court is capable of awarding, and second the Applicant should at the very minimum show in the pleadings, that in the absence of any rebuttal evidence, the applicant is entitled on the said relief see the case of *American Cyanamid V Ethicon* [1975] 1 All E.R 504. In the same vein Hon. Nsekela J. (as he then was) in the case of *Agency Cargo International Vs. Eurafrican Bank (T) Ltd*, Civil Case No.44 of 1998 (unreported) stated that; It is not sufficient for the applicant to file a suit with claims, the applicant must go further and show that he has a fair question as to the existence of a legal right which he claims in the suit. In the instant matter, the applicant claims to have a triable issue in main suit No. 37/2023 which involves a Motor Vehicle with Reg No. T.331 8 EBL. The applicant herein entered an agreement with the first respondent for equipment loan of the mentioned vehicle and their contract was 24 months beginning from 9th January 2023 to 9th January 2025. It was agreed that the applicant had to pay the initial amount which the applicant paid 48 million (Forty-eight Million). The first respondent confiscated the Vehicle while the time for agreement had not expired for about 19th months and sold it to the

second respondent. This fact was challenged by the respondent who agreed existence of an agreement between the parties but it was not a loan agreement but rather a lease agreement. In that agreement, it was agreed that the applicant shall make equal monthly rent payment to the tune of TZS. 2,825,739,000/= as reflected in paragraph 2 of the applicant's affidavit and paragraph 3 of the first respondent counter affidavit reflecting close 15 party A to the agreement. And that what was done by the first respondent was done in line with the agreed terms following the default of the applicant to adhere to the agreed terms. The contention may convince one to believe that there is a prima facie case in the main suit as alleged by the applicant's advocate. However, I have not come across from the submission by the learned 9 advocate which at least suggests or explains the very minimum show in the pleadings, that in the absence of any rebuttal evidence, the applicant is entitled to the relief claimed in the main suit. A mere submission that there are serious questions for determination in the main suit, is not sufficient for this Court to be satisfied on the first condition as filing a suit with claims is not enough rather the applicant must go ahead and show that he has a fair question as to the existence of a legal right which he claims in the suit something which is missing on the condition under scrutiny. In this circumstance, the first condition has not been met. Reverting to the second condition, the law clearly states that the applicant has to prove that it is necessary to grant the reliefs sought to prevent some irreparable injury. The injury or loss which the applicant shall suffer must be irreparable and cannot be atoned by the award of damages as stipulated in the case of *Abdi Ally Salehe Vs. Asac Care Unit Limited and 2 others*, Civil Revision No. 3 of 2012 (unreported) where it was held that. "The applicant is expected to show that, unless the court intervenes by way of injunction, his position will in some way be changed for the worse; that he will suffer damage 10 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 future damage..." More so the injunction is aimed at preventing the status quo pending the determination of the main suit. However, it should be noted that an injury capable of being compensated by money is not an irreparable one as it was held in the case of *Noormohamed Janmohamed Vs. Kassamali Virji Madhani*, (1952) 19 EACA 8. It was the submission of the appellant that the loss of a physical house cannot be compensated by monetary compensation. In the instant matter, the question for determination is whether the applicant will suffer irreparable loss and uncompensated in monetary form in case the the order is not granted. In Paragraphs 7 and 8 of the affidavit, the applicant tried to explain that the property in dispute had been seen in Mabatini area being drugged in another motor vehicle as a result of the accident and that the same would be wasted if left to be used by the second respondent. The affidavit further indicates that the applicant will suffer irreparable loss if the suit property is left in the use of the first respondent. In his submission, Mr. John's advocate stated that on irreparable loss the 11 applicant intended to buy the vehicle in dispute. Is this fact sufficient proof to establish irreparable loss that can not be attorned by way of damages? I don't think so. To that note, unfortunately, the applicant as submitted by Mr Godfrey Goyayi advocate for the respondents, failed to explain exhaustively how the applicant will suffer irreparable loss if

an order is refused. The Court expected the explanation that the irreparable loss suffered by the applicant will not be compensatory by monetary which the same has not been elaborated on and exhausted during the hearing. Be that as it may from the applicant's affidavit the property in issue has been sold by the first respondent to the second respondent therefore currently the property is under the second respondent's possession. It is my finding that the applicant has another forum for recovering the disputed property and the loss if any will be atoned by money as far as the nature of the disputed property is concerned. I proceed to find that the second condition test has not been met as well. Regarding the third and last condition, in determining this third condition for an injunction, the court needs to consider principles as stated in the case of Abdi Ally Salehe (supra) where it was said that; 12 "The question of balance of convenience, what it means is that, before granting or refusing the injunction, the court may have to decide whether the plaintiff will suffer greater injury if the injunction is refused than the defendant will suffer if it is granted" In this application on the balance of convenience, it is not only that the same was not reflected in the applicant's affidavit but in his submission, Mr. John Edward's advocate only mentioned without showing how as submitted by Mr. Godfrey Goyayi's, advocate for the respondent. I subscribe to the submission of Mr. Goyayi that the balance of convenience lies with the first respondent because it is a financial institution depending on its profit from renting activities. Having given due consideration to the submission made by the parties during the hearing, I have not come across any submission highlighting the circumstances that indicate the type of loss, hardship, and damage or injury that may likely be suffered by the Applicant rather than the respondent. In my view, the respondents stand to be more inconvenienced than the applicants. Therefore, the third condition was not met by the applicant. 13 Therefore, the third condition was not justified by the applicant. In the final analysis, I find this application is devoid of merits and hence dismissed with costs. DATED at MWANZA this 20th day of September 2024. W.M CHUMA JUDGE 14 The ruling delivered in court before Mr. Edward John, advocate for the applicant and Mr. Godfrey Goyayi, advocate for the respondent this 20th day of September, 2024. J. MSAROCHE DEPUTY REGISTRAR 15

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