

TANZANIA / JUDGMENT

HAWA SHANI TCB

COURT
TANZLII

DECIDED
28 June 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA SHINYANGA SUB REGISTRY
MISCELLANEOUS CIVIL APPLICATION. HC/SHY/CIV/MCA/11288/2024 HAWA
SHANI 1ST APPLICANT CLEMENT THOMAS NTABUJA
.....2ND APPLICANT VERSUS BILO STAR DEBT COLLECTOR CO. LTD 1ST
RESPONDENT TANZANIA COMMERCIAL BANK 2ND RESPONDENT THE
ATTORNEY GENERAL3RD RESPONDENT

RULING

11th June & 28th June 2024 F.H. MAHIMBALI, J This application is by way of chamber summons filed under the provisions of Order XXXVII Rule 2(1) and 8 (1) and sections 95 of the Civil Procedure Code [Cap 33 R.E 2019] and section 2(3) of the Judicature and Application of Laws Act (JALA) [Cap 358 R.E 358 2019] and is supported by joint affidavit of Hawa Shani and Cosmas Thomas Ntabuja dully deposed. The essence of the application is issuance of temporary injunction against the 1st and 2nd 1 respondents from doing any activity ranging from but not limited to selling through public auction, disposing, leasing and other incidental acts in respect to the premise located at plot No. 423950 Block “V” with certificate of Title No. 214 TBLR, Ngokolo Area within Shinyanga Municipality, the property of the first applicant pending service, maturity of statutory Ninety (90) days’ notice to serve the 2nd and 3rd Respondents and institution and determination of the main suit. Briefly, whereas the 1st applicant is the lawful owner of the premise with certificate of title number 214 TBLR, Plot No. 423950 Block V, Ngokolo Area within Shinyanga Municipality, the second applicant who is the son of the first applicant, being a businessman in 2016 applied for credit facility from the second respondent in financing his business to the tune of 11,000,000/=. By way of mortgage, the property of the first applicant dully secured the said credit facility in favour of the second respondent. Having defaulted its repayment, the second respondent through the 1st respondent while in efforts of exercising his right of lien, notified the applicants of his intention of selling the mortgaged property, thus the basis of the current application seeking to stop the second applicant from 2 exercising his legal rights on reasons that the market forces, loss of market and business competition (paragraphs 6 and 8 of the applicants’ joint affidavit), led to the detriment of the applicants business. On that basis, the applicants through this application, while intending to sue the respondents in the main suit to be filed, are persuading this court to issue temporary orders against the 1st and 2nd respondents from exercising the right of lien available against the applicants. In reliance to their

application, Mr. Kaunda acting for the applicants has urged this court to grant the sought orders pursuant to the cited provisions of the laws and relied further support the case of Atilio vs. Mbowe (1969) HCD, Kom Mining Company Limited vs. BHG Energy and Mineral Limited & 3 others, Misc. Commercial Application No. 139 of 2023 at page 8, Auto Mech Limited vs. TIB Development Bank limited & 3 others, Misc. land Application No. 73 of 2020 page 10. In rebutting the current application from being granted, Mr. Mpogole for the 2nd and 3rd respondents, vehemently opposed the application naming it as a misplaced one. He submitted that, firstly, it is undisputed that the 2nd respondent applied for credit facility from the 2nd respondent and that the 3 1st applicant consented her property in securing the said loan in favour of her son (1st applicant). Since there is a default in loan repayment by the applicants, the 2nd respondent has the right of action as per mortgage deed in exercising her legal rights, saying that there has not been stated any good reason as to why the 2nd respondent should restrain from exercising her legal rights. Though to grant or not grant is the court's discretionary powers, but the same must be exercised judiciously. To him, Mr Mpogole submitted that the minimum criteria set in the case of Atilio vs Mbowe have not been met in the current case. He however pressed that this Court on proper use of judicial discretion to consider what was said in the case of Starcom Consumer Health Care Ltd vs. Diamond Trust Bank (DTB), Misc. land application No. 08 of 2023 at page 23. In his considered view, Mr. Mpogole was of the view that, in his study to the contents of the applicants' joint affidavit and the prayers sought in the chamber summons, there are no triable issues even if the main case is filed. He bolstered that, there is no dispute that the 2nd applicant applied for the credit facility from the 2nd respondent and in consideration of the facility, he secured it by the mortgage facility of the 1st applicant in which she dully authorized it. the loan by then was 11 million. Now, by defaulting, what good 4 cause is there for the none repayment. Thus, to him there is no any triable issue by the court citing the case of Abdi Ally Salehe vs. Asaa care Unit Limited & 2 others, civil Revision No. 3 of 2012, CAT at DSM at page 8. "It cannot record a finding on the main controversy involved in the suit nor can genuineness of a document be gone into at this stage.." He criticized the submission by the applicants' counsel of just naming issues under 5th 9th – 10th paragraphs of the affidavit being not a sufficient explanation in law. With the principles stated prior to the grant of the injunction have been well named by the applicant's counsel. However, the same must be well explained in a particular case and not a mere mention of it. Nevertheless, Mr. Mpogole added others being public policy; court should not be used as a tool to deny/ delay one's rights. In expounding his submission in opposition to the application, Mr. Mpogole submitted that since the 1st applicant was guarantor to the 2nd applicant, the default of the loanee warrants the 2nd respondent as loaner to take appropriate legal actions as per law as it is in the current case – TCB1. 5 Therefore, urged this court not from interfering the contractual applications of the parties - see the case of Fullence Pantaleo Kavishe t/a Double way Auto parts vs. Tanzara Postal Bank, Misc. land Application No. 890 of 2017 at page 6. He added that, by the way, even the prayer of injunction pending determination of the main suit is not proper as was guided by this court vide Francis Bulugu Bundu & 82 others vs. Oxfam & 5 others, Misc. Civil Application No. 26 of 2022 at page 6, (Kulita, J) at page 6-7. Thus, with the prayer no.2 in the chamber summons, Mr. Mpogole considered it as being pre-mature. In making reply to the case cited case Kom Mining, Mr. Mpogole was in agreement with the legal principle

proclaimed there in, but differed in its application in the current case. Likewise, he stated that the applicability of the case of Automatch, is distinguishable from the facts in the case at hand. With condition No. 2 of irreparable loss, conversely, it has been Mr. Mpogole's submission that, it is the 2nd respondent who stands to suffer irreparable loss than the applicants in this case. As per para 9 and 12 of the applicant's application, the contention is, the shop is not a collateral. At page 6 20 of the case of starcom (page 20), it is not enough to say that the applicant will likely suffer loss but it must be irreparable loss that could not be adequately compensated by an award of damage. Thus, a mere mentioning of the loss was not sufficient but had to particularize how that could be an irreparable loss on a mere closure of the shop. He was of the firm view that since the 2nd respondent's responsibility is lending money to clients, if there will be no recovery of the debts, is likely to suffer the loss that is irreparable than the loanee who is then the beneficiary of it but either squandered or failed to supervise it commercially. On balance of convenience, Mr. Mpogole submitted that the applicants have failed to establish how on balance of convenient they are more righteous than the respondents. In essence, the third condition is much dependent on the strength of the two conditions. Reading paragraph 13 of the applicants' affidavit in line with paragraphs 5, 9, 10, 11 & 12, is clear that there are no triable issues. Counter arguing is not a triable issue. The issue is whether the 2nd applicant is indebted or not. Thus the 1st applicant is in for it for being guarantor. 7 With public interest or public policy, it is the interest of law that a court cannot be used as an instrument to cause loss or injury to the public. Not returning the borrowed money, affects the public at large. Thus injunction should not be granted when it does not meet the necessary legal requirements. Lastly, he submitted that he who seeks equity must go to court with clean hands. The cleanness required is to be judged to the reliefs sought. Reading paragraph 1 of the applicants' affidavit is clear. At para 6 & 10 of the affidavit, the applicants have no clean hands. Reading TCB3, it is clear that as per their para 1, it is very clear that the applicants are hiding some peculiar facts thus their cleanness on hands is disputed, argued Mr. Mpogole. Commenting on the default, Mpogole submitted that, the only remedy by the 2nd respondent is to exercise her legal remedy of selling the mortgaged property as per law. Therefore, selling the said house is the rightful action of the mortgagee. To order otherwise, is to make this court intervene with the parties' contractual obligation. 8 With this submission, Mr. Mpogole was of the view that this application be dismissed in its entirety with costs for being brought without any sufficient cause. In his rejoinder submission, Mr. Kaunda firstly reacted to what he considered what Mr. Mpogole had submitted went beyond on behalf of the 1st respondent in which he criticized that Mr. Mpogole being S/A, had no right of submitting on behalf of her. He cited the case of Simbo Yona Rabani Maya vs. David Sewa and 2 others, civil Appeal No. 42 of 2018, CAT at page 11 CAT which well stated that where the counsel has no any instruction to a party whose proceeding goes exparte, has no right of submitting on his behalf. Whether the Court had powers to grant the prayers sought, he reiterated that the court is mandated to grant the said prayers as per the enabling provisions of the law (see Auto Match Limited supra). He insisted that the court has unlimited powers to grant the prayers sought pending service, maturity of 90 days and determination of the suit to be filed pursuant to section 2 (3) of JALA. The argument would have been valid had he only applied Order XXXVII, of the CPC; nevertheless, this being Mareva 9 application, the court has unlimited powers extending

injunction up to the time of institution and determination of the suit, he insisted Mr. Kaunda. He amplified that the decision in Fransis Bulugu Bundu's case is distinguishable from the current case. In that case the 90 days' notice had expired and the suit was not yet instituted, thus, not applicable and distinguishable from the current case. With the case of Kom Mining company Limited (by Nangella, J), he clarified that even if that situation covered commercial cases, but the legal principal on temporary injunction remains the same. He added that by the way Nagella, J explicitly and verbatimly reproduced all that was prayed in that case. Thus by the prayer "any other relief the court deems fit and just to grant" included what the court had ordered i.e until disposition of the suit is one of the reliefs the court deemed fit to grant, insisted Mr. Kaunda. With the prima facie case, the essentials of granting injunctions are premised whether there are arguable issues. Whereas the applicants depose that the loan was defaulted in 2023 but the respondents say they defaulted repayment since 2017, that is a triable issue, said Mr. Kaunda. 10 Therefore, as the applicants even allege that the mortgaged property's title is not annexed, the cited case of Abdi Ally Salehe is more self-fitting to their position than the respondents' case, lauded Mr. Kaunda, emphasizing on page 8 – 12. Similarly, in the case of Auto Mech Limited (supra) at page 18 it almost reiterated what the CAT had set, reminding a warning that at this stage hhhwe should not shift to the merit of the case at this stage. That this court cannot interfere with the contractual relationship of the parties is not right, citing section 2 (3) of JALA and s. 95 of the CPC, this court's jurisdiction is inherent and unlimited it was commented. With the cited case of Fulgence Pantaleo kavione t/a Double way Auto parts (supra) at page 5, Kaunda argued that the court was satisfied that the applicant had not met any essentials of the grant of the temporary injunction, as opposed to the current case. On the necessity of the grant of the injunctive reliefs sought in order to prevent the irreparable loss, Mr. Kaunda reiterated his submission in chief as per paras 9, 11, and 13 of the applicants' affidavit, the application is very expressive. 11 I have critically digested the prayers in the chamber application, the facts deposed in the respective affidavits for and against the application, the respective submissions thereof and the authorities provided. The relevant question to ask is whether the application has met the threshold for its grant. According to law as rightly submitted by the both counsel, for the grant of injunction to qualify, there are three conditions to be followed as stated in the case of Atilio vs Mbowe. The same has been restated in the case of Total Tanzania limited vs River on Petroleum (T) Ltd and Salim Ali Said. The three conditions are:

- i) There must be a serious question of fact to be alleged and the probability that the plaintiff will be entitled to the relief sought. ii) The court's interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established. iii) That on balance, there will be greater hardship and mischief suffered by the plaintiff from withholding of injunction than will be suffered by the defendant from granting it. 12 These three tests must coexist jointly and not disjointedly. In my considered view, as to what has been submitted by both counsel, it is clear that there is no any serious contention whether the 2nd applicant borrowed money from the 2nd respondent which money was duly guaranteed by the 1st applicant vide mortgage instrument. It is also undisputed that the said loan stands undischarged to date. The

applicants in their joint affidavit are alleging that they faced business difficulties, thus failed to discharge the loan repayment (paragraph 6). Reading paragraphs 10, 12 of the applicants' joint affidavit allege that the 1st applicant never mortgaged her property as collateral to the said loan. Reading the joint counter affidavit for the 2nd and 3rd respondents in opposing the application, avers that the 1st applicant's property forms the mortgage deed (TCB1) and the same has not been countered by the 1st applicant. Taking into consideration that an affidavit is evidence by itself, failure to challenge it is equal to admission, it being not challenged by solid evidence from the 1st applicant, is equal to contradicting itself which then waters down the alleged seriousness of the contention that is worth triable by the court. I consider the application as carrying no such probative value for court's future consideration. I had expected there to have been a serious contention by the applicants against the TCB -1. There was none. Since the evidence of the applicants vide paragraphs 10 and 12 of their joint affidavit is defeated by the joint affidavit of the 2nd and 3rd respondents by TSB1 (paragraph 4 of the respondents' joint affidavit), then it is good saying that it has been sufficiently discredited. For it to remain contentious, it was expected either it remained un attacked, but as it has been sufficiently attacked, it ought to have been given rejoinder evidence for it to remain seriously contentious. Scrutinizing them both, I see nothing in contention. The cardinal principle of the law of contract being the sanctity of the contract as expounded in numerous cases including *Abualy Alibhai Azizi v. Bhatia Brothers Ltd* [2000] T.L.R. 288 and *Unilever Tanzania Ltd v. Benedict Mkasa t/a Bema Enterprises*, Civil Appeal No. 41 of 2009 (unreported), it must prevail here as well; that the principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement. All that the applicants are pleading here are nothing, but exhibiting admission of trivial excuses for non- performance of the contract of which they freely entered. As regards to the second test whether the court's interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established, as per discussion in test one is in negative, there is nothing worth of interference against the respondents but the applicants themselves. The applicants should either settle the loaned amount with interests or let the law takes its course (see section 127(2) d of the Land Act, Cap 113 R.E 2019. Lastly, on the test that on balance, there will be greater hardship and mischief suffered by the plaintiff from withholding of injunction than will be suffered by the defendant from granting it, I have digested the facts and submissions of this case, there is nothing worth tilting in favor of the applicants in this matter as alleged. Mr. Kaunda's submissions though tongue sweet, but holds no good substance in the circumstances of this case despite the fact this court has enormous unlimited powers in granting the said injunction orders sought. Much as this Court enjoys such powers, equally has vast powers of refusing granting the sought in the event there are no sufficient reasons warranting the granting of the said injunctive orders on balance of probability. I am much gripped by the submission of Mr. Mpogole on the manner he attacked the applicants' application. It has been convincing and meaningful in the circumstances of this case. A deep digest to the facts of the current matter, there is nothing tilting in favour of the

applicants but to the respondents. Therefore, I feel myself staturous to hold in favour of the applicants as there is nothing seriously in contention. All this said and considered, I find the applicants' application unmeritorious and the same is hereby dismissed with costs. No order as to costs It is so ordered. DATED at SHINYANGA this 28th day of June 2024. F.H. Mahimbali
Judge 16

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