IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

MISC. CIVIL APPLICATION NO. 15 OF 2020

(Arising from Civil Case No. 3/2020)

BANK OF AFRICA TANZANIA LIMITED.....APPLICANT

VERSUS

ABDUSAMAD MOHAMED SULEMAN.....RESPONDENT

RULING

18 Feb. & 15 April, 2021

DYANSOBERA, J.:

The applicant Bank of Africa, Tanzania Ltd, moves this court by way of chamber application to grant her interlocutory relief by way of prohibitory injunction. The prohibitory injunction is sought to restrain the respondent from collecting and/or obtaining three title deeds and valuation reports for residential properties located in Plots Nos. 149, 150 and 159, Block F, Msijute Area within Mtwara District deposited as security in court in Misc. Civil Application No. 28 of 2018 at High Court of Tanzania (Mtwara

District Registry) at Mtwara pending determination of Civil Case No. 3 of 2020.

The application is brought under O. XXXVII Rule 2 (1) and section 68 (e) of the Civil Procedure Code [Cap.33 R.E.2019]. An affidavit of Elizabeth Muro, the Principal Officer of the applicant, has been filed in support of the application.

On 3rd August, 2020 when this application was called on for hearing, the applicant was represented by Mr. Hendry Kimario, learned advocate whereas the respondent enjoyed the services of Mr. Stephen Lekey and Ms Lightness

In arguing this application, Mr. Hendry Kimario was alive to the principles or rather conditions on grant of temporary injunction set out in the case of **Atilio v. Mbowe** [1969] HCD 284

Submitting in support of the first condition, that is the existence of a triable issues, counsel for the applicant contended that under paragraph 3 of the affidavit, the applicant issued a loan under a credit facility to a company known as OM – Agro Tanzania Limited amounting to USD 2,950,000/= and an overdraft of USD 50,000/= supposed to be payable within two months. According to Counsel, the said security was secured by,

among others, a registered fast ranking debenture on floating charge over stock and receivables of the company. However, contrary to what was agreed in the loan agreement the company defaulted to pay the loan hence attracting a total amount of Tshs. 350,000,000,000/=. Counsel further submitted that the applicant commenced recovery measures but later discovered that the company hid part of the cashewnut consignment into a godowns. In a bid to protect its interest in the shock consignment which was a security to the said loan the applicant brought its alienation by locking the godowns and installing security guards to prevent tempering with the stock. Consequently, the respondent instituted in this Court Civil Case No. 6 of 2018 claiming contractual interest on the same stock. In that case the respondent claimed to have right accruing from the said stock while the applicant claimed to have a registered interest by a first tracking debenture.

As to what then transpired, counsel for the applicant went on submitting that taking into account that the stock of cashew nut was perishable, the respondent filed an application (Misc. Civil Application No. 28 of 2018) seeking orders to sell the consignment. Granting an order, the court, in order to maintain security for the due performance of the decree after determination of the main case (Civil Case No. 6 of 2018) ordered the

respondent to deposit the titles mentioned earlier which are in question in this application.

The order was complied with and title deeds deposited. But later, the respondent prayed to withdraw the main case with leave to re – file. The said order was granted but the court did not give orders on the title deeds placed as security in this Honourable court. Since there are no orders as to the same titles, Counsel for the applicant argues, the danger is that these titles may be collected by the respondents hence causing the applicant lose security on the loan and, therefore, fail to recover the claimed money leading to the dispute remain unresolved.

The applicant filed Civil Case No. 3 of 2020 together with this application praying that these titles remain in the custody of this court pending determination of the main suit. It is contended for the applicant that the dispute remains that the applicant seeks to recover this loan through the same stock of which the respondent seeks to recover through the same stock. It is argued that the court needs to determine the right of the parties in the main suit of which the security thereon are the title deeds and the respondent has also filed a counter claim. Counsel for the applicant asserts that this proves that there are triable issues to be determined by this court in the main suit. Reliance was placed on the cases of **Signori**

Investment Tanzania Limited and Amor V. Equity Bank (T) Ltd and others, HC Misc. Land Application No. 56 of 2019 at page 8 and **Mohamed Iqbal Haji and Others V. Zedem Investment Ltd, Misc**. Land Application No. 5 of 2020 at page 17. Also the case of **Pudensiana Hilary V. Standard Charted Bank (T) Ltd and 2 Others**, HC Misc. Land application No. 24 of 2018 at page 9 on a proof of a prima facie case.

With respect to the second principle, that is on irreparable loss, counsel for the applicant submitted that the applicant stands to suffer more irreparably taking into account that the cashewnut consignment stock has already been sold and that the titles placed as security are left without any court order which can be alienated or taken by the respondent at any time causing the applicant to lose security of the said loan. Further that, the amount in issue that is Tshs.350, 000,000/=, a colossal amount of which the respondent is a natural person of unknown asset and financial status and that therefore, if this order is not granted the applicant is at high risk of losing security and failure to recover the loan which is a huge amount taking into account that the applicant which is a financial banking institution needs such funds in order to keep it being in the business. This court was referred to the case of **Victoria Water Co. Ltd and Another**

versus Equity Bank Tanzania Ltd and Another, Misc. Civil Application No. 635 of 2018 at page 12.

> "In my sound view, it is the respondent who stands to suffer irreparable loss on account of the applicant's continuing default and breach of the terms of the loan agreement".

On the third principle of balance of convenience, it was submitted for the applicant that the balance of inconvenience lies heavily on the applicant as the one who will lose security of unpaid loan while respondent will bear no inconvenience if this application is granted because these matters will be determined on the merits in the main suit and if determined in his favour the title deeds will be well secured by this Honourable Court. Counsel cited the case of **Paul Mtatifikolo and 2 Others v. CRDB Bank Ltd and 2 Others**, Land Case No. 89 of 2005 at page 6, and 2nd paragraph to support his argument.

Responding to the submission by learned counsel for the applicant, Mr. Stephene Lekey, learned counsel for the respondent, contended that this application lacks merits and should be dismissed with costs. Adopting the counter affidavit to form part and parcel of his submission, learned advocate for the respondent pointed out that there are undisputed facts. First that the respondent filed Civil Case No. 6 of 2018 together with Misc.

Civil Application No. 28 of 2018 praying for the court to allow him to stock consignment before judgment. The application was decided in favour of the respondent but the court ordered the respondent to deposit in court the said documents as security. Second, on 29 July 2019 the respondent prayed for and was granted leave to withdraw Civil Case No. 6 of 2018 but with leave to refile it.

On the arguments counsel for the applicant is putting forward in support of the temporary injunction, Mr. Lekey was of the considered view that this court is being invited to make a revision of what was decided by this court in the Misc. Civil Application No. 28 of 2018 as indicated at pages 11-12 of the court's ruling in that application when Hon. Twaib, J was deciding on probability of success of the respondent. Counsel for the respondent urges this court to find its hands tied and decline from traveling on that road.

It is his contention that in this application, the applicant seeks for an order to restrain the respondent from collecting the deeds deposited in court through another case which was withdrawn with leave to refile subject, of course, to the laws of limitation. The effect of such order, Mr. Lekey submitted, is to remove completely Civil Case No. 6 of 2018. In his view, Civil Case No. 6 of 2018, if really filed, and there is already been

issued another order touching Civil Case No. 3 of 2020, it will create confusion and chaos.

Counsel for the respondent pressed that the order for depositing the tittle deeds was issued in respect of Civil Case No. 6 of 2018. The applicant in this application prayed only the title deed and valuation report not to be collected without praying for the order of depositing the same in court. According to him, with no order of depositing those documents, nothing will hold the title deeds in court since parties are bound by their pleadings and the court will grant only what a party has prayed for.

With regard to O.XXXVII Rule 3 of the Civil Procedure Code, Mr. Lekey was of considered view that the order holding the tittle deeds made under Misc. Civil Application No. 28 of 2018 has lapsed with time. He argues that the order was given on 18th October 2018 and to date it is more than two years which means that the documents are not strictly in the court but at the respondent's disposal even if the Court in that Misc. Civil Application No. 28 of 2018 aimed at safeguarding the applicant's rights of emerged victorious in that case, the cited order is clear that it should not last more than a year, learned counsel for the respondent remarked.

Challenging the wording used under paragraph 16 of the affidavit, counsel for the respondent told this court that the words suggest that an order be issued against the Court. Such a move, he argued, is tantamount to making a prayer against a stranger to the suit which is contrary law. The Court was referred to the case of **National Bank of Commerce v. Dar es Salaam Education and Office Stationary** [1995] TLR 272 in buttressing his argument.

Counsel for the respondent, in main, argues that the principles in the case of **Attilio v. Mbowe** should all be proved for the interim order to be granted, the position which was insisted in the case of **Mlela Fundikira Said v. Equity Bank (TZ) Ltd,** Misc. Land Application No. 750 of 2016 HC Land Division.

With respect to lack of probability of success to the applicant, Mr. Lekey referred this court to the ruling on Hon. Twaib, J in Misc. Civil Application No. 28 of 2018 at page 13, the first paragraph, where it was indicated that "There is no direct connection exhibited with regards to first respondent's facility letter...."

As regards the second principle, it was submitted on part of the respondent that the loan agreement was between the applicant and OM – Agro Tanzania Limited with whom the respondent had entered into a loan

agreement. Mr. Lekey pointed out that the applicant has not submitted that they have failed to recover their loan from OM – Agro, a person labeled as of unknown assets or financial status stands to suffer more than the applicant and further that the applicant has failed to specify the details and particulars of irreparable loss she is likely to suffer as averred under paragraph 16 of the affidavit which means that there is no basis established to enable the court to satisfy itself that such irreparable loss could be incurred. This court was referred to the decision of the Court of Appeal in the case of **Tanzania Cotton Marketing v. Cogecot Losa** [1997] TLR No. 63 which though spoke on stay of execution, Hon. Twaib, J in Misc. Civil Application No. 28 of 2018 held that the case expanded the legal position on matters of injunctive orders.

On the claim of Tshs. 350,000,000/=, learned counsel for the respondent argued that apart from the said claim being not substantiated by any document, the claim might have been put forward as an outstanding loan between the applicant and OM – Agro Tanzania Limited which does not concern the respondent. Counsel for the respondent submitted that the decision of the Court in Misc. Civil Application No. 28 of 2018 ordered the deposit of the title deeds equivalent to Tshs. 92,000,000/= only and they cover that amount and, therefore, the amount

of 350,000,000/=would be a greater amount and the argument of suffering loss is more is surprising.

It was further argued on part of the respondent that the case laws cited by Counsel for the applicant were decided by the High Court and therefore, not binding, rather are persuasive. Admitting that it is the principle that the this Court should not likely depart from the decision of its brethren but these cases are distinguishable in circumstances of this case as they are built on application for injunction by a defaulter against a bank, a fact which is different from that obtaining in this case.

In a brief rejoinder, counsel for the applicant reiterated what he had submitted in chief. He, in addition, drew attention to this court that since he has not been availed with any copy of decisions cited by his fellow learned friend, those authorities should be disregarded.

Mr. Kimario informed this court that they were not seeking revision of Misc. Civil Application NO. 28 of 2018, rather, they are arguing that while the former application was in respect of consignment of cashew nuts which are perishable goods and the Court had to make necessary orders for purposes of avoiding rotting and avert irreparable loss to both sides, what is sought in the present application is the order for restraining the

respondent from collecting the deposited title deeds pending determination of Civil Case No. 3 of 2020, so as to avoid miscarriage of justice.

As regards the case of **Sigori Investment**, counsel for the appellant contended that in that case it was clearly stated that what is required is not conclusive evidence of what is required as the standard of proof should be below that which is required. According to him, the said ruling was for securing the loan until the main suit was determined and this is the essence of the applicant's prayers.

On the lapse of deposit order, it was submitted that the documents are not strictly in the hands of the Court, rather at the disposal of the respondent which means that they can be alienated by him any time and that is why the applicant is seeking an order from this Court to grant the restraining injunctive relief against the respondent.

On the lack of the prayer to deposit the title deeds, Mr. Kimario pointed out that there is a Chamber Summons supported by an affidavit and other further grounds to be adduced at hearing.

With respect to paragraphs 15 and 16 of the affidavit in support of the Chamber Summons, counsel for the applicant pressed that the pleadings have clearly stated that the title deeds remain in the custody of the Court pending the hearing of the main suit.

On the loan being between the applicant and OM – Agro, Counsel for the applicant argues that paragraph 13 is clear that the applicant has failed to recover the loan and that the nexus is the security of which the applicant is to recover was allegedly also the security to the respondent. That is the essence of the main suit of which by way of counter claim OM-Agro is a party. The main question is who is entitled to the said security. The answer will be resolved in the main suit, counsel for the applicant maintained. He reiterates that the grant or otherwise, of the temporary injunction is discretionary.

I have considered the materials before me and the rival arguments presented by learned counsel. Much as I agree that the conditions for granting temporary injunction were set out by Georges C.J. in the case of **Attilio v. Mbowe** [1969] HCD No. 284, the issue for determination in this case, however, is whether, on the facts and the dispute before the court, the application is proper. This issue has to be addressed in line with the present application and the position of law under which this application has been preferred.

As the chamber summons depicts, the application has been preferred under Order XXXVII rule 2 and section 68 (e) of the Civil Procedure Code [Cap.33 R.E.2019]. Order XXXVII, Rule 2(1) provides:

"2-(1) in any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right."

According to the wording of the above provisions of law, the application for temporary restraining injunctive order envisaged must relate to any suit for restraining the defendant from committing a breach of contract or other injury of any kind and the restraining injunctive order must be to restrain the defendant from committing the breach of the contract or injury complained of or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

On the facts pleaded in the plaint and averred in the affidavit sworn by Elizabeth Muro, the Principal Officer of the applicant, there is no suggestion leave alone indication that the applicant has filed a suit to restrain the respondent from committing the breach of the contract. Indeed, it is not disputed that there is no contract entered into between the applicant and respondent which the respondent can be said to be

restrained from breaching. Likewise, there is nothing showing that the respondent is committing any injury. In other words, the applicant has not presented an arguable case that the respondent's acts or omission is wrongful. What is the respondent's action or omission which is wrongful? The collection of the title deeds which were deposited by the respondent pending the main suit which has already been withdrawn cannot, by any stretch imagination, amount a wrongful act or omission upon which this court can restrain. For that reason, Order XXXVII rule 2, is not applicable to the instant application.

As regards section 68 (e), the Section 68 (e) of the Civil Procedure Code which is on supplemental proceedings provides:

> "68. In order to prevent the ends of justice from being defeated the court may, subject to any rules in that behalf–
>
> (a) (.....not relevant);
>
> (b) (.....not relevant);
>
> (c) (.....not relevant);
>
> (d) (.....not relevant) or
>
> (e) make such other interlocutory orders as may appear to the court to be just and convenient."

It is clear that the section is only supplemental and cannot, alone, support any application. The Court of Appeal of Tanzania in the case of

Sea Saigon Shipping Limited v. Mohamed Enterprises (T) Limited, Civil Appeal No. 37 of 2005 had this to say:

> "It is to be observed that Section 68 is supplemental proceeding. It summarizes the general powers of the court in regard to nterlocutory proceedings. This section is similar to Section 94 of the Indian Code of Civil Procedure where it is also specified as a supplemental proceeding. Commenting on this provision of law (section 94), Mulla on the Code of Civil Procedure, Volume 1, Fifteenth Edition, at page 666 had this to say:
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> This section summaries the general powers of the court in regard to interlocutory proceedings. The details of procedure have been relegated to schedule 1".

With those observations, this application is not properly before this court because all the provisions cited by the applicant in the Chamber summons purporting to move this court to grant the injunctive relief are inapplicable.

On the other hand, even if the matter was to be carried further on its own merits, I am far from being convinced that sufficient reasons have been advanced by the applicant to justify the court to grant the reliefs sought.

As both learned counsel will agree with me, the applicant seeks this court's indulgence in restraining the respondent from collecting and/or

obtaining three title deeds and valuation reports for residential properties located at Plots Nos. 149, 150 and 159, Block F, Msijute Area within Mtwara District deposited as security in court.

It is not disputed that the respondent filed Civil Case No. 6 of 2018 together with Misc. Civil Application No. 28 of 2018. In the latter application, the respondent prayed the court to permit him sell the stock consignment of cashewnuts before judgment which are perishable goods. This court (Hon. Twaib, J) granted the prayer on condition that the said respondent deposited the documents in question as security pending the determination of Civil Case No. 6 of 2018. It is not in dispute that the respondent obliged. Likewise, the record is clear that on 29th day of July, 2019, the respondent prayed to have his Civil Case No. 6 of 2018 withdrawn and his prayer was granted but with leave to re-file. Both learned counsel agree that when the withdrawal order was made, the fate of the documents in in dispute was canvassed.

It is clear that the order of depositing the said documents was issued in respect of Civil Case No. 6 of 2018. That case which was withdrawn ceased to exist in the registers of this court in that the order of withdrawal meant that that case was completely removed from the record. Since the

basis of depositing those title deeds is no longer there, there is nothing on which this court can justifiably make a restraint order in respect of the title deeds that are not legally before this court. I agree to the submission by Mr. Stephen Lekey that the instant Civil Case No. 3 of 2020 filed by the applicant has no any direct relationship with the documents which were deposited in court by virtue of Misc. Civil Application No. 28 of 2018 pending the determination of Civil Case No. 6 of 2018 which has already been withdrawn from the court.

As the jurisdiction to grant an injunction is an equitable one, an injunction will not be granted if the applicant's conduct in relation to the subject matter is shown not to meet the approval of a court of equity.

Indeed, the object of the interim injunction is not far to seek. On this aspect, I seek guidance from Civil Appeal No.21 of 1971 between **Jayndrakumar Devechand Devani v. Haridas Vallabhdas Vhadresa and Baldev Vallabhdas Bhadresa ,** in which the erstwhile Court of Appeal for East Africa (Lutta, JA) observed:-

> "As I understand it the object of an interim injunction is to keep matters or things in status quo, in order that, if at the hearing of the substantive action the plaintiff obtains a judgment in his

favour, the defendant or the respondent, will have been prevented, in the meantime, from dealing with the property or the subject matter in such a manner as to make that judgment ineffectual".

Since the documents in question deposited by the respondent are not related to the matter on hand but relate to the suit which was marked withdrawn by my learned brother Hon. Ngwembe, J., granting the injunctive orders will be tantamount to reviewing the ruling and order of my fellow judge, the power which I do not possess at the moment particularly where it is clear that this not an application for review which can be brought by way of memorandum of review under the proper legal provision.

For the reasons adumbrated above, I find this application devoid of any legal merit. In consequence, I dismiss it.

Costs to be in the main cause.

Order accordingly.

W.P. Dyansobera

JUDGE

15.4.2021

This judgment is delivered under my hand and the seal of this Court on this 15th day of April, 2021 in the absence of the appellant but in the presence of the respondent.

W.P.Dyansobera

JUDGE