

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MWANZA DISTRICT REGISTRY)**

AT MWANZA

MISC. LAND APPLICATION NO.42 OF 2022

NEWSMASTER CORPORATION LTD..... APPLICANT

VERSUS

ATTORNEY GENERAL..... 1st RESPONDENT

TANZANIA COMMERCIAL BANK PLC..... 2nd RESPONDENT

AR COMPANY LTD..... 3rd RESPONDENT

RULING

13th July & 12th August, 2022

ITEMBA, J.

The applicant herein intends to move the Court to grant temporary injunction order to maintain status quo, pending the hearing and determination of application inter-parties, in respect of applicant's premises in plot No. 419 Kirumba Valley within Mwanza City. The said order is intended to restrain the respondents from disposing of the said premises as it will cause irreparable loss on part of the applicant.

The applicant herein is the natural person, registered as Newsmaster Corporation LTD, who is lawful owner of the suit premises. On 9th September, 2011 the applicant acquired a loan from the 2nd respondent in which the plot No. 419 with title No. 8336 was pledged as

respondent in which the plot No. 419 with title No. 8336 was pledged as a collateral to secure such loan. The applicant alleges that in the cause of repaying the loan, a temporary injunction order in respect of the suit land was issued by the District Land and Housing Tribunal (DLHT) in application No. 2 of 2012, which frustrated the loan agreement. According to him, later in the same year criminal investigation commenced over the same property with reference no. MW/IR/203/2012 which was filed by a person known as Mkoye Bungu. In 2016 the lender (Twiga Bancorp LTD) was declared undercapitalized and placed under statutory management of the Bank of Tanzania. He also alleged that; the said act made her incapable of attending to several arrangements which existed between them. In 2017 the applicant's bank accounts of term and overdraft facility was merged by the lender and charged with the same interests, which led to disruption of business as lender could take deposit from an overdraft account to service the loan in the term loan account. It is further stated that while the restructuring of the loan was in discussion the applicant was served with 14 days' notice of repaying the loan hence, this application.

When the matter came up for hearing, Mr. Godfrey Martin the learned counsel appeared for the applicant while the respondents enjoyed the representation of Mr. Innocent Michael. In his submission, Mr. Martin,

the learned counsel for the applicant, submitted in support of the application that he is applying for interim orders maintaining the status quo by granting mareva injunction in respect of Plot No. 419 Kirumba Valley in Mwanza, pending institution of a suit after expiration of 90 days' notice to the respondent. He prayed to adopt the affidavit of A. Batenga, Principal Officer of the applicant to form part of the submission.

It was counsel's further submission that there are three conditions to be met before the application succeeds which are first, whether there is triable issue or prima facie case, second, whether there is the likelihood that the applicant will suffer irreparably if the application is not granted, and third is the balance of convenience. He stated that paragraphs 2 to 5 of the affidavit in support of the application talk of the loan relationship between the applicant and second respondent whereby the suit premises was placed as collateral. It was stated further that the reason for the said loan was renovation and supporting the printing business. He submitted that the turnover of the business or running of the hotel will assist the payment of the debt.

He further submitted that failure to repay the loan was caused by unforeseen events which led to impossibility of performance of loan

contract and the same are contained in paragraph 6 of the affidavit which are as mentioned earlier and he explained the same as follows:

First, the applicant had faced frustration because nothing was done when the case was pending at the DLHT. Citing the authority in the case of **Felix Rutayerera vs Coperative and Rural Development Bank** [1996] TLR 382, he submitted that the Court of Appeal stated in that case that the principle of frustration has not been established as the Law of Contract Act does not cover every aspect. It was his submission however that the ***Law of Contract under Section 56(2)*** provides for the contract to be void and parties discharged from liabilities.

Making a slight comment on the counter affidavit of the 1st and 2nd respondents, he stated that the same contain evasive denial but does not object the prayers sought by the applicant. That, what the respondent want is proof which is already in the affidavit.

Second, the applicant believes there is no amount of money which can be paid to him after being dispossessed of the mortgaged property based on the location of the property in question and his goals.

Third, the applicant is in a position to suffer more than the 2nd respondent because what the applicant intends to challenge before the High Court is interest compounded during the time when the contract

could not be performed but the principal amount of the loan money has been paid.

In conclusion, the counsel stated that what is important is for the applicant to show good cause for temporary injunction to be issued. He prayed that his application be granted since the applicant has received a notice of sale of his property and the 2nd respondent being a government entity which requires the applicant to serve 90 days' notice before suing. He referred this court to the authority in ***Ali Kondo Mshindo & 67 Others vs Kinondoni Municipal Council & Two Others***, Miscellaneous Land Application No. 822 of 2015 HC-DSM where the court stated that there has to be a good cause on the balance of probability.

In the reply submission, Mr. Innocent Michael stated that he objects the application and prayed that the contents of the counter affidavit be adopted. In regards the three ingredients, he was of the opinion that the applicant's affidavit does not show a prima facie case because the applicant intends to challenge the interest.

He stated that paragraph 6 of the applicant's affidavit contains reasons for frustration of contract however it does not show how the applicant failed to repay his loan while in paragraph 8 the applicant agrees that there was a restructuring of the loan contract which meant that all

the interest and the loan started afresh. He adds that the same is averred in paragraph 6 of the respondents' joint counter affidavit to which was annexed the restructure and new terms and conditions of the new loan agreement that was made in 2017.

He argued that the act which the 2nd respondent is doing is to execute is his contractual right which the applicant had agreed and that he had served all the necessary notices. He stated that there is no prima facie case since the applicant is the one who breached the contract thus, he cannot be allowed to benefit from his own wrong.

With regard to the second ground, he submitted that a mortgaged property is not a human life it that cannot be compensated. If it happens that the property is sold and it was not proper, the amount and the property itself can still be recovered.

Lastly on the third ground regarding restructuring, according to paragraph 6 of the counter affidavit and paragraph 8 of the affidavit, it is averred that the said restructuring took care of all interests and both parties agreed and signed. He was of the view therefore that the applicant has nothing to inform this court as to what he is challenging.

As for the cited case of ***Ali Kondo Mshindo & 689 Others*** (supra), he stated that the same is not relevant as it has been cited out of context.

The matter at hand involves the breach of a loan contract while the cited case concerned the demolition of 674 houses and that loan recovery and demolishing a house are two different things. He prayed that the application be dismissed with costs.

The rejoinder by the learned counsel for the applicant was to the effect that paragraph 8 of the affidavit shows the steps taken by the applicant to have the loan restructured however, those prayers were not honoured. He stated that as the respondent does not dispute that the contract was frustrated, but only the extent of the damage caused by the said frustration, it was his opinion that there is an arguable ground.

In respect of balance of convenience, he submitted that the rights of a lender are exercisable even after the finalisation of the main case. He also made it notable to the court that the respondent does not dispute that the principal sum is already paid but the dispute is on the amount which was compounded.

With regard to the third ground, he submitted that in proprietary interest there are things which have unquantified value based on their importance or history of the property in question. He reiterated his prayer that the application be granted without costs.

Upon being asked by the court on the stuts of the hotel's operations, the learned counsel for the applicant replied that the hotel never operated and that is why there was an application for restructuring. He informed the court that the loan was issued in September 2011 and the case was filed in DLHT in 2012 up to 2013 where it was withdrawn.

Having heard parties' submissions the question which arises at this point is whether the application has met the requirements warranting for it to be granted. It is quite clear that the present application before this Court is for temporary injunction and that there is no pending suit before this court as provided for under Order XXXVII of the CPC, which governs temporary injunctions.

There is a notice of intention to sue dated 23rd May 2022 filed by the applicant.

It is now settled principle of law that in special circumstances an application for temporary injunction can be sought and also be granted without a pending suit before the Court. This profound principle of law has been long established in famous case of ***Mareva Compania Naviera SA vs International Bulk Carries*** [1980] 1 ALL ER 213. In our jurisdiction there are many cases to that effect, as follows; ***Tanzania Sugar Producers Association vs The Ministry of finance of United***

Republic of Tanzania and Attorney General, Miscellaneous, Civil Case No. 25 of 2003 (HC-Commercial Division Dar es Salaam) (Unreported), in which Hon. Kalegeya, J (as he then was) made it clear on genesis of such applications. **Tanzaco EA Mining Limited vs. Minister for Energy & Minerals and Another**, Commercial Case No. 74 of 2014, **Tanzania Sugar Producers Association vs. The Ministry of Finance of the United Republic of Tanzania and The Attorney General, Miscellaneous**, Civil Case No. 25 of 2003 (High Court Commercial Division, Dar es Salaam) (unreported), V. L. Makini. J, in Registered **Trustees of Calvary Assemblies of God (CAG vs Tanzania Steel Pipes Limited and 2 Others**, Misc. Land Application No. 677 of 2019 (Unreported) has quoted in approval the decision in **Nicholas Nere Lekule vs. Independent Power (T) Limited and The Attorney General, Misc. Civil Cause No. 117 of 1996 and Tanganyika Game Fishing and Photographic Limited vs. The Director of Wildlife, The Attorney General and Muanauta & Company (T) Limited**, Misc. Civil Cause No. 48 of 1998 where Hon. Kaji and Katiti, JJ (as they then were) held that a court has jurisdiction to issue an interim order where there is no pending suit. In England applications of this nature are known as "Mareva injunctions" having its roots in the famous case of **Mareva Compania Naviera SA v International Bulk**

Carriers SA (Supra). The reasoning in this case followed in the case of **Nicholas Lekule** (supra) where the court held:

*'Since courts in England used to issue injunction orders before institution of the main suit under S. 25 (8) of the Judicature Act 1873, and since that Act was in force in England on 22/7/1920 and would appear to have been of general application in England at that time, I am satisfied that under S. 2(2) of the Judicature and Application of Laws Ordinance Cap 453, in a proper case this court can grant such an order notwithstanding its peculiar name of Mareva. **Suffice to call it an interim Mareva injunction order before institution of the main suit.**'*

It is therefore, apparent from the above quotations that Mareva injunction can be granted where an applicant has successfully, established a prima facie case with a probability of success. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable loss, which could not be compensated in damages. But however, when the Court is in doubt it will decide the application sought on the balance of convenience.

Granting of a temporary injunction is an exercise of judicial discretion and the purpose of granting it is to preserve the matters in the status quo until when the question to be determined in the main suit is

finally disposed of. An order is granted so as to prevent the ends of justice from being defeated.

In the instant application, the applicant through his sworn affidavit has claimed that the respondents are intending to recover their loan by selling the premises erected in the suit land. In paragraph 8 of the affidavit, it shows that the loan agreement between the parties has been restructured and the applicant has already paid Tshs. 142, 133, 124/= and there has been on going negotiations in that regard. Now, at this stage the law does not require this Court to delve into the merits of the main suit but rather, the applicant is only required to prove that there is a serious issue to be tried by Court. Hence, it should be noted that an injunction will not normally be granted unless the applicant has shown that he is likely to suffer irreparable loss which would not adequately be compensated by an award of damages.

Looking at the contentions by the learned counsel for the applicant, the main concern is to the effect that, if his prayers for injunction is not granted, the respondents are likely to sell his premises and he will suffer irreparably. It is my conviction that the concern raised by the applicant constitutes a serious point, sufficient to draw the attention of this Court to grant temporary injunction to maintain status in quo pending determination of intended suit.

From the foregoing arguments, I am of the firm view that the applicant has established that; (i) there is a serious triable issue (ii) the court's interference is necessary to protect the applicant against an irreparable injury (iii) in the balance of inconvenience, there will be greater hardship suffered by the applicant if the application is not granted.

Hence, the application has merit and I grant it as prayed. Costs to be in the main cause.

It is so ordered.

DATED at **MWANZA** this 12th day of August, 2022.

