**IN THE HIGH COURT OF the united republic of Tanzania**
**(DAR ES SALAAM DISTRICT REGISTRY)**
**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO 494 of 2020**
(Arising from Civil Case No. 134 of 2020)

**LUKOLO COMPANY LIMITED.....APPLICANT**
**VERSUS**
**BANK OF AFRICA.....RESPONDENT**

**RULING**

19th November &15th December 2020

**MASABO, J.:-**

The Applicant has filed an application under section 68(e) and 95 and Order XXXVII Rule (1) (a) of the Civil Procedure Code [Cap 33 RE 2019], hereafter referred to as the CPC. Her main prayer is for a temporary injunction restraining the respondent from exercising rights arising from a credit Facility obtained by the applicant from the respondent pending final disposal of a suit, Civil Case No. 134 of 2020 pending in this Court. The application is accompanied by an affidavit of Burton N, Nsemwa (authorised officer of the Applicant) which was strongly resisted by the Respondent through a Counter Affidavit deponed to by Elizabeth E. Muro, a principal officer of the Respondent.

In brief, the application has its roots in a credit facility. 25th March 2010, the applicant obtained from the respondent a credit facility in the form of irrevocable advance payment guarantee payable on call in favour of Songea Municipal Council. It was averred that, upon receipt of a call from Songea Municipal Council, on 14th December 2018, the respondent bank negligently paid Songea Municipal Council a sum of Tshs 1,597,006,612.99. In recovery of this sum, the respondent bank has appointed a Receiver Manager one Peter Joseph Swai against the applicant's assets as per the terms of the Debenture and the said Receiver Manager has already issued a public notice as to the receivership. It is the applicant's averment that the measures taken by the respondent bank are unjustifiable as the payment of the above amount to Songea Municipal Council was negligently done in breach of the terms of the credit facility.

According to the applicant, if not restrained, the receivership will occasion an irreparable loss and frustrate its existence and operations in the following ways:

(i) it will deprive the applicant of the resources for pursuing the pending suit and obtaining justice against the negligent acts of the respondent;

(ii) the 13 trucks under receivership are involved in government reprojects which will be frustrated by the receivership;

(iii) demotion of its rank as First-Class Contractor for roads and buildings;

(iv) loss of ability to recover a sum of Tshs 3,275,969,399.81 arising from arbitral award against Songea Municipality;

(v) it will be rendered insolvent; 300 of its employees will be rendered redundant and unemployed.

The respondent while not disputing the appointment of the Receiver Manager, averred that allegations as to negligent payment to Songea Municipal Council are unfounded as they were done in accordance with the terms of the agreement. It was deponed further that the applicant is aware and has fully acknowledged indebtedness to the defendant but has wilfully neglected or defaulted payment and as a result the respondent has continued to suffer loss as her lending capacity has been dragged down. For these reasons, the respondent ardently disputed the averment that the Applicant stands to suffer any irreparable loss capable of being protected through injunction as in so doing, the court will allow the applicant to use court proceeding as a delay tactic to prevent the respondent from realising its contractual entitlement.

On the date of hearing, both parties were represented. Dr. Fredrick Ringo, learned counsel appeared for the applicants whereas the respondents enjoyed the service of Mr. Ereneus Swai, learned counsel. I commend both counsels for their enlightening submissions which I have carefully considered and dispassionately considered.

The courts power to grant injunction is discretionary and sparingly exercised based on well defined criteria/principles. As stated by Rutangwa J (as he then was in **Charles D Msumari & 83 Others v The Director of Tanzania Habours Authority**, Civil Appeal No. 18 of 1997, HC (Tanga) unreported,

> "Courts cannot grant injunctions simply because they think it is convenient to do so. Convenience is not our business. Our business is doing justice to the parties. They only exercise this discretion sparingly and only to protect rights or prevent injury according to the above stated principles, court should not be overwhelmed by sentiments however lofty or mere highly driving allegations of the applicants such the denial of the relief will be ruinous and or cause hardship to them and their families without substantiating the same. They have to show they have a right in the main suit which ought to be protected or there is an injury (real or threatened) which ought to be prevented by ana interim injection and that if that was not done, they would suffer irreparable injury and not one which can possibly be repaired."

A set of three criteria for granting injunction, which has become a trite law in our country was exemplified by Georges, C.J in the landmark case of **Atilio vs Mbowe** [1969] HCD 284. In this case, His Lordship held that, before granting injunction the court must be satisfied that:

i. There is a serious question to be tried on the facts alleged, and the probability that the plaintiff will be entitled to the relief prayed.
ii. the Applicant stands to suffer irreparable loss requiring the courts intervention before the Applicants legal right is established;

iii. that on the balance, there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendant from granting of it.

The parties are well vest with these criteria and all agree that it is crucial for the party seeking temporary injunction to meet the conditions laid down **Atilio v. Mbowe** (1969) HCD n.284. They also agree that for temporary injunction to issue it is incumbent that all the three conditions above be met (**Sango Petrol Station Ltd & 3 Others v Stanibic Bank (T) Ltd**, Commercial Case No.23 of 2013. Our task, therefore, is to determine whether or not the applicant has demonstrated the existence of these three criteria.

Regarding the first creteria, the applicant has deponed and submitted that payment to Songea Municipal Council was negligently done hence there is a serious triable issue between the parties. Submitting in support of this issue, Dr. Ringo passionately argued that there is a *primafacie* case between the parties predicated on two issues, namely, whether in advancing the disputed sum to Songea Municipal Council the respondent bank breached the terms of the credit facility and two, if the answer in the first question is in the affirmative, whether the applicant is entitled to a refund? In the applicants view, the claim is neither frivolous nor vexatious as it depicts on substance and reality and the applicant has greater chances to succeed on these two issues.

For the respondent, Mr. Swai resisted the existence of any arguable case between the parties. He submitted that the applicant has acknowledged her indebtedness against the respondent in paragraph 8 of the affidavit. Placing reliance on **Sungurwa Traders Co. v Equity Bank,** Misc. Application No. 687 of 2018 (HC) (unreported), he argued that the appointment of a Receiver Manager being a lawful exercise of the rights under the debenture does not constitute an arguable case especially because, there are no allegations of fraud or collusion with the purchaser of the of the assets which would amount to a good cause to grant the injunction sought.

I have objectively considered the facts placed before me while mindful of the fact that the requirement that there be a serious question to be tried on the facts alleged and the probability that the plaintiff will be entitled to the relief prayeed need not be exaggerated to unproportionally limits as that would be tantamount to giving verdict prematurely (**Suryakant D. Ramji vs Savings and Finance Ltd and others**, Civil Case No. 30 of 2000 HC (Commercial Division) at Dar, (Kalegeya,J). As held by Mapigano, J, (as he then was) in **Colgate - Palmolive Company vs Zacharia Provision store & others Commercial Case No.1 of 1997**, (unreported) all what is needed at this state is for the court to satisfy itself on whether on the face of facts placed before it the applicant has a case which needs consideration and that there is a likelihood of the suit succeeding.

Having applied these principles to the facts placed upon me, and being mindful not to encroach upon the main suit, I did not find credible facts upon

which to gauge the finding that the Applicant has established a prima facie case with the likelihood of success in the main suit. As argued by Mr. Swai, the applicant has on various occasions loudly acknowledged his indebtedness. The first of such acknowledgments is found in paragraph 8 of the affidavit deponed by Mr. Nsemwa in which he states as follows:

> "The applicant has not denied the debt but has sought a moratorium on payment of interest from the Respondent which is a normal business proposition given the Covid 19 PANDEMIC and the economic downturn in Tanzania"

Another acknowledgement of indebtedness is contained in the two letters appended to the respondent's counter affidavit as 'annexure LLA-3' collectively, both signed by Mr. Nsemwa, who is also the deponent of the affidavit in support of the application. In the 1st letter dated March 13th 2020, the applicant having expressed its gratitude to a favorable decision made by the respondent in respect of the debt, they informed the respondent of the claims they have lodged against Songea Municipal Council and their anticipation to use the award so obtained for repayment of the disputed sum. In addition, the applicant fronted a request for waiver of charges and interest on the suit amount. In the 2nd letter, dated 27th July 2020, barely two months before logging this application, the applicant having expressed deep concern as to the delay in settlement of the loan, requested for further waiver of charges and interest. With these three acknowledgements, I am unable to decipher the serious arguable question between the parties that would entitle the applicant to an injunctive order.

The averment that the applicant stands to suffer irreparable loss and that on the balance, there will be greater hardship and mischief suffered by her if the injunction is withheld, are equally devoid of merit as they are not supported by any credible evidence other than mere averments that the applicant will suffer the loss listed in paragraph 7 of the affidavit. No evidence was rendered to show that sale of the listed trucks will render the applicant totally insolvent and unable to continue with its operation.

As for the averment that she is implementing several government projects which stand to be frustrated if the injunction is withheld, the applicant produced a list (Annexture P-4 to the affidavit) containing projects which are still at tendering stage. No evidence whatsoever was rendered as to the ongoing projects. Likewise, no evidence was rendered on how the withholding of the injunction will prevent the applicant from realising the arbitral award and no list of employees was provided in substantiating the claim that there are 300 employees likely to be affected. Therefore, the averment that the applicant stands to suffer an irreparable loss and that on the balance of probability she stands to suffer more than the applicant if injunction is withheld, are all unmeritorious.

Since the applicant has acknowledged indebtedness as demonstrated above and since she has also impliedly acknowledged, through his prayers, that the receivership and intended recovery measures are rights arising from the credit facility, I will conclude with the wisdom of this court in the following two cases, which I have found to be highly persuasive and authoritative

regarding granting of injunctive orders against creditors seeking to exercise their contractual rights with respect to loan recovery measures. The first is in the decision by Nsekela, J (as he then was in **Agency Cargo International v. Eurafrican Bank (T) Ltd**, HC (DSM) Civil Case No. 44 of 1998(unreported) where he stated that:

> "... The object of security is to provide a source of satisfaction of the debt covered by it The Respondent to continue being in banking business must have funds to lend and which [h] as to be repaid by its debtors. If a bank does not recover its loans it will seriously be an obvious candidate for bankruptcy .... It is only fair that banks and their customers should enforce their respective obligations under the banking system".

The second is in **General Tryre EA Limited v HSBC Bank PLC**, [2006] TLR 60, where in the same spirit Sheikh,J had this to say:

> "The law is that banks/lenders and their customers borrowers must fulfill and enforce their respective contractual obligations under the various lending/securities agreements entered into by the parties. To restrain a debenture- holder from exercising his contractual rights and enforcing his security is not only unreasonable but contrary to the express contractual terms of the agreements entered into by the parties which were clearly admitted by the applicant himself. Indeed, the Courts have no jurisdiction to interfere into the express contractual terms of the parties by forcing the parties to negotiate when clearly there is a default entitling the respondent to enforce his security. A grant of a restraining order in this case would be contrary to

generally established banking principles and security laws."

Based on what I have demonstrated above as to the applicant's failure to satisfy the three criteria for granting of temporary injunction and guided by the authorities cited, the application fails in entirety and I dismiss it with costs.

DATED at DAR ES SALAAM this 15th December 2020.


**J.L. MASABO**

**JUDGE**