IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 143 OF 2022

TAMBULI GROUP OF COMPANIES LIMITED ..... APPLICANT

VERSUS

NMB BANK PLC ..... RESPONDENT

(Arising from Civil Case No. 25 of 2022)

RULING

3rd and 28th June, 2022

KISANYA, J.:

This is an application for temporary injunction. It was filed by Tambuli Group of Companies Limited, under Order XXXVII rule 2 (1) of the Civil Procedure Code, Cap. 33, Cap. 33, R.E., 2019 (henceforth "the CPC"). The orders sought in the Chamber Summons are as follows:

> *(i)* That this *Honourable Court may be pleased to restrain the Respondent from counting interest of the loan facilities issued to the Applicant from the date of filing of the main suit and service thereof pending the hearing and conclusiveness of the main civil case.*
>
> *(ii)* *That costs of this application be provided.*
>
> *(iii)* *Any other relief this Tribunal (sic) may deem and fit just to grant.*

Supporting the application are affidavit and supplementary affidavit of Japhet Bwire, principal officer of the applicant.

The background of the matter as shown in the pleadings is that, the applicant conducts the business of exportation of agricultural cash crops to different countries including China. Vide the term offer dated May 2020, the applicant and respondent entered into a loan facility agreement to the tune of TZS 2,000,000,000 which was required to be repaid within 23 months. It is alleged that despite that the respondent being informed about the urgency of the loan, she disbursed TZS 500,000,000 on 8th June, 2020 while interest of 1,000,000,000 started to count. The applicant claims further that TZS 500,000,000 was disbursed 22 days later, on 28th June, 2020 and that the loan facility was restructured on 15th September, 2020. It is the applicant's claims that the said delay affected her operation on the ground that it led to delay in collecting green mung beans which were required to be exported.

However, it turned out that the applicant managed to collect and transport to China 440 tonnes of green mung beans purchased at TZS 1,200,000,000. However, the transported cargo was not cleared at Vietnam Border for three months due to closure of the border between Vietnam and

China due to Covid 19 pandemic thereby leading to destruction of her cargo by weevil.

It is also the applicant's case that despite the respondent being informed about the destruction of the cargo, her (applicant) account which had TZS 200,000,000 was closed to the extent affecting the operation. The applicant alleges further that the respondent went on to deduct monies from her sister companies namely Tambuli Fisheries and Tambuli Spices. That, upon the respondent's failure to intervene on the matter, the applicant sued the respondent. One of the reliefs prayed in the main case reads as follows: -

> *"b) A declaratory order that the interest charged on a loan agreement of May, 2020 be halted from the day the Plaintiff filed a report of loss of its cargo to the defendant."*

Subsequent to filing of the said suit, the applicant lodged the present application for the above stated orders.

The respondent filed her counter affidavit and vehemently denied the applicant's claims. She categorically stated that there was no loan agreement dated May, 2020. The respondent further avers that the applicant is in default of the term loan dated 2018 as restructured in 2019 and September, 2020.

During the hearing of this matter, the applicant and the respondent enjoyed the services of learned counsel. While counsel Benson Kuboja, appeared for the applicant, counsel Godwin Nyaisa represented the respondent. The Court heard them orally arguing their respective cases.

Mr. Kuboja first and foremost submitted that the application is made under Order XXXVII, Rule 2(1) of the CPC. He also prayed to adopt the facts deposed in the supporting affidavit and supplementary affidavit as part of his submission.

The learned counsel submitted that temporary injunction is granted basing on the principles underscored in case of **Atilio vs Mbowe** [1969] HCD No. 284. These are *prima facie* case or serious question to be tried in the main case, irreparable injury and balance of convenience which must be decided in favour of the applicant.

Starting with the first principle, Mr. Kuboja contended that the main case give rise to the issues whether the respondent acted professionally when dealing with the loan facility of the applicant, whether the applicant requested for restructuring of the loan, whether the applicant defaulted to pay loan, whether Tshs. 1,200,000,000 incurred by the respondent as loss was caused by the respondent., whether the deduction of Tshs.

100,000,000 from the respondent's sister account was authorized by the applicant.

It was Mr. Kuboja's argument that in determining the first principle, the Court is required to consider the facts before it. His argument was cemented by the case of **Colgate Palmolive vs Zakaria Provision Store and Others**, Civil Case No. 1 of 1977, HCT at DSM and **Abdi Ally Salehe vs Asac Unit and 2 Others**, Civil Revision No. 3 of 2012 (unreported).

Mr. Kuboja submitted further that the applicant had posed serious questions to be decided by the court. His submission was based on the contention that despite the respondent not disputing that the applicant incurred loss of Tshs. 1,200,000,000, she continued to charge interest while the applicant's operation was not going on.

On the second principle of irreparable loss, Mr. Kuboja submitted that counting interest on the loan facilities while the applicant has suffered interest of Tshs 1,200,000,000 is uncalled for. He also contended that it causes the applicant to lose her potential investors as deposed in paragraph 2 of the supplementary affidavit. The learned counsel further contended that the applicant stands to suffer irreparable loss if the respondent is not stopped from calculating interest. Referring to the case

of **The Registered Trustees of Arch Diocese of Dar es Salaam vs The Chairman Bunju Village Government and 11 Others**, Civil Appeal No. 147 of 2016 (unreported), he submitted that the applicant will not be able to pay her employees and that the said loss cannot be adequately awarded by monetary damages.

And in respect to the third principle of irreparable loss, Mr. Kuboja argued that there will be great mischief if the application for temporary injunction is not granted. This argument was based on the contention that the applicant will be inclined to stop operation completely. The learned counsel was of the view that the respondent will not be affected because she has other customers. To reinforce his argument on the principle of balance of convenience, the learned counsel cited the cases of **Kilimanjaro Oil Company Ltd vs KCB T Ltd and Another**, Misc. Commercial Application No. 14 of 2021, HCT Commercial Division (unreported) and **Harold Sekiete Levia and Another vs African Banking Cooperation Tanzania Ltd and Another**, Misc. Civil Application No. 886 of 2016. In view of the foregoing, Mr. Kuboja prayed that the application be granted.

In his rebuttal submission, Mr. Nyaisa started by praying to adopt the counter affidavit and reply to supplementary affidavit filed by the

respondent to form part of his submission. He was in agreement with Mr. Kuboja that temporary injunction is governed by the principles established in the case of **Attilio vs Mbowe** (supra).

Responding to the first principle, Mr. Nyaisa argued that existence of the main case does not mean there are triable issues. He went on to submit that the applicant does not dispute that he borrowed money from the respondent and that he defaulted to pay the loan. Referring to paragraph 12 of the counter-affidavit, Mr. Nyaisa argued that the applicant prayed for restructuring of the loan.

On the issue whether the respondent's acted negligently, the learned counsel submitted that the respondent granted the loan requested by the applicant. He was of the view that under the principle of sanctity of contract, the applicant cannot say that she was over financed while the loan was issued in terms of the contract. It was also his argument that the respondent can only be blamed if there are terms of contract that were breached by her. On the issue of disbursement of Tshs 500,000,000, the learned counsel argued that it was a restructured loan to reduce the limit of the overdraft. He submitted further that the contract did not state the time within which the facility was to be disbursed and that the delay, if any, was condoned by the respondent who did not rescind the contract. He

further contended that the applicant commended the respondent for her professionalism as indicated letter to the counter affidavit as Annexure NMB 3).

On the issue of withdraw of monies from the applicant's sister companies without authorization, Mr. Nyaisa submitted that Annexures 6 and 7 to the counter affidavit show that the applicant gave authorization.

As regards the question whether the respondent did not intervene when the applicant suffered loss, Mr. Nyaisa contended that the applicant ought to have insured her cargo. He was of the firm view that, since that was not done, the applicant's assumed a risk or burden which cannot be placed to the respondent. He submitted that the respondent had already restructured the loan twice and that there is no legal requirement which obliged the respondent to accept every request for restructuring of the loan.

As to the issue of reporting loss, the learned counsel submitted such requirement is provided for under the Bank of Tanzania (Credit Reference Bureau) Regulation, 2012. He also submitted that the applicant does not state how she utilized Tshs. 800,000,000 which was part of the loan of Tshs. 2,000,000,000. He concluded that there was not prima facie case.

On the second principle, Mr. Nyaisa submitted that calculation of interest on the loan advanced to the applicant is not an irreparable loss. The learned counsel was of the firm view that such remedy can be awarded in momentary value. He contended that the applicant's submission as to investors, loss of employment and the respondent having other clients to whom she can charge interest was not stated on oath. He submitted further that the interest is charged in accordance with the terms of contract. In the event, the learned counsel submitted that the applicant had not proved that she will suffer irreparable loss.

In relation to the third principle, Mr. Nyaisa argued that loan is a public money which is recovered by charging interest to sustain the economy. Therefore, he was of the view that the balance of convenience is in favour of the bank as against the individual interest of the applicant.

Commenting on the authorities relied upon by the applicant's counsel, Mr. Nyaisa submitted that the same support the respondent's case and that some of the authorities are distinguishable from the circumstances of this case. He also called upon this Court to consider the cases of **Christopher P. Chale vs Commercial Bank of Africa**, Misc. Civil Application No. 635 of 2017, **Fulgence Pantaleo Kavishe t/a Double Way Auto Parts vs Tanzania Postal Bank,** Misc. Land Application No.

890 of 2019 and **Cosmass Developers and Another vs Mark Auctioneers and Court Brokers and 2 Others,** Misc. Land Application No. 56 of 2020, **Mohamed Iqbal Haji and 3 Others vs Zadene Investment and 2 Others**, Misc. Land Application No. 5 of 2020 and **Victorian Water Company Limited vs Equity Bank Tanzania Ltd**, Misc. Application No. 635 of 2018. In conclusion, the learned counsel invited me to dismiss the application with costs.

When Mr. Kuboja rose to rejoin, he reiterated his submission that the triable issue was whether the respondent acted professional or negligently. He contended that the applicant did neither admit that to be a defaulter nor commend the respondent for acting professionally. As regards withdrawal of the money from the applicant's sister company, he submitted that the issue is whether there was justification of withdraw will be determined in the main case. He reiterated further that the fact that the respondent refused to restructure the loan suggest that there is a triable issue in the main case.

Mr. Kuboja went on to submit that temporary injunction is based on the loss suffered by the applicant, the interest counted on the loan is unjustifiable due to force majeure thereby putting the applicant at the position of losing her potential clients. It was further submitted that the

issue of irreparable loss and applicant's employee who are likely to suffer were deposed in the supplementary affidavit. He reiterated that the respondent's act of calculating interest affects the applicant from looking at other workable solution and that it cannot be remedied by monetary value.

On the balance of convenience, Mr. Kuboja replied the continued calculation of interest will stack the business operation of the applicant. He therefore, reiterated his prayer that the application be granted.

I have carefully gone through the pleadings and considered the submissions for and against the application. In preface, it is settled position that an interim order is aimed at preserving the pre-dispute state until determination of the trial or further order as the case may be. This position was also stated in the **Abdi Ally Salehe**, (supra) when the Court of Appeal held that:

> *"The object of this equitable remedy is to preserve the pre dispute state until the trial or until a named day or further order."*

In this matter, I have indicated earlier that, one of the applicant's reliefs in the main case is for a declaratory order that the interest charged on a loan agreement of May, 2020 be halted from the day the Plaintiff filed a report of loss of its cargo to the defendant. Considering that the

applicant has asked this Court to restrain the respondent from counting interest of the loan facilities issued to the Applicant from the date of filing of the main suit, it is my considered view that granting the order sought in the present application is part and parcel of granting one of the reliefs to be determined in the main case.

Even if it is considered that the order sought in this application does amount to determination of the relief prayed for in the main case, I agree with the learned counsel for the parties that, temporary injunction is granted upon meeting the threshold established by the case law. Therefore, this Court is called upon to determine whether all principles or conditions governing temporary injunction are in favour of the applicant.

In determining the first condition on existence of a *prima facie* case, this court is required to consider whether the record displays contest between the parties and serious questions to be tried in the main case. This stance was stated in the case of **Colgate Palmolive** (supra) in which this Court held that:

> *"All that the court has to be satisfied of is that on the face of it the plaintiff has a case which needs consideration and that there is a likelihood of the suit succeeding"*

It is not disputed in the present case that the main suit is based on the loan facilities granted to the applicant by the respondent. In terms of paragraph 24 of the affidavit one of the issues is "whether the respondent acted professionally negligent to issue the overdraft facilities". The applicant deposed, among others, that the respondent delayed to disburse the loan for about 28 days. On the other hand, the respondent contended that she acted professionally and that the loan was disbursed in accordance with the terms of the contract. In view of the record, I am of the view that the said issue has to be adjudicated in a full trial with the aid of evidence. Thus, the first principle has been met.

Second for consideration is whether the applicant will suffer irreparable loss. In deciding on this issue, the question is whether the respondent's continued acts will cause the applicant to suffer damages which cannot be adequately compensated by an award of damages. I am also guided by the case of **Abdi Ally Salehe** (supra) where the Court of Appeal observed that: -

> *"There, 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 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 a future damage

In his submission, Mr. Kuboja argued that the irreparable loss to be suffered by the applicant is loss of potential investors and loss of employment of more than 50 persons. As rightly argued by Mr. Nyaisa, such fact was not stated in the supporting affidavit and supplementary affidavit as irreparable loss. Pursuant to paragraph 25 of the supporting affidavit, the fact that the applicant is likely to lose its business operation which is the root of almost 50 families was deposed to prove the principle of balance of convenience. With regard to the supplementary affidavit, it was not stated at all as to how calculation and reports of interest on the loan advanced to the applicant is likely to affect the applicant from losing investor and operating smoothly. It is trite law that submission by counsel is not evidence and thus, it cannot be taken into account to decide the matter before the court. See the case of **The Registered Trustees of the Archi Diocese of Dar es Salaam** (supra). Since the facts as to irreparable loss was not deposed in the affidavit, I hold that the second condition for grant of temporary injunction has not been met.

Last for consideration is whether the balance of convenience is in favour of the applicant. The settled position is to the effect that this issue is determined by addressing the question whether the applicants stand to

suffer the greater hardship and mischief if the injunction order is not granted than the respondents if the same order is granted.

Going by the supporting affidavit and supplementary affidavit, I hold that the view the applicant has failed to prove that the balance of convenience is in her favour. As indicated earlier, the applicant deposed in the supporting affidavit she is likely to lose her business operation which is the root of almost 50 families. However, the court was not told how the applicant's operation is affected by calculation of interest and reports made thereto. It was not stated whether the applicant is paying the interest charged on the loan advanced to her. On the other hand, it is undisputed fact that the respondent is licenced to carry out the business of lending. It is also common knowledge that interest is charged basing on the terms of contract entered by the applicant and respondent. The pleadings show that the applicant admits to have not repaid the loan on the account of loss incurred. This fact is, among others, reflected in paragraphs 8 and 9 of the reply to the respondent's reply to the supplementary affidavit. For instance, the relevant part of paragraph 8 thereto reads:

> *"...I reiterate that the Applicant has no outstanding amount to pay regarding agreements made in the letter mentioned and annexed by the Respondent..."*

On her part, the respondent deposed that supply of credit information to the BOT Credit Reference Databank is in accordance with Bank of Tanzania (Credit Reference Bureau) Regulation, 2012 as deposed in paragraph 4 of the respondent's reply to supplementary affidavit. All of the above considered, I am of the view that it is the principle of inconvenience is in favour of respondent who is required to charge interest on the report about all credits to the Bank of Tanzania.

In the upshot and the reasons stated herein, I find that threshold for the grant of temporary injunction have not been met. Consequently, the application is hereby dismissed. Costs to follow the event.

DATED at DAR ES SALAAM this 28th day of June, 2022.

S.E. Kisanya
JUDGE