

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
DAR ES SALAAM

MISC COMMERCIAL CAUSE NO 191 OF 2016
(Arising from Commercial Case No 98 of 2016)

BETWEEN

MBEGA FARM COMPANY LTD-----APPLICANT

VERSUS

CRDB BANK PLC-----1st RESPONDENT
SABAH ACKLAIN GHALIB -----2nd RESPONDENT
MEM AUCTIONERS AND GENERAL BROCKERS LTD-----3rd RESPONDENT

RULING

Date of hearing; 5/9/2016
Date of Ruling; 15/9/2016

SONGORO, J

Mbega Farm Limited, the Applicant filed Commercial Case No 98 of 2016 suing CRDB Bank PLC, the 1st Respondent seeking for several court reliefs including a declaratory Order for variation of loan facility.

While the suit was pending for hearing, the Applicant on the 28/8/2016 filed an application applying for Order of temporary injunction to restrain CRDB Bank PLC, Sabah Ackilain Ghalib and MEM Auctioneer's and General Brokers, the 1st 2nd and 3rd Respondents respectively , and their agents from interfering or transfer Mbega Farm situated at Sanje Village, Ulanga District Morogoro, pending the determination of the Commercial Case No 98 of 2016.

The Applicant`s Chamber Summons was made under Order XXXVII, Rule 2(1) and (4) and Sections 95 and 68 of the Civil Procedure Code Cap 33 [R.E 2002] and any enabling provisions of the law. Also the Application is supported by an affidavit sworn by Mr. Salman Malik.

In response to the Application, the 2nd and 3rd Respondents filed a Notice of Preliminary objection on point of law that, the Application is incurably defective as against the 2nd and 3rd Respondents for seeking an Order against persons who are not parties to the suit.

For that reasons, the 2nd and 3rd respondents prayed to the Court, that, they be struck out, from the Application, on the grounds that, are not parties to the suit.

Since it is a rule of practice that, the preliminary objection on point of law must be heard first, the court invited the parties to pursue the Preliminary objection on point of law, and Counsels representing parties appeared, and pursued the Preliminary objection on point of law.

To start with, Mr. Deogratias Lyimo, Learned Advocate for the 2nd Respondent raised the objection and then told the Court that, Applicant application for an Order of temporary injunction is made under Order XXXVII Rule 2 (1) and (4) of the Civil Procedure Code, Cap 33 [R.E 2002]

The Learned Advocate then informed the Court that, under the said provisions of the law, the parties to the Application must be parties to the main suit.

The Counsel then indicated that, from the legal point of view, it is presumed that, determination of the main suit and subsequent judgment will have impact to parties in the Application.

It was the argument, and prayer of Mr. Lyimo that, since the 2nd and 3rd Respondents are not parties to the main suit, it obvious may not be parties in the present application for an order of temporary injunction.

He then explained to the Court that, the Applicant`s Application is bad in law and pray for striking out of 2nd and 3rd Respondents from the Application.

On his part, Mr. Exavery Makwi, the Learned Advocate of the 1st Respondent he also supported the argument, and submissions of Mr. Lyimo that, the 2nd and 3rd Respondent be struck out from the Application

Responding to the preliminary objection on point of law, Mr. Fikiri Liganga, Learned Advocate of the Applicant opposed the preliminary objection on point of law, raised by the 2nd and 3rd Respondent and firmly stated that, it is misconceived, has no merit and prayed for its dismissal.

The Applicant`s Counsel then pointed out to the Court that, the Application is brought under the circumstances that, there was an auction which was conducted by the 1st Respondent on the basis of previous loan agreement which its terms are being challenged.

The Learned Counsel then stated that, the auction was conducted by the 3rd Respondent, from the instruction of the 1st Respondent the farm was sold to the 2nd Respondent. The Applicant`s Counsel then pointed out that, in view of involvement of the 1st and 2nd Respondents, the Order given in the Application, and the main suit, will obvious affect all Respondents.

The Applicant`s Counsel then told the Court that, there is no law which requires all parties to the Application be parties to the main suit. That, is the reasons, even Mr. Lyimo did not point or state in court, a specific provision of the law, which requires parties in the application for temporary injunction, to be parties to the main suit.

The Applicant`s Counsel then prayed for the dismissal of the preliminary objection on point of law for lack of merit.

In his brief rejoinder, Mr. Lyimo maintained his objection that, an order of temporary injunction may not the parties who are not parties to the main suit. The Respondents Counsel prayed that, the objection be uphold.

The Court has carefully weigh the preliminary objection on point of law raised by the 2nd and 3rd Respondents , arguments and submissions from both side and noted that, the Applicant `s Application is made under Order under Order XXXVII Rule 2 (1) and (4) of the Civil Procedure Code, Cap 33 [R.E 2002].

Next, the Court finds the text of Rule 2(1) of Order XXXV of the Civil Procedure Code states and I quote;

"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 form 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"

Now guided by the wording of Rule 2(1) of Order XXXV of the Civil Procedure Code, Cap 33 [R.E 2002] which is being relied by the Applicant in his application, the Court find there are words which statutorily directs that, the Application made under the cited Rule is specifically for restraining "Defendant" from committing a breach or any kind of injury. The said statutory direction may easily be found in words which reads as follows

....."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" form committing the breach of contract or injury complained"

So guided by the wording of Rule 2(1) of Order XXXV of Civil Procedure Code Cap 33 R.E 2002 referred above the Court find an application for an order of temporary injunction made under the said Order irresistibly suggests that, Injunction may lie against the Defendant.

Therefore bearing in mind what is stated in Rule 2(1) of Order XXXV of Civil Procedure Code Cap 33 R.E 2002 that, the said Order intends to restrain the Defendant, and submission of the 2nd and 3rd Respondents that, are not Defendants, the Court find the key issue for determination in the objection raised, is whether or not application brought against the 2nd and 3rd Respondents who are not "Defendants in the Commercial Case No 98 of 2016 is legally proper.

In addressing the above I have revisited the provision of Rule 2(1) of Order XXXV of Civil Procedure Code Cap 33 R.E 2002, and honestly I agree with Mr. Lyimo, Learned Advocate that, from the text of Rule 2(1) of Order XXXV of Civil Procedure Code Cap 33 R.E 2002 an application for an Order of temporary injunction may be applied for the purposes of restraining Defendant not a stranger. There is no ambiguity in the said Rule. It appears therefore that, since the 2nd and 3rd Respondents are not parties to the main suit, application of this nature may not be brought against them.

That, Court finding and legal position, that, application for an order of temporary injunction may not be brought against Respondents who are not Defendants is very much supported by the decision of the Court in the case of National Bank of Commerce Versus Dar es Salaam Education and Office Stationery [1995] TLR p 272 . In the said case the respondent borrowed money from the appellant`s bank. As security, a house was mortgaged in favour of the appellant. Respondent failed to repay the loan.

The appellant exercised its right under the mortgage deed and sold the house. After the sale of the house, the respondent filed a suit, and a Chamber Application filed under Order 37 Rule 1 and Sections 48 and 95 of the Civil Procedure Code Cap 33 [R.E.2002] for several Orders, including an order of temporary injunction restraining the NBC and Registrar of Titles from transferring title of the house

The Hon, Judge in the NBC case who heard the application issued orders that, the sale of the house be set aside, NBC and the Registrar of Title, and be restrained from transferring the title of the house.

Aggrieved by the two Orders, Appellant in the NBC case cited above, appealed against the decision of the High Court arguing, inter alia, that, the order to set aside the sale of the house was not properly given under Order .37 Rule 1, and temporary injunction may not be issued against strangers to the suit. The Court of Appeal relying on Order 37(2) of the Civil Procedure Code Cap 33 decided that;

"A temporary injunction cannot be issued against strangers to a suit".

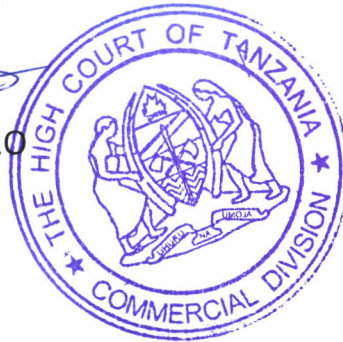
Bearing in mind the 2nd and 3rd Respondents are not Defendants, or parties to the suit, indeed are stranger to the suit, I find that, the application for an Order of temporary injunction may not be brought against them because are strangers.

On the foregoing reason, I hereby uphold the preliminary objection on point of law and immediately order the struck out of the 2nd and 3rd Respondents

from the Application. The Application to proceed against the 1st Respondent who is the Defendant. I make no order as to costs.

Dated at Dar es Salaam this 15th day of September, 2016

H.T. SONGORO
(JUDGE)



Delivered at Dar es Salaam this 15th day of September, 2016

H.T. SONGORO
(JUDGE)



The Ruling was delivered in the presence of Mr. Cuthbert, Learned Advocate for the Applicant, Mr. Exavery Makwi, Learned Advocate of the 1st and 3rd Respondent and Mr. Deogratias Lyimo, Learned Advocate of the 2nd Respondent.