**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR-ES-SALAAM**

**MISCELLANEOUS COMMERCIAL APPLICATION NO. 100 OF 2020**

*(Originating from Commercial Case No.27 of 2020)*

**EAST AFRICA WAREHOUSING (T) LIMITED.....1st APPLICANT**

**CAMEL OIL (T) LIMITED.....2ND APPLICANT**

**AMSONS PROPERTIES LIMITED.....3RD APPLICANT**

**EDHA ABDALLAH NAHDI .....4TH APPLICANT**

**VERSUS**

**AFRICAN BANKING CORPO RATION TANZANIA LIMITED.....RESPONDENT**

**RULING**

Date of Last order: 15/10/2020
Delivery of Ruling: 04/12/2020

**NANGELA, J:.,**

The Applicants herein have approached this Court through an application filed by way of a Chamber Summons supported by an affidavit of one, EDHA ABDALLAH NAHDI, the 4th Applicant herein, which was

affirmed in Dares Salaam, was filed in this Court on 26th June 2020.

The Chamber Summons was made and filed under Rule 2(2) of the High Court (Commercial Division) Procedure Rules, 2012 (as amended) and Order XXXVII Rules 1(a) and 2(1) of the Civil Procedure Code, Cap.33 [R.E.2019]; Section 2(2) of the Judicature and Application of Laws Act, Cap.433 [RE 2002] and any other enabling provision of the law.

In their Chamber Summons, the Applicants are seeking for the following Orders of the Court:

> 1. *That, this Honourable Court be pleased to issue a temporary injunction restraining the Respondent, its servants, employees or agents from possessing or selling or dealing in any manner whatsoever which amounts to intervention with the Applicants' possession over Plot No.699 Block FF, Nyakato in Mwanza City, Plot 700 Block FF, Nyakato in Mwanza City, Plot 200 along TANU Road in Mtwara Township; Plot 186 Oyster Bay in Dar-es-Salaam and Plot 991 Block H, Segerea Area, Ilala Dra-es-Salaam, pending the final determinantion of the original action*

*and counter-claim in Commercial Case No.27 of 2020.*

2. *That, the costs to follow event.*
3. *Any Other relief(s) this Honourable Court deems fit and just to grant.*

On 10th of July 2020, the Respondent filed a Counter- Affidavit. Although on 20th July 2020 this Court had granted leave to the Applicants to file a rely to the Counter-Affidavit, it seems that, that opportunity to do so was not utilised. It is worth noting, however, that, on 09th July 2020, this Court, upon request by the learned counsel for the Applicant, issued an order meant to maintain *status quo* until the hearing and determination of this application is finalised.

When the parties appear before me subsequently on 08th September, 2020, it was unanimously agreed that the matter should be disposed by way of filing written submissions. As such, on the 21st September 2020, the Applicants filed their written submission in support of the application and the Respondent file its written submission on the 28th September 2020. A reply thereto was filed on 13th October 2020. I will therefore summarize these submissions before determining the questions that arises from them.

In their submission, the Applicants have adopted the contents of the affidavit filed affirmed by EDHA

ABDALLAH NAHDI and the pleadings in general, as forming part of their submissions.

In a nutshell, the gist of their application is that, the applicants seek to restrain the Respondent from exercising its powers under a Term Loan Facility Agreement which was executed between the 1st Applicant and the Respondent on 24th November 2017. The facility was secured by way of mortgage of properties belonging, inter alia to the 2nd Applicant, the 3rd Applicant and the 4th Applicant.

Although the Respondent disbursed several sums to the 1st Applicant, on 24th April 2020, the 1st Applicant filed Commercial Case No.27 of 2020 alleging and seeking, *inter-alia*, a declaration that the Respondent is in breach of several fundamental terms of the Agreement, thus asking to be remedied for the specific and general damages suffered, to wit, USD 960,000 and USD 900,000 respectively or their equivalency in TZS.

On 15th May 2020, the Respondent fought back the claims by way of filing a written statement of defence and raised counter claims, suing not only the 1st Applicant but also the 2nd, 3rd and 4th Applicants. Further on 9th June 2020, the Respondent served Notices on the 2nd, 3rd and 4th Applicants demanding payments of the sums so far advanced under the Agreement failure of which the

Respondent would proceed and realise its monies by way of sale of the mortgaged properties.

It is from such a background, therefore, that the Applicants filed this application. In paragraphs 14 of the supporting affidavit it is averred that, the subject of the Respondent's Notices is the same as that in the counter-claim filed in Commercial Case No.27 of 2020 and the same has been disputed and awaits judicial determination of this Court. It is also averred in paragraph 15 of the Affidavit that the Applicants will suffer hardships in the even they are forced to pre-maturely pay the whole of the debt while the matter is in controversy and has not been adjudged by the Court.

The Applicants supporting affidavit further discloses, in paragraph 16 that, any monetary loss that the Respondent may suffer in the event the Applicants are granted an injunction is adequately covered by the Respondent's own prayers for commercial interest, penalty and decretal interest as contained in the counter-claim which is pending adjudication in this Court in Commercial Case No.27 of 2020.

In the submissions, therefore, the Applicants have made an argument that, the granting of the application for temporary injunction is warranted as its purpose is to preserve the status quo of the matters until the questions that are to be investigated in the main suit are finally

disposed of. Referring to the case of **Girlla vs Cassman Brown & Co. Ltd, [1973] E.A. 359**, the Applicants argue that it is a settled law that the principles in determining cases involving temporary injunction are the same. Relying on the case of **SIGORI Investment (T) Ltd and Another v Equity Bank Tanzania Limited and Another, Land Case No.56 of 2019**, (unreported) the Applicants pointed out three elements worth establishing, namely, that:

> *(i) on the facts alleged, there must be a serious question to be tried by the Court and a probability that the Plaintiff/Applicant will be entitled to the relief prayed for (in the main suit);*
>
> *(ii) the temporary injunction sought is necessary to prevent some irreparable injury befalling the Plaintiff /Applicant while the main case is still pending; and*
>
> *(iii) on the balance, greater hardship and mischief is likely to be suffered by the Plaintiff/ Applicant if the temporary injunction is withheld than may be suffered by the Defendant/Respondent if the order is granted.*

The Applicants have made a submission that, the properties in question are in the danger of being alienated and sold by the Respondent upon the expiry of the Notices issued by the Respondent, while there is, already, a pending suit in this Court. They contended that, the properties threatened to be sold are both the subject of the suit filed by the Applicants and the counterclaim filed by the Respondent. In view of that, it was the Applicants' contention that, since they have alleged a breach of the agreement and the Respondent has raised a counterclaim, these constitute triable issues which this Court will find relevant for determination.

It is argued that, therefore, that, on the basis of the available documents placed before this Court, the Applicants have demonstrated existence of a prima facie case with probability of success, hence fulfilling the first requirement in **SIGORI's case (supra).**

As regards the 2nd requirement, the Applicants submitted that, the irreparable harm, as considered in the case of **T.A. Kaare v General Manager Mara Cooperative Union (1984) Ltd [1987] TLR 17 (HC)**, is one that is irreparable. They submitted that, an applicant has to demonstrate, on the balance of convenience, that he/she stands to suffer more if the prayers sought are to be refused. In that regard, the Applicants contended that, if the properties are to be sold

while there are cases pending in this Court, in case any order is issued after the fact, the Applicants will be on the disadvantaged position. They claimed, therefore, that they are entitled to protection of this Court.

By way of reply submissions, the Respondent submitted that, the Applicants have failed to place sufficient material before this Court to warrant the issuance of the reliefs/orders sought. Reliance was placed on the decision of the Court of Appeal in the case of **Ingoma Holdings Ltd v Kagera Co-opertive Union (1990) Ltd and Another, Civil Appl.166 of (2005), CAT, DSM (unreported)**, where the Court restated the principles which govern the granting of the kind of orders sought by the Applicants herein.

Referring to the cases of **Atilio v Mbowe [1969] HCD, 284**, **Edu Computres (T) Ltd v Tanzania Investment Bank Ltd, Commercial Case No.38 of 2004**; as well as **Charles D. Msumari & 83 Others v The Director General T.H.A, Civil Case No.18 of 1997 (unreported),** the Respondent has argued that the principles which govern the granting of the kind of orders sought by the Applicants herein, must be considered conjunctively and not disjunctively.

The Respondent's legal counsel submitted that, the Applicants have not been able to particularise, in their affidavit filed in this Court, the kind of irreparable loss

they will suffer but have tried to do so in their submissions. It was the legal counsel for the Respondent's submission that, such an approach is erroneous since, as stated in the case of **TUICO at Mbeya Cement Co. Ltd v Mbeya Cement Company Ltd and Another [2005] TLR, at p.42**, submissions are only summaries of arguments and they are not evidence. The learned counsel for the Respondent argued that, the materials supplied to the Court by the Applicants have only been introduced at the submission stage and should, on the basis of the **TUICO's case** (supra), be expunged from the submission.

Secondly, it was argued that, as it may be ascertained from the prayers pleaded in the suit as well as the cause of action, since the injury which the Applicants seek to atone is in the monetary terms, the application falls outside the legal ambits for it to be granted. The reason assigned to that is that, the Applicants have shown that the injury complained of, i.e., breach of loan agreement, can be adequately compensated on payments of specific/general damages claimed therein.

Relying on the case of **Charles D. Msumari** (*supra*) the learned counsel for the Respondent submitted that, all pre-requisite conditions for the granting of an injunctive relief must exist conjunctively. He maintained,

therefore, that, in the instant application, the aspect of proof of irreparable loss is wanting.

It was further submitted by the Respondent's counsel that, the right to sell the mortgaged properties was freely contracted by the parties (2nd -4th Applicants and the Respondent) in the Deed of Mortgages annexed to the 4th Applicant's own affidavit. As such, it was submitted that, the law is settled, that, a mortgage Deed is a form of a contract and whose terms must be maintained by courts of law on the basis of the principle of sanctity of contracts as enshrined under section 37 of the Law of Contracts, Act, Cap.345 RE 2002.

Reliance was placed on the case of **Mboje s/o Jilala v National Bank of Commerce, Civil Case No.3 of 1993, HC Tabora (unreported)**, to further buttress the point made by the Respondent's counsel. In view of that, it was argued that the Mortgagee's rights to sell the charged properties in event of default should not be interfered.

The learned counsel for the Respondent submitted further that, this Court on 20th August, 2020 granted an order to the Applicants to file their reply to the Counter Affidavit, but they have failed to do so. That failure, it was submitted, implies that the contents of the counter affidavit, in particular on the debt due and outstanding,

stands uncontroverted and is admitted as true and the only truth.

In a further reply, the Respondent submitted that, it is a cardinal principle of law that he who comes to equity must come with clean hands. It was submitted that the Applicants' hands are tainted and, for that matter, cannot be allowed to enjoy the order of injunction which is an equitable remedy in nature.

Submitting on the aspect of balance of convenience, it was the Respondent counsel's views that; such does not lie in the Applicants' favour. Reliance was once placed on the case of **Christopher P. Chale v Commercial Bank of Africa, Misc. Civil Appl. No.635 of 2017, HC, DSM (unreported)** (Mwandambo, J.; (as he then was) regarding balance of convenience principle. The Respondent submitted that, since the Applicants are indebted to the Respondent, they should make good the debt due than rushing to the Court to seek orders of injunction.

To wind up his submission and, citing ***Halsbury's Laws of England,* 4th Edn, Re-issue Vol.37, pp.388, Para. 1234**, the learned counsel for the Respondent urged this Court to follow its earlier decisions as they restate a correct legal position.

Referring to the case of **SIGORI Investment (supra),** the learned counsel for the Respondent

submitted, therefore, that, in the present case the Applicants have not been able to exhibit, as in the **Sigori' case**, the aspects of "irreparable loss to be suffered" as well as "balance of convenience." The Respondent's counsel, thus, urged this Court to dismiss this application with costs.

In a brief rejoinder submission, the Applicants reiterate their main submissions and rejoined further by addressing, in the first place, the issue of non-filing of a reply to the counter affidavit. The Applicants strongly contested the submission that by not filing a reply counter affidavit it will mean that the contents of the counter affidavit have been admitted. They submitted further that, the object of their application to this Court is to seek protection of their rights against injuries which cannot be adequately compensated if they are to be allowed to happen should the main suit be tried their favour.

It was a further rejoinder that all conditions for the granting of this application were duly met. They argued that, sometimes the reference to irreparable damages refers to the difficulties of measuring the losses that could be inflicted. They contended that for them, showing that loss will ensue if the properties are sold while there is a pending suit already in court is sufficient. They submitted that, the **Sigor Investment's** case (supra) is in their

favour and, therefore, urged this Court to grant the prayers sought.

Having considered the competing submissions, the task ahead of me is to respond to the issue: **whether the Applicants have satisfied the necessary conditions or prerequisites for the grant of a temporary injunction**. Before I respond to this issue, however, I find it apposite to respond to one preliminary issue regarding whether a failure to file a reply to a counter affidavit amounts to an admission of the contents of the particular counter affidavit.

In his submission, the learned counsel for the Respondent has urged me to hold such a view, while the learned counsel for the Applicants has denounced it. However, the learned advocate for the Respondent did not cite any legal authority in support of his proposition that, if a party required to file a reply to a counter affidavit fails to do so, he will be taken to have accepted everything which is averred in the said counter affidavit.

In my view, the submission by the learned counsel for the Respondent on that point is erroneous. A failure to file a reply affidavit to the counter affidavit cannot be held to mean that the contents of the counter affidavit filed by the Respondent were admitted and hence presents the true position. This position of the law is not unique as it was once considered by this Court in the case

of **Silent Inn Hotels Ltd v Interstate Office Service Ltd, Civil Case No 464 of 1999, HC, DSM (unreported**). Responding to a similar issue, Mlay, J (a he then was) had this to say:

> *"My understanding of the law relating to affidavits is that an affidavit is a substitute of oral evidence and that, like all evidence, affidavits are governed by the law of evidence and any evidence is subject to evaluation. The Applicants advocate would therefore be entitled to evaluate and comment on the evidence adduced by way of the Respondents counter affidavit, not withstanding that a reply to the counter affidavit or a supplementary affidavit had not been filed. I do not therefore see any substance in the opening submission by the Respondent's advocate, on the failure to file a reply to the counter affidavit or, to the effect of such failure. The Applicant or this court is not bound by the contents of the Respondents counter affidavit, just because the Applicant did not file a counter affidavit in reply...."*

In view of the above legal position which I am fully prepared to be associated with, I cannot accept the proposition made by the learned advocate for the Respondent in this application as well. As regards the main issue, (i.e., whether the Applicants have satisfied

the necessary conditions or prerequisites for the grant of a temporary injunction), I am fully in agreement with the submissions by the learned counsels regarding the key factors to be looked at when there is an application seeking for the injunctive reliefs.

In principle, as correctly stated by the learned counsel for the Respondent, an injunction, be it interim or permanent, is an equitable remedy, the purpose of which may be varied, as it may be for the purposes of retraining certain actions from being taken, or interference of some kind, to furnish preventive relief against irreparable injury or the maintain the *status quo*. See the case of **Abdi Ally Salehe v Asca Care Unit Ltd, Ayoub Salehe Chamshama and Kenya Commercial Bank, Civil App. No.3 of 2012, (CAT)(unreported)**. In this case, the essence of the application seems to cater for all these purposes.

Being an equitable remedy, it is also a paramount legal requirement that the applicant should come with clean hands before this Court. See the decision of this Court in the case of **Registered Trustees of African Inland Church of Tanzania v CRDB Bank PLC and 2 Others (Comm Case No.7 of 2017) [2019] TZHCComD 134; [TANZLII (05 April 2019)]**.

In his submissions, the Respondent has argued that the Applicants herein have not come to this Court with clean hands. However, no further elaboration was given on such an averment to demonstrate how the Applicants are of soiled hands. I will, therefore, overlook that point and move on to find out whether the conditions for granting of the remedy sought herein have been met by the Applicants.

In their affidavit and submission, the Applicant have only disclosed that the Respondent has served them with Notices calling upon them to pay amounts of money which remain outstanding and arising from loan facility advanced to the 1st Applicant and secured by the rest of the Applicants by way of mortgage of their properties. The Applicants contend that the notices were issued threatening to realise the securities while there is a pending case which they have filed in this Court against the Respondent. They argued, therefore, that if the prayers sought are not granted they will suffer irreparable losses.

As a matter of law, as stated in the case of **Giella v Cassman Brown [1973] EA 358**, a case which is quite instructive, the Court in that case stated that:-

> *"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an*

*applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."*

Further in an Indian case of **Kashi Math Samsthan v Srimad Sudhndra Thirtha Swamy, AIR 2010 S.C. 296, the Indian** Supreme Court observed that, where the party seeking for such a relief was unable to make out a prima facie case, even if balance of convenience and irreparable loss are made out, such a party is not entitled to the relief. As regards what will constitute a prima facie case in a civil application, the case of **Mrao v First American Bank of Kenya and Two Others [2003] KLR 125,** is quite instructive and persuasive. In this case, it was observed that:-

*"a prima facie case in a civil application includes, but is not confined to, a genuine and arguable case. It is a case which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the*

*opposite party as to call for an explanation or rebuttal from the latter."*

In the instant application, there is no doubt that, the Applicants have a *prima facie case* in their main pending suit. This is based on the cause of action related to the breach of the facility agreement between the Applicants and the Respondent. The controversy, however, is whether they have been able to demonstrate that the other two aspects, i.e., that they will suffer irreparable loss and that of balance of convenience.

In my view, the Applicants who claims to be on the brinks of suffering irreparable loss must not only establish that they have a legal right but also that there is an invasion to it which will result into irreparable detriments if the Court will not intervene. Moreover, as matter of fact and law, therefore, such a person who claims to be on the brinks of suffering such an irreparable injury, is duty bound to demonstrate that, the kind of injury to be suffered cannot be atoned through monetary means. As regard balance of convenience, the same should be parallel and tilt to the favour of the Applicants.

In this case, following the notices sent to them by the Respondent, the Applicants have argued, in paragraph 15 of their affidavit in support of the application, that, they will suffer **"hardships"** in the event they are forced to prematurely pay the whole of

the debt while the main case is yet to be adjudicated. Although the Applicants have not come out clearly regarding the description of the irreparable loss they are about to suffer, the question to ask in the instant case is whether it is correct at all to argue that, if the application is refused and the Applicant happens to suffer loss, such loss will be irreparable.

In the case of **T.A. Kaare v General Manager Mara Cooperative Union (1984) Ltd** (supra) this Court stated that the injury must be "material, *i.e.,* one that could not be adequately remedied by damages." From this authority, it is indeed clear to me, that, monetary loss is at all times remediable and cannot fall within the so called 'irreparable injury".

I am aware, however, that in the case of **CPC International Inc v Zanzibar Grain Millers Ltd, Civil Appeal No. 49 of 1995(unreported)**, the Court of Appeal was of the view, having noted that the particulars of the irreparable injury were not pointed out, and citing its earlier decision in the case of **Deusdedit Kisisiwe v Protaz B. Bilauri, Civil Application No. 13 of 2001 (unreported** that:

> *"The attachment and sale of immovable property will invariably, cause irreparable injury. Admittedly, compensation could be ordered should the appeal succeed but*

*money substitute is not the same as the physical house. That difference between the physical house and the money equivalent, in my opinion, constitutes irreparable injury."*

In view of the above decision of the Court of Appeal, I am of the view that, even if the Applicants have not been above to provide the particulars of the irreparable loss, given the kind of properties described in the Notices, their nature suffices the kind of loss which they may suffer if the same are realised and it happens that their suit is decided in their favour. As such, the second condition is well established.

In his submission on the aspect of balance of convenience, the learned counsel for the Respondent has referred to this Court the decision in the case of **Christopher P. Chale (supra)** which cited with approval the case of **Agency Cargo International versus Eurafrican Bank (T) Ltd, Civil Case No.44 of 1998, HC (DSM) (unreported)**, where it was stated, inter alia, that:

*"The objective of security is to provide a source of satisfaction of the debt covered by it. The Respondent to continue being in the banking business must have funds to lend and which [have] to be repaid by its debtors. If a bank does not recover its loan 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."*

In my view, while I fully subscribe to the above views of this Court, still I find that each case has to be decided on the basis of its underlying facts. In the instant case at hand, the pending suit from which this application arises or is pegged has not only a claim by the Applicants but also a counter claim by the Respondent. This fact alone gives a leverage of convenience in favour of both. This means that, the balance of convenience factor is parallel and tilts to the favour of all parties involved if the prayers sought are to be granted.

In view of the above considerations, I am of a firm view that the issue regarding **"whether the Applicants have satisfied the necessary conditions or prerequisites for the grant of a temporary injunction or not",** has been responded to affirmatively. Consequently, this Court hereby proceeds to grant the Applicants the prayers sought and makes the following orders:

*(i) The Respondent herein, its servants, employees or agents are temporarily restrained from possessing or selling or dealing in any manner whatsoever*

*which amounts to intervention with the Applicants' possession over Plot No.699 Block FF, Nyakato in Mwanza City, Plot 700 Block FF, Nyakato in Mwanza City, Plot 200 along TANU Road in Mtwara Township; Plot 186 Oyster Bay in Dar-es-Salaam and Plot 991 Block H, Segerea Area, Ilala Dar-es-Salaam, pending the final determination of the original action and counter-claim in Commercial Case No.27 of 2020.*

*(ii) That, the costs shall costs in the main cause.*

***Order accordingly.***


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**DEO JOHN NANGELA**
**JUDGE,**
**High Court of the United Republic of Tanzania**
**(Commercial Division)**
**04 / 12 /2020**

Ruling delivered on this 04th *day of December 2020*, in the presence of Ms Irene Mchau, Advocate for the Respondent.


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**Hon. H. S. Mushi,**

**Deputy Registrar,**

**High Court of the United Republic of Tanzania**
**(Commercial Division)**
**04 / 12 /2020**