

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

**CONSOLIDATED MISC. COMMERCIAL APPLICATIONS No. 62/ 72
OF 2019**

(ARISING RESPECTIVELY FROM COMMERCIAL CASES NO. 58 AND 59 OF 2019)

THE PRIVATE AGRICULTURAL

SECTOR SUPPORT TRUST APPLICANT.

VERSUS

BANK OF AFRICA TANZANIA LIMITED RESPONDENT.

Date of Last Order: 10/03/2020

Date of Ruling: 17/04/2020

RULING.

MAGOIGA, J.

The Applicant, THE PRIVATE AGRICULTURAL SECTOR SUPPORT TRUST by way of chamber summons accompanied with certificate of urgency preferred the instant application under the provisions of ORDER XLIII Rule 2 and ORDER XXXVII Rule 1 (a) and any other enabling provision of the law against the above named respondents praying for this court be pleased to grant the following orders, namely:-

1. An order by this court to stay enforcement of the credit guarantee in the amount of USD.1,000,000.00 issued on 23rd November, 2017 by

the applicant in favour of the RESPONDENT in support of a short term cashew Nuts Trading Credit in the amount of USD.2,000,000.00 extended to a MAXIMUM AGRO RESOURCES LIMITED and USD.1,000,000.00 issued on 16th February 2018 by the applicant in favour of the RESPONDENT in support of a short term cashew Nuts trading Credit in the amount of USD.2,950,000.00 extended to one, OM-AGRO TANZANIA LIMITED by the respondent, pending determination of the pending main suits.

2. Costs of this application be borne by the respondent.
3. Any other order(s) that this honourable court may be pleased to grant.

The said chamber summons were supported or accompanied by the affidavits of NICOMED BOHAY containing the reasons for the grant of the orders prayed in the chamber summons.

Upon being served with the chamber summons and accompanied affidavits, the respondent filed her respective counter affidavits deposed by Ms. Joyceline Kaika stating the reasons why the instant application should not be granted.

The facts of these applications are not complicated. On 13th June, 2018, the applicant and the respondent signed a Credit Guarantee Agreement in which the applicant was to guarantee financial assistance to potential clients who wished to do business in the agriculture business sector and its sub sector. Pursuant to that agreement, the applicant guaranteed a client by the name of MAXIMUM AGRO RESOURCES LIMITED by issuing a credit guarantee certificate dated 23rd November, 2017 to cover 50% of the loan of USD. 2,000,000.00 and another client by the name of OM-AGRO TANZANIA LIMITED credit guarantee certificate dated 16th February, 2018 was issued to cover 33.33% of the loan of USD.2,950,000.00. Among the notorious terms were that the respondent was to debit all monies due from the accounts of the beneficiaries upon proceeds of sale through their accounts maintained by the respondent in the course of the business.

The facts goes that the respondent did not do his obligations for failure to deduct the money from the accounts of beneficiaries and as such they failed to pay the money as agreed and instead issued a demand notice under the credit guarantee agreement calling the applicant to discharge the debtor's obligations to the bank for payment of the sum mentioned in the demand letters within 14 days. It is against this background, the applicant

instituted commercial cases Nos. 58 and 59 of 2019 and subsequently preferred the instant application for orders sought, hence this ruling.

The applicant is at all material time enjoying the legal services of Dr. Alex Nguluma, learned advocate. On the other adversary part, the 1st respondent has the legal services of Mr. Godwin Nyaisa, learned advocate. By consensus of all parties, these two applications were consolidated as they stem from the same transactions.

Dr. Nguluma rose to argue this application prayed that the affidavits filed in support of the each application be adopted as evidence for the respective applications and the prayers contained in the chamber summons be granted. According to Dr. Nguluma, they are seeking restrained order from enforcing credit guarantee on the amount of USD.1,000,000.00 and USD.2,907,573,354.80 which were issued by the applicant in favour of the respondent in support of the short term Cashew Nuts Credit Trading because the amounts were to have been recovered by the respondent by deducting from amount received and deposited by the companies in their respective accounts that are maintained by the respondent. It was, therefore, the strong submissions of Dr. Nguluma that failure by respondent to recover the monies as agreed which was enough to cover the loan, then,

the respondent is not entitled to enforce the guarantee agreement which the applicant maintains was discharged the moment the credited amount was received by the respondent's bank by direct deposit.

Another reason the learned counsel for applicant want this court to intervene is that the respondents made calls in the applicant's guarantees seeking to recover the full amount notwithstanding that in commercial case No. 58 of 2019 the guarantee was for 50% of the whole amount and in commercial case no 59 of 2019 the guarantee was for 33.33% of the whole amount. In the circumstances, the learned counsel submitted that the call was not in compliance with the guarantee.

The learned counsel for applicant went on submitting that in case the order is not granted there is a danger the respondent will appropriate or debit the applicant's accounts maintained by the respondent, hence rendering the main suit pending superfluous. Not only that but also was the submission of Dr. Nguluma that by so doing will hinder the applicant's programmes to support farmers in need of applicant's guarantee to borrow from the bank. On that note, the learned counsel for applicant implored this court to grant the orders as contained in the chamber summons.

On the other hand, Mr. Nyaisa started by praying that their counter affidavits be adopted in these two consolidated applications and the written skeleton arguments which were filed in September, 2019.

Replying to the submissions of the learned counsel for applicant, Mr. Nyaisa submitted that the argument that there is a breach by the respondent for failure to recover the monies from proceeds of cashew nuts sales is not true, and the applicants have failed to provide detailed materials in proof of those allegations. Mr. Nyaisa called the court to note that the auction report annexed to counter affidavit as BE3 the amount covered did not satisfy the entire loan. According to Mr. Nyaisa, in respect of application No. 72 of 2019 the mortgage security has been deposited but was not enough to cover the outstanding amount. Further, Mr. Nyaisa submitted that on top of the recovery measures above there are two cases pending no. 158 and 159 of 2019 before her ladyship Philip, J.

Mr. Nyaisa pointed out that in their counter affidavit, they attached bank statements showing every proceeds that were deposited in such accounts and that the deposited amount were not able to cover the whole loan.

Mr. Nyaisa on allegations that the respondent raised guarantee to 100% is not true but the call of guarantees were called at 50% and 33.33% respectively and urged this court to see the demand notices which answers this point in a precise way. It was the humble submission of Mr. Nyaisa that all guarantees were properly called and the mention of the entire figures is intended to mislead this court.

On the point that if these prayers are not granted will render the main suit superfluous, Mr. Nyaisa submitted in reply that the main suit will still remain and if it is decided in favour of the applicant they will be compensated by whatever damages as may be ordered by this court. It was also the view and submissions of Mr. Nyaisa that no facts for irreparable loss has been put forward before this court so far and that even irreparable loss is proved, still it can be compensated by monetary value.

On allegations that the other farmers will be hindered from benefiting from the money it was humble reply of Mr. Nyaisa that the order sought do not entitle the applicant to access the funds, so if granted will not draw it but the funds will be idle, which according to Mr. Nyaisa is against the economic reasons that the money be recovered and enter into economic circulation for both good to the applicant and the respondent and in case the applicant

wins the case will be compensated. Mr. Nyaisa referred this court to the case of ATTILLIO v.MBOWE (1969) HCD 284 and drew the attention of the court that irreparable loss and balance of conveniences have not been met in this application. Along with other authorities cited in the skeleton written arguments the learned counsel prayed that this application is wanting and deserves an order of dismissal with costs.

In rejoinder, Dr. Nguluma replied that the authorities cited were not served to them and asked this court not to consider them for they denied them an opportunity to respond to them.

Dr.Nguluma argued further in rejoinder that whether the respondent managed to recover only part of the loan from the proceeds on account of guaranteed companies, is an issue to be determined in the main suit. So he should not be given a right to enforce the guarantee because the guarantee has already been met and to allow them enforce it will tantamount to have a cake they have already eaten.

On the balance of conveniences, Dr. Nguluma argued in reply that by taking money from the applicant which respondent is not entitled is causing the

inconveniences to the applicant for she will not use it as she wishes regards being that the guarantee was not with interest.

On the amount on the letters for calling the guarantees, it was the reply of Dr. Nguluma that the amounts on the letters are not known and the nature of the call is to allow the bank to make others suffers at their whims. The case of ATTILLIO (*supra*) shows in this application, there are issues for trial between the parties and prayed that the applicant be protected before the main suit is heard. In the event the learned counsel reiterated his earlier prayers in the chamber summons.

Having considered the affidavits and counter affidavits, written skeleton arguments and the oral submissions of the learned counsel for parties' on this matter, I am inclined to grant the restrained order to stay enforcement of the credit guarantee for the applicant has been able to raise serious issues to be tried in the main suits. The facts that were deposed in paragraphs 8 of the affidavits in the accounts of the beneficiaries were not countered with facts from the respondent. This being a guarantee, if it can be proved in the main suits that the respondent was negligent to deduct the amount in the accounts of the beneficiaries, then, it amounts to discharge of the surety.

The argument that there will be compensation is far from convincing this court because that is already an inconvenience on the part of the applicant. The ability for one to pay is not a factor not to grant the restrained order in proper application like the one we have in issue here. This point may sound good but with due respect to Mr. Nyaisa I am not very much persuaded with that line of argument.

Further on irreparable loss, the applicant has already said that she will be unable to guarantee other potential and would be beneficiaries in case the money is held by the respondent but whom she alleges to have breached the terms of the guarantees. Since the main contention is breach of the contract of the said guarantee, it is my considered opinion that putting the parties at equal playing ground would be for the interests of justice and will balance the inconveniences likely be caused in case one of the parties will be allowed to enjoy the contested credit guarantee agreement.

That said and done and without much ado this court hereby grant stay of the enforcement of the credit guarantee in both applications as prayed with costs in the course.

Since these applications and the main suits were brought under certificate of urgency, I direct that their determination if no amicable settlement will not be achieved inter parties be treated with the same urgency when due.

It is so ordered.

Dated at Dar es Salaam this 17th day of April 2020



A handwritten signature in black ink, appearing to read "S.M. Magoiga".

S.M MAGOIGA

JUDGE.

17/04/2020.