IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO 635 OF 2017

CHRISTOPHER P CHALE.....APPLICANT

VERSUS

COMMERCIAL BANK OF AFRICA.....RESPONDENT

RULING

MWANDAMBO, J

The Applicant has filed an application under section 68(e) and 95 and Order XXXVII Rule (a) of the Civil procedure Code, Cap 33 [RE 2002] hence forth to be referred to as CPC. The Applicant seeks an order for a temporary injunction against the intended sale of a mortgaged property on Plot No. 439 Block G Mbezi area in Dar es Salaam city pending final disposal of a suit in Land Case No. 157 of 2017 pending in this Court. It is noteworthy that the affidavit of Christopher Paul Chale (the Applicant) supports the application which is strongly resisted by the Respondent through a Counter Affidavit deponed to by Frida Shirima, a principal officer of the Respondent.

The genesis of the application has its root to a credit facility the Respondent extended to the Applicant way back in the year 2010 by way of equity release facility. That facility was secured by a mortgage of a right of occupancy over a landed property on plot No. 439 Block G Mbezi area

(the mortgaged property) and personal guarantees of Faustine Chale and Freda Chale.

It is the Applicant's averments he repaid the loan in full through an account held at the Respondent's bank which led to an additional loan of USD 50,000 on 26th July 2011 and later in December, 2013 that facility was enhanced to USD 165,966 on the same securities. The Applicant area further that he continued to service the loan smoothly till August 2016 when the Respondent unjustly blocked his account which made it difficult to service the loan anymore.

According to the Applicant, the freezing of his account occurred after deposits into his account of USD 233,256 from Ming Fei Zhang from Hong Kong China in two different transactions. By reason of the foregoing, the Applicant avers that his attempt to service the loan was frustrated by the Respondent's act of freezing his account and so it was not proper for her to serve him with notices of default and exercise its right under the mortgage and hence the application for injunction to ward off irreparable loss arising from sale of the mortgaged property pending determination of the main suit.

The Respondent who is represented by M/s IMMMA Advocate has taken a great exception to the Applicant's averments to the extent they relate to the servicing the facilities granted to the Applicant and blocking of the Account. Whilst admitting having blocked the Applicant's Account, the Respondent avers that it did so by reason of two suspicious transactions which it had obligation to report to the relevant authorities pursuant to the Ant Money Laundering Act and regulations made there under more so

because there was no satisfactory explanation of the said transactions. All in all, the Respondent maintains that the notice of default was properly made and served because of the Applicant's failure to service the facility which had an outstanding amount of USD 144,774.42 as of 30 November, 2017.

By reason of the foregoing, the Respondent disputes that the Applicant stands to suffer any irreparable loss which can be protected by the grant of injunction which will mean protection to a party who has breached the credit facility Agreement.

The hearing of the application was conducted by way of written submissions filed by the learned Advocates. I am grateful to both of them for the industry and energy expended in addressing the Court for and against the application.

From the submissions and indeed in every application for injunction, the Courts power to grant injunction is predicated upon the Applicant meeting the conditions set out in *Atilio V. Mbowe* (1969) HCD 284 . There is no dispute from the advocates' submissions that a party seeking an order for a temporary injunction must meet the conditions laid down in a litany of cases some of which were referred by the learned Advocates in their submissions. One of such cases is Atilio v. Mbowe (1969) HCD n.284. That case sets out preconditions which a litigant has to meet before the court exercises its discretion to grant an application namely; existence of serious question to be tried on the facts alleged with the probability of success in the suit, demonstration that the Applicant strands to suffer irreparable loss requiring the courts intervention before the Applicants legal right is

established and proof of greater hardship and mischief suffered by the Applicant if the injunction is not granted than the Respondent will suffer if the order is granted

The above principles are reflected in many other cases prior to and after Atilio V Mbowe's case, viz. **Noor Mohamed Van Mohamed Kassamali Virji Madani** (1953) 20 EACA 8, **E.A Industries Ltd. V. Trufford Ltd** [1972] EA 20, **Giela v Casman Brown & Co. Ltd** [1973] EA 358 and **Tanzania Tea packers Ltd V. Commissioner of the Income Tax**, Comm. Case No. 5 of 1999 (unreported) and **American Cynamid V. Ethicon Ltd** [1975] 1 All.ER 504. It is also the law that the conditions set out must all be met and so meeting one or two of the conditions will not be sufficient for the purpose of the court exercising its discretion to grant an injunction.

The Applicant's complaint is that his inability to service the loan was a result of the Respondent's freezing of his account which made it impossible for him to perform his obligations under the credit facilities agreement. According to him that constitutes a **prima facie** case with a probability of success. The learned Advocate for the Applicant invites the court to hold that from the facts there is likelihood of success by having regard to the existence of a legal right capable of being protected by law and the entitlement to the reliefs sought. He cites **Hubbard v. Vosper** [1972] 1 All.ER for that proposition. The Respondent's Advocates submit that the freezing of the account was done in compliance with the law and order of the Director of Public Prosecutions and so if I understood them correctly, they meant to say that it can't be argued that Respondent acted outside its

mandate thereby contributing to the default to service the outstanding liabilities. Although they made reference to an order of the DPP as a basis for freezing the Account, a copy of such order has not been annexed to the counter-affidavit other than correspondence with the Director of Criminal Investigation (DCI). Be it as it may, all factors considered and having regard to the authorities placed before the court and without discussing the merits of the main suit, from the facts discerned in the affidavits, it is hard to gauge that the Applicant has established a **prima facie** case with the likelihood of success in the main suit in relation to the alleged unlawful freezing of the account and so the default to service the loan. That means that the Applicant has failed to meet the first condition. The second precondition an applicant must meet is proof of irreparable loss to which I now turn my attention.

It is settled law and the learned Advocates for both sides agree that Courts will only grant injunctions if there is evidence that there will be irreparable loss which cannot be adequately compensated by award of general damages (See: **American Cynamid Co. V. Ethicon Ltd** [1975] 1 All ER 504 at p.509 Per Lord Diplock) followed in Various Cases in Tanzania including **Hotel Tilapia Ltd v. Tanzania Revenue Authority,** Commercial Case No. 2 of 2000 (unreported). Lord Diplock stated:

> *".... The object of the temporary injunction is to protect the plaintiff against injury by violation of his right for which he could not adequately be compensated in*

damages recoverable in the action if the uncertainty were resolved in his favour on the trial...."(at p.509)

The learned Advocate for the Applicant argues that the Applicant will indeed suffer irreparable loss because once the mortgage property is sold to recover the outstanding loan, the Applicant's family will have lost its home, good neighbourhood and equivalent property in Mbezi area and so the loss is incapable of atonement by any award of damages warranting the Court to issue an order of a temporary injunction as prayed. For their part, the learned Advocates for the Respondent submit that the Applicant has not demonstrated that the Applicant will suffer irreparable injury in the light of the tests articulated by courts in various cases including; **Giela v Casman Brown & Co. Ltd(**supra), **James Mizanza Kelela V KCB Bank (T) Ltd& Another**, Misc. Land case No. 240 of 2016(unreported). The learned Advocates argue that the particulars of the alleged loss have not been stated in the affidavit from which the court can gauge merits and consider the application. It is the learned Advocates' further submission that the court cannot look at the submission of the Applicant's Advocate because they are not equivalent to evidence on the authority of **The Registered Trustees of the Archi Diocese of Dar es salaam v the Chairman Bunju Village Government & 11 others**, Civil Appeal No 147 of 2006(unreported). I agree with this part of the submission from the authority cited and if I add one more I would cite to **Morandi Rutakyamirwa V. Petro Joseph** [1990] TLR 49 (CAT) for the same proposition. It is clear that the only averment dealing with irreparable loss

is to be found at para 25 of the affidavit which says nothing resembling what the Applicant's learned advocate states in his submissions. I would thus endorse the arguments by the learned Advocates for the Respondent that particulars of irreparable loss have not been given for the court's exercise of its discretion in the Applicant's favour.

I am increasingly in agreement with the learned Advocates for the Respondent that the Applicant is not the owner of the mortgaged property the subject of this application and so, stranger as he is to the said property he loses ground to support an application for injunction in the manner it has been argued by the Applicant's learned Idvocate. I will now discuss the third precondition which deals with balance of convenience.

From authorities cited and others it is trite law that the court's concern in this aspect is to determine who, between the Applicant and the Respondent stands to suffer greater hardship if the order is not made and vice versa. The learned advocate for the Applicant has invited me to hold that that it is the Applicant who stands to suffer more if the court declines to make the order sought because:

> *"the respondent t will not be affected in any manner if the injunction is granted as it is a strong financial institution with a lot of clients across the country. In other words its business will continue as usual even if an injunction is granted"*(at page 6).

The learned Advocates for the Respondent resist the submission by reference **to George Ndegeyiswa V National Bank of Commerce Limited,** Misc. Land Application No. 7 of 2015(unreported) and **James Mizanza Kelela V KCB Bank (T) Ltd& Another** (supra). it is the learned

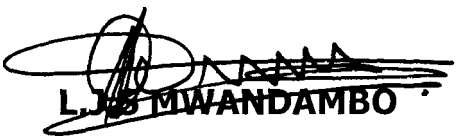
advocates' submission that in so far as the Applicant has defaulted repayment of the loan standing at USD 144,744.42 as of 30 November 2017, he cannot be protected by an order of injunction because the amount owed affects the Respondent's lending capacity and so it is the Respondent rather than the applicant who stands to suffer more hardship if the order is made as prayed. I am prepared to agree with the submission more so because I have already held that the Applicant has not satisfied the first two conditions particularly the irreparable loss test. It is not disputed that the Applicant's outstanding debt owed to the Respondent is as indicated at para 21 of the counter affidavit. No doubt not small amount. The argument by the learned Advocate for the Applicant reproduced above sounds attractive but it falls away in the light of **Agency Cargo International v. Eurafrican Bank (T) Ltd,** HC (DSM) Civil Case No. 44 of 1998(unreported) wherein the balance of convenience test was adumbrated in an application for injunction against the bank's move to enforce recovery measures as it were in this application. This Court (speaking through Nsekela, J as he the then was) stated thus:

> *"... 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" (at pp. 5 and 6).*

I entirely subscribe to the above statement for it as relevant in this application as it was in the said case. I hold that even assuming the

Applicant had met the first two conditions, the application was bound to fail on the third condition.

In the event I find no merit in the application which is accordingly dismissed with costs. It is so ordered.



L.J.S MWANDAMBO

JUDGE

13/ 03/2018