

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 55 OF 2019

(Arising from Commercial Case No. 55 of 2018 and Miscellaneous
Commercial Application No. 47 of 2019)

QUALITY CORPORATION LIMITED.....1st APPLICANT

QUALITY GROUP LIMITED.....2nd APPLICANT

TANPERCH LIMITED.....3rd APPLICANT

YUSUF MANJI.....4th APPLICANT

KANIZ MANJI.....5th APPLICANT

Versus

FORSTERS AUCTIONEERS &

GENERAL TRADERS.....1st RESPONDENT

NATINAL BANK OF COMMERCE LIMITED.....2nd RESPONDENT

Last Order: 24th July, 2019

Date of Ruling: 11th Sept, 2019

RULING

FIKIRINI, J.

This application brought under the certificate of urgency and under Order
XXI Rules 24 (1), (2), 27 and sections 68 (c) and 95 of the Civil Procedure

Code, Cap. 33 R. E. 2002 (the CPC) and any other enabling provisions of the laws seeking for the following orders:

Ex parte:

1. An Ex-parte interim order to maintain Status Quo restraining the respondent and/or their agents, servants, assignees, employees, contributories, assistants or any other person acting on their behalf, jointly or severally from interfering with the suit property, Plot No. 2410/5, Sea View, Dar es Salaam, City with Certificate of Title No. 186045/82 in the name of Quality Group Limited, by way of attachment, sale or any other kind of disposition pending determination of Miscellaneous Commercial Application No. 47 of 2019 and Commercial Case No. 55 of 2018.

Interparte:

1. ***An interim order to maintaining Status Quo*** restraining the respondent and/or their agents, servants, assignees, employees, contributories, assistants or any other person acting on their behalf, jointly or severally from interfering with the suit property, Plot No. 2410/5, Sea View, Dar es Salaam, City with Certificate of Title No.

186045/82 in the name of Quality Group Limited, by way of attachment, sale or any other kind of disposition pending determination of Miscellaneous Commercial Application No. 47 of 2019 and Commercial Case No. 55 of 2018.

2. ***An Order for Stay of Execution*** restraining the respondent and/or their agents, servants, assignees, employees, contributories, assistants or any other person acting on their behalf, jointly or severally from interfering with the suit property, Plot No. 2410/5, Sea View, Dar es Salaam, City with Certificate of Title No. 186045/82 in the name of Quality Group Limited, by way of attachment, sale or any other kind of disposition pending determination of Miscellaneous Commercial Application No. 47 of 2019 and Commercial Case No. 55 of 2018.

3. ***An Order for Restitution*** of the suit property restraining the respondent and/or their agents, servants, assignees, employees, contributories, assistants or any other person acting on their behalf, jointly or severally from interfering with the suit property, Plot No. 2410/5, Sea View, Dar es Salaam, City with Certificate of Title No. 186045/82 in the name of Quality Group Limited, by way of

attachment, sale or any other kind of disposition pending determination of Miscellaneous Commercial Application No. 47 of 2019 and Commercial Case No. 55 of 2018.

4. In alternative, a temporary injunctive Order maintaining "***Status Quo***" between the parties herein pending hearing and final determination of the main suit.
5. An order that costs of and incidental to this application abide by the results of the same; and
6. Any other order this Honourable Court may deem fit and justifiable to grant in the circumstance of this suit.

The application is supported by an affidavit deposed by Mr. Yassin Maka counsel for the applicants and opposed by the respondents through a counter affidavit deposed by Mr. Joseph Nuwamanya. Mr. Nuwamanya filed and adopted his skeleton argument filed on 22nd July, 2019 whereas Mr. Maka did not file any. They both, however adopted their affidavits filed in support of their, positions, and requested they be adopted and made part of their respective submissions.

In arguing the application Mr. Maka prefaced the submission with citing the case of **Sultan bin Ally Hilal El Esri v Mohamed Hilal & Others,**

Miscellaneous Commercial Cause No. 64 of 2017, where the Court spelt out grounds on which an order for maintenance of *status quo* can be granted.

Parties were not heard in Commercial Case No. 55 of 2018 and that led to filing of Miscellaneous Commercial Application No. 47 of 2019. Mr. Maka contended that the respondents were claiming for the decretal sum of the loan, penal interest as well as commercial interest. Summary suit should always be filed in respect of the undisputed decretal amount and if there are other disputed issues then the suit does not fit to be filed as a summary suit, he argued. In the already determined matter the respondents then plaintiffs were awarded Tshs. 6, 484, 896, 611. 65 of which, if allowed to execute the decree, the applicants will suffer irreparable loss. This was due to the fact that the respondents in their application for execution have sought by way of attachment and sale of the mortgaged property, and in that regard the applicants were praying for maintenance of status quo pending the hearing and determination of the application, lest it be nugatory.

Submitting on the 2nd prayer on stay of execution, it was Mr. Maka's submission that the respondents have already issued notice to the

applicants for the execution of the awarded decretal amount and prohibitory order against the 2nd applicant as reflected in annexure QGL-2, but since there was Miscellaneous Commercial Application No. 47 of 2019 with an intention to set aside the decision, this application should therefore be granted. In case this execution application proceeds and this application is granted, there would be inconvenience to the Court and the applicants and the hearing of this application would be fruitless, argued Mr. Maka. He further submitted that for the balance of convenience the respondents shall not suffer if this application was to be granted. And if it was their legal right to execute the decree they will always have that right to exercise compared to the applicants' whose right to be heard is at indeterminate state.

Adding to the above, he stated that the applicants were servicing the loan, so they deserve to be heard and this can only be done by each party stating their case and the Court would make its decision where each party will get their rights.

The 3rd prayer was restitution of the suit property made under Order XXI Rule 27 of the CPC. The order resulting from the summary procedure, subject of this application had tied the applicants' hands to deal with their

property and hence praying for the restitution order so that the applicants can enjoy their rights to the property.

Countering the application it was Mr. Nuwamanya's submission that the present application was for extension of time and nothing contesting the orders of the Court including the summary judgment, decree as well as execution orders. Miscellaneous Commercial Application No. 47 of 2019 cannot therefore be relied on.

Specifically responding to the submission related to a summary suit, it was his contention that the assertion that a summary suit should only be brought when there was no dispute on a specific amount, was wrong and no authority has been cited to back up the assertion. He as well challenged the assertion that, that was what should have been addressed in the Commercial Case No. 55 of 2018.

On submission that the applicants will suffer irreparable loss, he referred this Court to the case of **Tanzania Cotton Marketing Board v Cogecot Cotton SA 1997 [1997] T. L. R. 63, CA**, where the Court of Appeal was of the view that a vague and generalized assertion of irreparable loss cannot be taken as a ground for granting the stay of execution. Submitting

on the balance of convenience, the 2nd respondent was more inconvenienced than the applicants, it being a bank that conducted a business of lending and hence more affected if lent out money was not repaid, he contended. After all the applicants were not disputing borrowing money from the 2nd respondent, Mr. Nuwamanya underscored,

Refuting the claim that the applicants have been servicing the loan, he stated that no payment has been made since institution of Commercial Case No. 55 of 2018 to date. Supporting the submission the Court was referred to paragraph 13 of the counter affidavit and annexure NBC-1. Mr. Nuwamanya went on urging the Court that in the event this Court finds prudent to grant the application, then Order XXI Rule 24 (3) of the CPC should be invoked and the applicants be ordered to provide security for the outstanding amount. This was premised on the fact that there was no dispute that the applicants were lent money by the 2nd respondent and have not repaid the loan advanced.

Concluding his submission he submitted that no sufficient reasons have been put forward to warrant restitution. Moreover, the order will inconvenience both the Court and the 2nd respondent's rights.

Rejoining the submission Mr. Maka declined the claim that Miscellaneous Commercial Application No. 47 of 2019 was merely for extension of time. He argued that under prayer 3 and 4, the applicants have prayed for setting aside of the order from the summary suit, leave to appear and defend the suit and not merely extension of time as asserted.

While admitting the right for the 2nd respondent to recover the defaulted payment, the applicants disputed the amount awarded in the decree. And the only way that can be resolved was to have a hearing whereby all issues would be heard and determined. And if the Court decides in favour of the respondents, then the recovery would be on fair amount. As for security, it was his rejoining submission that the end respondent was already secured after the prohibitory order has already been made; the respondents were therefore well protected. However, for the facilitation of the process he suggested for the prohibitory order to continue until determination of the Commercial Case No. 55 of 2019 and Miscellaneous Commercial Application No. 47 of 2018.

Concluding his submission he urged the Court to use its discretion and inherent power provided under section 95 of the CPC cited in the chamber summons. Also the Court should consider that there was a pending

Miscellaneous Commercial Application No. 47 of 2019 so based on the common sense and advantage basis this application be granted to allow parties to be heard in the pending matters while the applicants for go costs.

In determining the merits of this application, I will start by pointing out that the assertion that summary suit should only be filed on a specific amount which is not disputed, has some truth in it, but not necessarily true at all the time and that is the rationale behind the defendant being invited to defend the suit after grant of a leave to do so. In the present case that should be the issue to be addressed in the main suit which is Commercial Case No. 55 of 2018. Mr. Maka's assertion at this juncture is unsupported as no law or case law has been cited in relation to that.

Coming to the application before this Court, the applicant is essentially seeking for maintenance of status quo or stay of execution and restitution of the property. Each of the prayed relief has its requirements to fulfill before the said application is granted. With the stay of the status quo the applicant has to show that there is imminent danger looming upon the applicant and if no such step is taken or order is given the consequences and hardships to be faced will be greater than if the order is given. Also,

this order when given its intention is to see that the status remains as it is when the application was being made.

This is different from temporary injunction which has three requirements to be fulfilled as propounded in the case of **Attilio v Mbowe (1969) H.C.D.**

284. The following three principles has to be observed prior to the grant of injunctions. Those are principles are:

1. *That there must be a serious question to be tried on the facts alleged and a probability that the plaintiff will be entitled to the relief prayed.*
2. *That the court's interference is necessary to protect the plaintiff from the kind of injuries which may be irreparable before his legal rights is established, and*
3. *That on the balance there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendant from granting it.*

As for the triable issues, this I would say is hard to determine at this time as no enough facts have been presented to this Court.

Another point for consideration would be irreparable loss. While that can stand as sufficient cause, but in order for the Court to arrive at such decision it has to be furnished with enough facts leaning towards showing that irreparable loss will be suffered. Vague and generalized claim should not have place as that will be causing injustice to the other party. In this position I am in complete agreement with Mr. Nuwamanya's submission and none other than the case of **Tanzania Marketing Board's** (supra) drive home that point. Moreover, in the present application, I do not fathom the situation whereby the 2nd respondent could not be able to compensate the applicants incase the Court decides in their favour.

The last requirement is the balance of convenience, which in this application both parties each must be considering their position. However, comparing the two, I find that the 2nd respondent will suffer more than the applicants. The nature of the business conducted by 2nd respondent which is that of lending money should be more inconvenienced when such huge amounts of money are just stuck somewhere underpaid.

The applicants have not disputed borrowing from the 2nd respondent, but have not provided any evidence that they have been servicing the credit facilities obtained as claimed. The 2nd respondent has through annexure

NBC-1 annexed to paragraph 13 of the counter affidavit which is a bank statement has shown that the applicants have not serviced the debt loan since institution of Commercial Case No. 55 of 2018.

What has been stated above is of course different as to when the Court considers an application for stay of execution, whereby good cause has to be shown. There is no specific definition as what amounts to sufficient cause but through various Court of Appeal decision illustrations have been given which guides the Court before which the application is presented, in considering as to whether there has been sufficient cause shown or not.

See: **Benedict Mumello v BOT, CAT, Civil Appeal No. 12 of 2002**, p. 5 -6; **Tanga Cement Company Ltd v Jumanne D. Masangwa & Amos A. Mwalwanda, Civil Application No. 6 of 2001** and **Lyamuya Construction Company Ltd v The Board of Registered Trustees of Young Womens Christian Association of Tanzania, Civil Application No. 2 of 2010**, (all unreported) to name a few.

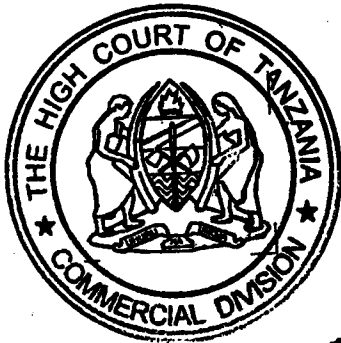
From the affidavit and submissions made the applicants have not furnished this Court with information sufficient to be considered by this Court and make it exercises its discretion in favour of the applicants'. Mr. Maka has been urging the Court to consider the application based on common sense

and advantage basis as propounded in the **Tanzania Cotton Marketing Board's** case (supra), of which this Court while should not ignore the principle but should only use it when the situation allows and not randomly. Borrowing exactly from the case this is what was stated:

"But in holding any such balance of advantage, full and proper weight had to be given by the court to the starting principle that there had to be a good reason for depriving a plaintiff from obtaining the fruits of a judgment"

The last relief sought was restitution of the suit property. On this one, I will not labour much, though initially Mr. Maka was for the grant of the restitution order but in rejoining submission he came with a different approach which I do not see any point of agreeing. Since the 2nd respondent has already obtained prohibitory order in respect of the suit property, the application for security made under Order XXI Rule 24 (3) of the CPC, would in my view be taken care of, so long as order for maintenance of status quo remain in place. This way the 2nd respondent will be assured that there will ultimately be no empty judgment once the decision ends in their favour.

In light of the above, I hereby proceed to decline reliefs sought on stay of execution and restitution and only extend the grant of the application for maintenance of *status quo* on the prohibitory order in place currently pending hearing and determination of **Miscellaneous Commercial Application No. 47 of 2019**. Costs in due cause. It is so ordered.



A handwritten signature in black ink, appearing to read "P.S. FIKIRINI", written over a horizontal line.

P.S.FIKIRINI

JUDGE

11th SEPTEMBER, 2019