

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 265 OF 2022

(Originating from Civil Case No. 92 of 2022)

BUDGET MOVERS COMPANY LIMITED APPLICANT

VERSUS

CRDB BANK PLC 1ST RESPONDENT

YOHANES ALATUVIKA JAAN 2ND RESPONDENT

TATU GALAGWISA MPWEPWA 3RD RESPONDENT

JONAS NELSON NYAGAWA NECESSARY PARTY

RULING

Date: 25/11 & 28/11/2022

NKWABI, J.:

The applicant is minded to obtain an injunctive order from this Court against the 1st respondent in respect of mortgaged properties pending the hearing and determination of the main suit. The application is brought under the provisions of section 95 and Order XXXVII Rule 1(a) and (b) of the Civil Procedure Act Cap. 33 R. E. 2019 and any other enabling provisions of law. It is supported by the affidavit of Heri Louis Kanyinga, the Company Secretary of the applicant. It is intended that the 1st respondent should not sell, or alienate the mortgaged properties which are: **1. Certificate of Title**

No. 167365MG, Land office No. 75852, Plot No. 53, Block "J" Misugusugu Kibaha Township; **2.** Certificate of Title No. 47880, Land Office No. 164662, Plot No. 740/1, Block "A", Buguruni, Dar-es-Salaam and **3.** Certificate of Title No. 86966, Land Office No. 351197, Plot No. 166-171, Block "F", Mabibo Area, Kinondoni Municipality all the properties of the necessary party.

The applicant obtained a loan from the 1st respondent at USD 9.6 million in the year 2005. The applicant does not indicate when the whole loan ought to have been paid by instalment or his part of obligations to the loan facility only that she received a demand notice to pay the entire outstanding balance at USD 753,375 by 31st May 2017. By 24th December 2020, the applicant obtained a second variation on the loan facility, but the necessary party was not versed in English language and legal knowledge. If ignorance of law is no good defence, see **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No. 10 of 2015 CAT (unreported), why not ignorance of a language is not a good defence?

Also, in a curious counter-affidavit of the necessary party, I say that a curious counter-affidavit of the necessary party for the reason that it supports the affidavit, then, what is it countering? Even so, it is averred that the 1st

respondent was controlling the business, indeed, the necessary party did not provide any proof, did not show how the 1st respondent was responsible for the loss, how was responsible for the failure to repay the loan and whether the 1st respondent had the duty to repay the loan. He also falsely maintained that he was not versed in English language though he was communicating with the 1st Respondent via email, in English. It should be noted that an affidavit that contains glaring falsehood the same cannot be acted upon. That is the position in **Damas Assey & Another v. Raymond Mgonda Paula & 8 others**, Civil Application No. 32/17 of 2018, (CAT) (unreported) stated

"An affidavit which is tainted with untruths is no affidavit at all and cannot be relied upon to support an application. False evidence cannot be acted to resolve any issue"

Further, the necessary party in paragraph 8 alleged the contents of affidavit of the applicant are best known to the applicant herself while the necessary party was addressed by the 1st respondent as, "Mkurugenzi Mkuu" of the Applicant in one of the letters of the 1st respondent to the necessary party. That is conspicuous falsehood on the party of the necessary party. There is also the allegation that there were forgeries of which the necessary party

was not aware about them as the applicant, as, it seems, the necessary party is a complete different person. It should be noted that the necessary party is not only the major shareholder of the applicant having 60 percent of the shares, but also the managing director (Mkurugenzi Mkuu) of the applicant. Decisions in running the company are made through the board of directors or shareholders. In the circumstances, the necessary party cannot be heard to say that he did not know what was going on with the applicant. The claim that the necessary party did not know what was going on in the business of the applicant is flagrant falsehood. That said, I feel perfectly entitled to say that the affidavit in support of the application and the counter affidavit filed by the necessary party are empty shells having no effect.

The alleged forgeries seem to be afterthoughts if not falsehoods, this is because, if the loan facility was issued in 2005 and yet they did some restructuring of the loan and the necessary party had mortgaged his properties, why did the applicant fail to notice the forgeries prior while it appears that the necessary party is the managing director (Mkurugenzi Mkuu) of the applicant? I also think I am entitled to have adverse inference on the applicant for her failure to attach any document that shows that she has instituted any criminal proceedings to the person(s) who committed her

alleged forgery. See **Emmanuel Senyagwa v Republic**, Criminal appeal no 22/2004 (CAT) at Dar-es-Salaam (Unreported):

"We think we are entitled to make an adverse inference from the failure to produce PF3 even after it was said that it was going to be tendered. That raises the question whether or not there was really sexual intercourse. If no, then there was no rape."

Mr. Ntanga learned counsel for the applicant maintained that the threshold enunciated in the case of **Attilio v. Mbowe** [1969] HCD No. 284 were met by the applicant to warrant this Court to grant the application for injunction. The threshold is:

1. There must be a serious question to be tried and probability the plaintiff will be entitled to relief.
2. The Court's interference is necessary to protect the plaintiff from injury which may be irreparable before his legal rights is established.
3. On the balance there will be greater hardship and mischief suffered by the applicant from withholding the injunction.

Be that as it may, I start by dismissing the half-heartedly brought preliminary objection by Mr. Nyaisa, learned counsel for the 1st respondent, to the effect that the applicant has no locus standi to bring this application as the applicant is not privy to the mortgage. I agree with Mr. Ntanga that the applicant is entitled to bring this application because she has interest to the mortgaged properties, because if the properties are disposed of by the 1st respondent, the applicant may be required to make good and restore the necessary party his properties/ or value thereof. In the circumstances, the applicant will be affected, there, her interests come into play.

It was the argument of Mr. Ntanga, nevertheless, that paragraphs 4, 5 and 10 of the affidavit in support of the application demonstrate there is a serious question to be tried as the remaining loan that is unpaid was caused by mismanagement by the 1st respondent. That argument was made after, Mr. Ntanga had adopted the contents of the affidavit as his submissions.

On his part, Mr. Nyaisa advanced that a prima facie case was not established as paragraphs 4, 5 and 10 of the affidavit are not substantiated. There is no any correspondence as to reconciliation request. He added that paragraph 10 is a lie (falsehood) since annexure CRDB 2 is an email, in English

language, there is a letter and an affidavit all written in English. I agree with the submission of the counsel for the 1st respondent. Paragraph 10 of the affidavit contains falsehood which is so blatant. Even if there were no emails, or any letter, how could one mortgage three of his houses for billions of monies and come to bring a mere claim that he did not understand or is not well versed in English? It is the position of the law that an affidavit that contains falsehood is unworthy of consideration. The affidavit of the necessary party and that of the company secretary contain falsehoods and are unworthy of consideration. In fact, Mr. Ntanga had tried to build his submission on **General Tyre Limited v HSBC Bank**, [2006] T.L.R. 60 where it was stated:

"It is a fact that the applicant has filed in court a suit civil case no 8/2005, is this enough to establish a prima facie case? I do not think so, the applicant must go further and show that there is a serious question to be tried as to the existence of a legal right which he claims in the suit."

The counsel for the applicant too argued that if the application for injunction is not granted, she would suffer irreparable loss while the 1st respondent would enjoy interests.

In rebuttal submission, Mr. Nyaisa contended that the applicant cannot suffer irreparable loss because the impleaded properties in the affidavit are not the properties of the applicant. He cited **Christopher P. Charle v. Commercial Bank of Africa**, Misc. Civil Application No. 635 of 2017 (HC) (unreported). To the contrary, Mr. Nyaisa asserted that the bank will suffer irreparable loss as if the loan is not paid timely the bank would run bankrupt. I agree with Mr. Nyaisa. In essence, I am of the view that it is the bank that endures not only loss but also hardship by its client's failure to repay the loan on time. I also agree to the contention that if the applicant wins the main case, would get adequate compensation.

On the balance of convenience, Mr. Nyaisa was of the view that it is against the 1st respondent as she has to recover the loaned money and loan the collected money to others. He pointed out that the outstanding loan is T.shs 11 billion or so as per paragraph 17 of the counter-affidavit supported by the bank statement. He added that all the condition for an application of this

nature to succeed have not been established cumulatively to grant injunction. He insisted the application has no merit and prayed it be dismissed with costs. I agree with Mr. Nyaisa and I hope I am fortified by **Aliseo Peter Nditi v KCB Bank (T) Limited**, Misc. land Application No. 13/2013 at page 5 held:

"That temporary injunctions are discretionary remedy is well settled. Courts cannot grant them even when it is convenient to do so. If the applicable principles enumerated above have not been fully met."

Further, how could I determine the balance of convenience in favour of the applicant while the applicant has not indicated even when he ought to have completed repaying the loan? The applicant has withheld such very crucial information which could make me determine where the balance is tilted towards. I have to have adverse inference for the applicant for withholding such information, to the effect that the applicant knew if she would have disclosed such information she could have been found not only to be the wrongful doer but also that granting injunction would cause grave inconvenience to the 1st respondent.

I could also add, as a reminder to the applicant that anyone who comes to the Court seeking injunction orders should come with clean hands as per **Abdi Ally Salehe v Ass Care Unit Ltd & 2 Others**, Revision no. 3/2011 (Unreported) where it was stated:

"When all the above minimal conditions are established, the court before deciding one way or another should then consider other factors such as the conduct of the parties, delay, lack of clean hands etc. this is because as seen above the remedy of injunction has its roots in equity and so equitable principles may be applied in appropriate cases."

Lastly, the applicant too did not aver in her affidavit that the 1st respondent is not permitted by the terms of the contract to sell the mortgaged properties, in order to recover the loan money.

Consequently, I rule that this application is untenable and it is dismissed with costs. The 1st respondent has to be reimbursed her costs.

It is so ordered.

DATED at **DAR-ES-SALAAM** this 28th day of November, 2022



A handwritten signature in blue ink, appearing to read "J. F. Nkwabi", is written over the seal.

J. F. NKWABI

JUDGE