

IN THE HIGH COURT FOR ZANZIBAR

HOLDEN AT VUGA
CIVIL CASE NO.49 OF 2016

SAHAD INVESTMENT CO. LTD APPLICANT

VERSUS

NATIONAL BANK OF COMMERCE LTD... RESPONDENT

RULING

This ruling arises out of the application made by the Applicant, Sahad Investment Co. Ltd asking the Court to issue an order restraining the Respondent, National Bank of Commerce Ltd, her cronies, agents, officers or any other person from selling by auction or dispose of in any other mode the five properties which were mortgaged to the Respondent.

In brief the facts leading to this application is that the Applicant on 3.12.2012 signed Credit Agreement Facility with the Respondent Bank, and on 17.7.2013 signed additional terms and conditions to the facility. Again on 26.2.2014 signed a letter of variation. All collectively are known as credit facilities agreement, in which the Applicant was granted the following facilities:

- a) An overdraft facility of TZS 500,000,000,
- b) A short time facility of TZS 450,000,000,
- c) Bonds, Guarantees and Indemnities Facilities of TZS 50,000,000,
and
- d) An Existing Term Loan 2 of TZS 420,000,000.

The said facilities were secured by five properties which were mortgaged in favour of the bank. The Applicant failed to repay the said facilities in accordance with the agreed terms. Hence, the Respondent on 24th August 2016 advertised in the Guardian Newspaper that she is going to sale by auction those five properties. In response to that, the Applicant filed a Civil

Suit No. 49 of 2016 asking this Court to issue a permanent injunction restraining the Respondent from selling the said properties.

The Applicant also filed an application by the way of chambers summons under certificate of urgency under section 129, Order XLIV Rule 1(a) and 2 (1) and Order XVIII Rule 3 of the Civil Procedure Decree, Cap. 8 of the Laws of Zanzibar. The application was supported by an affidavit sworn by the managing director of the Applicant, Yussuf Mohammed Yussuf. In this application the Applicant asked the Court to issue ex parte order to restrain the Respondent, her agents, cronies, officers or any other person from selling by auction or dispose of in any other mode the said properties pending the determination of the application inter parte. This Court on 6.9.2016 did issue an interim restraining order against the Respondent restraining her from selling by auction or dispose of in any other mode the said properties pending the determination of the application inter parte.

On the other hand, the Respondent filed a counter affidavit opposing the granting of the restraining order. Therefore, this ruling is with respect to the inter parte hearing of the application for temporary injunction to restrain the Respondent from selling by auction or dispose of in any other mode the said properties pending the hearing and determination of the main suit.

In the hearing of this application, the Applicant was represented by learned advocate, Mr. Rajab A. Rajab and the Respondent was represented by learned advocate Mr. Karume Mrisho. The Applicant's advocate, Mr. Rajab adopted the affidavit sworn by Yussuf Mohamed Yussuf and did not want to add anything to the reasons given in the affidavit.

Mr. Rajab submitted that the law governing granting or refusal of temporary injunction is very clear and he cited the case of **T.K Kaare V. General Manager Mara Cooperative Union** (1984) Ltd, [1987] TLR 17. He submitted that in this case three principles have been laid down. The first is the existence of prima facie case or bonafide contest. He said if one read the plaint and the affidavit it is clear that there is a bonafide contest. The Applicant

is saying the Respondent want to sell the house illegally and the Respondent says she has the right to sell. The second principle is balance of convenience. He submitted that paragraph 12 of the affidavit explained about the injuries the Applicant will suffer in the case of sale. The balance of convenience is in favour of not selling the houses. The third principle is irreparable injury, and he submitted that they have demonstrated that if the houses are sold they cannot get back the said houses. He prayed that the application should be allowed and the cost should follow the event.

Mr. Mrisho on the other hand opposed the application, but first he raised a concern that Sahad Investment, the Applicant has no locus standi to bring this application in Court. He submitted that the Applicant who is a company does not possess the properties which have been mortgaged and which are seen in the affidavit. The properties are owned by individuals who are not parties to this suit. Mr. Mrisho said the term "locus standi" has been defined in the case of Lujuna Shubi Ballonzi V. CCM [1996] TLR 203 at pg 208. The Applicant, therefore, must show that he is entitled to bring the matter to Court. The Applicant has not shown the legal interest he has on those properties owned by private individuals. The individuals have entered into separate agreement with the Respondent bank by signing mortgage deeds. This fact has been stated in the paragraph 5 of the Counter Affidavit and he added that the mortgage deed signed by those individual have been attached to the counter affidavit.

Mr. Karume added that any action regarding these properties must be brought by those individuals and not the Applicant. He submitted that it is an established principle that a stranger to the contract cannot sue. To substantiate this principle he cited the case of Kayanja V. New India Assurance Company Ltd [1968] EA 295 where the Court at pg 298 held that a stranger to the contract cannot sue. He also cited the case of Meshely Clearing & Forwarding Ltd & Another V. NBC Ltd & Another, Case No. 22 of 2015 (HC) (Unrep.) on pg 12-15 Mwampashi J, talked about the issue of locus standi in the case of property owned by other people.

With respect to the main application Mr. Karume adopted the counter affidavit, and he added that he agree with the principles laid down for granting injunction as laid down in Kaare case (supra). He also referred to the case of Atilyo V. Mbowe (1969) HCD 208 where the same three principles were also referred.

With respect to the prima facie case he submitted that the Applicant has to show the existence of prima facie case to allow the preservation of the subject matter. He referred to paragraphs 2,4,5,6 and 7 of the affidavit which show clearly that the Applicant has taken a loan and failed to repay the whole amount. He submitted that since the Applicant is not denying to have received the credit facilities and that the properties were mortgaged in favour of the Respondent, who is empowered by the mortgage deed to sale the mortgaged properties and appointing a receiver for the purpose of sale. Also the fact that the Appellant has admitted to have failed to repay the loan, therefore, the Applicant has failed to show a prima facie case. On the other hand, the Respondent has complied with the law in granting the facilities and selling them by giving the mortgagors 90 day's notice before the sale as seen in Annex. NBC 4 attached to the WSD which show the demand notice. Mr. Mrisho also cited again the case of Msheley (supra) on pg 29 second paragraph.

With respect to the issue of irreparable injury, Mr. Mrisho cited the case of Kyela V. Cassaman Brown (1973) EA 358 where it was established that the Respondent being a financial institution will be in a position to compensate the Applicant whenever required to do so. He also cited the case of Maisiya V. Housing Finance [2003] EA 133 and General Tyre East Africa Ltd V. HSBC Bank PCL [2000] TLR 69 where the Court held that the Bank is in a position to pay compensation if the suit succeeds.

With respect to the issue of balance of convenience. Mr. Mrisho submitted that this is a comparison of injury the Applicant will sustain if injunction is not granted and what Respondent will sustain if granted. If injunction is granted

the Respondent will suffer as the security will not be enough to cover the outstanding amount which is now 1 billion as shown in Annex NBC.

Mr. Mrisho added that the issue of protecting banks against defaulters such as the Applicant is of paramount importance. He cited the case of Aida Kyenkungu V. John Kyenkungu, NBC and Another Civil Case No. 57 of 2001 (Unrep.), Edward Nyelisy V. NBC Ltd and Another Civil Case No. 213 of 1998 (Unrep.) and Zak Imports & Export Co. Ltd V. Crown Finance & Leasing Ltd & Another, Civil Case No. 270 of 2000 (Unrep.). Finally, he submitted that for injunction to be granted all the three principles must be satisfied. He prayed for the dismissal of the application with cost.

Mr. Rajab on his reply to the legal concern raised he cited the case of Mukisa Biscuit Manufacture Ltd V. West End Distributions Ltd (1969) EA 696, and said the Court of Appeal has ruled out that preliminary objection must be pure point of law. The issue whether the Applicant is the owner of the property has to be probed from the main case by receiving evidence. It was not proper to say the Applicant was not the owner of the property. Alternatively, he argued that if you look on the plaint and affidavit there is a link between the properties and the Applicant. In the absence of those properties the loan could not have been issued. Therefore, the properties cannot be separated from the Applicant, and the issue of locus standi is immaterial.

Mr. Rajab further submitted that he agrees to the case cited, but there is difference in the interpretation of prima facie case. There is no dispute regarding taking the loan and failure to repay the same. The dispute is that the Bank wants to sell the mortgaged property illegally while the Bank is saying it is legally done. Therefore there is a bonafide contest.

Before dealing with the issues raised on this application, this Court feels first it should determine the legal concern raised. It has to be mention from the outset that what was raised is not a preliminary objection as argued by Mr. Rajab. Our Civil Procedure Decree, Cap. 8 of the Laws of Zanzibar has no provision for raising p.o. on the application of this nature. Therefore, this is not

a p.o. and the Mukisa case is not applicable. The advocate for Respondent has raised a legal concern and sought the view of the Court to before going to the main issues.

The legal concern raised is with respect to the issue of locus standi. The facts of this case are very clear and the good thing is that both counsels are in agreement regarding the facts of this case. In brief, the Applicant took credit facilities from the Respondent Bank and she failed to repay the same according to the terms of credit. The credit facilities were secured by five properties which are as follows:

- i) Property situated at Mwanakwerekwe, Zanzibar with registration No. 1258 of 2009, and registered in Vol. VI of Book A-3.
- ii) Property situated at Fuoni, Zanzibar with registration No. 687 of 2009, and registered in Vol. III of Book A-3.
- iii) Property situated at Bububu Kichangani, Zanzibar with registration No. 27 of 2011, and registered in Vol. I of Book A-3.
- iv) Property situated at Mwanakwerekwe, Zanzibar with registration No. 329 of 2004, and registered in Vol. II of Book A-3.
- v) Property situated at Migombani, Zanzibar with registration No. 1109 of 2010, and registered in Vol. V of Book A-3.

According to the mortgaged deeds attached to the counter affidavit these properties are not owned by the Applicant, Sahad Investment, and this fact has not been disputed by the advocate for Appellant. The first property is owned by Ahmed Abdalla Ali who signed a mortgage deed dated 27.1.2012. The second property is owned by Yussuf Moh'd Yussuf who signed a mortgage deed dated 16.4.2011. The third property is owned by Yussuf Moh'd Yussuf who signed the mortgage deed on 16.4.2011. The fourth property is owned by Yussuf Moh'd Yussuf who signed a mortgage deed dated 16.4.2011, and the fifth property is owned by Seif Hafidh Suleiman who signed a mortgage deed dated 9.4.2014.

Now, the question for determination is whether the Applicant has locus standi to sue for these properties. It is a fact that the mortgage deeds which give power to the Respondent to sell those properties have been signed by those individuals and the Bank. The Applicant is a total stranger to these contracts. The law governing mortgage in Zanzibar is the Transfer of Property Decree, Cap. 150 of the Laws of Zanzibar. This law sets out the definition of mortgage and the rights of mortgagor and mortgagee. A mortgage is defined in section 58 (1) as follows:

“A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability”.

On the other hand the Decree lay down the right of redemption in section 60 (1) and the right of foreclosure in section 67(1) as follows:

“60. (1) At any time after the principal money has become payable, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money to require the mortgagee –

- a) To deliver the mortgage-deed, if any, to the mortgagor;***
- b) Where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor; and***
- c) At the cost of the mortgagor either to retransfer the mortgaged property to him or to such third person as he may direct...”.***

"67 (1) In the absence of a contract to the contrary, the mortgagee has at any time after the mortgage-money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be sold".

From these provisions, it is very clear that the mortgagor conveys, transfers and assigns unto the mortgagee his right, title and interest in the property to have and to hold the same to the use of the mortgagee subject to the power of redemption by the mortgagor after payment of the mortgage-money. Similarly, the mortgagee also has been given the power of foreclosure, which includes the sale of the said property in case of default of payment of mortgage-money by mortgagor.

Therefore, there is no room for a third party to interfere with the contract of mortgage except as provided by section 82 which provides:

"82. Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of the mortgaged property –

- a) Any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same;**
- b) Any surety for the payment of the mortgage-debt or any part thereof;**

c) A creditor of the mortgagor who has in a suit for the administration of his estate, obtained a decree for sale of the mortgaged property.

This provision allows the above-mentioned people who are strangers to the mortgage agreement to institute a suit for redemption. Although, the Applicant has interest in those properties since they are the securities for her loan, but section 82 only allows a suit for redemption, and not other suits. But this is not a suit for redemption. The Applicant has filed a suit to restraint the Respondent from exercising her right of sale under the mortgage agreement. Therefore, the Applicant has no locus standi to institute this suit.

In the upshot this Court is of the view that the Applicant lacks locus standi to institute this case as he is not a party to the mortgage agreement which gave the Respondent the right to sale the mortgaged property. Having made this finding, this Court will not waste time on the application in hand. Therefore, the suit is hereby dismissed with cost, and this application has no leg to stand on, hence, it is similarly dismissed and the interim order of injunction issued by this Court on 6.9.2016 is also vacated.

It is so ordered.

(Sgd) ABDUL-HAKIM A. ISSA
JUDGE
8/5/2017

COURT:

This ruling was delivered in Chambers on this 8.5.2017 in the presence of Mr. Abdalla Juma for the Applicant and in the presence of Mr. Karume Mrisho for Respondent.

(Sgd) ABDUL-HAKIM A. ISSA
JUDGE
8/5/2017

COURT:

The right of appeal is explained.

(Sgd) ABDUL-HAKIM A. ISSA

JUDGE

8/5/2017

I certify that this is a true copy of the original.



YESAYA KAYANGE
DEPUTY REGISTRAR
HIGH COURT – ZANZIBAR.

/HALLY/