

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

**MISC. LAND APPLICATION NO 2 OF 2018**

**THOMAS A MBEGA ..... 1<sup>ST</sup> APPLICANT**  
**LILLIAN THOMAS MBEGA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**LIPINA MICHAEL MREMA**  
**T/A BASIC STOP SHOP.....1<sup>ST</sup> RESPONDENT**  
**FIRST NATIONAL BANK (T) LTD.....2<sup>ND</sup> RESPONDENT**

*10/05&22/06/2018*

**RULING**

**MWANDAMBO, J**

This ruling arises from an application for orders of temporary injunction made under by way of chamber summons under sections 68 (e) and 95 as well as Order XXXVII rule 2 (1) and Order XXXVII Rule 1 (a) of the Civil Procedure Code, Cap 33 [ R.E 2002] hence forth to be referred to as the CPC. The application is supported by an Affidavit of Lillian Thomas Mbega (the 2<sup>nd</sup> Applicant) and resisted by a counter affidavit of David Sarakikya an officer of the 2nd Respondent. The 1<sup>st</sup> Respondent has not filed any Counter affidavit in opposition.

The facts giving rise to the application are somewhat not without difficult to comprehend but they also represent some investing features from the affidavit, the Applicants executed mortgage to service a loan of Tshs. 315,000,000/= said to have to the 1<sup>st</sup> Respondent. The mortgage was in respect of a landed property on plot No. 2120 Block "E" Kunduchi area, Kinondoni Municipal. According to the affidavit the creation of the mortgage by the Applicants was merely a temporary arrangement to assist the 1<sup>st</sup> Respondent to secure his loan liability with the 2<sup>nd</sup> Respondent pending completion of registration formalities of his own title deed on plot No. 176 Block "G" Mbezi Beach area in Kinondoni Municipal on which a mortgage could be executed to secure the liability thereby discharging the Applicant's mortgage and release of their tittle deed. It is

further averred that on the basis of that understanding upon the 1<sup>st</sup> Respondent obtaining his title deed to his property the Applicants forwarded the same to the 2<sup>nd</sup> Respondent with a view to substituting it with theirs and in term discharge the mortgage to no avail as the 2<sup>nd</sup> Respondent not only refused to substitute the mortgage but also with held the said title deed. Instead, the Applicants aver the 2<sup>nd</sup> Respondent issued an empty loan of Tshs. 315,000,000/= deposited into their Account but soon thereafter that loan was credited to the 1<sup>st</sup> Respondents Account to discharge his loan liability. By reason of the foregoing the Applicants conned that the Respondents have conned them by creating a loan liability which they are now forced to discharge whose failure has culminated into the 2<sup>nd</sup> Respondent enforcing the mortgage on their property and hence the suit (Land Case No. 1 of 2018) and the application for injunctive relief.

The 2<sup>nd</sup> Respondent resists the applications and advances the following grounds; one, the Applicants executed the mortgage on their own volition to rescue the 1<sup>st</sup> Respondents indebtedness with the Bank. Two, the 2<sup>nd</sup> Respondent was not a party to the understanding between the Applicants and the 1<sup>st</sup> Respondent on the duration of the mortgage and the substitution arrangements. Three, the 2<sup>nd</sup> Respondent refused to accept a mortgage on the 1<sup>st</sup> Respondents property because it fills short of the conditions acceptable to it. Four, the 2<sup>nd</sup> Respondent is not bound to discharge the mortgage unless the secured loan is fully repaid and so it was entitled to enforce its right to sell the mortgaged property to recover the outstanding debt. Finally, the 1<sup>st</sup> Respondent's title deed is available for collection at any time. On the basis of the foregoing the 2<sup>nd</sup> Respondent asks the Court to dismiss the application.

Mr. Godwin Muganyizi, learned Advocate for the Applicants has essentially repeated the averments in the affidavit in his submissions made in writing. In his attempt to bring the application within the conditions discussed in **Atilio V. Mbowe** (1969) HCD 284, the learned Advocate urged me to find that the said conditions have been met in this application for the Court's exercise of its discretion for the grant of an order temporary injunction. However, the learned Advocate was too mean with details

in each of the conditions take the liberty to reproduce the relevant part of his submissions

*"... following the unjustifiable retention of the 1<sup>st</sup> Respondents title deed by the 2<sup>nd</sup> Respondent, the Applicants have sued the Respondents claiming release of the 1<sup>st</sup> Respondent's title deed to them, interest and damages we believe the Applicants have a strong case as against the Respondents ...*

*That on balances of inconveniences (sic!) the 2<sup>nd</sup> Respondent suffers nothing in circumstances order sought in this application are granted so far as the Applicants have demonstrated their redness (sic!) to pay same that the 2<sup>nd</sup> Respondent is retaining the title for the property on plot the property on plot designated as plot No. 176 Block "G" Mbezi Beach in Kinondoni Municipal Council which plot would have been sold to realize the sum, which sum would have released the sum outstanding ..."(emphasis added at page 3)*

Mr. Innocent Felix Mushi, learned Advocate for the 2<sup>nd</sup> Respondent has urged me to dismiss the application largely because the same has not met any of the tests in **Atilio V. Mbowe** (supra).The learned Advocate submitted that a look at the contents of the affidavit which is by and large a repetition of the plaint does not show that there is a serious case to be tried on the contrary the learned Advocate submitted is the Applicants who has a claim against the Respondent. Further, the learned Advocate submitted and indeed rightly so that the Applicants have not demonstrated that they will suffer irreparable loss and if so in what manner. Finally with regard to balance of convenience, the learned advocate invited me to hold that the same weighs more in refusing the application because the 2<sup>nd</sup> Defendant's act of enforcing the mortgage was a direct consequence of their default to repay the loan and that the grant of the order of injunction would result in more inconvenience to the 2<sup>nd</sup> Respondent than it will on the Applicants.

The learned Advocate referred the Court to a decision of this Court in **General Tyre East Africa Limited V HSBC Bank PLC**, HC (Arusha) Misc. Civil Application No. 35 of 2005(unreported) in which Sheikh,J followed an earlier decision in **Agency Cargo**

**International v. Eurafrican Bank (T) Ltd**, HC (DSM) Civil Case No. 44 of 1998 (unreported).

From the submissions and indeed in every application for injunction, the Court's power to grant injunction is predicated upon the Applicant meeting the conditions set out in *Atilio V. Mbowe (supra)*. 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 **the said and many other cases** notably; 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**, 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. The cases set 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 stands 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. 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.

Subjecting the principles to the facts in this application, 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 reliefs set out in the plaint. The second precondition requires an applicant to prove 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** (supra) 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 Applicants have not established through their affidavit that they will suffer irreparable loss if the Court declines to grant the order sought. At any rate, it is clear from the plaint that the loss (if any) is a reparable one for they have claimed general damages under item "f". 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 it is the Applicant who stands to suffer more if the court declines to make the order sought because:

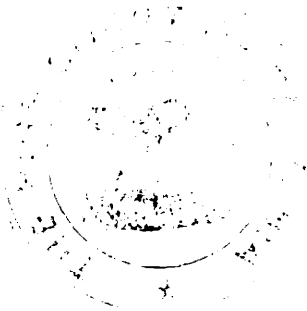
*"...the respondent will not be affected in any manner if the injunction is granted as it is a strong financial institution with a lot of clients across the country. In other words its business will continue as usual even if an injunction is granted"*  
(at page 6).

In **Agency Cargo International V. Eurafrican Bank (T) Ltd**, HC (DSM) Civil Case No. 44 of 1998 (unreported) referred by Sheikh,J in **General Tyre East Africa Limited V HSBC Bank PLC**(supra) 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**

**22/ 06/2018**