

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
MISC. LAND APPLICATION NO. 9 OF 2019
JADECAM REAL ESTATE LIMITED.....APPLICANT
VERSUS
INTERNATIONAL COMMERCIAL BANK
(TANZANIA) LTD.....RESPONDENT**

RULING

Date of last Order: 18/09/2019

Date of Ruling: 15/10/2019

MLYAMBINA, J.

The Applicant has moved this Court by way of chamber summons made under **Order XXXVII Rule 1 (a), Section 68 (e) and 95 of the Civil Procedure Code Cap 33 (R.E 2002) and Section 2 (1) and (3) of JALA Cap 358 (R.E 2002)** praying mainly for an order of a temporary injunction be issued restraining the defendants, workmen, agents or any other person or body working under it or receiving instructions from them, from selling or howsoever disposing off plaintiff's properties, namely Plot No. 182 Block C, CT No. 117157 Mbezi Beach, pending determination of the main suit.

The application has been supported with an elaborate affidavit of Salutory John Meja. The evidences testified in that affidavit raises one important issue:

"Whether the mortgage transaction involving the plaintiff's property on Plot No. 182 Block C, Mbezi Beach, Kinondoni District, Dar es Salaam (the suit premises) to secure a loan of USD 335,000 in respect of mortgage finance involving the apartment was lawful, legal and proper."

From the pleadings generally, there are other two serious triable issues that the Court would wish to get best evidence on trial.

1. Whether the parties herein had entered into a facility of TZS 500,000,000/= and USD 335,000.
2. Whether the Defendant's act of withholding its Certificate Title No. CT 11757 over Plot No. 182 Block C, Mbezi Beach Dar es Salaam is legal and lawful.

The Respondent vehemently contested the application by way of counter affidavit sworn by Marie Mangenya.

Both parties are in agreement with the object of granting injunction as put in the case of **Abdi Ally Saleh v. Asac Care Unit Ltd and 2 Others** Civil Revision No. 3 of 2012 at page 8, thus:

"The object of this equitable remedy is to preserve the pre dispute state until the trial or until a named day or further order. In deciding such applications, the Court is to see only a prima facie case, which is one such that it should appear on

the record that there is a bona fide contest between the parties and serious questions to be tried. So, at this stage the Court cannot prejudge the case of either party. It cannot record a finding on the main controversy involved in the suit; nor can geniuses of a document be gone into at this stage (see Sarkar on Code of Civil Procedure (10th ed. Vol. 2 PP 2009-2015).

Though it appears correct as stated by the Respondent, the Applicant's submission has not clearly pointed out the main controversy but the reading of the affidavit in support and the entire pleadings reveals the issues in controversy as hinted earlier on in this Ruling.

On balance of convenience, the principle was stated in Abdi's case (supra) at page 9 thus:

"And on the question of balance of convenience, what it means is that, before granting or refusing the injunction, the Court may have to decide whether the plaintiff will suffer greater injury if the injunction is refused than the defendant will suffer if it is granted"

In this case, taking into consideration of the controversy of the mortgage itself, I find the Applicant is likely to suffer more if injunction is withheld.

The Respondent will have nothing to lose because they will have the right to recover the loan by exercising the mortgage rights after the full trial.

It is true as cited by the Respondent that in **Charles D. Msumari and 3 others v. The Director General of T.H.A**, Civil Case No. 10 of 1997, High Court at Tanga, the Court emphasized on co-existence of three condition in granting injunction by stating:

"I need not place any emphasis on the accepted fact that there three conditions must be found to exist conjunctively and not disjunctively in any suit before a temporary injunction is granted."

The Respondent has contended that the Applicant breached the loan agreement. As such, it is the Respondent who is suffering injury.

As replied by the Applicant, the issue as to whether there is breach has to be ascertained on trial. But it has to be noted, if injunction is not granted, the Applicant's properties will be disposed. This will

place the Applicant at a hard ship compared to the Respondent because the subject matter of this dispute will be sold.

In the cited case of **Maina Amiri v. Ahmed Mbarouk, Ec Civil Appeal** No. 85 of 90 Msumi J.K as he then was observed:

"At the time of the alleged sale the vendors were aware that the demised house was a subject matter of pending Court litigation. Hence the purported sale agreement cannot be said to be bonafide as it has the effect of frustrating the Court process. The controversy over the ownership of the suit house is still to be determined by the Court. Any act which interferes with due process of law is illegal"

Taking into consideration that there are serious trial issues in this matter, it is wise for the Respondent to restrain from exercising the recovery right envisaged in the mortgage contract (if any).

In the end, the application is granted as prayed. Costs shall follow events.



Y. J. MYAMBINA
JUDGE
15/10/2019

Ruling delivered and dated this 15th October, 2019 in the presence of Stanislaus Ishengoma for Mbamba, Advocate for the Applicant and Stanislaus Ishengoma Advocate for the Respondent.



Y. J. MYAMBINA
JUDGE
15/10/2019