

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

MISC. LAND APPLICATION NO. 91 OF 2018

JOSEPH ELIAS KITAMBI.....1ST APPLICANT

HILUX HOTEL LIMITED.....2ND APPLIANT

VERSUS

CRDB BANK PLC.....1ST RESPONDENT

COMRADE AUCTION MART

AND COURT BROKERS.....2ND RESPONDENT

GREAT VISION ADVENTURES LIMITED.....3RD RESPONDENT

RULING

Date of last Order: 29/7/2019

Date of Ruling: 18/10/2019

MLYAMBINA, J.

The application at hand has been made under **Order XXXVII Rule 1 (a) and (b), Rule 4 Sections 68 (e) and 95 of the Civil Procedure Code Cap 33 (R.E. 2002)** the Applicant sought for the following inter parties' prayers:

- a) That, this Honorable Court be pleased to grant a *status quo ante* (temporary injunction) evicting and restraining the Respondents, their agents, assignees and any other person acting on their behalf from interfering with possession and use of properties located at Plot No. 49 Zone 11 railway street,

Morogoro Township with C.T. 183049/49, L.O 55200 in the name of the 1st Applicant, Plot No 301 Block (block "DD" Misufiri area Morogoro with C.T No. 31031 L.O No 79090 and property on Plot No. 303 block "DD" Misufini area Morogoro with C.T No. 57343 N L.O. No. 175475 pending hearing of the main suit.

b) That, this Honorable Court be pleased to grant temporary injunction restraining the 1st Respondent from selling, alienating, leasing or disposing off in any manner remaining mortgaged properties situated on Plot No. 225 Block "DD" Misufini area Morogoro with C.T No. 30706 L.O No 79024 and property on Plot No. 183 Block Block "DD" Misufini area Morogoro with C.T. No. 53098 L. O No. 175104 pending hearing of the main suit.

c) Costs of this suit.

d) Any other orders relief (s) this honorable court shall deem fit and just to grant.

The application has been supported with a joint affidavit of Joseph Elias Katambi and Emmanuel Kaseto. Paragraph 4 through paragraph 7 of the affidavit reveals that the Applicant failed to repay the loan it states:

- "4 *That,* subject to the aforementioned loan facility agreement, it was agreed that, the said loan should be repaid by the 2nd Applicant within 120 months and the last instalment was to be completed on October, 2026.
5. *That,* the 2nd Applicant started to service the loan as per the agreement by paying the agreed monthly instalment. However, sometimes in 2016 while the 2nd Applicant continued to service the said loan, hotel business deteriorated and experienced hardship in terms of business trend whereby daily income fell below expectations.
6. *That,* the 1st Applicant immediately informed the 1st Respondent on the same business trend verbally.
7. *That,* on 15th march, 2017 the 1st Respondent issued sixty (60 days default notices to the Applicant threatening to exercise her right to sell the mortgaged properties."

The application was contested by the Respondents through the joint Counter Affidavit of Vesha F. Ngunangwa and Zachy Mkumbo for the 1st and 2nd Respondents and through Counter Affidavit of Lameck Mussa for the 3rd Respondent.

Basically, the Respondents contended that the Applicant breached the terms of the mortgage deed and were subsequently issued with a 60 days default notice. As a result, the mortgaged property was subsequently sold to the 3rd Respondent vide a properly conducted public auction.

At the hearing, the following facts became evident true: *One*, the mortgaged properties already sold are Plot No. 49 Zone 11 Railway Street Morogoro Township, Plot No. 301 and 303 block "DD" Msufini Area Morogoro Municipality. *Two*, Plot No. 183 Block V. Msufini area is one of the mortgaged properties not yet auctioned but subject to this application for temporary injunction. *Three*, Plot No. 183 Block V. Msufini area is not pleaded in the plaint and it is not subject of the main suit. *Four*, as per the loan facility letter of October, 2016 the final loan owed by the borrower is TZS 3, 383, 0773,843/=. *Five*, it is indisputable valid that the auctioned properties were mortgaged by the mortgage in realization of the loan. *Six*, it is very clear from the pleading that the Applicant defaulted from repaying the loan since 2016 to date. *Seven*, it is not in dispute that the purpose of an order for a temporary injunction as set out *under **Order XXXVII Rule 1 of the Civil Procedure Code*** is to preserve and retain the status quo as

obtains at the time immediately before the filling of the application until determination of the suit. (See **National Bank of Commerce v. Dar es Salaam Education and Office Stationery** (1995) TLR 28. *Eight*, if it is not a restraint order, a nullifying act cannot be sought in an interlocutory order under **Order XXXVII Rule 1 of the Civil Procedure Code** (Supra) (see NBC Case, *supra*).

In this application, the Applicant has moved the court to evict the Respondents and their agents in the already auctioned properties. As found in NBC'S case (*supra*), the order sought does not qualify in terms of the purpose of temporary injunction. Even if it does, for the party to benefit temporary injunction, has to prove existence of three conditions conjunctively:

1. There must be serious triable issues.
2. Whether the Applicant is likely to suffer greater injury if the injunction is refused.
3. Whether on balance of convenience the Applicant is likely to be inconvenienced much than the Respondent if the sought injunction is refused. (See **Charles D. Msumary and 3 Others v. the Director General** of T. H. A, Civil Case No. 10 of 1997 High Court of Tanzania at Tanga.

As regards the first condition, the Applicants, through Counsel Prof. Andrew Mollel, told the court that the Respondents issued publication notice on 13th April, 2018. It informed the public that the auction was to be done on 15th April, 2018. In view of Prof. Mollel, such notice was illegal. Prof. Andrew Mollel conceded that prior to the notice issued on 13th April, 2018, the Respondent issued another 14 days legal notice. The other contended triable issue in this application is; whether the disputed properties were auctioned below 75% of the market valued.

As replied by Mr. Mboneko, Advocate, the records show clearly that the notice was issued on 13th March, 2018 to the effect that the auction will be conducted after 14 days. The auction been conducted on 15th April, 2018 neither violated the 10 days' notice legally required Under ***Section 132 of the Land Act No. 4 of 1999*** nor the 14 days' notice required under ***Section 12 (2) of the Auctioneers Act Cap 227 (R.E. 2002)***.

On the market value, as correctly asserted by Mr. Mboneko, under the provision of ***Section 133 (1) and (2) of the Land Act***, the determinant factor of the property price is the property of the same quality within that locality. The price has to be computed through the structure and not the liquidity.

If one goes through the valuation report, it is evident that Plot No. 49 Zone 11 Railway Street had the forced market value of TZS 2.3 Billion. The same property was auctioned at TZS 2 Billion. There is no dispute on that fact. Plot No. 301 which is linked with Plot No. 303 were sold at TZS 875,000,000/=. The forced market value as per the valuation report was TZS 788,250,000/=. Therefore, the properties were auctioned within the range of 75%.

There is another issue of negotiation raised by the Applicant. However, there is nothing in record that promises the mortgagee not to auction the mortgaged properties. Even there is nothing promising the Applicant not to discharge his duties as the mortgagor.

On irreparable loss, the Applicants has alleged that they stand to suffer irreparably because they are indebted from the Respondent and their business has been sold to the 3rd Respondent. Thus, if injunction is granted, the Applicant will proceed with his business and service the loan.

As replied by Heri Advocate for the 3rd Respondent and as observed earlier, the prayer for restoration is tantamount to the prayer for nullification of the sale. It is impossible to be issued in application for temporary injunction. If it will be issued, as submitted by Mr.

Mboneko, the 1st Respondent stand high chances of suffering more. If the court restores the Applicants at this stage, it will have four impacts. *One*, the court will have decided the main suit without evidence on merits. *Two*, the Bank will have to solicit funds. *Three*, the 3rd Respondent will have invested his capital without profit. *Four*, it will paralyze the banking industry because the business of the bank depends on the money to be returned. (See the cited case of **Hydrox Industrial Services Ltd v. CRDB (1996) Ltd and 2 others** at page 17.

On the balance of convenience, as the auction has already been done and the 3rd Respondent is running the business, I find the Respondent are likely to be inconvenienced more than the Applicants for four reasons; *First*, there is admission by the Applicants that they defaulted to service the loan. *Second*, the auction was legally conducted. *Third*, the 3rd Respondent as the bonafide purchaser is legally running the business. *Fourth*, the provisions used by the Applicants are not applicable for restoring him in the premises even if applicable. The orders for interim injunction do not have a finality effect of restoring an already evicted person.

In the end result, I find the application is hopeless. As such, the interim orders sought cannot be granted at this stage. The

application stands dismissed for lack of merits. Costs shall follow events.



Y. J. MLYAMBINA
JUDGE
18/10/2019

Ruling dated and delivered this 18th day of October, 2019 in the presence of Prof. Andrew Mollel for the Applicant Gerald Mosha holding brief of Mugisha Mboneko for the 1st and 2nd Respondents and Heri Zuku for the 3rd Respondent.



Y. J. MLYAMBINA
JUDGE
18/10/2019