

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)  
AT DAR ES SALAAM  
MISCL. CIVIL APPLICATION NO. 886 OF 2016**

**HAROLD SEKIETE LEVIRA .....1<sup>ST</sup> APPLICANT  
FLORESCENCE KOKUJAMA MUKYANUZI.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**AFRICAN BANKING COOPERATION  
TANZANIA LTD (Banc ABC).....1<sup>ST</sup> RESPONDENT  
NKAYA COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*Date of last Order: 05/05/2020*

*Date of Ruling: 10/07/2020*

**R U L I N G**

**MGONYA, J.**

Before this honourable court is an Application for temporary injunction filed under **Order XXXVII Rules 1 (a) and 2 (1)** and **Section 68 (e) of the Civil Procedure Code Cap. 33 [R. E. 2002]**.

The Applicants herein **HAROLD SEKIETE LEVIRA** and **FLORESCENCE KOKUJAMA MUKYANUZI** are seeking for an order of temporary injunction to restrain the Respondents, their agents, servants, or workmen and assignees or any other person acting under their title, to interfere anyhow with the suit property to wit, the Applicants' house located on **Plot No. 1230 Block**

**"G" at Tegeta in the City of Dar es Salaam** by way of eviction pending determination of the **CIVIL CASE NO. 239/2016** from the suit premises pending determination of the main suit before this honorable court.

The Application is supported by an affidavit sworn by **HAROLD SEKIETE LEVIRA** the 1<sup>st</sup> Applicant herein.

In determining this Application, I have to make it clear from the outset that, I have carefully read the Parties' respective written submissions as ordered by this honourable court for determination of this Application. However, in the cause of writing this Ruling, I don't intend in anyway producing the entire parties' respective submissions and instead, I prefer to briefly point out the parties necessary points to their respective submissions and straight focus on determining the merits of the Application to the decision.

In the event therefore, it suffices to say that the Applicants' Counsel herein had his respective submission in support of the Application before the court for the injunctive orders sought. In essence, the Applicant prayed hard that the application be granted as the same have qualified the principles articulated in the famous case of **ATILIO VS. MBOWE [1969] HCD 284**. He made clear that, through the facts adduced in the Applicant's Affidavit, the *prima facie* case has been established since there is

a triable issue to be determined by this honorable court in the main case since the Respondents herein has gone contrary to the terms and conditions of the contract between the parties in respect of the advanced loan. On this point, the learned Counsel averred that, in the midst of some discomfort contrary to the contract between the Respondents herein, the later continued with their intension of selling the Applicant's house, hence this Application. Hence the controversy between the parties.

On the second principle in respect of the irreparable loss, the Counsel for the Applicants demonstrated in the written submission that, in the event where the suit property which is the residence that the Applicants have for themselves and their family is disposed at this stage prior the hearing and determination of the controversy between the parties, the Applicant will suffer irreparable loss by becoming homeless as the same is a matrimonial house of which the entire Applicants' family with dependent children lives in.

As regards to the third condition, on the balance of inconvenience, the Applicants' Counsel is of the view that on the comparison, and in the event where the prayer sought is denied, the Applicants are the one who will suffer more than the Respondent herein.

In the premises, Mr. Mohamed Mpochi the learned Counsel for the Applicants prayed for the court to grant an order of temporary injunction pending determination of the main suit.

In reply thereto, Mr. Mohamed Muya learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contended that, the Applicants has failed to fulfil the conditions for the Court to grant temporary injunction as laid down in the case of **ATILIO VS. MBOWE** (Supra). Further to that, neither in the 1<sup>st</sup> Applicant's Affidavit nor in Applicants' written submission, the Applicants' Counsel has bother to clarify or demonstrate on the serious issues to be determined in the main case. Further on the issue of *prima facie* case, Mr. Muya submitted that, the Applicants did not even bothered to elaborate the clause to the Agreement that was breached as alleged. In the event therefore, the learned Counsel for the Respondent was of the view that, the first test for issuance of Temporary Injunction has not been met.

Responding on the second principle of temporary injunction; it was the Respondents' learned Counsel view that, in case of any disposition of the suit property, the Applicants herein are not going to suffer as the 1<sup>st</sup> Respondent being a stable financial institution can easily remedy the Applicants in terms of monetary after disposition. And that the Respondents' only remedy is to dispose the mortgaged property to recover the money advanced.

As for the balance of inconvenience, the Respondents' Counsel submitted that, it is the 1<sup>st</sup> Respondent who will suffer more loss compared to the Applicants in the event the Application is granted. The Counsel averred that further, according to the dispute at hand, for the mortgagor's default to repay the advanced loan and in the event where the 1<sup>st</sup> Respondent is yet to recover the outstanding amount; it is the 1<sup>st</sup> Respondent who stands to suffer more by the failure to recover its payment by affecting its banking business of which might collapse and affect other customers thereto.

In the premises, the Court was invited to dismiss the present Application since the Applicant is said to have not satisfied the principles governing temporary injunction.

Thus, it is from this juncture, I will start by expressing the Principles governing an order for temporary injunction which are generally founded under three main grounds.

**First**, the Applicant should show a *prima facie* case with a probability of success against the Respondent. **Secondly**, the Applicant should prove that if the application is not granted the injury that would be suffered would be irreparable by way of damages. The third principle is on the balance of convenience; that the Applicant would stand to suffer greater hardship if the

prayed order is denied than what the Respondent would suffer if granted.

As well said by both parties, these principles were well established in a number of cases including case of **ATILIO VERSUS MBOWE 1969 HCD 284**. Others are **GIELA VS CASSMAN BROWN & CO LTD (1973) E.A 358, AND GAZELLE TRUCKER LTD VERSUS TANZANIA PETROLEUM DEVELOPMENT CORPORATION, Civil Application No. 15 of 2006** to mention a few.

These principles were also expounded in the book of **SOHONI'S LAW OF INJUNCTIONS; Second Edition: 2003 at page 93** where the learned Author expounded:

*"The principles on which the exercise of discretion rests are well settled. The said principles have been outlined as hereunder. They are-*

- (i) In the facts and circumstances of each individual case there must exist a strong probability that the petitioner has an ultimate chance of success in the suit. This concept has been otherwise expressed by saying that there must be a prima facie case.*
- (ii) As the injunction is granted during the pendency of the suit the court will interfere to protect the plaintiff from injuries which are irreparable. The expression irreparable*



*injury means that it must be material one which cannot be adequately compensated for in damages. The injury need not be actual but may be apprehended.*

*(iii) The court is to balance and weigh the mischief or inconvenience to either side before issuing or withholding the injunction. This principle is otherwise expressed by saying that the court is to look to the balance of convenience."*

It has to be noted that, all the three above principles must be met before a temporary injunction can be granted.

Now in applying these principles to the case at hand, I will strictly confine myself with the above mentioned principles in its pure meaning as above illustrated in determining the matter at hand. To start with, the first issue to deal with is as to whether the Applicant has established a *prima facie* case.

Since at this stage of proceedings the Affidavit is the only evidence upon which the Application is pegged of course the controversy can only be appreciated by traversing the **7** paragraphs therein, thereof if I may choose to quote **paragraphs 3 and 7** of the said Affidavit in this respect, the same reads:

***"3. That, loan installments have been paid to substantial amount and that the remaining***

***amount is very small and the Applicant was willing to pay except the Respondent No. 1 was not willing to verify the amount to be paid.***

***7. Hence the act of both Defendants to decide to sell the house is contrary to the express provision of the loan agreement and prejudices the Applicant."***

As seen in the reply to the Applicants' submission, the Respondents herein have seriously opposed the Application through a Counter Affidavit deponed by **IMANI JOHN**, the Principal Officer of the 1<sup>st</sup> Respondent.

Apart from responding the contents of an Affidavit in support of Application, it is not harmful if I may choose and quote the wording of paragraphs **4** and **8** of the Counter Affidavit. They read:

***"4. That in response to the contents of paragraphs 3 of the Applicant's Affidavit are noted to the extent that Applicants paid only some of agreed installments, but the first Respondent avers that the Applicants substantially defaulted to repay the loan contrary to the Loan facility agreement and the mortgage deed.***



**8. That in response to the contents of paragraph 7 of the Applicant's Affidavit, is totally denied the first Respondent avers that is legally entitled to exercise his legal right to sale the mortgaged property in order to recover the outstanding defaulted amount, Interest and Penalties since is the only remain option after the F Applicants failure to honour their obligations despite of several chances given to them."**

Now, from the above the most important issue is whether the Applicants have managed to establish a *prima facie* case to command the issuance of an order sought pending the final determination of the main case before this honorable court.

In determining this principle of establishment of a *prima facie* case or rather a serious question with a probability of success, the Applicant cannot escape from showing two things:

- i. The relief sought in the main suit is one which court is capable of awarding; and***
- ii. The Applicant should at the very minimum show in the pleading that in the absence of any rebuttal evidence he/she is entitled to said relief.***

In the case of ***AMERICAN CYANAMID VS. ETHICON [1975] I ALL E. R. 504***, it was stated that:

***"In order to grant a temporary injunction the court no doubt must be satisfied that the claim is not frivolous or vexatious."***

In the same series, my learned brother Nsekela, J. as he then was in the case of ***AGENCY CARGO INTERNATIONAL VS. EURAFRICAN BANK (T) LTD, HIGH COURT, DAR ES SALAAM, Civil Case No. 44 of 1998 (Unreported)*** when explaining what the Applicant is required to show said:

***"It is not sufficient for the Applicant to file a suit with claims. The Applicant must go further and show that he has a fair question as to the existence of a legal right which he claims in the suit."***

The task then before me is to exhaust and measure out from the submission elaborated by the Applicant whether the court has been referred to the reliefs sought in the main suit in order to look whether the claims made have elevated a serious question/(s) for determination by the court. Of course in the instant principle my task is to look at the reliefs sought in the main suit and the claims made and see if they raise a serious question for determination by the court and then assess whether there is a justification for granting a temporary injunction.

At this juncture, I would like to refer to the Respondent's submission opposing the Application in this particular principle

where in several times he emphasized that the Applicant has failed to show the proof or rather the evidence to their allegations which are result of failure to service their loan advanced thereto.

From the above Respondents' Counsel concern, I am aware of the extent of proving whether there is a serious question for determination in this kind of Application that, **it is not conclusive evidence which is required but rather the facts as disclosed by the Plaint and the Affidavit** and so the standard of proof required would be somehow below the expected standard in full trials. See the case of ***SURYA-KANT D. RAMJI VS. SAVINGS AND FINANCE LTD & 3 OTHERS, HIGH COURT, Commercial Division Dar es Salaam, Civil Case No. 30 of 2002 (Unreported)***.

Now having careful gone through the facts disclosed in the Applicants' submission in chief in respect of the instant Application and brief facts as displayed in the 1<sup>st</sup> Applicant's affidavit seen above, it is my considered view that the Applicants have managed to solicit a ***prima facie*** case to the main suit for the court to determine the controversy at hand. From the same also, I find that the Applicants have at minimum managed to show at the very beginning of the pleadings that in the absence of some important answers to some matters, are entitled to the reliefs sought but upon consideration and analysis of the evidence

and the determination of those matters to clear the controversy between the parties.

For this reason, I will thus hold that **this condition has been satisfied.**

On the second condition which is that of suffering irreparable injury if the prayer for injunction is refused. I am mindful that the purpose of granting temporary injunction is to prevent irreparable injury befalling on the Applicants while the case is still pending.

The tangible issue in this principle is the phrase "**irreparable injury**". What is the irreparable injury? In the case of **KAARE VS. GENERAL MANAGER MARA COOPERATION UNION [1924] LTD [1987] TLR 17 Mapigano, J.** (as he then was) clearly stated that:

***"The Court should consider whether there is an occasion to protect either of the parties from the species of injury known as "irreparable injury" before his right can be established....."***

***By irreparable injury it is not meant that there must be no physical possibility but merely that the injury would be material, for example one that could not be adequately remedied by damages."***

It follows therefore that, the irreparable injury is an injury which could not be adequately remedied by damages. If I may quote part of the Applicants' written at page 5 the same reads:

***"Madame Judge, the Applicants will also be psychologically affected, as the act of being evicted from their house and remaining homeless together with their children while there is a pending case before the Court to make determination of their rights over that house is so painful and cannot be repaired by any compensation. Madame Judge, if the Applicants will be evicted and their house to be sold, will affect their economic activities as they cannot do their daily economic activities comfortable as they will be in an unexpected difficult situation. Madam Judge all these damage shall be irreparable if the application for temporary injunction is not granted."***

Further, in determining this point, I would like to refer to the case of ***RAMADHANI ALLY & 2 OTHERS VS SHABANI ALLY, Civil Appeal No. 3 of 2008 [Unreported]*** where the Court of Appeal held that:

***"The attachment and sale of immovable property will, invariably, cause irreparable injury. Admittedly, compensation could be ordered should the appeal***

***succeed but money substitute is not the same as the physical house. The different between the physical house and money equivalent, in my opinion, constitutes irreparable injury. (Deusdedit Kisisiwe v. Protaz B. Bikuli, Civil Application No. 13 of 2001 (Unreported).***

From the above quoted submission by the Applicants, and from the above precedent, I have no query to find that the purported injury mentioned will be irreparable since under the Applicants' condition as pleaded, can't be adequately remedied by damages. I proceed to find **the second condition likewise has been met.**

The last condition is on balance of convenience. Of course the question here is who is going to suffer greater hardship and mischief if the temporary injunction is not granted.

On a comparative basis, as the second condition has been met, the sun follows the night and under the circumstances, the answer to this principle follows the second principle that the Applicants are the one who are going to face more hardship if the temporary injunction is denied; unlikely to the 1<sup>st</sup> Respondent who have in its possession hundreds of clients and deposits under their roof.



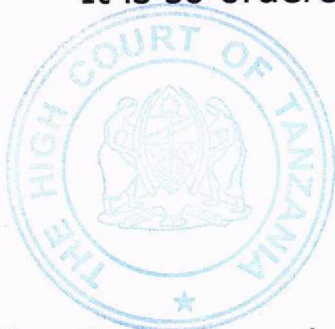
On my comparative basis from the submissions for and against the Application I proceed to find the **third condition has similarly been met.**

At this juncture therefore, having weighed the facts in totality, I will hold that this is a fit case for temporary injunction because all the conditions for granting temporary injunction have been met.

Consequently, **I hereby grant the Application accordingly.**

I make no order as to costs.

It is so ordered.



A handwritten signature in blue ink, appearing to read "L. E. Mgonya".

**L. E. MGONYA  
JUDGE  
10/07/2020**

**Court:** Ruling delivered before Hon. R. B. Massam, Deputy Registrar in chambers in the presence of Mr. Mohamed Muya, Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, the Applicants in person and Ms. Janet RMA, this 10<sup>th</sup> day of July, 2020.



A handwritten signature in blue ink, identical to the one above, appearing to read "L. E. Mgonya".

**L. E. MGONYA  
JUDGE  
10/07/2020**