

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
MISCELLANEOUS LAND APPLICATION No. 17 OF 2020

(Originating from Land Case No. 52 of 2019)

PROMATEX EST LIMITED.....APPELLANT

Versus

MAENDELEO BANK PLC.....RESPONDENT

RULING

6th August, – 3rd September, 22nd September, 2020

J. A. DE - MELLO J;

The Applicant has moved this Court under **section 68 (c), Order XXXVII Rule 1 (a)** of the **Civil Procedure Act Cap. 33, R.E 2019** for the following the same prayers for ex-parte and Inter-parte

- i. **That, this Honourable Court be pleased to grant temporary injunction against the Respondent, his assignee, agent, or authorized officer from exercising the Respondent's right to sale a mortgaged property located at plot No.40 Block 1 Hananasif area within Kinondoni Municipality pending the determination of the main suit.**
- ii. **That, this Honourable Court be pleased to grant temporary injunction against the Respondent, his**

assignee, agent, or authorized officer from transferring a right of occupancy of a mortgaged property located at plot No.40 Block 1 Hananasif area within Kinondoni Municipality to any one pending the determination of the main suit.

- iii. **Cost of this Application be provided for and;**
- iv. **Any other Relief that this Honourable Court may deemed fit to grant.**

The Applicant was represented by **Said Maneno Seif** learned Advocate while **Muganyizi Shubi** represented the Respondent. The Application is supported by the Affidavit of the Applicant **Julius Mwamba Barongo**, the Principal Officer of the Applicant whereas; similarly is the Respondent who filed his. On the **2nd July, 2020**, parties preferred to argue the Application by way of written submissions of which am grateful to both, for their compliance. The basis of the Applicant's claim is that, the actual value of the suit property is about **TShs. 800,000,000/=** as opposed to one ,illegally obtained by the Respondent, portraying a fabricated valuation report, of **TShs. 407,000,000/=**, far below the reality. This being the case, **1st Defendant** is now in process to sell the disputed property in a price ranging from **TShs. 350,000,000/=** to **TShs. 250,000,000/=**.

Counsel shared what it takes for an Application for restraining orders like this one, of the presence of existence of pending triable matter to be determined as evidenced by **Land Case No. 52 of 2019 Promatex Est Ltd vs. Maendelelo Bank Pic Ltd.and Kitupa Property Consults Ltd.**

pending before this Honourable Court, of **which Plot No. 40 Block I Hananasif Area within Kinondoni Municipality**, is the subject matter. Secondly, is the existence of extreme danger that the Applicant is to suffer irreparable loss if the Respondent continue to executing his right to sale dispute property before determination of the main suit. This is evidenced by the Respondent's process of selling and transferring the ownership of the disputed property, notwithstanding that the premise is a Hotel facility providing hospitality services and other services, for long, which had acquired public trust and reputation,. If this is not granted, then Applicant business will be negatively affected. The land mark case of **Atilio vs. Mbowe (1969) HCD No. 284** in exhibiting the laid principle for the Court to grant Temporary Injunction that;

"It is generally agreed that there are three conditions which must be satisfied before such an injunction can be issued: -

- 1. There must be a serious question to be tried on the facts alleged and a probability that the Plaintiff will be entitled to the relief claimed.**
- 2. That, the court's interference is necessary to protect the plaintiff**

from the kind of injury which may be irreparable before his legal right is established.

- 3. That, on a balance of convenience there would be greater hardship and mischief suffered by the Plaintiff from the withholding of the injunction than would be suffered by the**

Defendant from the granting of it."

Another case of **Kibo Match Group Ltd vs. H.S Impex Ltd**, was referred to, as it held;-

"In granting application for injunction, the Court has to satisfy itself that, unless immediate action is taken, the applicant may suffer irreparable damage, whether quantifiable or not, and further the final decision would be rendered nugatory as consequence of not granting the injunction".

On the third ground, Counsel suggests the **Presence of triable issues between the parties with a probability that it may be decided in the Applicant favour**, based on the facts that in **Land Case No. 52 of 2019**, it is alleged that there is collusion between **Maendeleo Bank PLC Ltd** and **Kitupa Property Consults Ltd.** for a fraudulent fabricated valuation report, maliciously undervaluing the market value of the dispute property. There is a greater chance of success of the case as stated in Affidavit under **paragraphs 9, 10, 11, & 12**, he states. With regard to the fourth ground on Balance of convenience, it is Counsel's assertion that if not granted, the Applicant stands to suffer more than, Respondent, considering no effect towards the Respondents, it being it's a strong financial institution with, strong clientele base country wide. As observed earlier it is the Applicant's repute and public trust that, will be injured, if not granted. The case of **Giall vs. Casma Brown & Co. Ltd, [1973] EACA 358** was put forward in that regard. On the fifth ground, it is Counsel's humble submissions that, according to **sections 68 (c) and, 95**

read together with **Rule 1 (a) of Order XXXVII** of the **Civil Procedure Code Cap. 33 RE: 2019** this Honourable Court has power to grant temporary injunction and other orders prayed by Applicant, hence jurisdiction.

Opposing the Application, **Counsel Shubi** brings the Court to the attention of the mandate the Respondent has, following default by the Applicant failing to honour his obligation towards the loan. The three conditions cited from the case of **Atilio** (supra) must all be complied with, before an order for temporary injunction is issued, he insists but, strengthened by what the case of **Abdi Ally Salehe vs. Asac Care Unit Limited and 2 Others, Civil Revision No. 3 of 2012 CAT (unreported) at page 9** where it was further held that:

"The High Court correctly directed itself on the need for the three preconditions to coexist before temporary injunction is granted".

That, obviously the Applicant has failed to discharge his legal duty, which the Plaintiff under **paragraph 5** as well as **3 of the Affidavit in Land Case No. 52 of 2019** vivid depicts glaring admission by the Applicant toward the said default. It is also pleaded by the Applicant that Respondent had instituted a summary suit, for recovery of defaulted money in **Land Case No. 56 of 2017** which was decided unopposed as the Applicant did not contest it as seen in **paragraphs 9 and 11** to the Plaintiff. Nothing triable is thus in existence for the Application to sail through as mere allegations have no place here, he observes, neither proof for the alleged fraud nor process to dispose. In **paragraph 7** of the written statement of defence filed on 2nd January 2020, Respondent clearly stated that, the mortgaged

house has already been disposed by this Court's Court Broker one, Hillary Sande Ligate trading as Noel Estate Company Limited. The same was served on the Applicant on **18th of February 2020**, as opposed to this Application was filed in Court on 3rd of April, 2020, rendering this Application overtaken by event. The property subject matter of this Application has been disposed of which this Court has nothing to restrain the decree rather order not contested by appeal or setting aside. The application is therefore misconceived and or misplaced. From the above, I find myself attracted to the case of **Hardmore Productions Limited & Others vs. Hamilton & Another (1983) 1A.C 191** where **Lord Diplock** at **page 220** had this to say:

"An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court Judge by whom the Application for it is heard".

The rationale is to develop a workable rather duable formula to the extent called for by the demands of the situation, keeping in mind the pros and cons of the matter and, thereby striking a delicate balance between two conflicting interests, such as injury and prejudice, likely to be caused to the Parties, if the relief is granted or refused. At this outset, I ask myself as to whether or not the Applicant has managed to keep up to the principles as observed above. Based on the Affidavit in support of this Application, as well as the written submissions thereof, it is my settled view that at this stage it is not possible for the Court and on its own, search for evidence to establish and ascertain facts surrounding the claim and, even worse on the

illegality or otherwise of the deductions. All this, is a matter of evidence and during hearing. In the case of **Colgate Palmolive vs. Zakaria Provision Stores And Others, Civil case No. 1 of 1997** (unreported), **Mapigano J**; (as he then was) held that;

"I direct myself that in principle the prima facie case rule does not require that the court should examine the material before it close it and reach to a conclusion that the plaintiff has a case in which he is likely to succeed, for to do so would amount to prejudging the case on its merits, all that the court has to be satisfied of, is that on the face of it the Plaintiff has a case which needs consideration and that there is likelihood of the suit succeeding."

In absence of proof and, with such contentious issues, I am satisfied that there is no Prima Facie case before the Court that the Application has established, to be duly heard and, determined in that line. This will thus attract a translation on evidence, established whether or not the mortgaged property has been disposed as alleged by the Respondent and to the detriment of the Applicant. I am satisfied that, this Application has no merits faced with two dissenting positions, one that the property is in process of being sold and two that, it had already been sold, respectively.

In the interest of justice, the main suit be heard expeditiously on its merits.

Costs in due cause.

I order.



Recoverable Signature

X *J. A. De-Mello*

Signed by: J.A. DE-MELLO

JUDGE

22nd September, 2020