

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO. 241/2020

PRIME PROPERTIES LTD.....1ST APPLICANT
HASNAIN GULAM HUSSEIN.....2ND APPLICANT

VERSUS

AZANIA BANK LIMITED.....1ST RESPONDENT
MURTAZA SHERALI RASHID.....2ND RESPONDENT
FARIDA MURTAZA SHERALI RASHID.....3RD RESPONDENT
KAZIM MURTAZA SHERALI RASHID.....4TH RESPONDENT
MUHAMMADRIDHA MURTAZA
SHERALI RASHID.....5TH RESPONDENT
JANETH PETER ISHENGOMA.....6TH RESPONDENT
MARK AUCTIONEERS AND
COURT BROKERS COMPANY LIMITED.....7TH RESPONDENT
SMX LIMITED.....8TH RESPONDENT

RULING

The applicants above mentioned are seeking for an order of interim injunction restraining the respondents from transferring the following properties, namely: apartment No. 112, 11th floor, Fayrouz apartments located on plot no. 108 Kitonga Street, Ilala Municipality, Dar es Salaam with certificate of title No. 77330/140; apartment No. B71, 7th Floor, plot no. 108 Kitonga Street, Ilala Municipality, Dar es Salaam with certificate of title No. 77330/1/10 and selling their properties which include: office No. 5 Kadry Complex, 1st floor, located on plot No. 1036/102 & 37102, Flur 11,

Samora Avenue road (0.059) undivided shares with certificate of title No. 47882 registered in the name of the 2nd applicant; office No. 6 Kadry Complex, located on plot No. 1036/102 & 37/102, Flur 11, Samora Avenue road (0.072) undivided shares with certificate of title No. 47882 registered in the name of the 2nd applicant as a personal legal representative of the late Fatim Mohamed. The ground upon which the application is taken is that the above properties were unlawfully sold at the (sic, instance) of the first respondent to the sixth respondent and that the first, seventh and eighth respondents are unlawfully intending to sale its properties described above. The explanation to this ground is that there have not been any complain by the first respondent to the applicants on any default to service of the loan by the eighth respondent; secondly, there was no statutory notice of default or to pay loan.

In response, the first respondent countered that the applicants were served with the default notice of the eighth respondent via registered post but they did not heed to the demand. That the addresses that were used to serve the registered mail were the ones indicated in their deed of guarantee as per annexure ABL 1 to the first respondent counter affidavit. That the applicants were aware of the default, as there were prior meetings that

were done by the Statutory Manager that required the third respondent together with the applicants to liquidate the term loan.

On reply to the counter affidavit by the first respondent, the applicants maintained that they were never been issued with any statutory notice of default by the eighth respondent from the first respondent.

However, the applicants did not state if at all the postal address reflected in the notice of default dated 24/09/2019 and registered mail receipt dated 3/10/2019 (annexure ABL3 to the counter affidavit of the first respondent) addressed to Hasnain Gulamhussein (second applicant), was a wrong one. Neither refuted an assertion by the first responded that the address used was one indicated in the deed of guarantee. More important, the applicants made no response to a fact that they were aware of the default as there were prior meetings that were done by the Statutory Manager that required the third respondent together with the applicants to liquidate the term loan. In law, a fact not controverted is tantamount to an acceptance of the unchallenged fact as accurate. See **Hamis Mohamed vs R**, Cr. App. No. 297/2012 CAT at Arusha (unreported), where the Court of Appeal cited with approval a position in the leading case of House of Lords in **Brown vs Dunn** (1893) 6R. 67.

Again in the supplementary affidavit, the applicants averred that on 27th April, 2020 the Registrar of Titles sent to the first applicant via postal address a notice to transfer under power of sale Plot No. 108 Upanga, Dar es Salaam with certificate of title No. 77330 in the name of the first applicant to the second, third, fourth and fifth respondents as occupier in common, within 30 days from the date of postage of the said notice unless the High Court orders otherwise.

According to the first respondent, the seventh respondent advertised an auction in the Guardian and Mwananchi News Paper dated 2/01/2020 and 3/01/2020, respectively. And a report for sale of apartment No. 112, first floor, Fayrouz apartment and apartment No. B71, seventh floor, plot No. 108 were made available on 10/2/2020 and 13/02/2020, respectively. The plaint for a main suit was presented on 16/01/2020. This application was presented for filing on 8/05/2020. And a supplementary affidavit was filed on 20/05/2020 being six days before expiry of 30 days notice of transfer.

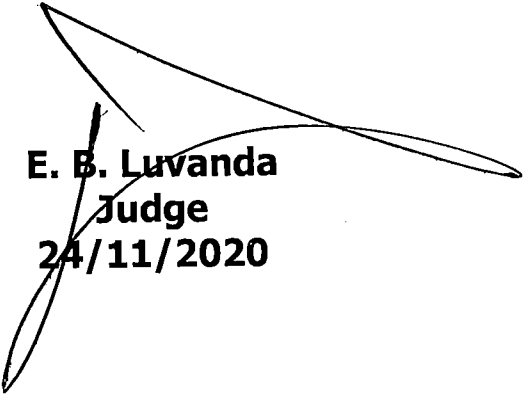
Both in the plaint and amended plaint, the plaintiff (applicants herein) stated that on 2/01/2020 the second defendant (seventh respondent herein) advertised for sale of plaintiff's properties in the Guardian News Paper. One could wonder why this application for stoppage of transfer and sale was not taken at the earliest opportune when a plaint was filed.

In view of what I have adumbrated above, an issue of non-service of statutory notice cannot be entertained for reasons depicted above. An argument by Mr. Gasper Nyika the learned Counsel for applicants that the sale of a mortgaged properties was a nullity on explanation that were sold at a price lower than the minimum set by law, is a novel concept or idea. This ground was not averred in the affidavit, rather was startup in the reply to a counter affidavit of the first respondent, meaning that the first respondent was denied a right to respond to it. Even in the plaint and amended plaint this fact was not pleaded.

Having premised as above, this application is doomed to fail for want of merits.

The application is dismissed with costs.




E. B. Luvanda
Judge
24/11/2020