

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA**

AT MUSOMA

MISC. LAND APPLICATION NO. 21 OF 2021

FLORENCE CHACHA APPLICANT

VERSUS

- 1. TPB PLC (as successor in title of the
defunct TIB CORPORATE BANK LIMITED) 1ST RESPONDENT**
- 2. MCHINGA AUCTION MART & REAL
AGENCY 2ND RESPONDENT**
- 3. RAMADHAN BWANA t/a LE GRAND
VICTORIA HOTEL 3RD RESPONDENT**
- 4. KITAJI INVESTMENTS LIMITED 4TH RESPONDENT**
- 5. GATI DEBORAH ISACK (Administratrix of the
Estate of the late CHACHA MWITA NG'ARIBA 5TH RESPONDENT**
- 6. ZAITUNI NG'ARIBA 6TH RESPONDENT**
- 7. THE ATTORNEY GENERAL 7TH RESPONDENT**

RULING

6th and 11th May, 2021

KISANYA, J.:

In this application, Florence Chacha has by way of chamber summons made under section 2 (3) of Judicature and Application of Laws Act [Cap 358, R.E. 2019] (the JALA) and Order XLIII, Rule 2 and 95 of the Civil Procedure Code [Cap. 33, R.E. 2019] (the CPC) moved the Court to grant the following orders: -

1. ***That,** this Honourable Court may be pleased to make an order that the status quo in respect of the Applicant's possession and peaceful enjoyment of the property on Plot No. 2 Nyabisare Area, Musoma Municipality with Certificate of Title **No. 6334 LO No. 133090** be maintained pending the hearing and determination of an application for temporary injunction to be filed after the expiration of 90 days statutory notice of intention to sue the Government and her Public Company.*
2. ***That,** this Honourable Court may be pleased to grant an order restraining the Respondents, their agents or servants or anyone acting under their instructions and or authority from entering, evicting, threatening and or interfering with or making or cause to be made anything that may interfere with the Applicant's possession and peaceful enjoyment of the property on Plot No. 2 Nyabisare Area, Musoma Municipality with Certificate of Title **No. 6334 LO No. 133090** pending filing, hearing and determination of the application for temporary injunction and the main suit to be filed after the expiration of 90 days statutory notice of intention to sue the Government and her Public Company.*
3. *That the costs of this Application to follow the event.*
4. *For any other Order(s) as this Honourable Court may deem fit and just to grant.*

The application is made under a certificate of urgency. It is supported by the affidavit of Florence Chacha deposed on 27.04.2021. In terms of the facts averred in the said affidavit, Florence Chacha was married to the late Isack Chacha Mwita Ng'ariba in 1989. During their marriage life, they acquired Plot No. 2, Nyabisare Area, Musoma Municipality (hereinafter referred to as "the suit

premises"). Following a spouse consent signed by the late Isack Chacha Mwita Ng'ariba and the 6th respondent, the suit premises was pledged as security for the loan facility issued by the 1st respondent in favour of the 4th respondent in 2016. As the 4th respondent defaulted to service the loan, the 1st respondent instructed the 2nd respondent to sell the suit premises. It was bought by the 3rd respondent on 25th November, 2020.

On 15th March 2021, the 5th respondent received the 3rd respondent's 30 days' notice to vacate the suit premises. That notice prompted the applicant to serve the 1st and 7th respondents with a 90 days' notice to sue the Government. She intends to challenge the mortgage transaction which led to the sale of the suit premises to the 3rd respondent. During the pendency of the said notice, she lodged the present application on 28th April, 2021.

The application was contested by the 1st, 2nd, and 7th respondents on one hand and the 3rd respondent on the other hand. They filed their respective counter affidavits to such effect. The 4th, 5th, and 6th respondents did not object the application.

At the hearing of this matter, the applicant was represented by Mr. Paul Kipeja, learned advocate. On the other hand, Mr. Kitia Turoke assisted by Mr. Innocent Danga, learned State Attorneys appeared for the 1st, 2nd and 7th respondents, Ms. Ghati Deborah Isack, director appeared for the 4th respondent

and the 5th respondent appeared in person. The hearing proceeded in the absence of the 3rd and 6th respondents who defaulted to appear without notice.

In the light of the pleadings and submissions by the parties, the following facts are not disputed:

- a) That the suit premise was in the name of Isack Chacha Mwita Nga'riba and that it was mortgaged to secure the loan facility advanced to the 4th respondent.
- b) That, the spouse consent was signed by the late Isack Chacha Mwita Ng'ariba and the 6th respondent.
- c) That, as the 4th respondent defaulted to pay the loan, the suit premises was sold to the 3rd respondent by the 2nd respondent under instruction of the 1st respondent.

Before proceeding further, I wish to point out that parties did not dispute that the source of information deposed in paragraphs 11 and 12 of the applicant's affidavit was not stated. The said omission contravened the provisions of Order, XIX, Rule 3(1) of the CPC which require the affidavit to be confined on facts which the deponent is able of his knowledge to prove. In interlocutory applications, the facts may be confined on statements of the deponent's belief. This position was also stated in **Uganda vs Commissioner of Prisons, Ex parte Matovu** [1996] EA 514 relied upon by Mr. Turoke. If the affidavit is based

on the statement of the deponent's belief, the source of information must be disclosed in the verification clause. Therefore, the impugned paragraphs are expunged for failure to disclose the source of information deposited therein. However, the affidavit stands after expurgation of paragraphs 11 and 12 of the affidavit.

Reverting to the application, the first prayer is on maintaining the *status quo*. Mr. Kipeja urged the Court to order for maintenance of the *status quo* as at the time of filing this application. For this stance, the learned counsel cited the case of **National Bank of Commerce vs. Dar es Salaam Education and Office Stationery** [1995] TLR 272.

Responding, Mr. Turoke for the 1st, 2nd and 7th respondents argued that the order of *status quo* starts to run from the time it is issued by the court and not from the date of filing the suit. He contended that the applicant had been evicted from the suit premises from 30th April, 2021. In that regard, the learned state attorney was of the firm view that the application for the order of maintaining the *status quo* had been overtaken by event. He also contended that the said order will be in favour of the 3rd respondent who is in occupation of the suit premises.

Rejoining, Mr. Kipeja argued that the application has not been overtaken by the event due to the fact that the suit was filed when the applicant was in occupation of the suit premises.

On my part, I agree with Mr. Kipeja that the *status quo* in respect of the order for temporary injunction relates to the status that existed at the time immediately before the filing of the application up to the determination of the case. See the case of **National Bank of Commerce vs. Dar es Salaam Education and Office Stationery** (supra) where the Court of Appeal held:

"...the purpose of an order for a temporary injunction as set out under Order 37 rule 1 is to preserve and retain the status quo as obtains at the time immediately before the filing of the application until the determination of the suit."

Although the above cited case makes reference to temporary injunction made under Order 37, Rule (1) of the CPC, I am of the view that the said decision applies in determining the meaning and the time when the order for maintaining the *status quo* starts to run. That, it covers the time and position that existed immediately before the filing of application up to the determination of the case.

It is on record that this application was filed on 28th April, 2021. Two days later, on 30th April, 2021, the Court issued the initial orders requiring the parties to appear for orders on 3rd May, 2021. However, it appears that the 1st

respondent handed over the suit premises to the 3rd respondent on 30th April, 2020. In the circumstances, I am of the view that the application is not taken by event because, the handing over of the suit premises to the 3rd respondent was made when the application was pending in the Court.

The next issue is whether the application for temporary injunction is meritorious or otherwise. Generally, this Court has no mandate of granting an interim injunction order pending institution of a suit if the circumstance does not fit in Order XXXVII of the CPC. However, section 2(3) of the JALA empowers the Court to apply the common law and statutes of general application in force in England on 22nd July, 1920 if the matter is not covered in the existing legislations. This position was stated in **Tanzania Electric Supply Company (TANESCO) vs Independent Power Tanzania Limited (IPTL) and 2 Others** (2000) TLR 324, where it was held:

"The Civil Procedure Code cannot be said to be exhaustive. It is legitimate, therefore, to apply, under section 2(2) of the Judicature and Application of Laws Ordinance, relevant rules of Common Law and statutes of general application in force in England on the twenty-second day of July, 1920, where the Code is silent. So the High Court has jurisdiction in a proper case to grant an "interim injunction order" pending institution of a suit or in circumstances not covered by Order XXXVII of the Code."

In the light of the above, I am of the view that the Court has power to hear and determine the present application for interim injunction order pending

the filing of the application for temporary injunction after expiration of the statutory notice served to the 1st and 7th respondents.

In relation the merit of the relief for an order of temporary injunction, both parties are at one that this is granted basing on the following conditions established in **Atilio vs Mbowe** (1965) TLR 84: -

1. There must be serious question to be tried on the facts alleged, and a probability that the plaintiff will be entitled to the relief prayed;
2. 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; and
3. On the balance there will be greater hardship and mischief suffered by the plaintiff from the withholding of the injunction than will be suffered by the defendant from the granting of it.

It is settled that all of the above conditions must be applied and tested cumulatively. See for instance the case of **Charles D. Msumari and 3 Others vs the Director General of T.H.A**, Civil Case No. 10 of 1997, HCT at Tanga (unreported). Therefore, I am duty bound to consider whether all conditions have been met.

As regards the first issue, Mr. Kipeja argued that the triable issue is legality of the mortgaged property. His argument was based on the reason that the

spouse consent required under section 59(1) and (2) of the Law of Marriage Act [Cap. 29, R.E. 2019] and section 161 of the Land Act [Cap. 113, R.E. 2019] was not issued by the applicant who was the lawful wife of the late Isack Chacha Mwita Ng'ariba. He referred the Court to the case of **Automech Ltd vs TIB Development Bank LTD**, Misc. Land Application No. 73 of 2020, HCT Land Division at DSM (unreported).

On the other hand, both counter-affidavits were to the effect that the applicant was not married to the late Isack Chacha Mwita Ng'ariba. Mr. Turoke submitted that the applicant had not proved that the consent was fraudulently procure. On his part, Mr. Innocent contended that the 1st respondent conducted due diligence on the matter before advancing loan to the 4th respondent. Mr. Turoke cited the case of **American Sinamid vs Scon Ltd** (1975) ALL ER 504 where it was held that the court must be satisfied that the application is not frivolous. Thus, he was of the view that the applicant had not advanced triable issue.

In determining whether there is triable issue, the Court is not required to resolve the issue of law or facts as that would prejudice the main suit. At this stage, the court is only required to consider whether in terms of the pleadings, the applicant has demonstrated prima facie and that there is a possibility of succeeding in the main suit. There is a long list of authorities on this point, one

of them being **Automech Ltd vs TIB Development Bank LTD**, (supra) which Mr. Kipeja placed heavy reliance to bolster the proposition. In that case, this Court cited the case of **Colgate - Palmolive Company vs. Zacharia Provision Store and 3 Others**, Civil Case No. 1 of 1997 where Mapigano, J., as he then was, had this to say:

"I direct myself that in principle the prima facie case rule does not require that the court should examine the material before it closely and come 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 the instance case, the applicant deposed to have been married the late Isack Chacha Mwita Ng'ariba and that, the suit premises was matrimonial property. The applicant averred further that she did not issue a spouse consent authorizing the suit premises to be pledged as security for the loan advanced in favour of the 4th respondent. She contended further that the consent signed by the late Isack Chacha Ng'ariba and the 6th respondent was fraudulently procured.

Now, in in terms of section 59(1) and (2) of the Law of Marriage Act [Cap. 27, R.E. 2019], section 161 (3) of the Land Act [Cap. 113, R.E. 2019] and regulation 4 of the Land (Mortgage Financing) Regulations, GN. No. 355 of 2019, spouse or spouses' consent is a legal requirement for the matrimonial property to

be mortgaged as security. In the absence of spouse consent, the mortgage of the suit premises is null and void.

I understand that the 1st, 2nd, 3rd and 7th respondents deposed in their respective counter affidavits that the applicant was not lawful wife of the late Isack Chacha Ng'ariba. For instance, the paragraph 5 of the Counter affidavit of the 1st, 2nd and 7th respondents reads:

"...the applicant was not spouse of Isack Chacha Mwita at the time of his death and therefore there was no a matrimonial home between the two neither a requirement for obtaining her consent."

It is clear that the 1st respondent did not address the status of the applicant's marriage to the late Isack Chacha Mwita at the time when the suit premises was mortgaged.

All in all, I am of the considered view that, the applicant has demonstrated that triable issues that are required to be proved during trial. These may include:

1. Whether the applicant was married to the late Isack Chacha Mwita Ng'ariba.
2. Whether the suit premises was matrimonial property.
3. Whether the applicant's consent was required before mortgaging the suit premises to the 1st respondent.

From the foregoing, the first condition has been met by the applicant.

The second condition calls this Court to consider whether court's interference is necessary to protect the applicant from the kind of injury which may be irreparable before his legal right is established. Mr. Kipeja contended that the applicant will suffer irreparable loss if the application is not granted because the 3rd respondent will evict her from the suit premises. Making reference to the case of **Automech Ltd vs TIB Development Bank LTD** (supra), he reiterated his argument that the order for status quo is in respect of the position that existed on 28th April, 2021 when the present application was filed in the Court.

On the other hand, Mr. Turoke countered that the applicant had been evicted from the suit premises. He went on to contend that there was nothing for the Court to order for status quo and that the applicant had not prayed for restoration.

This issue should not detain me. I have decided herein that the order for temporary injunction is intended to preserve the status quo as it existed immediately before the filing of application. The respondents do not dispute that the applicant was in possession of the suit premises on 28th April, 2021 when the present application was filed in this Court.

The issue of irreparable loss is reflected in paragraph 13 of the affidavit in support of the application when the applicant deposed:

"That, while await to abide the statutory requirement as stated in foregoing paragraphs, there a vivid threat from the Respondents and especially the 3^d respondent that they will evict me from the Property in dispute at any time as of now without any further recourse to me, an act which will cause me irreparable loss, as being a widow and suffering from ill health for number of years now I do not have the capacity to acquire another home."

The 1st, 2nd and 7th respondents' counter affidavits were to the effect that the eviction will not cause irreparable loss on the part of the applicant and that she will re-occupy the suit premises or be entitled to the orders to be issued by the court.

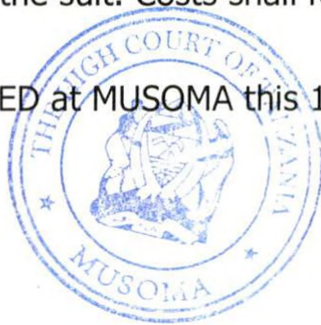
Having considered what is deposed in paragraphs 3 of the affidavit, including the fact that the applicant has no means of acquiring another home upon being evicted from the suit premises, I am of the view that she will suffer injury which cannot be quantified in general damages. For that reason, the second condition has been met as well.

Finally, I have to consider whether the applicant will suffer greater injury if the application is not granted than the injury to be suffered by the respondents upon granting the application. Again, in view of paragraph 13 of the applicant's affidavit, I am of the view that she will suffer greater injury if the application is not granted. This is so when it is considered that the respondents did not

demonstrate on oath any injury to be suffered in the event the application is granted.

To this end, I find merit in this application. I accordingly issue the temporary injunction order requiring maintenance of the *status quo* as existed on 28th April, 2021 when the application was filed in the Court to 22nd July, 2021 when the notice to sue the 1st and 7th respondents is expected to expire. Thereafter, the applicant will be at liberty to apply for temporary injunction after instituting the suit. Costs shall follow the event.

DATED at MUSOMA this 11th day of May, 2021.




E.S. Kisanya
JUDGE

Court: Ruling delivered this 11th day of May, 2021 in the presence of Mr. Kidaraja holding brief for Mr. Paul Kipeja, learned advocate for the applicant, Mr. Kitia Turoke, learned State Attorney for the 1st, 2nd and 3rd respondents and in the absence of the 3rd, 4th, and 6th respondents.




E.S. Kisanya
JUDGE

11/05/2021