

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

LAND APPLICATION NO 494 OF 2020

MARRY J. MKONDYA.....APPLICANT
VERSUS
PONEKA PATRICK MIHAYO.....1ST RESPONDENT
SAYUNI CONTRACTORS LIMITED.....2ND RESPONDENT
CRDB BANK PLC.....3RD RESPONDENT

RULING

MASABO, J.:-

Marry Mkondya, the applicant herein has moved this court under Order XXXVII Rule (1) (a) and (b), sections 68(e) and 95 and of the Civil Procedure Code [Cap 33 RE 2019] seeking temporary injunction to restrain the 3rd Respondent and her agents from selling or exercising any right over two matrimonial properties located in Plot No. 1318 Block D Mtoni Kijichi area in Temeke Municipality and another one in Plot No. 752 Block 47 at Kijitonyama area, Kinondoni Municipality in Dar es Salaam as they were unlawfully mortgaged by the 1st Respondent.

The application is accompanied by an affidavit deposed by the applicant in which she states that the two houses were unlawfully mortgaged by her husband, the 1st respondent herein, in securing an overdraft facility of Tshs 375,000,000/= in favour of the second respondent. Her major complaint is

that, the 1st respondent mortgaged the two matrimonial properties without obtaining her consent contrary to the requirement of the law as to spousal consent. The application was sternly contested by the 3rd respondent who deponed that the two properties were lawfully mortgaged as spousal consent was obtained. The application proceeded in the absence of the 1st and 2nd respondent. Both were duly served but defaulted appearance hence an *ex parte* hearing against them.

Hearing proceeded in writing. The applicants were represented by advocate Samson Rusumo whereas the respondent was represented by Mr. Mugisha Mboneko, learned counsel. Both parties submitted their submission which I have thoroughly read and considered.

The law on injunction is fairly settled in our jurisdiction. For temporary injunction to issue the applicant must satisfy the conditions articulated in the landmark case of **Atilio vs Mbowe** [1969] HCD 284, thus;

- i. There is a serious question to be tried on the facts alleged, and the probability that the plaintiff will be entitled to the relief prayed.
- ii. The Applicant stands to suffer irreparable loss requiring the courts intervention before the Applicants legal right is established;
- iii. On the balance, there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendant from granting of it.

These conditions mutually inclusive. For a temporary injunction to issue all the three conditions must be satisfied (**Sango Petrol Station Ltd & 3 Others v Stanibic Bank (T) Ltd**, Commercial Case No.23 of 2013. Our task, therefore, is to determine whether or not the applicant has demonstrated the existence of these three criteria. Having examined the affidavit filed in support of the application and the submission made by the applicant's counsel, I cannot help but conclude that the applicant has miserably failed to satisfy the three conditions above. Apart from citing the case of **Aloyce Anthony Duwe v Ally Juuu ya Watu** (1969) HCD 284 and reproducing the three principles above as articulated in **Atilio Mbowe** (supra) she has entirely failed to marry these conditions with the facts pertaining to her application.

Since all the three conditions must be satisfied for the injunction to issue and since I have not been presented with any concrete material in support of these conditions above, the prayer cannot be granted. Needless to say, although the powers to grant injunction are discretionary, they are sparingly exercised based on well defined criteria/principles. As stated by Rutakangwa J (as he then was in **Charles D Msumari & 83 Others v The Director of Tanzania Harbours Authority**, Civil Appeal No. 18 of 1997, HC (Tanga) (unreported),

"Courts cannot grant injunctions simply because they think it is convenient to do so. Convenience is not our business. Our business is doing justice to the parties. They only exercise this discretion sparingly and only to protect rights

or prevent injury according to the above stated principles, court should not be overwhelmed by sentiments however lofty or mere highly driving allegations of the applicants such the denial of the relief will be ruinous and or cause hardship to them and their families without substantiating the same. They have to show they have a right in the main suit which ought to be protected or there is an injury (real or threatened) which ought to be prevented by an interim injunction and that if that was not done, they would suffer irreparable injury and not one which can possibly be repaired.”

Based on what I have demonstrated above as to the applicant’s failure to satisfy the three criteria for granting of temporary injunction, the application fails in entirety and is hereby dismiss. As the parties have consistently defaulted appearance, I will refrain from awarding costs.

DATED at DAR ES SALAAM this 20th May 2021.



A handwritten signature in blue ink, consisting of stylized, overlapping loops and lines.

J.L. MASABO
JUDGE