

IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

MISC. LAND APPLICATION No. 3 OF 2021

(Arising from the Land Case No. 10/2021)

ROSE NYATEGA -----APPLICANT

VERSUS

YASIN MOHAMED NGOZI-----1ST RESPONDENT

STANBIC BANK TANZANIA LIMITED-----2ND RESPONDENT

RULING

11th & 29th June 2021

TIGANGA, J

The applicant in this application is an individual and a spouse of the 1st respondent, while 1st respondent is also an individual and a husband of the applicant living at Pasiansi Mwanza. The 2nd respondent is a bank carrying out its business in Tanzania and having branch in Mwanza.

The applicant, through the service of Ms. Susan N. Gisabu, Advocate of Leonard & Company Advocate, has under certificate of urgency moved

this court by a chamber summons filed under Order XXXVII, Rule 1 of the Civil Procedure Code [Cap 33 R.E 2019] and any other enabling provision of the law. In the chamber summons, the applicant moved this court to grant temporary injunction restraining the second respondent from transferring and/or conducting any disposition pending the final determination of the main suit. She also asked for costs and any other relief as the honourable court may deem fit and just to grant.

This application was filed subsequent to the main suit Land Case No. 10 of 2021 in which the plaintiff is asking for a number of reliefs all emanating from the mortgage agreement entered between the 1st and 2nd respondents on plot No. 351 and Plot No. 348 Block "A" Kangaye, Mwanza.

The application was supported by an affidavit of the applicant, who introduced herself as a spouse of the 1st respondent having interest in the properties mortgaged in by the 1st respondent by virtue of being a wife of the 1st respondent.

From the affidavit, the main complaint is that the properties were mortgaged without her consent contrary to law. According to the facts deposed in the affidavit, the facts that the 1st respondent mortgaged their

matrimonial house came to light, after an officer from the 2nd respondent had visited the applicant's house that they are about to take recovery measures.

The 1st respondent did not oppose the application and so declares his intention not to oppose it for the obvious reasons that the order sought are beneficial to him. The second respondent opposed the application by filing the counter affidavit sworn by one Grace Obadia a branch Manager of the 2nd respondent, Mwanza branch. In the said counter affidavit, the deponent disputed the houses to be matrimonial as all are in the names of the 1st respondent and no caveats were entered by the applicant. He also said the properties do not qualify to be matrimonial homes. Last but not least, she averred that, the applicant participated and consented to the creation of the mortgages over two houses.

The hearing of the application was orally conducted whereby the applicant was represented by Ms. Suzan Gisabu, the first respondent was represented by Mr. Frank Obeid while the second respondent was represented by Dr. George Mwaisondola, learned Advocates.

In her submission in chief Ms. Susan Gisabu, reminded the court that the application was filed under Order XXXVII Rule 1 of the Civil Procedure Code [Cap 33 R.E 2019], and any other enabling provision of the law and that the court is asked to grant temporary injunction restraining the 2nd respondent or its agent from selling or conducting any disposition of plot No. 357 and plot No. 348 all in Block "A" at Kangaye, Mwanza pending determination of the main suit Land Case No. 10/2021.

He started by adopting the grounds in the affidavit of Rose Nyatega, the applicant, to form part of my submission. She submitted that, the base of the application is that, the second respondent is in the process of disposing the said properties in the effort to recover the debt as evidenced by paragraph 7 of the counter affidavit of the second respondent.

According to her, there is a threat indicated in paragraph 8 of the affidavit of the applicant, Rose Nyatega that the second respondent is in the process of disposing the said lands and that if an injunction will not be granted, it will cause irreparable loss on the part of the respondent and the applicant will lose her residential houses.

The second reason for this application is that, there is a pending suit Land Case No. 10/2021, which case has triable issues to be determined by the court, she said the issues are whether the applicant consented to the mortgage or not, while the applicant contends that she did not consent, as she did not sign the said consent, and that the signature seems to have been forged. In paragraph 6 of the counter affidavit of the second respondent it is alleged that, the applicant consented, that according to her creates a triable issue.

On the issue of the consent of the applicant, she cited the case **Samwel Olunga Igogo and 2 Others vs Socio Action Trust Fund and Others**, HC Commercial Case No. 03/2004, reported in [2005] TLR 340 in which it was held inter alia that:

"A lender is now not only required a search in the land Registry, but also has a duty to make inquiries whether the borrower's spouse has consented to the mortgage"

In this case, she insisted that, the applicant did not sign the consent form, according to him; the signature appears to have been forged.

On the principle governing the grant of temporary injunction he cited the case of **Atilio vs Mbowe** [1969] HCD which held that for the temporary injunction to issue the applicant must prove that there is a serious question to be tried or determined on the fact alleged and that there is a probability that the plaintiff will be entitled to the relief claimed. In her opinion, in this matter a serious question to be determined is the issue of consent as to whether it was really given or not.

The second issue is that, the court interference is necessary to protect the plaintiff from any kind of injury which may be irreparable if established. She submitted that, if the court will not issue temporary injunction, the 2nd defendant will proceed to dispose the said properties and the loss will be irreparable.

The third principle is the suffering of the applicant rather than the respondent. On that, she urged the court, to find that, the applicant will irreparably suffer loss of residence herself and her family including the children. She submitted that in this case, the applicant has managed to fulfill the ingredients laid down in the case of **Atilio vs Mbowe** (supra).

To cement the point, she cited the case of **Giella vs Carsaman Brown & Company Limited** [1973] E.A 358 where the court held *inter alia* that, that the applicant must show a *prima facie* case with a probability of success for the court to exercise its discretion to grant temporary injunction.

She said the applicant has managed to show that in Land Case No. 10/2021 the main issue the main issue to be determined is consent of the spouse. Regarding the suffering of the applicant, she submitted that the applicant will suffer loss of residence and her right in the matrimonial properties will be affected.

Also, in the case **Edward Sargent vs Chnotabhi Jhaverbhai Patel**, Civil Appeal No. 42 of [1949] EACA where the Court granted an injunction pending the decision as to whom the business belongs.

She submitted that in this case the issue is the consent of the applicant whether it was given or not. In her opinion the court will do justice if it will issue the temporary injunction to prevent the 2nd respondent from selling the said houses. Finally, she prayed that the temporary injunction be granted as prayed in the chamber summons.

As earlier on pointed out Mr. Frank Obeid, Advocate who is representing the 1st respondent did not object the application, he simply said they do not object the application, therefore he had nothing to counter.

In reply Dr. George Mwaisondola- Advocate who was representing the 2nd respondent objected the application, which is seeking to restrain the second respondent from selling two properties, located at plot No. 351 and 328 both on block "A" Kangaye Mwanza.

In his submission he adopted the counter affidavit sworn by Grace Obadia, Branch Manager Mwanza Branch. He also subscribed to the three tests given in the principle in the case of **Atilio vs Mbowe** [1969] HCD 284. Describing the first test, which the presence of the triable issue and the probability that the case will be decided in favour of the applicant. He said in this, the plaintiff needs to establish the *prima facie* case which is established by looking at the plaint.

He said in this case, going through the plaint, it does not establish the two issues, there is no probability and there is no likelihood that the

case will be decided in favour of the applicant. The reasons of saying so according to him, is because the applicant in paragraph 4, he began by alleging that the mortgages between the 1st and 2nd respondent were unlawful due to absence of valid spouse consent. This in his opinion presupposes that, there was spouse consent which was invalid.

However, the facts leading to that invalidity are not shown, but inference, he thinks it may be meaning the representation or fraud. That is the requirement of Order VI Rule 3 and 4 of the Civil Procedure Code requires that in the matter of this sort more facts must be given. In all cases where validity is in question then, rule 4 requires that details should be stated in the pleadings.

He said the counsel for the applicant complained about forgery in his submission. However, that was not expressly deposed in the affidavit and pleaded in the plaint. Moreover the counsel submitted that the same can be inferred from the content of paragraphs 11, 12 and 13 that the applicant never participated in the mortgage. That is so under paragraphs 4, 11, 12 and 13 of the plaint in which the applicant alleges that she never

gave consent of the two matrimonial properties on Plots No. 351 and 348 Block "A".

The counsel submitted that, the two properties are on registered land; according to the plaint and affidavit they have certificates of titles. For that matter, the applicant was supposed to prove that, the two plots are matrimonial properties. He submitted that, although the applicant managed to prove that she is a wife of the first respondent, she failed to prove that the properties are matrimonial.

He submitted that the link is important because section 58 of the Law of Marriage Act, 1971, [Cap 29 R.E 2019] provides that being a party to the marriage does not automatically turn the property belonging to one spouse to be the property of another spouse. To support this contention, he cited the decision of the Court of Appeal, in the case of **Hadija Issah Arerary vs Tanzania Posta Bank**, Civil Appeal No. 137 of 2017 CAT - Iringa (unreported), in May 2020, at page 12 of the judgment, it was held that where there is only the name of the husband in the title deed, the spouse is supposed to enter a caveat to signify that she had interest in the property.

According to him, in the case at hand, the two properties are in the names of the 1st respondent, the applicant did not enter a caveat to establish her interest; therefore the absence of her names in the certificate of title as the caveat, to create no link of the applicant's interest in the properties in question.

He also submitted that, the issue of residence in the houses subject of this dispute was neither pleaded in the plaint nor included in the affidavit. Therefore the argument that the applicant will lose the residence has no foundation in the pleadings. However, even if it has been pleaded and included, the two houses cannot be termed as matrimonial homes as section 112 (2) of the Land Act [Cap 113 R.E 2019] defines the matrimonial home to mean a building or part of the building in which a husband and wife ordinarily reside together, it has to be a building in which the husband and wife resides.

He said in the case there are two houses; the applicant cannot be living in the two houses at the same time. Further to that, even if we assume for sake of argument that she is living in those houses, she said she is living there with the children, she said nothing about her husband

the fact which makes the equation unbalanced, as the husband is missing in the equation. Therefore, the two properties are not matrimonial.

To support his contention, he cited the decision of the High Court in the case of **NMB vs Dadu Kidendei and Another**, HC Mwanza, Land Appeal No. 10/2020, which gave a definition of a matrimonial home. In that case the property in question was an unfinished building commonly known as a pagala, since it was not used for residence then it fall short of the attributes to be called matrimonial home because of lack of residence of husband and wife.

In that regard, it is our submission that, there is no link between the applicant and the two properties which do not qualify as matrimonial properties or matrimonial home. To finish with this test, the applicant did not attach the two certificates of tittles. He asked the court to find non attaching the said documents to be deliberate because she did not want the court to notice that her names are not there.

However, to establish a link, she was supposed to attach between her and the two properties. The High Court has resolved this issue when it came to the issue of attaching the document to establish a *prima facie*

case. In **Petrolux Service Station Limited vs NMB Bank PLC and Another**, Misc Land Application No. 59/2020 in which at page 6 the second paragraph the High Court emphasized the importance of attaching the document. He asked this court to be highly persuaded by the decision he has cited. In his opinion for that matter, the first test has not been established.

Regarding the second test, that court interference is warranted, he submitted that, court interference is not warranted because of the lack of connection between the applicant and the two properties.

On the last test, on the balance of who will suffer more, he submitted that the greater hardship will be suffered by the 2nd respondent.

In his persuasive tone, he submitted that, the second respondent is a bank, doing banking businesses, it lends money and accepts securities, the second respondent is required to make sure that loans are recovered for the benefit of the economy of the country.

In his view, the High Court has been very hesitant to stop the recovery measure. In the decision of **General Tyres East Africa vs HSBC Bank PLC**, [2006] TLR 60, in particular at page 69 (e) - (i), the

court said it has no jurisdiction to interfere in the recovery measures. This case has been used in two other cases, **Petrolux** (supra) and again in the case of **Peace Maker Express Co Limited vs Mkombozi Commercial Bank and Another**, HC Commercial Division at Mwanza, Misc. Application No. 13/2019, at page 5,6,7,8,9 and 12. According to him, the case of **General tyre** was cited extensively to deny a temporary injunction, because if the court interferes in the recovery measure, court might be used as bush or a place where people go to hide from the recovery measures.

The High Court cautioned the danger of interfering in the case of **SME Impact Fund CV vs Agroserve Company Limited**, HC Bukoba, Civil Appeal No 09/2018 (unreported) Mtulya J, cautioned about the danger of the court being used as a bush or a pagala, at page 15, 2nd paragraph where people hide against recovery measures.

He prayed the court to find that, the applicant has failed to meet three tests as laid down in the case of **Atilio vs Mbowe** (supra), he prayed that, in that regard, the application be dismissed with costs.

In her rejoinder, Ms. Susan Gisabu adopted his submission in chief, and added that in one of the ground she posed is seriousness of issues to be determined by the court. She submitted that Mr. Mwaisondola, conceded that there is a serious issue to be determined. It is the High Court which would determine. She also submitted that there is a link as the applicant proved to be a lawful wife and has established the link with the properties.

Further, section 161 (1) of the Land Act is clear that the land may be in the names of one spouse but owned by both spouses. Also, in all cases which the counsel cited, the parties were defaulters; in this case, the applicant is the victim of the failure to follow the procedures. She prayed this court to find that the procedure was not followed, as the consent was not obtained. She prayed this court to find and grant the temporary injunction as prayed.

Now, having summarized at length, the contents of the affidavits in support and opposition of the application, the submission filed by counsels for the parties, which includes the authorities cited, before starting to consider the merit of the application I feel indebted to say a word by way

of commending the counsel for both parties for extensive and well researched submissions filed in support of each parties case. I hasten to agree with the legal position highlighted by the counsel for the parties, as propounded by the authority in **Atilio Vs Mbowe** (supra) on the conditions to be fulfilled for the temporary injunction to issue. That position is also made clear in the case of **NBC vs Dar es salaam Education and office stationary** (1995) TLR 272, **Augustine L. Mrema and Others vs Abdallah Majengo & Others** CAT, Civil Appeal No. 41/1999 DSM CAT (unreported) and **Anastasia Lucian Kibela Makoye & 2 Others Vs Veronica Lucian Kibela Makoye & 4 Others**, Civil Appeal No. 46 of 2011, CAT-Zanzibar. In all these cases the following three conditions were identified as the condition for the temporary injunction to issue namely;

- (i) *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;*
- (ii) *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; and*
- (iii) *that 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

Without much repeating, a historical background of this matter *albeit* in brief, will suffice to bring home the nature of the dispute between the parties. Some times in June, 2015 the 1st respondent asked and was granted a loan from the 2nd respondent and mortgage as security the two houses on plots No. 351 and 348 Block "A" Kangaye, Mwanza. He failed to pay the same as per loan agreement, consequent of which the 2nd respondent started the recovery measures.

Due to the recovery measures taken by the 2nd respondent, the applicant who is a wife of the 1st respondent sued in Land Case No. 10 of 2021 and this application asking for the temporary injunction.

The issue is whether the applicant has managed to fulfill the conditions in the case of **Atilio vs Mbowe (supra)**

From the conditions stipulated herein above, it is glaringly clear that for the first conditions to be established that is the presence of a serious question to be tried by the court, the applicant seeking for injunction must first show his/her interest in the affidavit and his/her arguments, in the

subject matter for which he is seeking the court to grant the temporary injunction for him/her to be understood that there is a serious question to be tried on the facts alleged, and a probability that the plaintiff will be entitled to the relief prayed.

In this case, the applicant has only proved that she is a wife of the 1st respondent, she has said nothing to show that she has interest in the land located in the two plots which were mortgaged to secure the loan by the 1st respondent. She has neither proved by evidence that the said houses on the said plots are matrimonial nor residential and herself and her husband are residing therein. Even if we agree for the sake of arguments that the same are residential, the next question is which one between the two houses is she residing in, as she cannot be residing in the two houses at a time.

It is the position of the law as submitted by the counsel for the applicant that, marriage does not turn all properties owned by spouses to be matrimonial, as under section 60 of the Law of Marriage Act [Cap 29 R.E 2019] provides for presumptions as to property acquired during marriage.

"Where during the subsistence of a marriage, any property is acquired—

- (a) in the name of the husband or of the wife, there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse;*
- (b) in the names of the husband and wife jointly, there shall be a rebuttable presumption that their beneficial interests therein are equal."*

As the title deed of the said plots are in the names of the 1st respondent alone, they are presumed to absolutely belongs to the 1st respondent in the exclusion of the applicant, unless the applicant rebuts that presumption by evidence proving her interest in the said plots. However as earlier on pointed out in this application, the applicant did not prove her interest in the said property before seeking the same to be protected from the injury. The proof has neither been shown in the affidavit, nor the argument in support of the application. According to the affidavit, the facts that the 1st respondent mortgaged their matrimonial houses came to light after an officer from the 2nd respondent had visited

the applicant's house for valuation purpose as an initial step to take recovery measures.

It must be noted that, temporary injunction is a serious court order which must be issued to protect the known and actually proved interest of the applicant, according to Order XXXVII Rule 1 and 3 of the CPC [Cap 33 R.E 2019] upon which this order is sought, read together with Rule 3 of the same order, as interpreted in the case of **Africa Trophy Hunting Limited Vs. The Hon. Attorney General and 4 others** Civil Appeal No. 25/1997 (CAT) at Dar es Salaam (unreported). **John Joseph Magazeti Versus Gabriel Mushi @ Gabriel Stephen Masha & 2 Others**, Misc. Civil Application No. 43 Of 2019, it is an order intended to last for at least a minimum of six months, but renewable, all that time it prohibits the respondent from carrying the acts which is in most cases lawful.

It should be issued to restrain him from doing a certain act for the purpose of preventing future injury or to stop the continuation of the present injury. It should be based on actual threat of violation of ones rights which right or interest must be first established by the applicant. In

this case the applicant has not established the visible interest to entitle her the grant of temporary injunction.

What is vividly seen instead, is a conspiracy theory conducted in the style of "hide and seek game", of the husband and wife to protect their property to the detriments of the 2nd respondent. This is done without any promise or visible effort from the 1st respondent who does not dispute to have taken loan and failed to repay, to pay the debt. The other sign of the conspiracy is the fact that, the 1st respondent did not oppose the application and so declares his intention not to oppose it, for the obvious reasons that the order sought are beneficial to him.

It should also be noted that, even the information which the applicant deposed in the affidavit and submitted in her arguments, are very scanty, as neither in her affidavit nor in the arguments, the applicant told the court when her husband, the 1st respondent defaulted to pay the loan, when did she discover that the properties were mortgaged, and when did the 2nd respondent start his recovery measures. In my considered view these information were very important to assist the court to look not only on the merits of the application, but also in the motive behind this

application, and without which no way the court could determine and precisely so, on the right of the applicant. Else the court will accumulate the blame that it is used by the bad motive defaulters to continue holding the money of the bank without justification, the syndicate which I am not ready to be part of. Therefore failure to prove the existence of interest, the applicant cannot be taken to have shown the necessity of the court interference or intervention to protect her from the irreparable injury.

The fact in the affidavit do not disclose the *prima facie* case with the probability of success, and since she has not established her sufficient interest in the said plots other than proving that she is married to the 1st respondent, she cannot have proved to suffer an irreparable injury, should the injunction not issue. I entirely agree with the counsel for the applicant, that most of the cases cited by Dr. Mwaiondola are distinguishable as they relate to the applicants who are defaulters of the banks loan, as opposed to this case in which the applicant is the spouse claiming to have given no consent of the mortgage deeds. However the authority in the case of **Hadija Issah Arerary vs Tanzania Postal Bank** (supra) is relevant but also in the main case where the validity of the mortgage will be discussed.

In this application, it is sufficient to confine my arguments and findings, as I have done, on the issue as to whether applicant had established the conditions in the case of **Atilio vs Mbowe** (supra). Having examined the application and the arguments as I have herein above, I find the applicant has not managed to establish the conditions sufficient to entitle her the grant of the temporary injunction. The application is therefore refused with costs.

It is so ordered.

DATED at MWANZA, this 29th June 2021



J. C. Tiganga

Judge

29/06/2021

Ruling delivered in the presence of the counsel representing the parties.

J. C. Tiganga

Judge

29/06/2021