

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

MISCELLANEOUS CIVIL APPLICATION NO. 148 OF 2020

(Originating From Land Case No. 13 of 2020)

ASTERIA AUGUSTINE MOKWE @

ASTERIA CHARLES MARWA APPLICANT

VERSUS

NATIONAL MICROFINANCE BANK PLC 1ST RESPONDENT

CHARLES MARWA WARIOBA2ND RESPONDENT

NYAMASWA INVESTMENT LIMITED3RD RESPONDENT

KILIKRAALS ADVENTURE & SAFARI

COMPANY LIMITED4TH RESPONDENT

RULING

Date of last order: 07/09/2021

Date of ruling: 22/09/2021

F. K. MANYANDA, J.

This is a ruling in respect of an application for temporary injunction by the Applicant Asteria Augustine Mokwe @ Asteria Charles Marwa to restrain the Respondents, their agents and all persons claiming under them from selling, transferring or registering some landed properties listed in the chamber summons pending determination of Land Case No. 148 of 2020 filed in this Court.

Before I examine the legal mish mash that seem to surround these proceedings at this stage, the factual position of the matter needs to be put in its proper perspective albeit, in a nut shell.

On 05/11/2020, the plaintiff filed a suit in this court claiming against all the Respondents jointly and severally for nullification of mortgage of landed properties listed in the chamber summons. She was alleging that the 2nd Respondent, who is her husband, entered into a money borrowing contract with the 1st Respondent in favour of the 3rd Respondent without involving her or obtaining her consent. The 4th Respondent is an auctioneer who intends to sell, by auction, the said landed properties.

The application, with leave of the Court, was disposed by way of written submissions.

The submission for the Applicant was drawn and filed by Mr. Joseph Kinango, learned Advocate and the submission for the Respondents was drawn and filed by Dr. Geroqe Mwaisondola, learned Advocate.

Mr. Kinango submitted in support of the application arguing that temporary injunction being a specie of interlocutory order is in the discretion of the court. To bolster his position, he referred to the case of **Hardmore Production Limited and Others vs. Hamilton and Another**, (1983)1 AC at page 220 where it was held that: -

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

Moreover, Mr. Kinango argued that the established principles guiding the courts in exercising their discretion to grant or not to grant were meticulously stated in the famous case of **Atilio vs. Mbowe**, [1969] HCD n. 284 namely: -

- i. There is a prima facie case in the sense that there are serious questions to be tried on the facts with a probability that the suit would ultimately be decreed in favour of the Applicant.
- ii. That the award of damages to the Applicant at the conclusion of the suit would not provide an adequate remedy for any loss that the Applicant may suffer; and

- iii. That the balance of convenience that the Applicant stands to suffer greater hardship from the withholding of the injunction than will be suffered by the Respondent if it is granted.

Then Mr. Kinango submitted that the gist of the complaint in the main suit which forms the central issue in controversy is lack of spousal consent in the mortgage agreement of the landed properties. He contended that, the 2nd Respondent, been the husband of the Applicant ought to have obtained the consent of his wife, the Applicant. Mr. Kinango was of the views that the alleged consent is a forged document. The matter therefore constitutes a triable issue making up a prima facie case which in applications for injunction it is not necessary to prove the allegations, it suffices to show that there is a triable issue constituting a prima facie case. He relied on the authority on the commentary by Justice P. S. Narayan in his Book, **Law of Injunctions**, 9th Edition (2005) at page 85 where it is commented as follows: -

"When the court is called upon whether the Plaintiff has a prima facie case for the purpose of granting temporary injunction, the court must perforce examine the merits of the case and consider whether there is a likelihood of the suit being

decreed and the depth of investigation which the court pursue may vary with each case.”

Mr. Kinango was of the views that there exist irregularities in the process of creating the mortgage resulting from absence of the spousal consent because the purported consent is forged. The said irregularity makes up a central issue in the controversy which establishes a prima facie case. He insisted that the first guidance in **Atilio vs. Mbowe’s case (supra)** is established.

Mr. Kinango argued further in respect of the second guidance that the Applicant is put in a position of suffering more from a loss which will not be compensated in monetary terms for reasons that the mortgaged houses are matrimonial and residential houses and the proceeds from the rented ones are used for feeding the Applicant and her dependants’ children. It is the views of the Counsel that the loss will not be atoned by monetary compensation in case the main suit is decided in his favour.

As regards to the third guidance, the Counsel argued that if the temporary injunctive orders are granted pending determination of the suit the Respondents will not be prejudiced. He added that, it is the

Applicant who is placed to suffer more than the Respondents if the injunction is granted. He prayed the application be granted.

On his side Dr. Mwaisondola conceded on the principles of the law guiding the courts in granting or not granting injunction as stated in **Atilio vs. Mbowe's case (supra)**. However, he differed with the Counsel for the Applicant on whether the said test have been established. It was his views that none of the said principles have been established. The Counsel argued that in the first principle, there must be established serious issues to be tried. He argued that in this matter the affidavit does not show any certificate of joint ownership of the landed properties. To bolster his argument, he cited the case of **Petrolux Service Stations Ltd vs. NMB Bank PLC and Another**, Miscellaneous Land Application No. 59 of 2020 (unreported) where this Court insisted that bank guarantee agreements which formed the basis of the controversy were required to be annexed to the affidavit in order to avail the court with opportunity to scrutinize whether there existed triable issues. The Counsel therefore opined that in the matter at hand it was important for the Applicant to attach title deeds of the landed properties in order to avail this Court with chance to scrutinize them in ascertaining the controversy whether the same establishes triable

issues. It was the contention by the Counsel for the Respondents that unless the title Certificates of Title exhibits joint ownership otherwise prima facie case is not yet established.

Further the Counsel was of the opinion that the Applicant was supposed to establish link between herself and her husband, the guarantor, on one hand and the properties on the other. He relied on the authority in the case of **Rose Nyatega vs. Mohamed Yasin Ngozi and Another**, Miscellaneous Land Application No. 03 of 2021 (unreported) where this Court said that a link between the Applicant and the properties is a must which is established if her name is included in the Certificates of Titles.

Moreover, the Counsel argued that in order to prove that the Applicant stands a chance to win the case, she was supposed to have entered caveats claiming her interests in the titles. To support his position, he cited the case of **Hadija Issa Arerary vs. Tanzania Postal Bank**, Civil Appeal No. 135 of 2017 where the Court of appeal stated that where the property is in the name of the husband and the wife did not enter a caveat to protect her interest, she cannot benefit from the statutory protection under either section 161 of the **Land Act**,

[Cap. 113 R. E. 2019 or section 59 of the **Law of Marriage Act**, [Cap. 29 R. E. 2019]. He insisted that the Applicant cannot win the case because not all eight (8) houses are matrimonial homes and she has not indicated which one is used for residence.

As regard to the second and third guidance in **Atilio vs Mbowe's case** (supra), Dr. Mwaisondola argued that it is about importance of the court interference to protect interests of the Repondents in matters like this one. He was of the views that the Applicant was aware of the money borrowed by the 3rd Respondent on guarantee by her husband and that the said 3rd Respondent has defaulted to repay the loan, therefore the court cannot interfere with recovery in any circumstances. He cited the cases of **General Tyre East Africa Ltd vs HSBC Bank PLC** [2006] TLR 60 where it was stated that if banks were not allowed to recover the loans due to court interference, the banking system will collapse in Tanzania. He also cited the case of **Peace Makers Express Co. Ltd vs. Mkombozi Commercial Bank Ltd**, Miscellaneous Land Application No. 13 of 2019 (unreported) where this Court stated that since a bank is legally allowed to lend and recover loans, to stop recovery, the bank will suffer more. He also cited the case of **SME Impact Fund CV & 2 Others vs. Agroserve Company Ltd**, Civil

Appeal No. 09 of 2018 where this Court cautioned about the trend to use the court by defaulters to hide from their obligations to repay loans. He prayed this application be dismissed.

In rejoinder the Applicant's Counsel as far as the Certificates of Titles are concerned argued that copies of the same were attached to the plaint and it is unfair to require her to tender the Original Certificates as they are in hands of the Respondents. He distinguished the **Petrolux Service Stations Ltd** case (supra) where the dispute was on breach of terms and conditions of overdraft agreement while the matter at hand is about lack of spousal consent to the mortgage agreement.

Those were the submissions by the Counsel for the parties. I am grateful to all counsel for the well researched submissions which have eased my work in determining the controversy in this matter.

In the first place I subscribe to the principle of law in **Hardmore Production Limited and Others (supra)** that an interlocutory injunction is discretionary relief and discretion whether or not to grant is vested in the judge or magistrate before whom the application for it is heard. Second, I also subscribe to the guiding principles for the grant of injunctive orders, as submitted by the Counsel for both sides, the

leading case is that of **Atilio vs Mbowe** [1969] HCD n. 284 are as follows;

- i. That there is a serious question to be tried on the facts alleged, and a likelihood that the plaintiff will be given the relief prayed.
- ii. The plaintiff must show that the court's intervention 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 must be shown that there will be great hardship and mischief suffered by the applicant from the withholding of the injunction than will be suffered by the defendant from the granting of injunction.

The said guidelines have been restated in many other cases by the courts. Apart from the case cited by the Counsel for the Respondent that of **General Tyre East Africa Ltd (supra)** others include **Suryakant D. Ramji vs. Savings and Finance Limited and Others** [2002] TLR 121 where this Court (Hon. Kalegeya, J, as he then was) stated as follows: -

"What is basic (in granting temporary injunction) is that there should be in existence, a serious triable issue between the parties, a looming danger of irreparable injury to plaintiff and, on a balance of convenience, the existence of more sufferings by plaintiff if the injunction is refused than would be the case with the defendants if granted; between the two, therefore, the plaintiff stands to lose more if the injunction is refused"

Another case is **Philemon Joseph Chacha and Three Others vs. South African Airways and Three Others** (Number 2) [2002] TLR 362 this Court (Hon. Bwana, J. as he then was) said:-

"Injunction pendente lite is granted discretionary by a court of competent jurisdiction; in granting it the court must be satisfied that unless immediate action is taken, the applicant may suffer irreparable damage, and further that the main dispute in the case would be rendered nugatory."

See also the case of **Kibo Match Group Ltd vs. H. S. Impex Ltd**, [2001] TLR 152.

In the instant application the main issue for determination is whether the application passes the tests set out by the case law expounded in the cases cited above. In order to answer the main issue, I have raised other sub-issues as follows: One, is there any triable issue before this Court involving the Applicant interests? To answer this question, I have gone through the submissions and found that there is no dispute that there is a suit in this Court, which is Land Case No. 148 of 2020, instituted by the Applicant in which the main issue is on availability of the spousal consent by the applicant to provide the properties as collaterals or security to guarantee the loan that was entered into between the 2nd Respondent and the First Respondent for the benefit of the 3rd Respondent.

The dispute between the parties in this matter is on whether existence of that issue in the main case suffices to establish the required prima facie case. The view of the Counsel for the Applicant, is in affirmative, the Respondent's Counsel view is in negative. The Counsel for the Applicant is contending that the signature affixed on the mortgage agreement does not belong to the Applicant, it is forged, therefore, the Mortgage Deed pledging the suit property as security for the loan is not valid. It is as good as there was no consent of the 2nd

Respondent's wife. This according to the Counsel is a central serious triable issue, which makes up a prima facie case.

On his side the Counsel for the Respondent is that a mere existence of dispute over the signature, though it is a triable issue, does not constitute a prima facie case. He was of the view that the Applicant was required to establish a link between herself and the mortgaged properties by tendering Certificates of title for this Court to examine if they bear her name as co-occupancy. Moreover, it is the views of the Counsel that she ought to have filed caveats to signify her interests in the said properties. It is the contention of the Counsel for the 1st Respondent that failure to do so, fails the application from meeting the tests in **Atilio vs. Mbowe's case (supra)**.

I have seriously pondered the rivalling urgings by the Counsel. In my considered opinion it is that when analysing the facts in order to see whether a prima facie case has been established, it is important only to see if there is a triable issue in the main case without going into the details of the evidence intended to be tendered because to do so will be going into the nitty gritty of the main case, an act which may be pre-

empty and prejudicial when it comes to determination of the said main case.

I side with the Counsel for the Applicant. It is a requirement of the law as expounded in **Atilio's case (supra)** that the applicant is required to demonstrate that there is a triable issue before this Court which concerns his or her interests. There is no need at this stage to go into detail of proving the triable issue since doing so is tantamount to hearing of the suit itself, which is not the case here. Dr. Mwaisondola may arm his bow now but not to fire it at this stage. I am fortified by the decision of this Court (Hon. Msumi, J. as he then was) in the case of **Kibo Match Group Ltd vs. H. S. Impex Ltd**, [2001] TLR 152 where he stated that: -

*"It is worth mentioning here that a long-held view of establishing a prima facie case before an injunction is granted is misleading. As rightly pointed out by Mapigano, J., in **Colgate - Palmolive Company v. Zacharia Provision Store and others**, Civil Case Number 1 of 1997, HC (unreported):*

'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.”* (emphasis added).

The concept of chances of success of the main case, as demonstrated in the case above, has become obsolete. It is on this finding that makes me get satisfied that the first arm of the guiding principles in grant of injunctive orders is well established.

As regards the second and third arms, it has been argued by the Counsel for the Applicant that the Applicant is in a position of suffering more from a loss which will not be atoned by monetary terms for because the mortgaged houses are matrimonial and residential houses and the proceeds from the rented ones are used feeding the Applicant and her dependants' children. As regards to the third guidance the Counsel argued that if the temporary injunctive orders are granted pending determination of the suit the Respondents will not be prejudiced because the properties will be available instead it is the Applicant will suffer as the landed properties will go forever.

The Counsel for the Respondents submitted generally urging courts to be protective of the banking business. He contended that in this matter the Applicant was aware of the money borrowed by the 3rd Respondent on guarantee by her husband, now since the said 3rd Respondent defaulted to repay the loan, then the court should not interfere with recovery and any circumstances.

In this matter, in my considered opinion, the issue is not a matter of this Court interfering by preventing the 1st Respondent from recovery her money, but it is rather a matter of putting a holding order temporarily pending determination of the main case which goes to finality of the parties' rights. It will be a prevention to the bank from recovery in the challenged manner if it is shown that there was no compliance of the law during lending. It will not be a prevention in case it is proven that the law was complied during lending of the money. These issues depend on determination of the main case.

The question for determination in the instant matter is when the facts placed on a weighing balance, which party will suffer loss most in case the injunctive order is granted. I am impressed by the Counsel for the Applicant that it is the Applicant who is placed to suffer the most if

injunctive order is withheld because, the houses which include residential and business for her daily bread earning cannot be recovered in their existing form in case they are sold. Any monetary compensation cannot return the houses if the main case is decided in her favour. On the other hand, if the injunctive orders are granted in my opinion, the Respondents will not seriously suffer loss because if the main case is decided in their favour, still the properties will be available for realization of the lent money as they hold the Certificates of Titles thereof.

Moreover, I also agree with the authority in the case cited by the Counsel for the Respondents on the need to protect the business of banking as held in the case of **General Tyre East Africa Ltd vs HSBC Bank PLC (supra)** and the case of **Peace Makers Express Co. Ltd vs. Mkombozi Commercial Bank Ltd (supra)**.

I am equally aware of the likelihood of the danger of defaulters to borrowing agreements to turn courts as shields against forfeitures of collateralized properties as was stated in the case of **SME Impact Fund CV & 2 Others vs. Agroserve Company Ltd (supra)**. However, it is a cardinal principle of law that each case is decided according to its circumstances.

In the result it is the finding of this Court that the application meets the guiding tests as stated in **Atilio vs. Mbowe's case (supra)**.

Consequently, I make the following orders, that is to say: -

1. Temporary injunction is issued against the Respondents retraining them, their agents and all persons claiming under them to dispose of, or sell, transfer, register in other manner the suit premises namely: -

- a. CT. No 17239, Plot No. 209 Block "B" Bwiru, Mwanza City;
- b. CT. No 15595, Plot No. 416 Block "KK" Nyakato, Mwanza City;
- c. CT. No 14763, Plot No. 127 Block "G" Nyakato, Mwanza City;
- d. CT. No 31593, Plot No. 130 Block "AVI" Kirumba, Mwanza City;
- e. CT. No 11802, Plot No. 1 Block "LL" Kiloleli, Mwanza City;
- f. CT. No 35734, Plot No. 483 Block "A" Nyamhongolo, Mwanza City;
- g. CT. No 033059/40, Plot No. 129 "AVI" Kirumba, Mwanza City; and
- h. Plot No. 467 "F" Nyamanoro, Mwanza City.

2. The injunctive orders given above will remain in force for six months only from the date of this order, according to the law.

3. No order as to costs

It is so ordered.




F. K. MANYANDA
JUDGE
22//09/ 2021