

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

**MISC. LAND APPLICATION NO. 50 OF 2020**

*(Arising from Land Case No. 24 of 2020)*

BETWEEN

**SAFINA HOLDING CO. LIMITED ----- APPLICANT**

VERSUS

**AMANA BANK LIMITED ----- 1<sup>ST</sup> RESPONDENT**

**JULIUS RAPHAEL NGEKELA ----- 2<sup>ND</sup> RESPONDENT**

**ADILI AUCTION MART ----- 3<sup>RD</sup> RESPONDENT**

**GRANITECH (T) CO. LIMITED ----- 4<sup>TH</sup> RESPONDENT**

*Date of Last Order: 24/09/2021*

*Date of Ruling: 04/10/2021*

**R U L I N G**

**MGONYA, J.**

This application have been brought under *the Provisions of Order XXXVII Rule 1 (a) of the Civil Procedure Code, Cap. 33 (R.E. 2019)* and it is supported by the affidavit affirmed by **John Msemo**, the Applicant's Principal Officer. Whereas the Applicant through the Chamber Summons is praying for orders among others that, Court be pleased to Order that the 2<sup>nd</sup> Respondent/Defendant and his Agents or

Appointees be restrained from taking possession of and evicting the Agents, Appointees and Employees/Staff of the Applicant from **Plot No. 2185, Block "D" Mbezi, Dar es Salaam and Plot No. 2186, Block "D" Mbezi Dar es Salaam**, properties that were previously, prior to the facts giving rise to this Application and the attendant Suit, registered in the name of the Applicant/Plaintiff pending the hearing and final determination of the main suit currently pending before this Honourable Court.

The background facts giving rise to the present Application may be briefly stated that; sometime in May, 2017 the 4<sup>th</sup> Defendant/Respondent applied for and was duly granted facility on **Musharakah** and **Murahaba** terms. Further that, the said loan to the 4<sup>th</sup> Defendant/Respondent was secured by the Plaintiff/Applicant's landed properties described above. That, the purpose of the loan facility was to finance the 4<sup>th</sup> Defendant/Respondent's purchase of equipment, namely an Excavator whose description are as follows; Make Hydraulic, Model Crawler, Registration No. T 384 DJH, Chassis No. 3800037. The loan facility was secured further by the 1<sup>st</sup> Defendant/Respondent's share in the said equipment. The 1<sup>st</sup> Defendant/Respondent was well aware, and it was stipulated in the loan facility that the equipment subject of the loan was for business purposes; proceeds thereof being routed

into the 4<sup>th</sup> Defendant/Respondent's Account maintained with the 1<sup>st</sup> Defendant/Respondent.

Further it is said that due to the Applicant's problems to some business operation, they had been performing admirably and challenges in its repayment obligations, hence failure and finally this Application after alleged illegal sale of the properties in issue.

Submitting in support of the Application **Mr. Omary Msemo** stated that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents conducted an illegal sale to the Applicant's above properties. According to him, the sale was not to the range of the market value as per the valuation reports. It is also stated that there was no proper notice prior to the auction. Citing the case of ***ATILIO VERSUS MBOWE HCD 284***, Mr. Msemo stated that, under those circumstances, there are triable issues to be determined by the court on part of the Applicant particularly in determining the main suit pending this honourable court.

Submitting for the second and the third point as whether the Applicant will suffer irreparable loss and on the balance of convenience, it is the Applicant's Counsel submission that in the event where the Application is withheld, the Applicant is going to suffer irreparable loss more and in comparison with the Respondents herein.

In reply thereto, **Ms. Georgina Bazil**, Advocate for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents was of the view that, the Applicant's case has not fulfilled the grounds outlined in ***ATILIO VERSUS MBOWE (Supra)***. It is the Respondent's concern that the suit properties in question have already been sold to a *bonafide* purchaser for value thus, the Applicant had no more right over the property which had moved to the 2<sup>nd</sup> Respondent. The case of ***EDWARD NYEWSYE VS THE NBC LTD AND ANOTHER, CIVIL CASE NO 213/1998*** stating that the *bonafide* purchaser is protected by the law from the alleged irregularities of the auction was cited.

I have gone through the chamber application and its supporting affidavit as well as the counter affidavits. I have also considered the contending submission of both counsel. Let me now proceed to determine the merits or otherwise of this application.

I am mindful of the principles prerequisite for the grant of temporary injunction as set out in the case of ***ATILIO VERSUS MBOWE (Supra)*** that; the Plaintiff/Applicant has to establish that there is a *prima facie* case, balance of convenience and that he will suffer irreparable injury if the injunction is refused.

These principles were also elaborated in the book of **Sohoni's Law of Injunctions; Second Edition: 2003** at **page 93** where the learned author stated that:

*"The principles on which the exercise of discretion rests are well settled. The said principles have been outlined as hereunder. They are-*

- (i) In the facts and circumstances of each individual case there must exist a strong probability that the petitioner has an ultimate chance of success in the suit. This concept has been otherwise expressed by saying that there must be a prima facie case.*
- (ii) As the injunction is granted during the pendency of the suit the court will interfere to protect the plaintiff from injuries which are irreparable. The expression irreparable injury means that it must be material one which cannot be adequately compensated for in damages. The injury need not be actual but may be apprehended.*
- (iii) The court is to **balance** and **weigh** the **mischief** or **inconvenience to either side** before issuing or withholding the injunction. This principle is otherwise expressed by saying that the court is to look to the balance of convenience."*

In the case of **GAZELLE TRUCKER LTD VERSUS TANZANIA PETROLEUM DEVELOPMENT CORPORATION; CIVIL APPLICATION NO. 15 OF 2006 LUBUVA J. A** had the following observations regarding temporary injunction:

*"As provided for under **Rule 1 Order XXXVII CPC 1966**, temporary injunction may be granted where in any suit, the property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit. It is therefore clear that injunctive reliefs are according to the law as set out above, generally invoked at the stage where the trial of a suit is in progress or pending."*

In determining the Application at hand I was moved by some paragraphs in the Applicant's Affidavit of which I saw that would assist in reaching to the fair decision hereto. Those paragraphs are **10, 11, 12, 14** and **16** of the Applicant's Affidavit as seen below:

***"10.** That, the Plaintiff/Applicant has never been served with any statutory 60 days' Notice by the 1<sup>st</sup> Defendant/Respondent outlining any breach of repayment terms by the 4<sup>th</sup> Defendant/Respondent. As such, the Plaintiff/Applicant as Mortgagor knows that the 4<sup>th</sup> Defendant/Respondent is complying substantially with repayment obligations;*

- 11.** *That, the Plaintiff/Applicant has never been served with any Statutory 14 days' Notice by the 1<sup>st</sup> Defendant or the 3<sup>d</sup> Defendant/Respondent prior the proposed auction/disposal by ale of the landed Mortgaged properties;*
- 12.** *That, it thus came as great shock when sometime on 19<sup>th</sup> October, 2020 the Applicant was served with a letter with **Ref. ABL/CDT/RD/037/2020** entitled **LIQUIDATION OF YOUR FINANCING OBLIGATION AND RELEASE OF EXCAVATOR**. In the said letter the 1<sup>st</sup> Defendant purports to inform the Applicant/Plaintiff that the Plaintiff's Properties, described as Plot No. 2185, Block "D" Mbezi, Dar es Salaam, Plot No. 2186, Block "D" Mbezi, Dar es Salaam and Plot 319, Ex-Daya Estate, Ilala Dar es Salaam have been auctioned. The date and manner of auction are not even mentioned in the said letter which is annexed as **Annexure TAL-3**;*
- 14.** *That, apart from the lack of Notices, the prices indicated are way below the said properties market value, even in the event of a forced sale; and*
- 16.** *That, I did an official search at the Registrar of Titles and discovered that the 2<sup>nd</sup> Defendant/Respondent's names have been entered onto the Titles for*

*properties described as Plot No. 2185, Block "D" Mbezi, Dar es Salaam and Plot No. 2186, Block "D" Mbezi, Dar es Salaam; which are the most valuable in terms of prime location."*

Now, in applying the above principles to the instant case; and going by the Applicant's affidavit and the counter affidavits hereto, the Applicant's grounds for injunction are based on two facts.

The first one is that the **sale was illegally** conducted as the notice was not properly served upon the Applicant. Another ground is that the **sale amount does not reflect the amount which was indicated in the valuation report** which was approved by both parties. I am convinced that these two factors suffices to show that there is a ***prima facie*** case. I say so because apart from there being triable issues, looking at the Complaint of the main suit these are the main issues/ points posed by the Plaintiff, the Applicant herein to be determined by the court. Thus, if this application for injunction will not be granted the main suit will be rendered **nugatory** as there are facts which will need to be proved during trial in that respect. For instance to ascertain the valuation of the suit properties in that respect and many other factors that will be presented before the court for determination.



In the case of **PHILEMON JOSEPH CHACHA & 3 OTHERS VERSUS SOUTH AFRICAN AIRWAYS & 3 OTHERS. (2002) TLR 362; Dr. Bwana, J.** as he then was had this to say:

*"It is a principle of law that injunction pendent elite is granted discretionary by a court of competent jurisdiction. In so doing that the court must be satisfied unless immediate action is taken the applicant may suffer irreparable damage and further that the main suit dispute in the case would be rendered nugatory".*

Again in **KIBO MATCH GROUP LIMITED VERSUS HIS IMPEX LIMITED. (2001)TLR 152 DR. BWANA, J.** as he then was held that:

*"The court is satisfied that, unless immediate action is taken the applicant may suffer irreparable damage whether quantifiable or not and further the final decision will be rendered nugatory as a consequence of not granting the temporary injunction."*

In the line of the above cited authorities, given the nature of the main suit, I find it apposite that we take an immediate action in order to save the main suit from being nugatory. Further to that, it is a well settled principle that grant of temporary injunction is discretionary to the court. This was

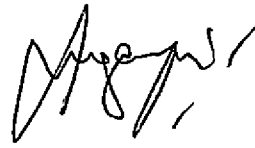
held in the case of **HARDMORE PRODUCTIONS LIMITED AND OTHERS VERSUS HAMILTON AND ANOTHER (1983) 1A.C 191** where **Lord Diplock** at Page 220 had this to say:

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

All said, I am satisfied that the Application before the court is suitable for being granted as it has qualified the three tests established in the case of **ATILIO VERSUS MBOWE (Supra)**. Consequently, **I grant this Application as prayed.**

For the avoidance of doubt, the Respondents herein, and their Agents or Appointees are hereby restrained from taking possession of and evicting the Agents, Appointees and Employees/Staff of the Applicant from **Plot No. 2185, Block "D" Mbezi, Dar es Salaam and Plot No. 2186, Block "D" Mbezi Dar es Salaam**, properties that were previously, prior to the facts giving rise to this Application and the attendant Suit, registered in the name of the Applicant/Plaintiff pending the hearing and final determination of the main suit currently pending before this Honourable Court vide **LAND CASE NO. 24 of 2020** respectively.

Costs to follow the event.

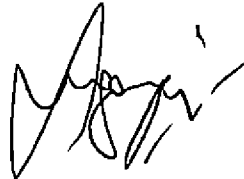


**L. E. MGONYA**

**JUDGE**

**04/10/2021**

**Court:** Ruling is read in the presence of Ms. Aron, Advocate for the Applicant, Mr. Richard, RMA and in absence of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents in my chamber today 4<sup>th</sup> October, 2021.



**L. E. MGONYA**

**JUDGE**

**04/10/2021**