

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**MISC. LAND APPLICATION NO. 71 OF 2021**

*(C/F Land Case No 28 of 2021)*

**ROBSON ELISHILIA LASEKO .....1<sup>ST</sup> APPLICANT**

**NELSON NICK NSAILO alias**

**NELSON ROBSON LASEKO .....2<sup>ND</sup> APPLICANT**

**VERSUS**

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

**M/S TANCHI BROTHERS**

**CONSTRUCTION COMPANY LTD ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

29/11/2021 & 13/12/2021

**KAMUZORA, J.**

Under a certificate of urgency the applicants made an application before this court seeking for an order of temporary injunction to restrain the respondents from selling and or tempering in any manner with the disputed properties with certificate of title No. 22084, L.O No. 205932, Plot No. 14 Block 'C' Kituoni Street, Arusha and landed property with Certificate of title No. 1024 L.O No. 44226 Plot No 133 Block 24 Kaloleni, Arusha Municipality both being the property of the 1<sup>st</sup> Applicant and another landed property with certificate of title No. 15528, L.O No.

178389, Plot No 66, Block 'C' west Meru, Arumeru District in Arusha, the property of the 2<sup>nd</sup> Applicant pending hearing and determination of the main case that is, Land case No. 28 of 2021 filed before this court.

The application was brought under section 68(e), section 95 and Order XXXVII Rule 1(a) of the Civil Procedure Code Cap. 33 R.E 2019 and supported by a joint affidavit deposed by both applicants. The application was opposed by the respondents through a counter affidavits deposed by Hamad Said and Zang Hong Quan for the 1<sup>st</sup> and the 2<sup>nd</sup> respondent.

When the matter was called for hearing the applicants were ably represented by Mr. Silayo Edwin a learned advocate while the 1<sup>st</sup> respondent was represented by Ms. Georgina Basil, learned advocate and the 2<sup>nd</sup> respondent enjoyed the service of learned counsel Mr. Ramadhan Ally Hassan. They both argued the application orally.

Mr Edwin prior to submit on the substance of the application he made some corrections of the clerical error on the certificate of title number. He then adopted the affidavit and the reply thereto to form part of his submission and went on to submit that, the disputed properties in this suit are three as appearing in the chamber summons and the affidavit. That, the property at Kaloleni consists of several buildings which are apartments located behind TAKUKURU building here in Arusha. That, the

West Meru property is just near the Tengeru Market and Kituoni street property is opposite and adjacent to CRDB Bank at Friends corner here in Arusha and all belongs to the applicants.

In pointing out the issues which he considers raising a serious question to be tried by the court, Mr Edwin while referring paragraph 6 and 16 of the applicant's affidavit submitted that there is dispute regarding the period upon which the disputed properties were issued as security. He pointed out that the securities were only issued in respect of the advanced payment bond with condition that after raising certificate all payments by the clients will be made through the account of the 2<sup>nd</sup> respondent with the 1<sup>st</sup> respondent of which the 1<sup>st</sup> respondent has control over that account. That the applicants entered into an agreement with the 2<sup>nd</sup> respondent to issue their properties as bond to secure project awarded to the 2<sup>nd</sup> respondent. That they agreed to issue their properties as security for the period of one year only.

The applicant also raised the issue of forgery as another serious question for the court's determination. He pointed out that there was a serious issue on the authenticity of the mortgage deeds. Referring the mortgage deed attached to the counter affidavit, Mr. Edwin submitted that the signatures on the mortgage deeds by its look differ from those

signed by the applicants in their affidavits. That the same contain no dates as to when they were signed. He insisted that the mortgage deed signed by the applicants are not the same attached by the respondents in their counter affidavit thus thinks that there is a serious issue to be tried by the court.

Mr. Edwin went on and submitted that it is not in dispute that the 1<sup>st</sup> respondent intended to auction the suit properties for them to recover 2.7 billion which they owe the 2<sup>nd</sup> respondent at the expense of the applicant. That it will be a great injury on the part of the applicants of which it is this court which can only attend it by issuing an injunction order pending determination of all triable issues as above mentioned.

—Mr. Edwin in referring paragraphs 22 and 24 of the affidavit in reply submitted that, there is great loss to be suffered by the applicant as compared to those to be suffered by the respondent if the application is not granted. He pointed out that the property at Kaloleni are apartments of 6 floors building and there is more than one building within the same title. That, the same are rented by TPDF officers according to annexure RN3 and If the auction is conducted, it will raise chaos in court of law among parties to the tenancy agreement. For the West Meru property, he pointed out that, it contains the petrol station and supermarket and a

service bay. That, there are numbers of employees and a licence issued by EWURA and if this court will not intervene the acts of the 1<sup>st</sup> respondent, then there will be another chaos between BP petrol station and those all employees mentioned in the affidavit. For Kituoni street property he submitted that, there are number of business people occupying the area. That, if terminated there will be multiple and hundreds of cases which will be in different adjudicating organs in this country. To avoid all those, Mr. Edwin is of the view that the interference of this court is necessary to rescue the situation by granting a temporary injunction.

Based on those circumstances Mr. Edwin is of the view that, the applicants are likely to suffer irreparably unlike the bank because all loan in the bank is insured. He supported his argument with the case of **Atilio Vs Mbowe (1969) HCD 254** and **Kibo Match Group limited Vs H.S. Impex Ltd, 2001 TLR**, and insisted that the three elements mentioned under those cases has been proved.

Contesting the application, Ms. Basil adopted the counter affidavit to form part of her submission and addressed the court on the three prerequisites conditions for the court to grant the order sought. On the first condition on prima facie case, she submitted that in construction

projects certificate are issued upon completion of the projects. That, as a normal practice, advance payment guarantees whether a contract of a specific projects is subject to renewal upon their tenure clause. She maintained that the correspondence from AUWSA has nothing to do with the applicant and had no relationship with the applicant. Concerning the issue of forgery, she replied that forgery is a serious allegation whose proceedings involve criminal intervention something the applicant has not proved to have attempted.

On the second condition, that the applicant will suffer irreparable injury if the application is not granted, she submitted that, the matter before this court is based on contractual breach and the redress of contractual breach is by way of damages. That, the 1<sup>st</sup> respondent being the bank doing business, is in financial position to pay damages or loss that may be awarded to the applicant if their suits succeed. To buttress her submission, she cited the case of **General Tire East Africa Ltd Vs H.S.B.C Bank PLC**, Misc. civil Application 35 of 2005 TLR 206.

On the last condition, that on balance of expediency there will be mischief to be suffered, Ms. Basil reiterated her submission on the second condition and added that, for the bank to continue being in bank business, it must have funds to lend and be paid by its borrowers', failure of that

will result to bankruptcy. That, it is against the financial policy to restrain the financial institution from realising collaterals against defaulters. That, as there is outstanding amount, the auctioning and selling the mortgaged properties in the lawful means available for the 1<sup>st</sup> respondent. That, if the application is granted there will be no means to recover the money from for the facility secured by the said properties and the 1<sup>st</sup> respondent will be subjected to write off the facility which will impact the bank's core capital and result into sanction by the regulator BOT. That, that may result into close of business and downgrading the institution.

In concluding, Ms. Basil submitted that, the applicant has not met the condition to warrant grant of temporary injunction as per the cited case of **Atili vs Mbowe** in which all conditions need to be complied wholly. Therefore, she prayed for this court not to grant the prayers sought in this application

Mr. Hassan representing the 2<sup>nd</sup> respondent did not contest the application. He only insisted that for the purpose of administration of justice, the application should be granted.

In his rejoinder Mr. Edwin reiterated his submission chief and added that, it is not true that the redress will be by way of damages. That, the fact that the 1<sup>st</sup> respondent is a financial institution capable of paying, is

unfounded because the loss to be incurred in those three properties cannot be quantified by money. That, taking out people residing in those properties will cause chaos that cannot be quantified by money.

The above being the summary of what was submitted by parties, it is apparently that the instant application aims at obtaining a temporary injunction restraining the respondents from selling or tempering with the disputed properties till full determination of the main suit.

The position of law with regard to temporary injunction is clear. Order XXXV11 Rule 1 (a) and 2 (1) of the Civil Procedure Code, to which this application relates, gives incidences upon which temporary injunction may be granted. It includes (among others) that, there is the existence of the suit. That there must be proof by affidavit that "any property in dispute is in danger of being wasted, damaged, or alienated by any party to the suit or suffering loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree. Thus, for the court to grant the order, the applicant must establish existence of a serious question to be tried by the court on the facts alleged of by the party and a probability that the Plaintiff will be entitled to the relief prayed, also that if the order is not issued then the applicant will suffer an irreparable loss compared to the respondent. The requirement of the law



has been embraced by court in a number of decisions. See the famous case of **Atilio Vs Mbowe, (1969) HCD 284** which set out conditions to be satisfied by the applicant for the grant of temporary injunction.

In determining whether the current application is a fit one for the grant of a temporary injunction then all the three conditions set forth under the case of **Atilio Vs Mbowe** will be tested.

As for the first condition on existence of a prima facie case, it is not in dispute that there is a pending case before this court and that is Land Case No 28 of 2021. The applicant in his submission has stated that the court is called upon in the main suit to determine and rule out on the time within which the applicants' properties were issued as security and whether they fall under advance payment bond or not. The other issue pointed by My Edwin is that there existed forgery of signatures in respect of the mortgaged properties. Ms. Basili moved this court to rule that there is no prima facie case warranting the determination of this court.

In considering the submission by the parties and records, I am convinced with the submission by the applicants' counsel. There is a pending suit before this court and what was pointed out by the counsel for the applicant sufficiently establish serious issue to be determined by the court. Much as the time to which the properties were offered as

security is disputable, it is upon the court determination to that issue that will justify the legality of realising the securities for purpose of recovering the amount due. The first condition therefore is met.

Regarding the second condition on irreparable injury, I find this condition is also met. I say so basing on the well elaborated submission by the counsel for the applicant. He categorically elaborated the embarrassment and volatilities likely to occur if the properties are sold before the determination of the rights of the parties. I agree that if not properly evaluated, this case is likely to lead into the drastically flooding of various disputes due to breach of contracts from the rented houses and business premises. For purpose of controlling this, granting injunction is the best option to pave way to the determination of the rights of the parties and prevent injuries likely to be suffered by other people not part to the suit. I agree that monetary compensation will not in any how remedy the situation due to the nature of the properties intended to be realised. I also consider the decision in **General Tyre EA Ltd vs HSBC Bank PLC (supra)** that, the court should balance the danger of granting and or not granting the temporary injunction.

On the last condition on a balance of convenience, the question here is who is going to suffer greater hardship and mischief if the temporary

( injunction is granted or not granted. There is no doubt that the applicants are likely to suffer more than the respondent. The respondent being financial institution does not depend on a facility issued to one customer to run bank business. Thus, I do not see how the bank will cease to operate merely because the auction to recover a single loan facility is postponed. Much as the ownership documents (certificate of titles) of the mortgaged properties are under custody of the 1<sup>st</sup> respondent, if the main suit will be decided in favour the 1<sup>st</sup> respondent, she will still recover the amount claimed by selling the same.

For reasons above, the three conditions set in **Atilio Vs Mbowe** (supra) have been met by the applicants, and I find that this application is of merit and is hereby granted. An order of temporary injunction is granted for six months in respect of disputed properties with certificate number 22084, L.O No 205932, Plot No 14 Block C Kituoni Street, Arusha and landed property with Certificate of title No. 1024 L.O No. 44226 Plot No 133 Block 24 Kaloleni Arusha Municipality both being the property of the 1<sup>st</sup> Applicant and another landed property with certificate of title No. 15528, L.O No. 178389, Plot No 66, Block 'C' West Meru, Arumeru District in Arusha the property of the 2<sup>nd</sup> Applicant. The mentioned properties should not be sold, transferred or tempered in any how by the

respondents, their agents, workmen or any other person related or not for the period mentioned. In the upshot, the application is allowed with no order for costs.

**DATED** at **ARUSHA** this 13<sup>th</sup> December 2021



A handwritten signature in blue ink, appearing to read "D.C. Kamuzora", is written over the printed name.

D.C. KAMUZORA

JUDGE