

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. LAND APPLICATION NO. 40 OF 2021

(C/F Land Case No. 14 of 2021)

ST. THOMAS NURSERY AND PRIMARY SCHOOL LIMITED.....APPLICANT

VERSUS

MAK MEDICS LIMITED.....1ST RESPONDENT

NMB BANK PLC.....2ND RESPONDENT

KILICRAALS ADVENTURE AND SAFARIS AUCTIONEE.....3RD RESPONDENT

RULING

21/09/2021 & 02/12/2021

GWAE, J

The Applicant has brought filed this application under Order XXXVII, Rule 1(a) and Rule 4, Sections 68 (e) and 95 of the Civil Procedure Code, Cap 33 Revised Edition, 2019 praying for the court to make an order restraining the 2nd and 3rd respondents, their agents, servants, workmen or any person whoever acting in their behalf from trespassing onto and selling the suit properties to wit; Farm No. 2127, under Certificate of Title No. 21107, Land Office No. 251030 and Land Registry Office, Arusha City and

Farm No. 1305 comprised and held under Certificate of Title No. 16826, Land Office No. 178648 and Land Registry Moshi, situated at Mareu village, Arumeru District within Arusha City registered in the name of the applicant, either by way of public auction or private contract and thereby evict applicant from occupation and or ownership of the suit properties or deal in any way whatsoever with the suit properties pending the hearing of the main case before the court.

The Application is supported by an Affidavit, sworn by one Galinga Makongoro Nyiriza the Managing Director and shareholder of the applicant and the 1st respondent, on the other hand the Counter Affidavit affirmed by the Principal Officer of the 2nd respondent one Patrick Said Pharseko noting some of the contents while contesting some. The Application was disposed orally.

Mr. Jaffary Suleiman learned counsel, appeared for the applicant whereas Mr. Sabato Ngogo appeared for the 2nd respondent. The 3rd respondent did not enter appearance nor did she file her counter affidavit.

Supporting his application, Mr. Jaffary adopted the contents of the applicant's affidavit and further prayed for the grant of this application on

on the following reasons; that there are two valuation reports whereas the former fetched the higher value and that they were not served with notice of default as required by section 133 of the Land Act Cap 133 Revised Edition 2019.

Mr. Sabato, on his part, vigorously resisted this application by arguing as follows; that, the application before this court has its principles in order to be granted as articulated in the case of **Atilio's** case. As to the issue of a default notice, Mr. Sabato submitted that, the default notice was served to one Makongoro-principal officer of the plaintiff and that, the 2nd respondent has not breached any contractual rights of the applicant as what has been done by the 2nd respondent is within the contractual terms and conditions of the loan facility. The counsel for the respondent thus urged this court to dismiss the application with costs.

In his rejoinder, Mr. Jaffary stated that, the said notice was served to the borrower and not the applicant therefore there is a breach of the contractual obligation on the part of the 2nd respondent. The counsel was of further view that if the 2nd and 3rd respondents are not restrained the applicant will suffer more irreparable loss.

I have carefully considered the rival submissions by the parties' advocates in this application and I have these to say; For the application of temporary injunction to be granted by the court there must three conditions namely; presence of triable issues in the main case, decree of prejudice to the applicant if the application is refused and a real requirement to protect irreparable loss, if any. The said conditions are to be fulfilled before grant of an injunctive order as was rightly enunciated in the case of **Atilio v. Mbowe** (1969) HDC No. 284 in which the court pointed out three conditions to be satisfied for the court to consider when granting an order of injunction, these conditions are;

- (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"

Based on the Affidavit in support of this Application as well as the submissions thereof, it is my settled view that at the outset, the question to be asked is whether or not the applicant has sufficiently managed to establish the required principles quoted above. As correctly submitted by the counsel for the second respondent that, for an application of this kind to be granted by the court, the above three conditions articulated in the case of Atilio must be satisfied. I have keenly looked at the application at hand together with the submission by the learned counsel Mr. Jaffary, I am of the view that there is apprehended irreparable loss on the part of the applicant if the applicant's landed properties are sold taking into account of serious difference in the former valuation report and the later.

I have also found that, if this application is granted, the respondent will not suffer more hardship than the applicant as the respondent will have still have right to sell the landed properties whose certificates of titles are withheld by him.

Similarly, the I have observed the contradictory nature of the notices issued by the 2nd respondent and his agent (3rd respondent), namely; statutory notice dated 10th June 2019 addressed to the applicant's managing Director indicating that, the borrower being the 1st respondent whereas 14


notice dated 26th February 2021 addressed to the 1st respondent as the guarantor and issued by the 3rd respondent for attachment and sale of the applicant's properties.

I have further taken into account merits or demerits of the applicant's main case, basing on the requirement of service of statutory sixty days-notice by the mortgagee to the mortgagor and copies to guarantors, if any, as provided for under section 127 (1) of Land Act, Cap 113, Revised Edition, 2019 (See also the jurisprudence of the High Court of Kenya in **David Ngigi Ngaari vs. Kenya Commercial Bank Limited** (2015) eKLR)

At this juncture, therefore, having weighed the facts in their totality and for the interest of justice, this application is therefore grantable for the sought temporary injunction. The respondents are restrained from attaching and selling of the applicant's mortgaged properties pending determination of Land Case No. 14 of 2012 or lapse of statutory period available for temporary injunctive orders, which comes first. Costs of this application shall be in the course

It is so ordered.




M. R. GWAE
JUDGE
02/12/2021