

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

**MISC. CIVIL APPLICATION NO. 98 OF 2021**

*(From Land Case No 39 of 2021 High Court of Tanzania at Arusha)*

**MATHAYO OROMBOI .....1<sup>ST</sup> APPLICANT**  
**OROMBOI KINYASI ..... 2<sup>ND</sup> APPLICANT**  
**SABINA MATHAYO OROMBOI .....3<sup>RD</sup> APPLICANT**  
**NAITPUKAI OROMBOI KINYASI ..... 4<sup>TH</sup> APPLICANT**  
**SIROINET LANDEI NGUNGU ..... 5<sup>TH</sup> APPLICANT**

**VERSUS**

**NDAHAT FARM TANZANIA LIMITED ..... 1<sup>ST</sup> RESPONDENT**  
**NATIONAL MICROFINANCE BANK PLC ..... 2<sup>ND</sup> RESPONDENT**  
**KILICRAALS ADVENTURE &**  
**SAFARIS AUCTIONEERS..... 3<sup>RD</sup> RESPONDENT**

**RULING**

31/03/2022 & 19/04/2022

**KAMUZORA, J.**

Under a certificate of urgency the Applicants made an application before this court seeking for an order of interim injunction to restrain the Respondents, its agents, workmen or any other third party from auctioning, sale, transfer, or disposal of the title to landed property and

any other dealing with landed property comprised under the certificate of Tittle No. 14940 located at Namalulu/Naberera, Simanjiro District Council, Manyara Region pending hearing of the main suit, Land Case No. 39 of 2021.

The application was brought under section 68 (c)(e), and Order XXXVII Rule 1(a) and Rule 4 of the Civil Procedure Code Cap. 33 R.E 2019 and supported by the affidavits deponed by the Applicants. The application was opposed by the 1<sup>st</sup> Respondent through a counter affidavit deponed by Hassan Ahmed, the Managing Director of the 1<sup>st</sup> Respondent but the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not file counter affidavit opposing the application.

When the matter was called for hearing the Applicants were ably represented by Mr. Michael Lengitambi a learned advocate while the 1<sup>st</sup> Respondent was represented by Mr. Luis Boniface learned advocate who was holding brief for Mr. Shadrack Mofulu learned advocate and the matter proceeded ex-parte against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The application was argued orally.

Submitting in support of the application Mr. Lengitambi adopted the affidavit in support of application and submitted that the Applicants pray for court intervention to restrain all Respondents from selling the land in dispute pending determination of main suit. He referred the

decision of **Atilio Vs Mbowe, 1969 HCD 284** which proposed three tests to be considered before issuing temporary injunction which are: -

- 1. There must be a prima facie case or triable issues*
- 2. There must be irreparable loss which the Applicants are likely to suffer.*
- 3. Balance of convenience between Applicant and Respondent.*

Mr. Lengitambi went on and submitted that, in the case of **Anna investment company limited and 3 others Vs National Microfinance Bank PLC and 2 others**, Misc. Land application No. 465 of 2021 (unreported), the court held that the test in Atilio's case must be met.

Starting with Prima facie case, Mr. Lengitambi submitted that, the affidavits of the Applicants disclose the issue of ownership, fraud and legality of title deed No. 14940 which are triable issues which this court will determine in the main case on whether the land belong to the Applicants or the Respondents or whether there was legality to use the suit land as collateral for the loan obtained from the second Respondent. In that regard Mr. Lengitambi believes that there is arguable issue to be determined in the main case.

On the second test of irreparable loss, Mr. Lengitambi argued that, annexure DEL3 it shows that there is pending auction to sell the suit

property which was advertised through Habari Leo Newspaper dated 24<sup>th</sup> October 2021 at page 7 of the newspaper and it involves all the Respondents. He referred this court to the decision by Hon. Opiyo J, in the case of **Dar es salaam water supply and sanitation authority and Attorney General Vs Tabu Hassan (as a legal representative of the late Pili Tamaambele) and another**, Misc. Land Application No. 247 of 2021 pg5 and claimed that if the injunction is not granted to restrain the Respondent from selling the suit property as advertised on the newspaper, the Applicant will not recover the similar land and the action of selling the land will deprive them with ownership of land totally.

Submitting on the last test on balance of convenience, Mr. Lengitambi claimed that the title deed is with the second Respondent and the property is immovable property. That, even if the decision will be in the Respondent's favour, they will remain with right to auction and sell the suit land for purpose of recovery of the loan. But if the injunction is not granted the Applicants will not get the land and even if the court will rule in their favour, they will not be able to recover the same land with the same quality and they will suffer more than the Respondents.

Mr. Lengitambi added that, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not file the counter affidavit to oppose the application thus proving that they have conceded to the application. To buttress his submission, he cited the case of **Devatha Methew Minja Vs Tito Simon Haule, Misc. Land Application No 681 of 2019** where Mango J, at page 1 and stated that failure to file counter affidavit presupposes that a party does not oppose the application.

Mr. Lengitambi finalised by stating that, apart from the case of **Atilio Vs Mbowe**, the court also added the fourth ground which is optional for the court to follow in the case of **Jayndrekumar Devechand Devani Vs Haridas and another**, EACA Civil Case No. 21 of 1971 where the court added the likelihood of the Applicant to win the case. He argued that, in this test although the case is yet to be decided, Applicants have reasons to prove if allowed by the court that they are owners of the suit land, and the director of the 1<sup>st</sup> Respondent was only invitee/lessee to that land. Basing on the submission above Mr. Lengitambi prays for this court to grant temporary injunction to the Applicants pending determination of the main suit and the costs of this application.

Contesting the application, Mr. Boniface replied that, although the application was brought under certificate of urgency, the affidavits of

the Applicants does not indicate any urgency of the matter. Mr. Boniface in addressing the tests under the case of **Atilio Vs Mbowe** submitted on the first test on the existence of triable issue that the Applicants legally sold the suit land to the first Respondent, and they signed the contracts as attached in the counter affidavit. That, the land that was used as collateral belongs to the 1<sup>st</sup> Respondent and all Applicants knows that. Mr. Boniface was of the view that there is no triable issue on who is the rightful owner of the disputed land because all Applicants knows, and they signed the contract for the sale of that land.

On the second test of irreparable loss the counsel submitted that, the Applicants in this application will not suffer loss because the land is no longer in their ownership. He supported his submission with the case of **Samwel Apolo Odielo Vs Temeke Municipal Council**, Misc. Land Application No. 87 of 2018, page 2 where the court quoted the case of **General Tire EA limited Vs HSBC Bank PLC**, 2006 TLR 60, 61 where it was held that the court should balance on the danger of granting or not granting temporary injunction.

He went on and stated that, the first Respondent is a company based on the agricultural business and the second Respondent is a bank that gave loan to the first Respondent which its collateral is the land in dispute. That, the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Applicants are the original owner of the

disputed land, but they passed right and interest of the said land to the 1<sup>st</sup> Respondent. That, the 3<sup>rd</sup> and 4<sup>th</sup> Applicants are unknown and for that reason, the possibility to suffer irreparable loss is on the 1<sup>st</sup> and 2<sup>nd</sup> Respondents That, if the land is not sold to pay the loan obtained from the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent will not do business without being disturbed. That, the 2<sup>nd</sup> Respondent is the financial institution which earn from the business including loan paid with interest. That, if the land will not sold the 2<sup>nd</sup> Respondent is likely to suffer vital loss which is irreparable because, she depends on the recovery of that amount to run the business.

On the argument that no affidavit of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent, the counsel for the 1<sup>st</sup> Respondent submitted that this is an ex-parte application thus, it was not easy for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to file counter affidavit because they know that the application will be heard ex-parte.

On the claim that the Applicant can prove that they are owners of the disputed land, the counsel for the 1<sup>st</sup> Respondent submitted that there is contract that were signed on the sale of the said land between the Applicants and the 1<sup>st</sup> Respondent. Therefore, that, they cannot prove ownership or possession of interest on the disputed land. Mr.

Boniface prayed for this court to dismiss the application with costs so that the Respondents will not suffer irreparable loss.

In his rejoinder on the issue of certificate of urgency Mr. Lengitambi submitted that the affidavits of the Applicants under paragraph 9 of the affidavit of the 1<sup>st</sup> Applicant, discloses the issue of auction to sell the suit land as advertised by the Habari Leo Newspaper. That, it discloses that the same is urgent thus filing the application under certificate of urgency to rescue the sale of the suit land was the only available option.

On the case of **Atilio Vs Mbowe**, he submitted that, the same established the tests for the grant of temporary injunction and based on the case of **Anna Investment Limited** (supra) page 12, he added that, the court must satisfy itself that there is a bonafide dispute raised by the Applicants which needs investigation and decision on merit.

Mr. Lengitambi also submitted that, in this application, there are two sides. While the Applicant claims the ownership of the suit land, the 1<sup>st</sup> Respondent dispute and claim to be the owner of the disputed land. That, this issue needs investigation of the court to determine the real owner. That, the sale agreement referred by the counsel for the Respondent also requires investigation hence a point for determination in the main suit. He added that the provision of Order XXXVII Rule I (a)



of the CPC, cap 33 RE 2019 requires that where there is danger on the disputed property to be disposed off, the court must intervene and maintain the status quo.

Regarding the case of **Ota Edward Msofu and Company**, cited by the Respondent, the counsel for the Applicant stated that the same is distinguishable from the matter at hand because, at page 4 of that decision the Applicant admitted obtaining loan from the Respondent while in this application, the Applicants are third party to the contract between the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent. That, Applicant claim that their land was wrongly used as collateral for the loan issued by the 2<sup>nd</sup> Respondent to the 1<sup>st</sup> Respondent.

On the issue of the affidavit of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent, the counsel for the Applicant reiterated that they were served with copies of application but deliberately refused to file the counter affidavit therefore they admitted to the application. That, the 3<sup>rd</sup> and 4<sup>th</sup> Applicants are responsible in this application as they are lawful wives of the 1<sup>st</sup> and 2<sup>nd</sup> Applicants and under the Law of Marriage Act, they have right to claim interest over the matrimonial properties as per section 59 of the LMA RE 2019.

On the last test on the balance of convenience, the counsel for the Applicant reiterated that, the disputed property is immovable property

and if the injunction will be granted, it will still be there and even if the Respondent will win the case, they will still have chance to sell the same to recover their money. From that reason the Applicants pray for the injunction to be granted by this court to restrain all the Respondents and their agents or workmen from selling the disputed land pending determination of the main case.

The position of law with regard to temporary injunction is clear. Order XXXVII Rule 1 (a) of the Civil Procedure Code to which this application has been preferred, gives conditions upon which temporary injunction may be granted. It includes (among others) the proof that there is the existence of the suit, proof that 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. The requirement of the law has been embraced by court in a number of decisions including the famous case of **Atilio Vs Mbowe**, (1969) HCD 284 where it was set out that for the court to grant the order for temporary injunction, 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.

On the first condition of existence of a prima facie case, it is not in dispute that there is a pending case before this court and that is Civil Case No 39 of 2021. The Applicant's counsel Mr. Lengitambi in his submission stated that the court is called upon in the main suit to determine and rule out as to who is the lawful owner of the suit property between the Applicants and the 1<sup>st</sup> Respondent and whether it was proper for the first and the second Respondent to use the suit land as a collateral. Mr. Lengitambi pointed out that there is also issues of fraud and legality of the title deed No. 14940 as between the Applicants and the 1<sup>st</sup> Respondent. The counsel was of the view that the Applicants were able to show to this court that there is a prima facie case warranting the determination of this court.

The counsel for the Respondent on the other hand claimed that the Applicants legally sold the suit land to the first Respondent thus the land used as collateral is the property of the 1<sup>st</sup> Respondent. The counsel insisted that no triable issues as the property in dispute does not belong to the Applicants.

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. I say so also bearing in mind the response by the Respondent in the counter affidavit and submission there to which is to the effect that the Applicants legally sold the suit land to the 1<sup>st</sup> Respondent. To me here there exists a prima facie case warranting the determination of this court to adjudicate on the issue of ownership of the suit land. The first condition therefore is met.

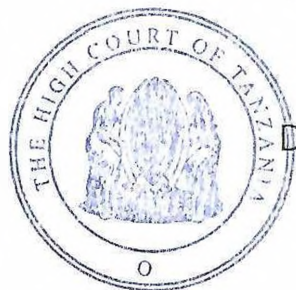
Regarding the second condition on irreparable injury, it was agreed by the Respondents that the Applicants were original owner of the property before they passed tittle to the 1<sup>st</sup> Respondent a fact which is disputed by the Applicants. In this the Applicants have interest to the matter under which the legality over the property needs to be determined before they are permanently deprived of the ownership to the suit land. It becomes obvious that if the auction will be conducted it will pass tittle to a third party to which if the final decision will be in favour of the Applicants, recovery of the property will be with greater hardship. The 1<sup>st</sup> Respondent being a company basing on the agricultural business did not state how its business will be affected by the grant of this application. The contention by the counsel for the 1<sup>st</sup> Respondent that the 2<sup>nd</sup> Respondent is a financial institution which

depend to earn money from business including loan paid with interest and that if this application is granted it will suffer vital loss is baseless. The 2<sup>nd</sup> Applicant did not appear or file a counter affidavit to contest the application. Even if they had appeared and contested still the financial institution like the Bank does not depend solely on loan facility to run its business as loan is just one component in banking business. Thus, no proof of irreparable loss likely to be suffered by the second Respondent. I therefore find that this condition is also met.

On the last condition on balance of convenience, the question here is who is going to suffer greater hardship and mischief if the interim injunction is granted or not granted. I have considered the decision in the case of **General Tyre EA Ltd vs HSBC Bank PLC** (supra) as cited by the counsel for the Respondent that, the court should balance the danger of granting and or not granting temporary injunction. The reason put forward in the first two conditions proves that the Applicants will suffer more than the Respondents if the application is not granted. As opposed to the Applicants who will suffer hardship in getting back the property already transferred to a third party by sale, the Respondents will still have a chance to sell the suit land for them to recover the amount of money claimed in case the decision in the main suit is in their favour.

In the upshot, I find that the three conditions set in the case of **Atilio Vs Mbowe** (supra) have been met by the Applicants. The application for temporary injunction is therefore granted restraining the Respondents, their agents, workmen or any other person from auctioning the suit land, sale or disposing off, transfer of title to the landed property comprised under the certificate of Tittle No. 14940 located at Namalulu, Nabelela, Simanjiro District in Manyara Region pending hearing and determination of the main suit, Land Case No 39 of 2021. Costs shall follow the events.

**DATED** at **ARUSHA** this 19<sup>th</sup> day of April 2022.



  
D.C. KAMUZORA

JUDGE