

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

MISC. LAND APPLICATION NO 129 OF 2022

(Originating from land case No 54 of 2022 High Court Arusha District Registry)

GAUDENCE VICENT LYIMO1ST APPLICANT
MONICA GAUDENCE LYIMO2ND APPLICANT
GAIMO CONSTRUCTION COMPANY LIMITED3RD APPLICANT

VERSUS

NCBA BANK TANZANIA LIMITED1ST RESPONDENT
LOCUS DEBT MANAGEMENT LTD2ND RESPONDENT

RULING

04/10/2022 & 03/11/2022

KAMUZORA, J.

Under a certificate of urgency, the Applicants brought this application seeking for an order of temporary injunction to restrain the Respondents, their agents or authorized persons and or any one working in that behalf from selling or disposing off by any means the land which is located at Kimandolu within the City and Region of Arusha with title number 21389 Plot number 235, Block GG, L/O No. 252881 pending hearing and final determination of the main case before this honourable court. The application was brought under section 68(c) and

section 95, Order XXXVII Rule 1(a) of the Civil Procedure Code Cap. 33 R.E 2019 and supported by an affidavit deposed by the Applicants. The application was opposed by the Respondents through a counter affidavit deposed by one Daudi Lyimo, the 1st Respondent's relationship Manager- Business Banking. When the matter was called for hearing the Applicant was ably represented by Mr. Sylvester Kahunduka, learned advocate while the Respondent was represented by Mr. Rogers Mlacha and they both argued the application by way of written submissions.

The facts from the Applicants' affidavit and the submission by the counsel for the Applicant reveals that, the 1st Respondent extended a loan facility to the 3rd Applicant to the tune of Tshs 300,000,000/= as per the bank facility dated 22nd December, 2016 annexed to the affidavit as annexure P1. The 1st and 2nd Applicants who are husband and wife allowed their land located at Kimandolu within the city and region of Arusha with title number 21389 Plot number 235 Block GG and L.O No. 252881 to be used as security for the loan obtained by the 3rd Applicant.

It is the claim by the Applicants that, they have been paying the overdraft to the 1st Respondent but they received a note from the 1st Respondent that they have an outstanding overdraft of Tshs 317,467,482.89 and outstanding loan of Tshs. 85,945,942.55. That, the

Applicants took initiative to write to the 1st Respondent requesting for a bank statement for them to verify the said overdraft but no response. Instead, the 1st Respondent instructed the 2nd Respondent to sell the Mortgaged property in public Auction and the same was announced to be conducted on 9/09/2022. This application was therefore brought to seek for interim injunction to restrain the Respondents from selling the suit property pending the hearing and determination of the main suit.

The counsel for the Applicants submitted that, when the overdraft facility was advanced it was agreed that all the payments made by the 3rd Applicant be made through the 1st Respondents bank account who will deduct the amount due and when the 3rd Applicant through the 1st Applicant inquired on the balance after the deduction no reply was made by the 1st Respondent. It is the Applicants claim that, they were not issued with the 14 days' notice by the 2nd Respondent contrary to section 12(2) and (3) of the Auctioneers Act Cap 227 R.E 2002. That, there was no any announcement or publication made and displayed near the suit property on the intended public auction hence a procedural irregularity which needs to be determined by this court in the main case.

The Applicants' counsel added that, there is no proof on the Respondents' claim that the public auction has already been conducted.

He faulted annexure NL-6 to the counter affidavit on account that it fabricated. To him, annexure NL-5 and NL-6 shows does not show if any amount was paid by the successful bidder as a down payment hence there was no any public auction that was conducted on 10/09/2022.

It is the Applicants' prayer that this application be granted as the Applicants stands to suffer an irreparable loss. That, if the property is disposed of to a 3rd party it will be difficult for the Applicant to recover the same even if they succeed in the main suit. That, the Respondent can still recover their money by selling the said property at any time even after the conclusion of the main suit.

He added that, the 1st and 2nd Applicants being guarantors of the mortgaged property live in the suit land with their family and if the application is not granted, the whole family will be rendered homeless but the Respondents will not be inconvenienced as the Applicants due to the fact that they may recover the overdraft at any time. That, since there is a triable issue and there are overwhelming chances of success the Applicants prays that the application be granted with costs.

Responding to the application and pointing at paragraph 4(b) of the Respondents counter affidavit the counsel for Respondents argued that, no parcel of piece of land comprised under CT No 21391 owned by

the Applicants have been under the mortgage of the 1st Respondent but rather plot No 235 block GG Kimandolu area within Arusha city comprised under CT No 21389 which were owned by the 1st and 2nd Applicants.

Referring to the case of **Peak Merchant Bank Ltd vs Central Bank of Nigeria and others** [2004-2006] 13 N.B.L.R (PART 1) 314 the Respondents' counsel submitted that, injunction cannot be granted for a completed act. He claimed that, the mortgaged property was auctioned on 10/09/2022 and the highest bidder in the said auction was Rhodes Moshi who bid Tshs 750,000,000/= and the reply to the counter affidavit do not negate the fact that the mortgaged property was auctioned hence the application be dismissed with costs for being incompetent.

The counsel for the Respondent submitted also that, the facts that the 1st and 2nd Respondents reside at the dispute property is unproved and that fact was not well disclosed in the affidavit. He was of the view that, if they reside in that house as matrimonial house, they could have witnessed the auction that was conducted on 10th September 2022.

The counsel further submitted that, an order for temporary injunction is an equitable relief and among the principle of equity is that a person cannot benefit from his own wrong and those who come for

equity must do equity. He referred the case of **Maithya Vs. Housing Finance Co. of Kenya and another** [2003] 1 EA 133, **East African Cables (T) Ltd Vs. Spenco Services Limited**, Misc. Application No 61 of 2016(Unreported). He insisted that, failure to service the loan does not justify the grant of injunction. He was of the view that, if the Applicants claim that no auction was conducted such fact was to be proved by them through an affidavit.

He added that, the Applicants admit that the overdraft of 300million was to the 3rd Applicant. That, they also admit that there was default in servicing the overdraft facility extended to the 3rd Applicant. That, the default notice was served to the Applicants as per annexure NL 3 attached to the counter affidavit. Referring this court to the case of **Atilio Vs Mbowe** 1969 HCD 284 the Respondents' counsel submitted that, three conditions set in that case must be satisfied for the grant of a temporary injunction; that, there are serious questions to be tried on the facts alleged and a probability that the Applicants will be entitled to the reliefs prayed, Court interference is necessary to protect Applicants from the kind of injury which may be irreparable before the legal rights are established and on the balance, there will be a greater hardship and

mischief suffered by the Applicants from withholding of the injunctions that will be suffered by the Respondents from granting it.

It is the Respondents claim that, the Applicants' application has not satisfied any of the above conditions. That, the Applicant ought to have made a prima facie case with probability of success and the fact that the Applicant will be entitled to the reliefs prayed does not rise. That, the 1st Respondent was exercising her powers of sale under the mortgage deed as held in the case of **National Bank of Commerce vs Dar es Salaam Education and Office Stationery** [1995] TLR 272.

Responding to the issue of notice, it is the Respondents submission that, the admitted notice of public auction by the 2nd Respondent was a sufficient compliance of section 12(2) (3) of the Auctioneers Act. Regarding the claim that the suit is a matrimonial home the Respondents stated that, the procedures of using the property as security for loan was followed as spouse consent was obtained prior to charging the property as security for the loan.

Regarding the condition on balance of convenience the Respondent stated that, this matter tilts in favour of the 1st Respondent as he is the lender and up to this moment interest and penalties on the 3rd Applicant loan continue to accrue hence increasing the liability of the

Applicant to the Respondent and the amount may double and the sale of the suit property may not be sufficient to settle the Applicants liability to the 1st Respondent.

Pointing at the Applicants' submission, the Respondent contends that, the three conditions have not been met by the Applicants such that the Applicants main concern was on the issue of auction which has nothing to do with the order of the grant of injunction. That, there is no need of summoning the deponent of the affidavit to seek clarification as whether the public auction has been done or not as the court can make findings on the issues based on the facts deposed in the Affidavit.

In a brief rejoinder the Applicants reiterated the submission in chief and added that, the Respondent was issued with summons before the District Commissioner for Arusha and it was agreed that Auction could not proceed pending appearance before this court on 12/09/2022 thus, there was no any public auction which was done on the suit land hence the Applicants' application is not overtaken by event.

From what was submitted by parties, it is apparently that the instant application aims at obtaining an interim injunction restraining the Respondent from disposing of the mortgaged property until full determination of the main suit. It is the Respondents claim that, the

application is overtaken by event as auction took place on 10th September 2022 and the alleged property is already sold in auction. That was disputed by the Applicants who insisted that no proof that the auction was conducted.

From the records, it is clear that this application was called in court for the first time on 09/09/2022 which is the date to which the auction was intended to be conducted. When the counsel for the Applicant appeared, he informed this court that the notice to the auction was orally given and he had no any written notice showing that there was any auction intended to be conducted. He however prayed for summons to the Respondents for them to appear and verify the fact. That was Friday and the summons was issued for the Respondents to appear on Monday 12/09/2022. On that date the counsel for the Respondents Mr. Rogers Mlacha appeared in court and informed the court that he was engaged over the weekend and the auction took place on 09/09/2022 he thus insisted that the application is overtaken by event hence be dismissed. He however prayed for 7 days to file counter affidavit. That fact was disputed by the counsel for the Applicant who insisted that, there was attempt but no public auction was conducted.

In the counter affidavit, it was deposed under paragraph 4 (g) and 8 (e) that the mortgaged property was auctioned on 10th September 2022 and attached a copy of auction report, annexure NL-6. Looking at the said annexure, it is auctioneers report. It contains the headed paper of LOCUS DEBT MANAGEMENT LTD and it shows the names of three bidders and the bidding price for each together with their signatures. It was also signed by only one witness Shamila Mdachi, introduced as Operation Manager probably from the auction company. There is no other evidence proving that payment was made to effectuate the auction. It cannot be said that there was legal auction if there is evidence proving payment of the bidding price. That being the case, I take the same stand with the Applicants' counsel that, the evidence under counter affidavit as well as the annexure does not prove any sale. That is why there is even contradicting statement from the counsel for the Respondents intending to show that the auction was conducted on 09/09/2022 while in the affidavit it is indicated that it was conducted on 10/09/2022.

It must be noted that, for this court to conclude that the auction was conducted and this application is overtaken by event, it was expected for the evidence like bank pay-in-slip or receipt proving

payment of the bid amount to be attached to the counter affidavit. In the absence of that, the mere report by the auctioneer does not satisfy that the auction is conclusively conducted. This take me to the proposition by the counsel for the Applicant that, there was an attempt which was not conclusive. I therefore conclude that, this application is not overtaken by event as suggested by the counsel for the Respondent.

Turning to the merit of the application, the position of law on temporary injunction is clear. Order XXXV11 Rule 1 (a) of the Civil Procedure Code, to which this application was preferred gives circumstance under which temporary injunction may be granted. It includes among others that; the existence of the suit, proof by affidavit that, a property in dispute is in danger of being wasted, damaged, or alienated by any party to the suit or property is likely to suffer loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree. The Applicant must also establish existence of a serious question to be tried by the court on the facts alleged by the party and a probability that the Plaintiff will be entitled to the relief prayed. He must establish 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 landmark case of **Atilio Vs. Mbowe**, (supra) 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 conditions set under the law and appraised in the case of **Atilio Vs Mbowe** (supra) will be tested.

On the first condition on existence of a prima facie case, it is the Respondent's argument that there is no any triable issue as the Applicants had admitted to have taken the loan from the Respondent and following the request by the 3rd Applicant the overdraft was restructured in to one term loan of Tshs. 457,3030,000/= carrying interest at 17% per annum and the 3rd Applicant utilized the said loan facility and failed to repay it. That, the 1st and 2nd Applicants as guarantors agreed to mortgage their property which the 1st Respondent in turn used to recover the amount claimed by auctioning it on 10/09/2022.

The Applicant in his submission as well as under paragraphs 6, 7 and 9 of the affidavit in support of the application has addressed what he call triable issues. He contended that, they have been repaying the

loan and they took initiative to write to the 1st Defendant requesting to be availed with the bank statement to verify the balance received but no response from the 1st Respondent. They later heard the 2nd Respondent announcing in a moving vehicle that auction was to be conducted against the mortgaged property.

It is clear that the Applicants have lodged a civil suit, Land case No. 54 of 2022 which is pending before this court to challenge the intended auction on account that it is illegal for not giving the Applicant their right to assess the outstanding balance. As pointed out by the counsel for the Applicants, I agree that, there is a triable issue to be determined by the court much as there is dispute over the balance to be paid by the Applicants. The Applicants claims that, they were issued with an outstanding overdraft note by the Respondent contrary to what was guaranteed by the 1st and 2nd Applicants. Also, it is the claim by the Applicants that, they have not been issued with a valid notice for the public auction of the mortgaged property. All these are matters worth the determination by this court thus, the first condition 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 Applicants. There is no dispute that the property

intended to be sold is the matrimonial property of the 1st and 2nd Applicant who mortgaged it to secure a loan facility to the 3rd Applicant. This is also seen in the Respondents' counter affidavit under paragraph 4 (b) (c) and annexure NL-1 which portrays that the mortgaged property is a matrimonial property. I agree that the procedure in charging the same as security was followed but, if its title is passed to a third party before determining their right, the Applicant will suffer irreparable injury.

In considering the decision in **General Tyre EA Ltd Vs. HSBC Bank PLC** Misc. civil Application 35 of 2005 TLR 206 that, the court should balance the danger of granting and or not granting the temporary injunction, I agree with the Applicants that, if the injunction is not granted it may lead to the 1st and 2nd Applicants to remain homeless the injury which cannot be covered even if the case is decided in their favour. For purpose of preventing 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. In my view monetary compensation will not in any how remedy the situation due to the nature of the properties intended to be realised and the kind of injury likely to be suffered by the 1st and 2nd Applicant and their family.

On the last condition, that on balance of conveniency there will be mischief to be suffered, 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 Respondents. The Respondent's counsel submitted that, if restrained by this court from selling the mortgaged property, the 1st Respondent who is the lender will be in a real hazard as his business is lending money and if the amount lent to the 3rd Applicant remain unpaid the loan will continue to accrue and the Applicants property will not be sufficient to settle the Applicants liability to the 1st Respondent.

I understand that loan facilities are among the banking business. In my view, the 1st Respondent being financial institution whose main business is to lend money to its customers does not depend on a facility issued to one customer (the 3rd Applicant) to run a bank business. Thus, I do not see how the bank will be in real hazard just because the auction to one loan facility has been postponed by this court. Much as the ownership documents (certificate of titles) which are annexure NL-1 to the Respondents counter affidavit of the mortgaged property is still under custody of the 1st Respondent, if the main suit will be decided in

favour the Respondent, it 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. I therefore find merit in this application and proceed on granting the same. It was however contended by the Respondent that, the property deposited to the 1st Respondent by the 1st and 2nd Applicants as security does not comprise CT. No. 21391 rather it is Plot No. 235, Block GG Kimandolu Area Arusha City comprised under CT No. 21389. In their rejoinder, the Applicants did not address this contradiction on the title number but looking to the spouse consent which is part on annexures in the Respondents' counter affidavit, the property mortgaged comprise certificate of title no. 21389, Plot No. 235 Block GG. The certificate of title is also attached and it bears No. 21389 as well pointed out by the counsel for the Respondents and not disputed by the Applicants.

Therefore, an order for temporary injunction is granted in respect of disputed property in plot No. 235, Block GG Kimandolu Area Arusha City comprised under Certificate of Title No. 21389 located at Kimandolu area, Arusha City in the name of the 1st Applicant Gaudence Vincent Lyimo and 2nd Applicant Monica Gaudence Lyimo. The Respondents,

their agents, workmen or any other person related are restricted from selling, transferring or tempering in any how with the said property pending determination of the main suit unless there is court order to the contrary. In the upshot, the application is granted with no order for costs.

It is so ordered.

DATED at **ARUSHA** this 3rd day of November, 2022.




D.C. KAMUZORA

JUGDE