

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

MISC. LAND APPLICATION NO. 07 OF 2022

(Originating from Land Case No. 3 of 2022)

ELEN A. VASILIKAKIS.....APPLICANT

VERSUS

CRDB BANK PLC.....1ST RESPONDENT

YONO AUCTION MART AND CO. LIMITED.....2ND RESPONDENT

RULING

Last order date: 17/03/2022

Ruling date: 17/03/ 2022

MLYAMBINA J.

The Applicant is seeking for an order of temporary injunction to restrain the Respondents or their agents or servants from selling or disposing the suit premises to any person until the final disposal of the land in dispute between the parties herein. The instant application has been preferred under *inter alia Order XXXVII Rule 1 (a) and (b) of the Civil Procedure Code Cap 33 (R.E. 2019)*. The application is supported by the affidavit of Lazaro Joseph Hukumu.

It is alleged that; the Applicant is the registered owner of a piece of land comprised of 928 Acres under Title No. 10652 L.O. No. 12925 located at Magubike Village, Nzihi Ward, within Iringa Municipality in Iringa Region.

It is further deponed that; on December, 2009, the Applicant herein entered into a loan agreement with the first Defendant, subject of which the landed property in dispute was placed as security for the said loan. But surprisingly on 22nd September, 2017 the first defendant without any lawful justification did cease the Applicant's Bank account without any notification. The Applicant made efforts in realizing the wrongful act of the 1st Defendant by questioning her through letters and requesting for explanation and assistance for her Bank account to be released, unfortunately, her efforts turned futile.

It is further deponed that due to the act done by the first Respondent, the Applicant herein faced challenges in repaying back her loan as agreed because her freeze account was the same account used in repayment of the loan. Surprisingly, and without any lawful justification on 24th February, 2022, the second Respondent under instruction of the first Respondent did advertise in the gazette that she will be conducting public auction of the mortgaged property on 24th March, 2022 at 10:20 am.

It was the view of the Applicant that the act of the Respondents herein is unlawful act as the Applicant herein has never been served with default notices pursuant to the requirement of the law.

The Respondents, however, despite of being properly served with the application, never filed counter affidavit to oppose the application.

On 17th March, 2022 when the application was called for mention, learned Counsel Hafidhi Mbinjika while holding brief of Counsel Antipas Lakamu for

the Respondents told the Court that the Respondents are not objecting this application for interim injunction.

From the facts material to the application discerned from the affidavit filed by the Applicant in the light of the enabling provisions, the issues appearing to be necessary for the Court's determination are three: *One whether there are triable issues in the main suit upon which the Applicant stands high chances of success. Two, whether the Applicant will suffer irreparable injury if the application is not granted and; three, whether the balance of convenience is weighed in favour of the Applicant.*

In the celebrated decision of **Atilio v. Mbowe** (1969J HCD 284, Georges, CJ (as he then was) stressed on the above laid three proposition (issues) and held as follows:

It is generally agreed that there are three conditions which must be satisfied before such an injunction can be issued. That there must be a serious question to be tried on the facts alleged and probability that the plaintiff will be entitled to the relief prayed. Second that the Court's interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal rights is established, third that on a balance of convenience there will be greater hardship and mischief by the plaintiff from the withholding of injunction than will be suffered by Defendants from the granting of it. (Emphasis I supplied)

It is a settled law that in an application for injunction the Applicant must demonstrate and satisfy the Court that there is a prima-facie case or a strong case for trial which needs investigation and trial on merits. The Applicant must further establish that on the facts before the Court there is probability of the Applicant being entitled to the relief(s) claimed by him. The principle of which was well enunciated in the case of **Geffa v. Cassman Brown and Co. Limited** [1973] E.A. 35 in which justice Sorv (as he then was) had the following to say:

The conditions for the grant of an interlocutory injunction are now: I think well settled in East Africa. First an Applicant must show a prima-facie case with probability of success.

What ought to be looked at in the first test/principle/issue is the cause of action. This principle was expounded by Lord Mustill in **Channel Tunnel Group Ltd v. Balfour Bealty Construction Ltd** [1993] AC 334 at pp 360-362 in which he said:

The right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependent on the enforcement of a substantive right, which...although not invariably takes the shape of cause of action.

It is the view of the Court that the right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. In the light of the affidavit evidence before the Court, it is crystal clear that the Applicant is alleging on 22nd September, 2017 the first Defendant without any lawful justification did cease the Applicant's Bank account without any

notification. Further, the Applicant herein faced challenges in repaying back her loan as agreed because her freeze account was the same account used in repayment of the loan. It is further alleged that the Applicant herein has never been served with default notices pursuant to the requirement of the law.

In view of the above affidavit evidence, it is clear that there are serious triable issues to be tried by this Court. Such issues include; one, *whether the first Defendant without any lawful justification did cease the Applicant's Bank account without any notification*. Two, *whether the Applicant was served with the mandatory default notice*.

The second principle is on; *whether the Applicant will suffer irreparable injury*. The Applicant must prove before a prayer for injunction is granted that she would suffer irreparable injury if injunction as prayed is not granted and there is no other remedy open to him by which he can protect himself from the consequences of apprehended injury. This principle is reflected in the case of **Tanzania Breweries Limited v. Kibo Breweries Limited and Another** (1999) IEA34 in which Kalegeya, J (as then was) while citing with approval the landmark case of **Atilio v. Mbowe** (*supra*).

From the affidavit evidence it is clear that the Respondents have advertised to sell the mortgaged property. The Respondents do not challenge that their action causes irreparable damage to the Applicant which cannot be atoned by an award of damages. That is why the Respondent neither filed counter affidavit nor resisted the application anyhow. However, it is the Court's considered opinion that the Court must exercise this principle /test

carefully and judiciously. Lord Diplock in **American Cyanamid Company v. Ethicon Ltd** [1975] AC 396 noted that:

The Court should first consider whether, if the plaintiff were to succeed of the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the Defendant continuing to do what was sought to be enjoined between the time of application and the time for the trial. If the damages in the measure recoverable at common law would be an adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should be granted, however strong the Plaintiff's claim appeared at this stage.

This principle was also fortified in the case of **Central Bank of Kenya v. Giro Commonwealth Bank Limited and Another** [2007] 2 EA 93 in which it was held that:

An injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury and when the Court is in doubt, it will decide the application on the balance of convenience.

In the present application, basing on the facts stated in the affidavit, and being not objected by the Respondent, I hold that; if the suit mortgaged property is auctioned, the Applicant is likely to suffer irreparable injury.

On the last test of balance of convenience, the Court is of the findings that the convenience should be taken in parallel with rights of the parties and the legal principle, as it was decided in the case of **General Tyre EA Ltd v. HSBC Bank PLC** Misc. Civil Application No 35 of 2005 (unreported). Since there statements on evidence by the Applicant that the Respondent have freeze the account of the Applicants and are intending to auction the mortgaged property without serving her with the mandatory sixty days default notice, the Court is of the settled view that; further evidences are required during trial of the main suit. If injunction is not granted and the said property turns to have been sold and transferred, the comparative mischief, hardship or inconvenience which is likely to be caused to the Applicant by refusing the injunction will be greater than that which is likely to be caused to the Respondents by granting it.

In the end result, given the fact that in order for the application of injunction to be granted all the three conditions in **Atilio v. Mbowe** (*supra*) must exist, and taking into consideration that the Applicant has established all the three conditions, I find in the interests of justice, as I hereby do, grant this application. Since the Respondents have not troubled the Court and the Applicant in prosecuting the application for interim injunction, I award no costs. It is so ordered.



Y. J. MLYAMBINA

JUDGE

17/03/2022

A handwritten signature in blue ink, written over a circular line that encircles the text below.

Ruling delivered and dated 17th March, 2022 in the presence of Counsel Lazaro Hukumu for the Applicant and Hafidhi Mbinjika holding brief of Antipas Lakamu, Advocate for the Respondents.



Y. J. MLYAMBINA

JUDGE

17/03/2022

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