

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

**MISC. LAND APPLICATION NO. 88 OF 2022**

*(C/F Land Case No. 37 of 2021 High Court of Tanzania at Arusha)*

**MARIANA JOSEPH MAKOI ..... APPLICANT**

**VERSUS**

**EKARUWA NEMES MAKOI ..... 1<sup>ST</sup> RESPONDENT**

**STANDARD CHARTERED BANK TANZANIA LTD ..... 2<sup>ND</sup> RESPONDENT**

**MEMA AUCTIONEERS AND GENERAL BROKERS**

**& CO. LTD ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

30<sup>th</sup> November, 2022 & 22<sup>nd</sup> February, 2023

**TIGANGA, J.**

The Applicant is under certificate of urgency seeking for court orders pursuant to **Order XXXVII Rule (1) (a) and (4), section 68 (c) and section 95 of the Civil Procedure Code**, [Cap 33 R.E. 2019] on the following;

1. For *Ex-parte*; this Court has been asked to be pleased and issue an order for interim injunction to restrain the respondents and their agents, workmen or any other persons whatsoever from selling the suit property with C.T. 28869 L.O. No. 312203, Plot No.726, Block DD located at Sombetini within the city and region

of Arusha pending hearing and determination of this application inter-parte.

2. For *Inter-Parties*, this Court is asked to be pleased to issue an order for interim injunction to restrain the respondents and their agents, workmen or any other persons whatsoever from selling the suit property with C.T. 28869 L.O. No. 312203, Plot No.726, Block DD located at Sombetini within the city and region of Arusha pending hearing and determination of the main suit.
3. Costs to follow the events.

The application is supported by the affidavit of Mr. John Lairumbe Lairumbe, learned Advocate for the applicant. The 1<sup>st</sup> and 2<sup>nd</sup> respondents disputed the application and filed their counter affidavits to that effect. However, the 3<sup>rd</sup> respondent did not file her counter affidavit.

A brief history of the parties' dispute as gleaned from their affidavits can be traced back to 2014 when the 1<sup>st</sup> respondent executed a loan facility to the tune of Tshs. 310,000,000/= and the applicant's property with **C.T. 28869 L.O. No. 312203, Plot No.726, Block DD** located at Sombetini within the city and region of Arusha (suit property) was put as collateral to secure such loan. According to the applicant, she signed the 2<sup>nd</sup> respondent's documents as the guarantor to the 1<sup>st</sup> respondent without

knowing the content of the said loan, she thus claims that, she was tricked. She further claims that she was not aware if the 1<sup>st</sup> respondent had defaulted payment, she just saw an advertisement on the Jamvi la Habari Newspaper that her property, the suit land, was to be auctioned in a public auction by the 3<sup>rd</sup> respondent so as to pay the 2<sup>nd</sup> respondent's loan facility.

Following the above discovery, the applicant filed both Land Case No. 37 of 2021 and this application in this court seeking temporary injunction pending the final determination of the main suit i.e. Land Case No. 37 of 2021.

On the other hand, the 2<sup>nd</sup> Respondent refuted fact that, the applicant was not aware of what she was signing since the loan facility was not issued once but on four different occasions. The first loan facility was Tshs. 80,000,000/= issued on 23/09/2010, the second was Tshs. 94,500,000/= issued on 04/04/2012, the third was Tshs. 272,000,000/= issued on 21/10/2013 and the fourth was Tsh. 310,000,000/= issued on 10/12/2014. According to 2<sup>nd</sup> respondent, in all loan facilities they issued, the same suit property to secure the loan as collateral. He further deposed that, the applicant signed all deeds of variations on each loan hence, she cannot play ignorance card after the 1<sup>st</sup> respondent had defaulted

payments. More so, she was aware of 1<sup>st</sup> respondent's failure to repay the loan as required since she was fully notified of the same.

During hearing of this application which was conducted by way of written submissions, the applicant was represented by Mr. John Lairumbe whereas the 2<sup>nd</sup> respondent was represented by Ms. Ashura Mansoor Salum, both learned Advocates. The 1<sup>st</sup> and 3<sup>rd</sup> respondent did not bother to file their submissions.

Supporting the application, Mr. Lairumbe submitted that, the principles for granting temporary injunction were laid down in the case of **Atilio vs. Mbowe** (1969) HCD 284 as;

1. There are serious question of facts or issue to be tried and likelihood of the applicant to succeed.
2. The applicant will suffer irreparable loss which cannot be adequately remedied or attained by damages.
3. Balance of inconveniences; that the applicant will suffer grater loss than the respondent if an order for temporary injunction is not granted.

Starting with the first principle, Mr. Lairumbe submitted that, taking into account the facts presented by the applicant in her affidavit, there are several legal issues which need this Court's intervention. To support

his stance, the learned counsel cited the case of **Sukyakant D Ramji vs. Saving and Financing Limited and Another** [2000] TLR 121 which subscribed to the principles laid down in the case of **Atilio vs. Mbowe** (supra). He added that there are triable issues between the parties which require determination by this court one of which the applicant was tricked into signing a loan agreement in which her property was set as a collateral. He further argued that, the existence of triable issues should not be interpreted to mean that the facts at hand should declare the applicant a winner but show that although the evidence has not been given, the allegations so far made, *prima facie* portray the applicant as being aggrieved by the respondent's actions and presumably entitled to the reliefs sought in the main application.

It was the learned counsel's view that, the applicant herein has demonstrated triable issues against the respondent and that the cause of actions against the latter is not frivolous or vexatious.

Regarding the 2<sup>nd</sup> principle Mr. Lairumbe submitted that, it is without doubt that, the applicant is the one expected to suffer irreparable loss if an order for temporary injunction is not granted by this court. This is because the respondent is planning to sell the suit property unlawfully and eventually an eviction and transfer of the suit property to the 3<sup>rd</sup>

respondent which will cause irreparable loss to the applicant as she will be thrown to the streets with her family. However, should the respondent succeed in the main application, they will not be restrained from evicting the applicant from the suit land. The learned counsel referred the court to the case of **Kaare vs. General Manager Mara Cooperation Union** [1987] TLR 17 and **Hoffman La Roche and Com Industry vs. Secretary of the State for Trade and Industries** (1975) AC 296 which underscored the purpose of granting temporary injunction as preventing the applicant from irreparable injury while the main case is still pending.

As to the third principle which on balance of inconveniences, it was Mr. Lairumbe's submission that, the applicant will suffer greater loss than the respondent if an order for temporary injunction is not granted. More so, no irreparable loss is anticipated on the part of the respondent taking into consideration the fact that the loan advanced is still secured by the suit property. The learned counsel urged the court to grant a temporary injunction as prayed by the applicant as all the required tests have been proven.

In reply, Ms. Salum submitted that, the three conditions pointed out in the case of **Atilio vs. Mbowe** (supra) as submitted by the Applicant's

learned Advocate are essential and mandatory in granting temporary injunction. However, the applicant has not established the presence of all the requirements in the application at hand.

Starting with the 1<sup>st</sup> requirement on establishing a prima facie case against the respondent; it was Ms. Salum's submission that, the applicant failed to demonstrate or prove if there is a serious question to be tried by the court in respect of the allegations raised against the 2<sup>nd</sup> respondent. The fact that the applicant suspects foul game played by the 1<sup>st</sup> and 2<sup>nd</sup> respondent is a mere allegation that lacks feet to stand on and with no colour of right. She argued further that, the applicant dully executed the security documents devoid of any coercion and was given time to peruse each clause therein. In the circumstances, the fact that she was tricked into signing the loan security documents without knowing what she was signing is misplaced and an afterthought which this court should disregard for lacking substantiation.

The learned counsel added, the applicant consented for her property to be used as collateral, she voluntarily signed before the Commissioner for Oath and she even gave her passport photo. She claimed that, this application is a way of circumventing her liability to the 2<sup>nd</sup> respondent as a guarantor to the 1<sup>st</sup> respondent after he defaulted to

repay the loan. She referred this court to the case of **General Tyre East Africa Ltd vs. HSBC Bank PLC** [2006] TLR 60 where the court underscored the importance of customers/borrowers to fulfil their contractual obligation under lender/security agreements entered by the parties without court's interference.

Ms. Salum further submitted that, the presence of the main suit alone does not establish *prima facie* case against the respondents to entitle him an injunction order, there has to be a legal right which the applicant claims in the main suit. However, she failed to demonstrate such rights in the present application.

Regarding the second element on whether the applicant will suffer irreparable loss, it was Ms. Salum's submission that, the applicant has not demonstrated any danger of suffering any loss as a result of being denied injunctive orders. She argued that, the applicant mention in paragraph 14 of her affidavit that she will suffer irreparable loss but she did not explain further the instances of such irreparable loss claimed. She referred the court to the cases of **Giella vs Cassman Brown & Co Ltd** [1973] EA 358 and **General Tyre East Africa Ltd vs. HSBC Bank PLC** (supra) which underscored the importance of proving irreparable loss and defined



it as any damage suffered that could not be compensated in damages in case temporary injunction is not granted.

As to the last ground on the balance of convenience, Ms. Salum submitted that, the applicant has not substantiated any loss that she will suffer if the injunction order is not granted whereas the 2<sup>nd</sup> respondent is in danger of losing the outstanding monies loaned to the 1<sup>st</sup> respondent. As a result, the latter will suffer financial loss which will paralyse her lending power hence running bankruptcy. To cement this argument, she cited a number of cases including the case of **Christopher P. Chale vs. Commercial Bank of Africa**, Misc. Civil Application No. 653 of 2017 and **Lucy Anastazia Mkopoka vs. Allan Peter Mkopoka and 2 Others**, Misc. Land Application No. 15 of 2015.

Learned counsel further submitted that, borrowing from the principle of sanctity of contract, it is the parties themselves and not the court which made the contract for parties. She referred the court to the decision from the Court of Appeal of Guyana in the case of **Caledonian Insurance Co. vs. Ramkissoo** [1985] LRC 143 where it was held that, parties have fundamental right to interpret and enforce what they have agreed to in their contract. From this position, Ms. Salum averred that, the 2<sup>nd</sup> respondent had a right to issue a statutory Notice of Default and

serve the Applicant in accordance to **section 127 (1) of the Land Act**, [Cap 113 R.E. 2019]. That upon failure to comply, the 2<sup>nd</sup> respondent has right entitled by law as provided under section 126 of the same law to execute the remedies stated therein including the receiver and selling the mortgaged property. She prayed that the applicant's prayers be dismissed with costs. There was no rejoinder.

After I have gone through the parties' affidavits and their rival submissions the only issue of determination is;

***Whether the applicant deserves the grant of temporary injunction.***

It has been well established in a number of cases including the famous case of **Atilio vs. Mbowe** (Supra) as cited in the by parties' submission that, the court before granting an injunction has to gratify itself on **first**; there is a serious question to be tried on and probably the plaintiff will be entitled to the relief prayed, **second**; the court interference is necessary to protect the plaintiff from the kind of injuries which may be irreparable before his legal right is established and **third**; on the balance of convenience, the plaintiff will suffer mischief and hardship if the injunction is withheld than the defendant if injunction is granted.

In determining this application therefore, I will base on the above three basic principles as mentioned herein above and argued by both parties in extenso. Starting with the first principle, it is undisputed fact that the applicant's grievances of her rights as the owner of the suit property calls for determination which is yet to be finalised vide Land Case No. 17 of 2021. Although she does not dispute being a guarantor to the 1<sup>st</sup> respondent and the fact that her property, the suit property, is a collateral to the loan facility issued to the 1<sup>st</sup> respondent by the 2<sup>nd</sup> respondent, her main grievance is the fact that she was tricked into signing the guarantee to secure the said loan in dispute. This in my view needs more evidence which shows that there is prima facie arguable issue to be tried and finalised in the main suit.

Regarding the second principle, **Order XXXVII Rule (1) (a) of the Civil Procedure Code**, provides that;

*1. Where in any suit it is proved by affidavit or otherwise-  
a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit or suffering loss of value by a reason of its continued use by any part to the suit, or wrongly sold in execution of a decree; or...*

*the court may order temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting damaging, alienating, sale, loss in value, removal or disposition of the property as the court thinks fit, until the disposal of the suit or until further orders;*

Although the 2<sup>nd</sup> respondent argued that the applicant did not demonstrate how she will suffer irreparable loss but, in her submission, she averred that, unless the injunction is granted, the eviction and auctioning the suit property will make her and her family homeless. This, in my view is a plausible loss.

On the third principle whether there will be greater hardship and mischief suffered by the applicant by withholding of the injunction than will be suffered by the respondents from granting of it is answered in affirmative. From the affidavit and applicant's submission, it is undisputed fact that, the suit property was mortgaged to secure loan issued to the 1<sup>st</sup> respondent. Whether or not the applicant was tricked to be a guarantor, it will not change the fact that the suit property is still mortgaged and should the respondent succeed in the main suit, they will not be restrained from evicting the applicant from the suit property, sell it and repay the remaining amount of monies defaulted by the 1<sup>st</sup> respondent. In other words, it is my considered opinion that, the applicant will be more affected if the injunction is denied than the respondent.

For the foregoing reasons and due to the fact that, the main case is yet to be determined and the suit property is subject to such determination, I hereby grant temporary injunction restraining the

respondents and their agents, workmen or any other persons whatsoever from selling the suit property with C.T. 28869 L.O. No. 312203, Plot No.726, Block DD located at Sombetini within the city and region of Arusha pending hearing and determination of the main suit. Costs to follow the event.

It is so ordered.

**DATED** and delivered at **ARUSHA** this 22<sup>nd</sup> day of February, 2023



  
**J.C. TIGANGA**  
**JUDGE**