

IN THE HIGH COURT OF TANZANIA
(IN THE MWANZA SUB-REGISTRY)
AT MWANZA
MISC. LAND APPLICATION NO.33 OF 2023

GERALD GODFREY LUTALO..... APPLICANT

VERSUS

CRDB BANK PLC..... 1ST RESPONDENT

ACCURATE RECOVERY

AND AUCTIONS LTD.....2ND RESPONDENT

RULING

Date of Last Order: 16/05/2023

Date of Ruling: 06/06/2023

Kamana, J:

The applicant herein intends to move the Court to grant temporary injunction order to restrain the respondents from auctioning the suit properties situated in plot No. 45 Block "X" Capri Point and Plot No. 300 Block "L" Pasiansi, within Mwanza City pending hearing and determination of the Land Case No. 15 of 2023 between the applicant and the respondents.

The applicant herein is the administrator of the estate of the late Godfrey Kagoma Lutalo, the deceased who was the lawful owner of the

above-mentioned properties. On 1st July, 2006, a company named Nyamguruma Enterprises Ltd in which the applicant and the late Godfrey Kagoma Lutalo were Director and Managing Director respectively obtained a loan from the 1st respondent in the sum of Tshs.300,000,000/= whereby properties on Plot No. 45 Block "X" Capri Point and Plot No. 300 Block "L" Pansiansi were mortgaged to secure the loan. Later on, in October 2006, Nyamguruma Enterprise Co. Ltd obtained an additional loan of Tshs.300,000,000/= from the 1st respondent on similar terms and conditions. The affidavit reveals further that the loan has been fully repaid. It is further stated that the 1st respondent has instructed the 2nd respondent to auction the mortgaged property aforesaid purportedly to recover a loan advanced to the late Godfrey Kagoma Lutalo. The act has annoyed the applicant as a result he has preferred a civil suit against the respondents.

When the matter came up for hearing, Mr. A. K. Nasimire, learned counsel appeared for the applicant while the respondents enjoyed the services of Mr. George Mwaisondola, learned counsel. In his support submission, Mr. Nasimire submitted that his client is applying for a temporary injunction in respect of Plot No. "X" Capri Point, Mwanza City registered vide C.T. No. 0330034/15 and Plot No. 300 Block "L" Pansiansi,

Mwanza City registered vide C.T. No. 629 MZLR, pending hearing and final determination of the main suit. He prayed to adopt the affidavit of Gerald Godfrey Lutalo, the administrator of the estate of the late Godfrey Kagoma Lutalo to form part of the submission.

He submitted further that there are three conditions to be met before the application succeeds which are; first, whether there is a triable issue or prima facie case, second, the likelihood that the applicant will suffer irreparably if the application is not granted, and third is the balance of convenience. He cited the decision in the case of **Atilio v. Mbowe** [1969] HCD 284 in which the principles for grant of injunction orders were pronounced.

On prima facie case, the learned counsel contended that the current application originates from Land Case No. 15 of 2023 in which the applicant has raised a serious question tried by the Court regarding the act of the second respondent to advertise the sale by public auction at the instance of the 1st respondent of the landed properties. He was of the view that the main suit has a huge probability of succeeding since the loan has been fully repaid.

Concerning the likelihood of the applicant suffering an irreparable loss, if the application is not granted, counsel for the respondent

submitted that the applicant is in grave danger of being struck by a massive financial blow if the injunction is not granted pending determination of the main suit.

On the balance of hardship likely to be suffered by the applicant and respondent if an injunction is withheld than granted. Mr. Nasimire, learned counsel averred that the balance of hardship falls greater onto the applicant if an injunction is not granted compared to the respondents when it is granted. He added that granting of this application will minimize the risk of depriving beneficiaries of the estate of the late Godfrey Kagoma Lutalo while the respondents will have nothing to lose as the properties in question are immovable properties dully registered.

Lastly, he beseeched this Court to allow this application.

In the reply submission, Dr. Mwaisondola, learned counsel for the respondents prefaced by objecting to the application and prayed that the contents of the counter affidavit be adopted. Concerning the principles which guide Courts in granting orders of temporary injunction he was on the same understanding with Mr. Nasimire, learned counsel for the applicant. He further argued that conditions stated in the case of **Atilio v. Mbowe** (Supra) are to be proved cumulatively to warrant a grant of temporary injunction.

In respect of the prima facie case, Dr. Mwaisondola was of the view that the applicant was not a borrower and therefore never privy to the loan agreement. According to him the applicant as mortgagor has no right to speak about the rights under the loan agreement, hence there is no serious question to be tried.

On the likelihood that the applicant will suffer irreparably if the application is not granted, he contends that since the 1st respondent is a banker and Nyamguruma Enterprises Co. Ltd defaulted to repay the loan, the Court cannot interfere with recovery measures under any circumstances. To bolster his contention, he referred to the decision of this Court in the cases of **General Tyre East Africa Ltd v. HSBC Bank PLC** [2006] TLR 60, **Peace Makers Express Co Ltd v. Mkombozi Commercial Bank Ltd**, Misc. Application No. 13 of 2019 at Mwanza (Unreported), **SME Impact Fund CV and Another v. Agroserve Company Ltd**, Civil Appeal No. 9 of 2018 HC Bukoba (Unreported) and **Rose Nyatega v. Yasin Mohamed Ngozi & Stanbic Bank Tz Ltd**, Misc. Land Application No. 3 of 2021. He insisted that since the Bank is legally allowed to lend and recover loans, it stands to suffer more if the application is granted. In the end, the learned counsel prayed for the application to be dismissed with costs.

Having heard parties' submissions, the question which arises at this stage of proceedings is whether the application has met the requirements warranting for it to be granted. In determining that question, I will be guided by the celebrated case of **Atilio v. Mbowe** (Supra). In that case, it was observed that the Court, before issuing an order for maintenance of the status quo, must consider that the Applicant has met the following conditions:

1. The applicant must demonstrate the existence of a serious triable issue on the alleged facts and probability that the applicant will be entitled to the relief prayed.
2. The Applicant must demonstrate that the court's interference is necessary to protect the applicant from any kind of injury which may be irreparable before his legal rights are established.
3. The Applicant must demonstrate that on the balance of convenience, there will be greater hardship suffered by him from withholding the prayed order that will be suffered by the Respondent from granting it.

Starting with the existence of a serious triable issue, the affidavit in support of the application as deposed by the applicant states that there is

a main suit in which the applicant seeks declaratory order that the second respondent's advertisement to auction the landed properties at the instance of the first respondent is unlawful. The existence of such a suit so far as the orders sought are concerned convinces me that there is a triable issue. I understand the arguments of Dr. Mwaisondola that there is no triable issue as the dispute was adjudicated by this Court in Civil Case No. 24 of 2011 between Nyamguruma Enterprises Co. Ltd and Others v. CRDB Bank PLC and Another. However, I am not prepared to go along with his line of arguments as doing so will have an impact of prejudging the impending suit which is not the domain of this Court when hearing and determining an application of this kind.

Concerning whether the 1st Respondent will suffer irreparable loss, this Court thought it pertinent to understand what irreparable loss means. In the case of **Morgan Air and Sea Freight Logistics Limited v. Serengeti Fresh Limited**, Misc. Civil Application No. 10 of 2021, this Court (Mteule, J.) had this to state:

'At this point the conceptual and contextual meaning of irreparable loss is not a new notion in our jurisprudence. In short, it is simply measured by an injury which cannot be recovered by way of damages or if recoverable, not

*sufficiently or adequately. (See **Kaare v. General Manager Mara Cooperation Union [1924] Ltd** (1987) TLR 17).*

It is clear from the above passage that irreparable loss must be the one that cannot be remedied sufficiently by way of damages. Given that, this Court asked itself whether the alleged irreparable loss is likely to be experienced by the applicant. The answer is negative.

The thirteen-paragraphed affidavit deposed by the applicant does not state in clear terms what irreparable loss is imminent to be suffered by the beneficiaries of the estate of the late Godfrey Kagoma Lutalo or persons interested therein if the sought order is not granted. A mere statement that there is a likelihood that beneficiaries of the estate or persons interested therein are to suffer irreparable loss without establishing how they will suffer is insufficient to warrant granting of the temporary injunction order. Further, the affidavit is silent as to whether the loss likely to be suffered is not reparable by way of damages.

At this juncture, it is imperative to note that for an application for the maintenance of the status quo to succeed, both three conditions enunciated in Atilio's case must cumulatively be met. This is a well-established position that has been taken by this Court in several cases. In

the case of **Denis Mkabai and Other v. Kinondoni Municipal Council and Other**, Misc. Land Application No. 366 of 2022, this Court (Msafiri, J) stated:

'Basing on the principle set out in the case of Attilio vs. Mbowe (supra) and other numerous cases referred to in this application that the three conditions must be met cumulatively and not alternatively...'

Given this position and taking into consideration my holding that the applicant did not substantiate the loss to be suffered, it will serve no purpose to determine the third condition. Forthwith, the application is dismissed with costs.

It is so ordered.

DATED at MWANZA this 6th day of June, 2023.



KS KAMANA

JUDGE