

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI SUB -REGISTRY

AT MOSHI

MISC. LAND APPLICATION NO. 11180 OF 2024

(C/F LAND CASE NO. 11236/2024)

ELIZABETH MARO MINDE (*As Administrator of estate of the late Pascal Joseph Mlay alias Paschal Joseph Mlay*)

..... **APPLICANT**

VERSUS

ROSEMARY PASCHAL MLAY **1ST RESPONDENT**

KENYA COMMERCIAL BANK (T) LTD **2ND RESPONDENT**

YONO AUCTION MART & CO LTD **3RD RESPONDENT**

FELIX JOSEPH MANENO **4TH RESPONDENT**

RULING

29/05/2024 & 10/06/2024

SIMFUKWE, J.

The applicant herein seeks temporary injunction pending determination of Land Case No. 11236 of 2024. The application was filed under

certificate of urgency under **Order XXXVII rule 1(a)(b) of the Civil Procedure Code**, [CAP 33 R.E 2019]. The applicant prayed for ex parte and inter partes orders as follows:

EX-PARTE

- 1. That this Honourable Court be pleased to grant an Interim Injunction Order restraining the Respondents, their agents, workers or anybody else from occupying, selling, transferring or doing anything which is prejudicial to the Applicant's interests in suit properties namely Plot No. 5 Block XX, Zone III, Burton/Liwali Street, Moshi Township L.O No. 16047 C.T. No. 056040/37 and Plot No.1, Block Z, Section III, Moshi Township L.O No.21760, C.T. No. 056040/99, and that the status quo be maintained pending determination of the Application interparties.*

INTERPARTIES

- 1. That the Respondents, their agents or workmen be restrained from disposing off or alienating the aforesaid*

*suit properties namely Plot No. 5 Block XX, Zone III,
Burton/Liwali Street, Moshi Township L.O No. 16047
C.T. No. 056040/37 and Plot No.1, Block Z, Section III,
Moshi Township L.O No.21760, C.T. No. 056040/99.*

*2. That status quo as of today be maintained pending
determination of the main suit.*

3. Costs for the application be provided in the due course

The application was supported by an affidavit sworn by the applicant which was contested by the joint counter affidavit of the 2nd, 3rd and 4th respondents which was sworn by Baby Batano, Principal Officer of the 2nd respondent, Felix Joseph Maneno (4th respondent) and Sakina Omary, the principal officer of the 3rd respondent.

Briefly, what is deduced from the parties' pleadings is that, the applicant herein was appointed by Moshi Urban Primary Court to be administratrix of the late Paschal Joseph Mlay. In the course of her administration, the properties with registration No. L.O No. 16047 C.T. No. 056040/37 Plot No. 5 Block XX, Zone III, Burton/Liwali Street, Moshi Township and L.O No.21760, C.T. No. 056040/99 Plot No.1, Block Z, Section III, Moshi Township which she claimed to be the property of the deceased were

negligently and recklessly mortgaged to the 2nd respondent by the 1st respondent without the consent of the beneficiaries. In pursuit of negligent and reckless acts of the 1st respondent, the 2nd respondent granted loan to **SHELL COMPANY** which deliberately defaulted payment thereby exposing the suit properties to great danger. Then, the 3rd respondent purported to sell the suit property illegally through public auction via Habari Leo Newspaper dated 16th April 2023. The 4th respondent purporting to have acquired interest in the suit properties issued eviction notices to tenants in the suit properties, disconnected water and electricity in the suit premises, demolished the house on Plot No. 1, Block Z, Section III and threatened security of tenants and their properties. Following such acts, the applicant instituted Land Case No. 11236 of 2024 to determine the negligent and reckless acts of the respondents. Meanwhile, she is applying to be granted temporary injunction pending determination of the said case.

During the hearing, the applicant was represented by Ms. Diana Solomon, learned counsel while the respondent was represented by Mr. Godfrey Saro, learned counsel.

On the outset, Ms. Diana for the applicant adopted the applicant's affidavit to form part of her submission.

Supporting the application for temporary injunction, Ms. Diana relied on the case of **Atilio v. Mbowe (1969) HCD** at page 284 where conditions for granting temporary injunction were stated to the effect that: **First**, there must be serious question to be tried on the facts alleged and probability that the plaintiff will be entitled to the relief prayed. **Second** the court's interference is necessary to protect the applicant from the kind of injury which may be irreparable before his/her legal right is established. **Third**, on balance of convenience there will be greater hardship and mischief suffered by the applicant from withholding the injunction than will be suffered by the respondent from granting it.

Submitting in respect of the first condition, Ms. Diana elaborated that, the applicant has filed Land Case No. 11236 of 2024 which is still pending in this court. Thus, the temporary injunction aims to stop the respondents so that the main suit is determined. She explained further that, it is necessary for the court to interfere because the respondents have negligently and recklessly mortgaged the suit premises without the consent of the beneficiaries which led to the demolition and eviction of the tenants resulting to great losses to the beneficiaries. She stated that,

for the respondents not to continue doing these dubious circumstances, this court's interference is necessary to protect the applicant.

Arguing in support of the third condition, the applicant's learned counsel said that it is the applicant who will suffer more if the injunction is not granted than the respondents if it is granted. She added that the beneficiaries will suffer more if the injunction is not granted for destruction which will occur both economically and physically.

Based on the three conditions provided in **Atilio's** case, the learned counsel prayed this court to be pleased to grant interim injunction pending determination of the main suit which is also before this court.

In reply, Mr. Saro adopted the joint counter affidavit of the respondents to form part of his submission. He submitted that as per the ex parte prayers in the chamber summons, the court should not grant the same since the parties have already appeared inter parties.

Opposing the submission of the learned counsel for the applicant, Mr. Saro subscribed to the case of **Atilio V. Mbowe** (supra) together with the three conditions prescribed in the said case cited by Ms Diana.

On the first condition on the issue of serious case to be tried and probability of plaintiff's high chances to win; the learned advocate did not

object the fact that there is a pending main suit between the parties. However, he was of the view that the counsel for the applicant has not shown in her submission the chances of the applicant to win the said case. That, she has not stated why the applicant will succeed in the main case and left the said ground hanging. Mr. Saro was of the opinion that it seems that the case is not serious and there are no chances to succeed but rather trying to buy time for unnecessary reason. He said so due to the fact that there is multiplicity of cases that were filed before the District Land and Housing Tribunal by the same parties that are yet to be tried, regarding the same subject matter and same issues. He prayed this court to take a judicial notice of existence of Application No. 234 of 2023 before the DLHT, which is yet to be determined. Also, he informed this court on the existence of Application No. 161 of 2023 before the DLHT at Moshi, which is also yet to be determined and Application No. 66 of 2023 before the same tribunal. He argued that the three applications are among five applications before the DLHT in which they are praying for temporary injunctions. He contended that the acts of the applicant aim to play around the courts and deny rights of the respondents.

Furthermore, Mr. Saro referred to their counter affidavit and argued that the 4th respondent is a bona fide purchaser who bought the suit premises

from the 3rd and 2nd respondents at an auction. The properties were placed as a collateral by the 1st respondent as administratrix of the late Paschal Joseph Mlay. Mr. Saro explained that based on the stated facts, the only option available to the beneficiaries or to the current administratrix of the estate of the late Paschal Joseph Mlay (the applicant herein) is to challenge the matter or former administratrix for her acts under normal civil suit or probate cause if at all they think their rights were prejudiced.

In addition, Mr. Saro observed that the argument that the beneficiaries' interest will be prejudiced is an afterthought because there is no affidavit sworn by beneficiaries saying the same and neither of the beneficiaries has been added as party to this application.

Contesting the second ground that the courts interference is necessary before the applicant suffers irreparable loss before her legal right is established; particularly on the argument that the said property was recklessly mortgaged without consent of beneficiaries, it was replied that the said property was properly mortgaged as the first administratrix had that capacity even without the consent of beneficiaries. That, the administratrix had full right to do the same for the interest of the estate which she was administering. Mr. Saro informed the court that to date,

there is no beneficiary before any court lamenting or pursuing any case stating that his interests were prejudiced and that the said properties were mortgaged without their consent. Thus, there is no any serious issue that needs court interference as there is no irreparable injury on part of the applicant.

On the third and last ground on balance of probability, Mr. Saro submitted that the one who might suffer is the 4th respondent who is the bona fide purchaser who has the right to enjoy his property which was purchased legally than the applicant who has no interest over the property. He prayed that the status quo should not be maintained and the 4th respondent should not be restrained from enjoying his property as he is a bona fide purchaser.

In rejoinder Ms. Diana insisted that there is need for the temporary injunction to be granted because there is a pending case, Land Case No. 11236 of 2024. He faulted the respondents' learned counsel for arguing the main suit instead of this application by making reference to what had been said in respect of the 4th respondent. She said those were the things to be argued in the main suit and not in this application.

Responding to the prayer of taking judicial notice of the applications alleged to be pending before the DLHT, Ms. Diana submitted that there is no proof of existence of the said applications and the same were not pleaded in the counter affidavit. She maintained that there is a serious case to be tried and temporary injunction should be granted.

On the allegations that the beneficiaries were supposed to institute a civil case or probate cause, Ms Diana replied that it should be noted that the proper case to be filed is land case because the administratrix was given mandate of the suit lands which are subject of this application of temporary injunction by beneficiaries as verified by the applicant in her affidavit.

On the second condition, the learned counsel for the applicant stressed that the disputed properties were negligently mortgaged by the 1st respondent in various circumstances. She implored this court to interfere and protect the applicant by granting temporary injunction pending determination of the main suit.

On the last argument, Ms. Diana expounded that the applicant and the beneficiaries have a right to their suit property that was left by their late Paschal Joseph Mlay. That, the same was mortgaged recklessly and

negligently. Hence, court's interference is required for the interest of beneficiaries and administratrix of the estate.

I have examined the affidavit in support of the application, the joint counter affidavit of the respondents and submissions of the learned counsels of both parties. The issue for determination is *whether the applicant has established the prescribed conditions for the temporary injunction to be granted.*

The applicant has moved this court under **Order XXXVII rule 1(a) and (b) of the Civil Procedure Code** (supra). As rightly submitted by both counsels, there are three conditions which must be complied with for temporary injunction to be granted as expounded in the case of **Atilio v. Mbowe** (supra).

Starting with the first condition whether there is a serious issue to be tried; it is undisputed fact that there is a pending case in respect of the deceased's properties which is yet to be determined by this Court. That is Land Case No. 11236 of 2024. Therefore, there are serious and arguable issues to be tried by the Court.

Concerning the second condition whether irreparable loss will be suffered by the applicant, **Order XXXVII Rule 1 (a) of the Civil Procedure Code**, which is the enabling provision of this matter, 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 of 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 court may **by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, 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.***"Emphasis added

In the case of **Abdi Ally Salehe vs ASAC Care Unit Limited & Others (Civil Revision No. 3 of 2012) [2013] TZCA 179** (30 July 2013)

[Tanzlii] it was held that:

"Once the court finds that there is a prima facie case, it should then go on to investigate whether the applicant

stands to suffer irreparable loss, not capable of being atoned for by way of damages. There, the applicant is expected to show that, unless the court intervenes by way of injunction, his position will in some way be changed for the worse; that he will suffer damage as a consequence of the plaintiff's action or omission, provided that the threatened damage is serious, not trivial or minor, illusory, insignificant, or technical only. The risk must be in respect of a future damage..."

In the matter at hand, the properties which are subjects of administration according to paragraph 3 of the applicant's affidavit are the properties of the deceased which the applicant complained that were negligently and recklessly mortgaged to the 2nd respondent by the 1st respondent. Based on such facts, I am of considered opinion that since the estate of the deceased is not yet administered to date, then it is prudent for the status quo to be maintained pending determination of the Land Case.

Moreover, since it is undisputed fact that the applicant was dully appointed by the court, then I am satisfied that she is representing and defending the interests of the beneficiaries. Respectfully to Mr. Saro, the argument that there are no beneficiaries before any court complaining

that their interests are prejudiced is unfounded. As I have already stated, the Administratrix of the estate of the deceased is protecting the interests of the beneficiaries. Therefore, without protecting the properties of the deceased from being wasted by the respondents or any other person, the beneficiaries are likely to suffer irreparable loss.

Mr. Saro tried to alert this court on existence of several applications before the District Land and Housing Tribunal. Also, he stated that the 4th respondent is a bona fide purchaser. As correctly submitted by Ms Diana, the respondents did not depone in their counter affidavit the presence of several applications before the District Tribunal. Thus, the judicial notice is a mere statement from the bar which cannot be considered and was never raised as a preliminary objection. Regarding the issue of a bona fide purchaser, with all due respect to the learned counsel of the respondents, in the application of this nature the respondent is not expected to pre-empt the pending suit. See **SARKAR ON CODE OF CIVIL PROCEDURE**, 10th Edition, Volume 2, at page 2011 where it is stated that:

" In deciding such applications, the court is to see only a prima facie case, which is one such that it should appear on the record that there is a bona fide contest between the

*parties and serious questions to be tried. So, at this stage the court cannot prejudge the case of either party. **It cannot record a finding on the main controversy involved in the suit;***"Emphasis supplied

See also the case of **Alli Saidi Kurungu & Others vs Administrator General & Others** (Civil Appeal No. 148 of 2019) [2023] TZCA 17279 (Tanzlii) at page 19.

On the last condition whether there will be greater hardship to be suffered by the applicant by withholding the injunction than will be suffered by the respondents if the application is granted; I am of considered opinion that the applicant side may suffer irreparable loss if this application won't be granted. In case this application is not granted, then the pending land case as well as the probate matter will be useless. Thus, it is of paramount importance for the injunction to be issued pending determination of the main case in order to prevent it from being nugatory.

In the upshot, I hereby grant temporary injunction restraining the respondents, their agents, workers or anybody else from occupying, selling, transferring or doing anything which is prejudicial to the applicant's interests in the suit properties namely Plot No. 5 Block XX,

Zone III, Burton/Liwali Street, Moshi Township L.O No. 16047 C.T. No. 056040/37 and Plot No. 1, Block Z, Section III, Moshi Township L.O No. 21760, C.T. No. 056040/99, until final determination of Land Case No. 11236 of 2024. No order as to costs.

It is so ordered.

Dated and delivered at Moshi this 10th June 2024.



X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

10/06/2024