

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC. COMMERCIAL APPLICATION NO. 163 OF 2020**

**(Arising from Commercial Case No. 100 of 2020)**

**MOHAMED ABDILLAHI NUR ROBERRY**

**(Suing in his capacity as an administrator of the**

**Estate of MAHAD ABDILLAHI NUR) ..... APPLICANT**

**VERSUS**

**BANK OF AFRICA TANZANIA LIMITED.... 1<sup>ST</sup> RESPONDENT**

**VIGU TRADING COMPANY LIMITED .....2<sup>ND</sup> RESPONDENT**

**(necessary party)**

**RULING**

**B.K. PHILLIP, J**

The applicant herein has lodged this application under the provisions of section 68 (i) and (e), Order XXXVII rule 1 (a) and 8 (a) of the Civil procedure Code Cap 33. R.E. 2019 (Henceforth "the CPC") praying for the following orders;-

- (a) This Honorable Court may be pleased to grant an interim order to restrain the 1<sup>st</sup> respondent, its workmen or agents from transferring the property held at Plot No. 61 CT No. 31870 Jangwani Beach Area Dare es Salaam to the purported buyer

by virtue of power of sale pending the determination of Commercial Case No. 100 of 2020.

- (b) This Honorable Court be pleased to order the 1<sup>st</sup> respondent to deposit CT No. 31870 in Court and the Court be pleased to detain the said title pending the determination of the suit as the 1<sup>st</sup> respondent, due its conduct is not trustable to hold the title in its custody.
- (c) The respondents be condemned to pay the costs of this application.

The application is supported by two affidavits, the 1<sup>st</sup> one is affirmed by Abdillahi Nur Gulled (the father of the late Mahad Abdillahi Nur and the applicant herein), whereas the second one is affirmed by Falastin Ali Abdi, the widow of the late Mahad Abdullahi Nur. The 1<sup>st</sup> respondent's principal officer Ms Joyceline Kaiwa, swore counter affidavit in opposition to the application.

I ordered the application to be disposed of by way of written submissions. The learned Advocate Gabriel Mnyele filed the submissions in support the application and the learned Advocate Mwang'eze Mapembe filed the submission in opposition to the application.

A brief background to this application is that, it arises from Commercial Case No. 100 of 2020 which is pending for hearing in this court, (hereinafter to be referred to as the "Main Case"). In the Main Case the applicant herein has sued the respondents praying for the following reliefs;

- a) A declaratory order that the mortgaged property, on Plot No. 61 Jangwani Beach Area, CT No. 31870 is not liable for sale as the loan over which it was mortgaged has been already paid fully.

- b) A declaratory order that the purported sale of the house at Plot No. 61 Jangwani Beach Area CT No. 31870 is illegal null and void.
- c) A declaratory order that the deceased's legal representative (the plaintiff) is still the lawful owner of the said house.
- d) General and punitive damages as the court may determine and costs.

The applicant's allegations in the Main Case are as follows; That the late Manad Abdillahi Nur mortgaged his property located at Plot No. 61 Jangwani Beach Area CT No. 31860 as security for the loan that was granted to the 2<sup>nd</sup> respondent (Vigu Trading Company Limited). Also, the loan was secured by specific debenture on vehicles issued by the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent paid the whole of the loan amount over which the deceased's property was mortgaged. The 1<sup>st</sup> respondent without colour of right served the applicant with a default notice. The applicant took initiative to resolve the issue by negotiating with 1<sup>st</sup> and 2<sup>nd</sup> respondents. However, on 3<sup>rd</sup> day of October 2020, the 1<sup>st</sup> respondent acting through a purported auctioneer whom the plaintiff's relatives who were in the suit premises could not identify him, did illegally and fraudulently conduct an auction of the deceased property contrary to the law. The aforesaid auction was tainted with a number of irregularities, to wit; the auctioneer did not advertise the said auction in any newspaper, the auctioneer did not give the plaintiff fourteen (14) days notice as required under the law and the 1<sup>st</sup> respondent did not issue a final demand notice to the plaintiff, just to mention a few.

Now, back to the merits of the application, in his submission Mr. Mnyeje pointed out that, the conditions required to be established for the Court to

grant an injunctive order like the one sought by the applicant in this application are as follows; there ought to be a pending suit unless there is an emergency situation or the filing of the suit is subject to expiration of the statutory notice issued under the law, the application has to be made by way of chamber summons supported by affidavit and the injunction sought must be equitable. He went on to submit that injunctive orders are granted under the Court's discretion. Relying on the case of **Giele Vs Cassman Brown (1973) EA 420**, Mr. Mnyele submitted that Courts have developed the following principles which they normally rely on while exercising their discretionary powers in granting injunctive orders;

- (a) The applicant must establish or make out a *prima facie* or an arguable case with a probability of success.
- (b) Normally, an injunction will not be granted unless it can be shown that the applicant is likely to suffer irreparable injury which cannot be adequately compensated by an award.
- (c) If the Court is in doubt, it should decide on a balance of convenience.

Other cases cited by Mr. Mnyele in relation to the principles stated herein above are as follows; **Atilio Vs. Mbowe (1969) HCD, 284** and **Marungu Sisal Estate Limited Vs. George Nicholas Efstathiou and two others, Commercial case No. 27 of 2000** (unreported). Mr. Mnyele contended that the applicant herein has met all the required conditions for this Court to grant the orders sought in this application as there is a pending Main Case (Commercial Case No. 100 of 2020) where this application arises from, which contains serious triable issues. The same have been pointed out in the affidavits in support of this application, to wit, the 1<sup>st</sup> respondent acting through a purported auctioneer illegally and

fraudulently conducted an auction of the suit property contrary to the law and without making any advertisement of the auction.

Moreover, Mr Mnyele submitted as follows; that the loan amount had already been paid by the 2<sup>nd</sup> respondent who is the principal borrower. If the orders sought in this application will not be granted, the applicant will suffer irreparable loss that cannot be compensated by an award of damages. Referring this court to contents of the affidavit sworn by Falastin Ali Abdi, Mr. Mnyele submitted that, the deceased left a widows and four children who are residing in the suit property which was the deceased's matrimonial home. If the suit property is transferred to the purported purchaser, the widow and the deceased's children will be homeless as they will evicted from the suit premises. Loss of home, materially and mentally cannot be atoned by way of damages, contended Mr Mnyele. With regard to the balance of convenience, Mr. Mnyele contended that if this application will not be granted, the applicant is likely to suffer inconvenience than the respondents as the deceased's family will be forced to find new accommodation and that task will be shouldered by the plaintiff who is the administrator of the deceased's estate. He implored this court to grant the application

In rebuttal, Mr. Mwang'eza was in one direction with Mr. Mnyele as far as the conditions and principles applicable in determination of an application for injunction like the instant application. However, he insisted that the applicant has a duty to supply the certain facts and evidence to prove the prerequisite conditions stated in the case laws which exists, Mr. Mwang'eza contended that the applicant has failed to meet the required conditions to move this court to grant this application on the following grounds to wit , there is no *prima facie* case established by the applicant because it is not

in dispute that the 1<sup>st</sup> respondent granted credit facility to the 2<sup>nd</sup> respondent and the deceased mortgaged the suit property to secure the loan granted to the 2<sup>nd</sup> respondent. The loan amount has not been repaid as agreed, that is why in his arguments Mr. Mnyele was questioning as to why the 1<sup>st</sup> respondent did not start realizing the motor vehicles, the properties of the 2<sup>nd</sup> respondent instead of auctioning the suit property. According to Mr. Mwang'eza that argument is contradictory to the applicant's contention that the principal borrower paid the whole of the loan amount. He insisted that under the above contended set of facts, there are no triable issues, since the applicant failed to bring any bank statement to substantiate that the whole of the loan amount has been paid. The letters annexed to the Affidavit shows clearly that there is outstanding loan amount, contended by Mr Mwang'eza. Furthermore , he pointed out that this court should not issue the injunctive order sought as it is aimed at obstructing the 1<sup>st</sup> respondent from exercising its contractual right with respect to loan recovery measures contrary to the law. To Cement his arguments he cited the case of **Agency Cargo International Vs. Eurafrican Bank (T) Limited, Civil Case No. 44 of 1998** (unreported) and **General Tyre EA Limited Vs HSBC Bank PLC (2006) TLR 60**.

As regards the applicant's concern on the way the auction was conducted, Mr. Mwang'eza submitted that, the plaintiff was issued with a statutory notice and the procedures for the auction were all adhered to and the same was properly done. Mr Mwang'eza was of the view that the applicant has not established that if this application is not granted the applicant will suffer irreparable loss as required by the law. The affidavits in support of

this application were supposed to contain particulars regarding the claimed irreparable loss to enable this court to exercise its discretion, but both affidavits have no such particulars, contended Mr Mwang'eza. To bolster his arguments he cited the case of **Christopher P. Chale Vs. Commercial Bank of Africa, Misc. Civil Application No 635 of 2017** (unreported). Relying on the case of **National Furnishers Ltd and Another Vs. Exim Bank (T) Limited and 2 others, Misc. Land Application No. 1002 of 2016** (unreported), Mr Mwang'eza submitted that the 1<sup>st</sup> respondent is a reputable financial institution capable of indemnifying the applicant for whatever loss, should the main case be decided in favour of the applicant. Thus, the applicant will not be at any risk of suffering from any loss which would not be compensated.

With regard to the balance of convenience, Mr. Mwang'eza submitted that the balance of convenience stands against granting this application. He insisted that the outstanding loan amount to a tune of USD 616,548.56 is a huge amount of money, if it is not immediately recovered will affect the 1<sup>st</sup> respondent's lending capacity and it will be harder for the 1<sup>st</sup> respondent to continue with its banking business thus, naturally, it will suffer more hardship than the applicant. The main objective of security is to provide sources of satisfaction of the debt covered by it to enable the bank to continue with the banking business, maintained, Mr. Mwang'eza.

In addition Mr. Mwang'eza raised the following concerns; that in the main suit as well as in this application, the applicant has not joined the *bonafide* purchaser of the suit property who is a necessary party in this matter. The orders that are going to be issued by this court will definitely affect the purchaser of the suit property and he/she will be denied his/her right to be

heard. Without joining the *bonafide* purchaser, this court will not be able to issue effective and executable orders. He insisted that it is a cardinal principle of natural justices that a person should not be condemned unheard. To cement his arguments he referred this court to the case of **Ridge Vs. Baldwin (1964) AC40** and **Furnell Vs. Whangarei High School Board (1973) AC 600**. Explaining on who is a necessary party, Mr. Mwang'eza referred this court to the case of **Abdulatif Mohamed Hamis Vs. Mehboob Yusuf Osman and another, Civil Revision No. 6 of 2017** (unreported) ,in which the Court of Appeal quoted with approval the case of **Benares Bank Limited Vs. Bahwandas Air (1948) All 18**, in which the court held as follows;

*"First, there has to be a right of relief against such a party in respect of the matters involved in the suit and, Second the Court must not be in a position to pass an effective decree in the absence of such a party. The foregoing benchmarks were described as true tests by Supreme Court of India in the case of Deputy Comr. Hardoi Vs. Rama krishma A.I.R. (1953) S.C.521"*

Mr. Mwang'eza implored this court to dismiss this application with costs. Having analyzed the submissions made by the learned Advocates, let me start with the concern on non- joinder of the purchaser of the suit property since, if same sails through will automatically dispose of this application. The court's records show that Mr. Mnyele did not file any rejoinder submission, therefore he did not make any response to this concern. I wish to point out the following; there is no dispute that among the applicant's allegations in the Main Case is that the suit property was auctioned. Once one talks of an auction, automatically there must be a purchaser of the property in question/issue, whether *bonafide* purchaser



or not. The applicant has termed the auction as a "purported auction". In the affidavit sworn by Falastin Ali Abdi it is stated that the deponent was not able to identify the auctioneer as he did not introduce himself to her and the name of the purchaser was not disclosed. What is deposed in the aforesaid affidavit suggests that there was no auction. For ease of reference and understanding what I have said herein above, let me reproduce the relevant paragraph from the affidavit of Falastin Ali Abdi hereunder;

*4. "I state that at the time the purported auction was done, there were no other people other than the one who announced that the house has been sold. No name of the purchaser was announced. The man who pronounced the price did not mention his name nor the company that he came from. I never held any advertisements around to announce the sale of the said house. And no advertisements were plastered on the house or around the fence to announce or advertise the sale of the house."*

In paragraph 11 of the main case the applicant stated that on 3<sup>rd</sup> October 2020, the 1<sup>st</sup> defendant acting through a purported auctioneer whom his relatives did not identify, purported illegally and fraudulently to conduct an auction at the deceased's property. In addition to the above, in his counter affidavit as well as the defence, 1<sup>st</sup> respondent did not disclose the name of the purchaser of the suit property. This leaves a lot to be desired. I do not want to make more observations on this as I might find myself crossing to the issue pertaining to the Main Case, but it suffices to show that the concern raised by Mr. Mwang'eza on the non-joinder of the *bonafide* purchaser is devoid of merit, as the same is unknown and the 1<sup>st</sup> respondent who alleges that he sold the suit property to recover the

outstanding loan amount has not disclosed the purchaser's name. Under the circumstance, demanding the applicant to join a party who is unknown to him is ridiculous. Much as I entirely agree with the position of the law that the right to be heard is fundamental and no person should be condemned unheard, but it is important for that person to be known for him/her to be accorded the right to be heard. From the foregoing, the concern on non-joinder of a *bonafide* purchaser is hereby disregarded.

With regard to conditions required to be considered in determination of an application for injunctive order, it is common ground that the conditions laid down in the case of **Gielle Vs Cassman** (Supra) quoted earlier in this Ruling are the ones applicable. Upon perusing the Main Case, I am in agreement with Mr. Mnyele that the applicant has established a *prima-facie* case. The pleadings raise a number of issues including whether or not the whole of the loan amount was paid by the principal debtor and whether or not the auction was properly conducted. I am also convinced that if this application will not be granted the applicant will suffer irreparable loss. As correctly submitted by Mr. Mnyele, loss of home cannot be atoned by way of damages. Likewise, the balance of convenience tilts in favour of the applicant as there is no dispute that the suit property is a matrimonial home where the deceased's family resides up to date and if this application is not granted they might be required to vacate from the suit property, thus they will be more inconvenienced than the 1<sup>st</sup> respondent.

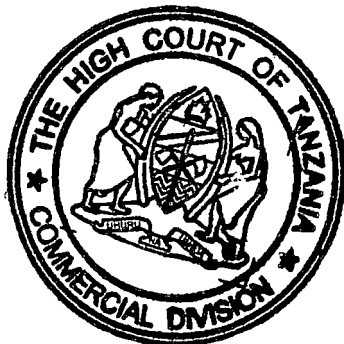
For avoidance of doubts, let me state here that I have considered the arguments raised by Mr. Mwang'eza in opposition to this application. However, under the circumstances, I have not been convinced by the

argument that since the 1<sup>st</sup> respondent is a big financial institution, then it can adequately compensate the deceased's family the loss it is likely to suffer if it will be evicted from the suit premises. Also, the arguments raised by Mr. Mwang'eza that there are no serious issues that need to be determined by this court is devoid of merit as the two affidavits in support of this application and the counter affidavit disclose facts showing the existence of a *prima facie* case as well particulars of irreparable loss likely to be suffered by the applicant if this application is not granted.

In the upshot, this application is granted and since the 1<sup>st</sup> respondent has not disclosed in the pleadings the name of the purchaser of the suit property as well as any fact suggesting that the process for transfer of suit property was been initiated and/or completed, and since the process for transfer of the suit property has to be initiated by the 1<sup>st</sup> respondent, I hereby order as follows.

- i) The 1<sup>st</sup> the respondent, its workmen or agents are hereby restrained from transferring the property located on Plot No. 61 CT No. 31870 Jangwani Beach Area Dare es Salaam to any person by virtue of power of sale pending the determination of Commercial Case No. 100 of 2020.
- ii) Each party will bear its own costs.

Dated at Dar es Salaam this 14<sup>th</sup> day of July, 2021.



  
**B.K. PHILLIP**  
**JUDGE**