

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. LAND CASE APPLICATION NO. 1071 OF 2017
(Originating from Land Case No. 443 of 2017)

**THE REGISTERED TRUSTEES OF THE EVANGELICAL
LUTHERAN CHURCH IN TANZANIA.....APPLICANT**
VERSUS
**COMMERCIAL BANK OF
AFRICA (TANZANIA) LTD.....RESPONDENT**

Date of last order: 16/07/2018
Date of Ruling: 23/07/2018

RULING

Makuru, J.:

The Applicant has moved this court under section 68(c) & (e) and Order XXXVII Rules 1(a) & (b), 2(1), 3 and 4 of the Civil Procedure Code, Cap 33 RE 2002, seeking for temporary injunction restraining the Respondent from disposing of, alienating, damaging or causing to suffer loss the Applicant's property described as Plots No.161, 162 and 163 Block "J" at Uyole Area within Mbeya City, registered under Title No. 12140 MBYLR. The application is supported by an affidavit sworn by Rt. Rev. Dr. Fredrick Shoo, the Presiding Bishop and Chairman of the Board of Trustees of the Applicant.

The matter was disposed of by way of written submissions. The Applicant enjoyed the legal services of Mr. Ezra J. Mwaluko, learned counsel from

Mwaluko and Company Advocates while the Respondent was represented by Mr. Gasper Nyika, learned counsel from IMMMA Advocates.

Submitting in support of the application Mr. Mwaluko outlined the principles for granting temporary injunction as provided in the case of **Atilio versus Mbowe (1969) HCD No. 284, Ibrahim Vs Sheikh Bros Investment Ltd (1973) E.A 118** and **Kibo Match Group Ltd Vs H.S Impex LTD (2001) TLR. 152**. The said principles are:

1. That there must be a serious question to be tried on the facts alleged by the Applicant and a probability that the Plaintiff will be entitled to the relief prayed for.
2. That the court's interference is necessary to protect the Plaintiff from the kind of injury which may be irreparable before his alleged right is established.
3. That on a balance of convenience, there will be greater hardship and mischief suffered by the Plaintiff from the withholding of the injunction than will be suffered by the Defendant from granting of it.

Arguing on the first principle Mr. Mwaluko submitted that, on the strength of the Plaintiff's pleadings in the main suit and the averments in both the Applicant's affidavit and the reply to the counter affidavit, the Applicant/Plaintiff has satisfied the three conditions for granting temporary injunction. According to him, there are serious questions to be tried in Land Case No. 443 of 2017 as hereunder:

- a) Whether or not the Applicant/ Plaintiff applied for the said loan facilities

- b) Whether or not the Applicant/Plaintiff was treated as a guarantor and mortgagor for the said loan facilities without his knowledge or consent or approval.
- c) Whether or not the application, letter of offer, acceptance, contract of guarantee and mortgage deed for the loan facilities were procured fraudulently.
- d) Whether or not the Applicant/Plaintiff never signed the contract of guarantee and the mortgage deed.
- e) Whether or not the signature of the presiding Bishop of the Plaintiff/Applicant was mandatory to give validity of the loan agreements of the mortgage deed.

On the second principle it is argued that, the Respondent had already issued a notice of default to the Applicant as per annexure ELCT-3 to the Applicant's affidavit. It is therefore the learned counsel's contention that, the interference by this honourable court by granting an order for temporary injunction is necessary to protect the Plaintiff/Applicant from the kind of irreparable loss or injury that can be caused before determination of Land Case No. 443 of 2017. Otherwise, the pending case will be rendered nugatory.

As for the third principle Mr. Mwaluko contended that, there will be greater hardship and mischief to be suffered by the Plaintiff/Applicant from withholding of the injunction than will be suffered by the Defendant/Respondent from the granting of it because the mortgaged property is a university.

In reply thereto, Mr. Nyika started with the first principle and argued that, this application does not establish any *prima facie* case with probability of success since it is true that the Applicant was not granted a loan as the same was granted to the borrower Tumaini University Makumira Mbeya Center. According to him, the Applicant was a mere guarantor. It is the learned counsel's further contention that, there is no evidence that, the persons who signed the mortgage deeds are not authorized signatories of the Applicant. He cited the case of **Giella Vs. Kassam Brown & Co. Ltd (1973)** EA 358 whereby it was held that for a court to grant an interlocutory injunction "*first, an applicant must show a **prima facie** case with a probability of success*". It is Mr. Nyika's submission that he Applicant in the present case failed to establish a *prima facie* case with probability of success.

On irreparable loss it is submitted that, the affidavit in support of the application does not disclose any injury which will be irreparable that the Applicant will suffer if temporary injunction is not granted. Mr. Nyika contended that the loan was fully disbursed and utilized by the borrower and the Applicant consented to the consequences of the default by the borrower when he signed the mortgage deed. According to him, the issue of damages or loss cannot arise where the actions being taken are contractually agreed as the damages, if any, become consensual. To support his argument, Mr. Nyika cited the case of **Aida Kyenkungu v John Kyenkungu and 2 Others**, High Court Civil Case No. 57 of 2001 (Dar es Salaam Registry, unreported) whereby it was held that:

"... Banks, and in this application the 3^d Respondent, in granting credit facilities to the borrowers receive pledges from them as security in terms of properties freely and voluntarily given. This was exactly the case in this application. The law protects both the borrower and the bank and obligations of each to the other are supposed to be respected and exercised without hinderance subject only to the terms and conditions obtaining in their agreement and the law."

In the instant case, it was Mr. Nyika's submission that the Applicant has failed to meet the second condition.

On the balance of convenience Mr. Nyika submitted in reply that, if this application is granted the Respondent stand to suffer more inconvenience since the Respondent's banking business depends on money that has been vested on the loans which are granted to people, like the borrower. He stated further that, the impact of the Applicant and borrower's continued default to the Respondent is beyond measure and the Respondent's ability to lend money to other borrowers has been reduced, unless the amount is recovered by way of sale of the collateral charged as security. He cited the case of **Edward Nyelusye versus NBC Limited**, High Court Civil Case No 213 of 1998 (Dar es Salaam Registry, unreported) in support of his argument. In rejoinder Mr. Mwaluko reiterated his submission in chief.

In determining an application of this nature what the court ought to consider is whether the Applicant has managed to establish the three principles outlined in the case of **Atilio Vs. Mbowe** (supra).

In interpreting the three principles **Sarkar on Code of Civil Procedure, Ninth Edition, 2000 at page 1997** had this to say:-

"By irreparable injury it is not meant that there must be no physical possibility of repairing the injury all that is meant is that the injury would be a material one, and one which could not be adequately remedied by damages"

On the balance of convenience the learned author stated that:-

"Where the Plaintiffs are likely to suffer irreparable injury in case the injunction is refused and balance of convenience also lies in their favour they are entitled to grant an interim injunction."

The learned author went on to elaborate that:-

"Before granting injunction the court is required to consider the existence of prima facie case which would also imply prima facie consideration of the jurisdiction of that court. There would not be a prima facie case if the court considering has apparently no jurisdiction to entertain the suit."

In order to secure an order for temporary injunction the Applicant has to establish in whole the three co-existing requisites (see the case of **Tanzania Breweries Limited versus Kibo Breweries Limited and Another (1998) EA 341**).

I will start with the first one that the Applicant must establish that there is a *prima facie* case or there is a serious question to be tried and the Applicant is likely to succeed. In paragraph 4 of the affidavit in support of the application it has been averred that the Applicant is challenging the legality of a loan facility which has been granted by the Respondent to the Trustees of Tumaini University Makumira Mbeya Center. It is averred further that the Applicant without her knowledge was treated as the guarantor and mortgagor of its property stated herein above. Further to that in his submission Mr. Mwaluko stated that there are serious issues to be determined in the main suit including, among others, whether the Applicant guaranteed the loan facility which was advanced to Tumaini University.

From the above facts, I am of the view that the Applicant has established that there is a *prima facie* case and that there are triable issues to be determined by this court during the hearing of the main suit. In that respect, **Giella's Case** (supra) which was cited by Mr. Nyika learned counsel for the Respondent is relevant.

As regards the second principle in respect of irreparable loss, Mr. Mwaluko submitted that the property used to secure the loan belongs to a university which is under the Applicant. Thus, it is my well thought out view that, if this application is not granted the educational institution for learning and research under the Applicant will suffer as students will have nowhere to conduct their studies. The staff of the University will also be rendered

jobless. I am of the considered opinion that this court interference is necessary to protect the Plaintiff/Applicant from the kind of injury which may be irreparable before his legal right is established.

As for the last principle, having found that the Applicant will suffer irreparable loss, it follows that, there will be greater hardship and mischief to be suffered by the Applicant if the application is not granted than what will be suffered by the Respondent if the same is granted.

Having said all that, I find that the Applicant has managed to establish all the three principles for grant of temporary injunction. I hereby grant the application. Costs will be in due course.



C.W. Makuru
JUDGE
23/07/2018

Court: Ruling delivered in court this 23rd day of July, 2018 in the presence of Mr. Mwaluko learned counsel for the Applicant and Ms. Arwal Yusufuali learned counsel for the Respondent.



C.W. Makuru
JUDGE
23/07/2018