

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

**MISC. LAND APPL. NO. 940 OF 2017  
(Original Land Case No. 303 of 2017)**

**JIMMY BROWN MWALUGELO.....APPLICANT**

***VERSUS***

**ROSE MIAGO ASEA. ....1<sup>ST</sup> RESPONDENT**

**BANK OF AFRICA (T) LTD.....2<sup>ND</sup> RESPONDENT**

**MABUNDA AUCTIONEER MART CO. LTD.....3<sup>RD</sup> RESPONDENT**

**YUSUF SHABAN OMAR.....4<sup>TH</sup> RESPONDENT**

**RULING**

*Date of last order: 08/05/2018*

*Date of Ruling: 27/07/2018*

**MZUNA, J.:**

The applicant **Jimmy Brown Mwalugelo** filed this application under Order XXXVII Rule 1(a), (b) and 2(1) and Sections 68(e) and 95 of the Civil Procedure Code Act, Cap. 33 R.E 2002, praying among others for:-

*Temporary injunction order restraining the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents, their workers, agents and any person working under their instructions from further demolition of Applicant's Houses on Plots No. 660/1, 662/1,*

*696/1 and 698/1 Block C Ukonga Stakishari Area pending final determination of this matter;*

***AND;***

*An order compelling the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents to return back the house hold properties collected during a course of eviction and demolition of applicant's Houses on Plots No. 660/1, 662/1, 662/1 696/1 and 698/1 Block C Ukonga Stakishari area, pending final and conclusive determination of this matter, plus costs.*

The applicant was represented by Mr. Samwel Shadrack, the learned advocate whereas the 2<sup>nd</sup> and 3<sup>rd</sup> respondents enjoyed the legal services of Mr. Godwin Nyaisa learned counsel. On the other hand, the 4<sup>th</sup> respondent was represented by Mr. Masinga, the learned counsel. With leave of this court, the application was disposed of by way of written submissions. I thank both counsels for adhering to the schedule as well as for their painstaking submissions.

According to the filed affidavit, the applicant says that he owns five houses on Plots Nos. 660/1, 662/1, 696/1 and 698/1 Block "C" Ukonga Stakishari area, Ilala Municipality, Dar es Salaam. That he was served with Notice of intention to sell the mortgaged properties which he denies to have

been so mortgaged to advance loan in favour of Rose Miago Asea, the first respondent. He denies to have guaranteed such loan in favour of her.

That he was evicted from the suit premise and then parted with doors, windows, iron sheets and timbers after committing the demolition.

It is therefore asked for an order to restrain the said respondents from committing further demolition otherwise it may defeat the pending suit.

The 2<sup>nd</sup> respondent has filed a counter affidavit and says there was advanced loan as per the credit facility annexed but the first respondent whom the applicant guaranteed the said loan never paid same. The first respondent never filed counter affidavit in opposition.

The main issue is whether this application should be granted?

Submitting in support of the application Mr. Shadrack argued that the applicant never obtained such loan or even guaranteed the 1<sup>st</sup> respondent and the alleged loan is full of fraud.

Apart from raising issue of fraud, he further said there was no legal spousal consent as required under Section 114 (1) and (2) of the Land Act, Cap 113, RE 2002.

It was therefore his view that there exist a triable issue and unless immediate action is taken, the applicant may suffer irreparable damage, citing the case of **Kibo Match Group Ltd vs. H.S Impex** [2001] TLR 155.

On the issue of irreparable loss as the second condition to be satisfied, it is argued that if the application is not granted the properties will be demolished by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents while the main suit is still pending. That the loss will be irreparable as the properties will not be able to be redeemed back otherwise they will perish.

Lastly, the balance of convenience principle, it is the learned counsel's contention that if the application is not granted the suit will be rendered superfluous and nugatory and the family will continue to suffer for the loan they did not guarantee. He therefore prayed for the application to be granted as prayed.

In reply thereto, Mr. Nyaisa averred that, before granting an application for temporary injunction, the court should without omission apply and test if the three mandatory requirements are fully satisfied by the applicant.

Starting with the first issue as to the existence of serious triable issues Mr. Nyaisa submitted that the applicant has failed to prove in his pleadings that he reported to the police on the alleged fraud.

On the issue of spouse's consent, Mr. Nyaisa contended that there is nowhere in the affidavit where the applicant pleaded that there was no spouse consent so that the 2<sup>nd</sup> respondent could counter and attach necessary proof. That, raising such allegations at this stage of hearing is an afterthought and contrary to established cardinal principle of law that parties are bound by their own pleadings as it was held in the case of **Charles Richard Kombe t/a Building vs Evarani Mtungi & Others**, Civil Appeal No. 38 of 2012, CAT (unreported).

On irreparable loss, Mr. Nyaisa submitted that the applicant does not stand to suffer irreparable loss that cannot be remedied by monetary compensation because there was no breach of the terms and conditions of the loan agreement by the 2<sup>nd</sup> respondent. He contended that all that the 2<sup>nd</sup> respondent is doing is to exercise a lawful act arising from contractual agreement. Therefore, it is argued that granting injunction at this point will not only be contrary to generally established banking principles and securities law but also create a bush for the defaulters to hide. He made

reference to the case of **General Tyre East Africa vs HSBC Bank PLC** [2006] TLR 60.

On the last pre condition, Mr. Nyaisa submitted that the balance of inconvenience tilts in favour of the 2<sup>nd</sup> respondent. That the applicant will not be able to compensate damages that the 2<sup>nd</sup> respondent suffered and those it will continue to suffer in case the main suit is determined in its favour. He therefore prayed for the application to be dismissed with costs for want of merits.

On the other hand, Mr. Mutakyamirwa, learned counsel for the 4<sup>th</sup> respondent entirely agree with Mr. Nyaisa that the applicant has failed to meet all the conditions for grant of the temporary injunction.

In rejoinder Mr. Shadrack reiterated his submission in chief and insisted that, the applicant has met all the conditions for grant of the said application.

In determining this application I will be guided by three principles governing issuance of an order for temporary injunction as laid down in the famous case of **Atilio vs Mbowe (1969)** HCD 284. The applicant must show that there is a triable issue which if not dealt with may render the

pending suit superfluous before his legal right is established; Second, irreparable injury which cannot be quantifiable and which cannot be adequately compensated by way of damages. Lastly, balance of convenience that he is likely to suffer more than the respondent if the order is not granted.

This case is one of its kind. The applicant says never guaranteed loan to the 1<sup>st</sup> respondent and that there is fraud. That there was no spousal consent. The affidavit never said about fraud or issue of spousal consent. This was submitted from the bar otherwise to do so is to take the other party by surprise in view of what was held in the case of **Charles Richard Kombe t/a Building vs Evarani Mtungi & Others** (supra) where Luanda, J.A held that:

***"...Parties to the suit should always adhere to what is contained in their pleadings unless an amendment is permitted by the Court..." (Emphasis mine).***

The alleged lack of spousal consent or issue of fraud is amere conjecture which waters down even the application. I say so while fully aware as Mapigano J (as he then was) once said in the case of **Colgate Palmolive vs Zakaria Provision Stores And Others**, Civil Case No. 1 of 1997 (unreported) that;

*"I direct myself that **in principle the prima facie case rule does not require that the court should examine the material before it close it and come to a conclusion that the plaintiff has a case in which he is likely to succeed**, for to do so would amount to prejudging the case on its merits, **all that the court has to be satisfied of, is that on the face of it the Plaintiff has a case which needs consideration and that there is likelihood of the suit succeeding.**"*[Emphasis is mine]

Looking at the facts, there may be a cause of action but the applicant wants sympathy which is not one of the conditions for grant of temporary injunction.

I revert to the second principle that is, whether the applicant will suffer irreparable loss?

Assuming as the applicant has said that there has been demolition that means the order cannot return to normal what had been done. Of course, I would urge the Banking Institutions to resort to **summary procedure** as the law has smoothened the process of recovering loan based on letters of facility by laying two defences for the mortgagor(s); First that the loan has been fully discharged; Or, that loan was actually not taken (see; Mortgage Financing (Special Provisions) Act, Act No. 17 of 2008. Much as I agree they have equitable right of redemption but the way they enforce such right has



created chaos to the courts which in most cases are understaffed. Though the applicant says never took loan, that was subject to his duty of informing the court how his Certificate of Titles found its way to the second respondent. That would be a point which calls for proof and therefore would entitle him for damages which of course must be subject to proof. That has never been established.

On the last test, which is on balance of convenience, this would fail because the bank had already advanced loan which must be repaid to enable the circulation of money otherwise the Bank may be rendered "bankrupt" as it was so held by Nsekela, J (as he then was) in the case of **Agency Cargo International v. Eurafrican Bank (T)**, Civil Case No. 44 of 1998, HC Dsm, unreported, cited by Mruke, J in the case of **Abdi All Salehe vs. Asac Care Unit Limited and two Others**, Land Case No. 71 of 2011, High Court Dar es Salaam District Registry (unreported).

Balance of convenience does not favour the applicant because in the first place, the 1<sup>st</sup> respondent whom it is said guaranteed the mortgage in her favour had not filed any defence be the counter affidavit or even the Written Statement of Defence which presupposes collusion.

Second, though he was served with notice as stated by the second respondent, there was no reporting of fraud to the relevant bodies.

Third, nothing has been shown that there was some money which was paid back out of the advanced loan, that means the second respondent is likely to suffer more if the order for temporary injunction is granted.


Lastly, as the applicant admits had already been evicted, then granting an order of injunction would mean a "nullifying act" while temporary injunction is meant to maintain status quo as at the time of the application not before, see, **Atilio vs Mbowe** (supra). Georges, CJ (as he then was) had the following to say:-

*"...It is unnecessary, therefore, to consider the third precondition – **the balance of convenience. The primary consideration there is the maintenance of the status quo pending the determination of the action. The status quo, in my view, is the status quo at the date of the filing of the action.**"*  
(Emphasis mine).

Having carefully considered this application and the advanced submissions both for and against, I find that the applicant has totally failed to convince the court to grant it.

The application for temporary injunction stands dismissed with costs.



  
**M. G. MZUNA,**  
**JUDGE.** 27/7/2018