

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

**MISC. LAND APPLICATION NO. 654 OF 2016**

*(Originating from Land Case No. 259 of 2016)*

**MWAKEYE INVESTMENT LTD.....APPLICANT**

**VERSUS**

**ACCESS BANK TANZANIA LIMITED.....RESPONDENT**

*Date of last order: 10/07/2018*

*Date of ruling: 27/08/2018*

**RULING**

**Makuru, J.:**

This is an application made under Order XXXVII Rule (1) of the Civil Procedure Code, Cap 33 RE 2002. The Applicant is seeking for orders, among others, that this court be pleased to restrain the Respondent from selling Applicant's property until determination of the main suit No. 259 of 2016. The application is supported by the affidavit of Nkwarula Mussa Omari, the Applicant's Principal Officer. The application was argued by way of written submissions.

In support of the application, the Applicant cited the case of **Atilio versus Mbowe (1969) HCD, 284** whereby the following principles for granting temporary injunction were established:-

- (i) There must be serious questions of facts or issues to be tried and likelihood of the Applicant to succeed.
- (ii) The Applicant will suffer irreparable loss which cannot be adequately remedied or attained by damages.

- (iii) Balance of inconveniences; that the Applicant will suffer greater loss than the Respondent if an order for temporary injunction is not granted.

On the first principle it is argued that, there are several legal issues as presented by the Applicant's Principal Officer in his affidavit which need intervention of this Honourable Court. As the 90 days' default notice issued by the Respondent to the Applicant expired after the Applicant had already deposited Tshs 30,000,000/= into the Respondent's account, the Applicant contended that he complied with the default notice timely.

Citing the provisions of **section 132 of the Land Act, Cap 113 RE 2002** as amended by the Mortgage Financial (special provision) Act, No. 17 of 2008, the Applicant argued that, the Respondent was required to issue a 60 days' notice to the Applicant after expiration of the 90 days' notice. It is therefore the Applicant's Principle Officer's contention that, there is a necessity of this Honourable Court's intervention in order to ascertain if the intended sale of the disputed house by the Respondent is lawful.

As for the second principle on whether the Applicant will suffer irreparable loss, it is submitted that, if the order for temporary injunction will not be granted the Applicant will suffer loss as a result of the sale and transfer of the property to the third party and he will eventually be evicted. Hence, it will be difficult for him to recover the said property if the Applicant succeeds in the main suit.

Regarding the third principle it is submitted that, no irreparable loss is anticipated on the part of the Respondent taking into consideration that

the loan advanced is still secured by the suit property and that interest and penalty will continue to accrue until final disposition of the main suit. According to the Applicant's Principal Officer, if it is proved otherwise, the Respondent may continue to recover her loan plus interest and penalty accrued thereon.

It is therefore the Principal Officer's submission that, the Applicant has met all the three tests adduced in **Atilio's case** (supra).

In reply thereto, Mr. Itege learned counsel for the Respondent submitted that, the Applicant has not met the three tests outlined in **Atilio's case**.

On the first principle it is submitted that, the Applicant admits to have taken the loan and that he has defaulted in repaying the same. It is the learned counsel's further contention that, it is a strange situation that the Applicant is seeking to object the Respondent's act of exercising the right of sale.

On the second principle Mr. Itege argued that, it has not been proved in the Applicant's affidavit on how he is going to suffer loss since he has admitted to have taken the loan and defaulted in repaying the same.

As for the balance of convenience it is submitted in reply that, the bank will suffer loss if the loan is not repaid in time and this will automatically affect the growth of national economy and individuals at large as banks are the backbone for the sustainability of the economy in Tanzania.

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 earlier 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 principle 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. The Applicant's/Plaintiff's cause of action arose from issuance of a 90 days' notice requiring payment of the accrued debt. According to the Principal Officer of the Applicant, they complied by depositing Tshs 30,000,000/= and prayed for extension of time to repay the whole amount but it was not granted by the Respondent. From the foregoing, it appears that, the Applicant does not dispute the fact that he defaulted in repaying the loan and that there was a breach of the agreement. It is therefore my considered view that, the Applicant/Plaintiff has failed to establish that there are triable issues to be determined by this court.

On irreparable loss, the Applicant's counsel submitted that, if the order for temporary injunction will not be granted the Applicant will suffer loss as a result of the sale and transfer of the property to the third party and they will eventually be evicted. I am of the view that this cannot be said to be irreparable loss because it can be compensated by monetary terms. Hence, the Applicant has not met the second principle established in **Atilio's case**.

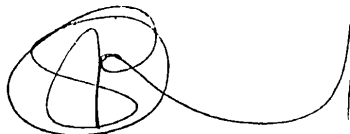
On the balance of convenience, having found that the loss that will be suffered by the Applicant can be compensated by monetary terms, it is therefore the Defendant who stands to suffer more if the application is granted. Hence, the balance of convenience lies on her side.

In the upshot, the Applicant has not established the three principles outlined herein above for grant of temporary injunction. The application is hereby dismissed with costs.



**C.W. Makuru**  
**JUDGE**  
**27/08/2018**

**Court:** Ruling delivered in court this 27<sup>th</sup> day of August, 2018 in the presence of Mr. Itege learned counsel for the Respondent and in the absence of the Applicant.



**C.W. Makuru**  
**JUDGE**  
**27/08/2018**