

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)  
AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 468 OF 2018**

*(Arising from Land Case Number 274/2017))*

**IBRAHIM TWAHILI KUSUNDWA .....1<sup>ST</sup> APPLICANT  
IBRAHIM TWAHILI KUSUNDWA  
THE ADMINISTRATOR OF ESTATE  
OF THE LATE TWAHILI SELEMANI KUSUNDWA ... 2<sup>ND</sup> APPLICANT**

**VERSUS**

**CRDB BANK LIMITED *alis***

**CRDB BANK PLC ..... 1<sup>ST</sup> RESPONDENT**

**MEM AUCTIONERS AND**

**GENERAL BROKERS LTD ..... 2<sup>ND</sup> RESPONDENT**

**EPIMAKI S. MAKOI ..... 3<sup>RD</sup> RESPONDENT**

**PRI A. MUSHI ..... 4<sup>TH</sup> RESPONDENT**

**RULING.**

**S.M. MAGHIMBI, J:**

The application beforehand was filed under the provisions of Section 68(c) and Order XXXVII Rule 1(a) of the Civil Procedure Code Act Cap. 33 R.E 2002 ("The CPC") whereas the applicant was praying for the following orders:

- (a) That the court grant a temporary injunction against the respondents, their employees, agents and/or representatives from causing transfer of the landed property on plot No. 13 Block 30 Nyamwezi Street

Kariakoo Area, under certificate of title No. 32350 pending the final determination of the main suit.

(b) That the respondents their employees and/or agents be temporary restrained from causing any interference with operations at the suit premises including the tenants and other occupants pending the final determination of the main suit.

(c) The costs of the application be provided for

The application was supported by an affidavit of one Ibrahim Twahili Kusundwa, dated 26<sup>th</sup> July, 2018. By an order of the court dated 29/05/2019, the application was disposed by written submissions.

In determination of this application, I will start disposing the first prayer of the applicants, a temporary injunction order restraining the respondents, their employees, agents and/or representatives from causing transfer of the landed property on plot No. 13 Block 30 Nyamwezi Street Kariakoo Area, under certificate of title No. 3235 (the suit property) pending the final determination of the main suit. In his submissions, Mr. Rutabingwa argued that the first respondent took the advantage of being in possession of the original Certificate of title as mortgagee and caused the transfer of the said property to 3<sup>rd</sup> and 4<sup>th</sup> respondents. This is clearly indicated on **annexture P1** to the Counter affidavit of fourth respondent. That the respondents did so without regard to the Orders of this Court for maintenance of the *status quo* issued on 1<sup>st</sup> August 2017 of which at the time of the registration of transfer on 9<sup>th</sup> August 2017 was still valid. He argued further that as the Orders sought under the 1<sup>st</sup> ground of the application for a temporary injunction was filed and an interim order made before the transfer, the court

can issue a necessary order in particular to those in contempt of valid court orders as has been done by respondents.

In reply, Mr. Musa was brief submitting that the first ground of the Application need not detain this court. He pointed out that in affidavits and submissions of the Applicants, the prayer has been overtaken by events due to the undisputed facts that the suit property is already registered in the names of the 3<sup>rd</sup> and 4<sup>th</sup> Respondent following the trucking out of **Misc. Land Application No.629 of 2017 by Madam Makuru J (retired)**.

On my part, on thorough perusal of the records of this application, I have noted that in paragraph 10 of the counter affidavit of the 1<sup>st</sup> Respondent sworn by Vesna Flora Ngunangwa, the suit property is currently owned by Prim Aloyce Mushi and Epimaki Steven Makoi the 3<sup>rd</sup> and 4<sup>th</sup> Respondents respectively. On para 3 of his counter affidavit opposing the application, the 4<sup>th</sup> respondent while referring to Annexure P1 therein, averred that the suit property is now owned by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents respectively. Annexure P1 is the official search of the suit property which reveals that the property has already been transferred and currently registered in the names of the Prim Aloyce Mushi and Epimaki Steven Makoi the 3<sup>rd</sup> and 4<sup>th</sup> Respondents respectively. This note is as far as the records of the application currently are and is not a conclusion of this court as to the ownership of the disputed property. On that note, the first prayer of the applicants cannot be granted as it is already overtaken by events.

Going to the second prayer to temporarily retrain the respondents, their employees and/or agents from causing any interference with operations at the suit premises, including the tenants and other occupants, pending the final determination of the main suit. In his submissions to support this prayer, Mr. Rutabingwa established the principle stated in the famous case of **ATTILIO VS. MBOWE (1969) HCD number 284** by **Georges C. J** (as he then was) where in that case the Court held that it is generally agreed that there are three conditions which must be satisfied before such an injunction can be issued. These are;-

- (i) There must be a serious question to be tried on the facts alleged and a probability that the plaintiff will be entitled to the relief prayed;
- (ii) That the court's interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established, and
- (iii) That on the balance, 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 the granting of it.

Starting with the first principle on whether there is a serious question to be tried on the facts alleged (prima facie case), Mr. Rutabingwa submitted that the Pleadings in the Land Case No. 274 of 2017 (main case) are quite clear as the Plaintiffs thereon are challenging the auction purportedly to have been conducted by the 2<sup>nd</sup> respondent who acted under the instructions of the 1<sup>st</sup> respondent arguing that the respondents did not abide by the

procedure for conducting a public auction. He argued that the issue arising from the above facts is whether the auction alleged to have been conducted by the 2<sup>nd</sup> respondent under the instructions of the 1<sup>st</sup> respondent (if any), was lawful? With a caution not to go into the merits of the main case at this stage, he submitted that the answer to this question is open and the applicants have strong evidence to adduce at the hearing of the main case the effect of which will be to nullify the alleged auction. He then cited the Court of Appeal of Tanzania at Dar es Salaam in **Civil Revision No. 3 of 2012 between Abdi Ally Salehe versus Asac Care Unit Limited and 2 Others (Unreported)**, Massati J.A (as he then was) stated the following:-

*"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 bonafide contest between the parties and serious question 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 a suit; nor can a genuineness of a document be gone into at this stage".*

He then concluded that from the cited case, it is clear that as per the facts pleaded, a *prima facie* case has been established by the applicants against the respondents for this court to grant a temporary injunction as prayed.

On the second principle whether the applicant is likely to suffer irreparable injuries before his legal right is established, Mr. Rutabingwa submitted that it is necessary for this Court to intervene by issuing a temporary injunction against the respondents and/ or their agents from doing any action that may interfere with the operations at the suit premises otherwise, the respondents

may cause the interference that may result to irreparable injuries to the applicants that cannot be atoned by the award of damages. He submitted further that the respondents have the tendency of disregarding the Court Orders as stated in the Counter affidavit of the first respondent particularly paragraph 11 of the said counter affidavit that, on **1/ 8/ 2017** this Court (**Hon. Justice Makuru, J** as she then was) issued the Order for maintenance of the *status quo vide Misc. Land Application Number 629 of 2017*. He argued that to the applicant's surprise, on **9/ 8/ 2017** the respondents proceeded to cause the transfer of the disputed plot to the third and fourth respondents while the Order for maintenance of the status quo issued by this court was still valid. That the conduct of the respondents as above stated should be restrained by granting a temporary injunction with a strict warning, otherwise the 3<sup>rd</sup> and 4<sup>th</sup> respondents may proceed to evict the applicants and the tenants on the premises as they are claiming possession of the same. He argued further that the kind of injury which the applicants are likely to face is irreparable and incapable of compensation considering the tenants who have occupied the premises for a long time. that in the event a temporary injunction is not granted and applicants and tenants on the premises evicted, it may be difficult to bring them back and the available properties for renting following the current economic recession may be disrupted while the main case is still pending for determination.

On the last principle of balance of conveniences, Mr. Rutabingwa submitted that on the balance of conveniences, the applicants stands to suffer more if a temporary injunction is withhold while the respondents stand to suffer nothing if a temporary injunction is granted. That the withholding of a temporary injunction can make the respondent do any action that may

frustrate the end result of the pending suit particularly, if the same is concluded in favor of applicants. On the other hand, if the main suit is concluded in the favor of respondents, they will be at liberty to take possession of the plot and any kind of compensation to respondents (if any), would be in monetary form capable of being atoned by the award of damages. He submitted further that from what is submitted above together with the contents of the affidavit in support of the application and the replies to counter affidavits of the 1<sup>st</sup> and 4<sup>th</sup> respondents, it is the applicant's prayer that the application for a temporary injunction be granted with costs. In reply, Mr. Musa, whose argument dragged into this matter the determination of Misc. Land Application No. 601/2018, argued that there is no balance of convenience in relation to the circumstances of this matter. That in assessing the balance of convenience in this matter the following factors are to be taken into account; who is the registered owner of the suit property, who has been collecting rent since the year 2017 up to now, and whether the rental amount collected has been accounted anywhere and the credibility of the parties. He also raised an issue of the possibility of money collected as rent not being recoverable upon determination of the suit and the accountability of the person collecting rental amount.

He then submitted that there is no dispute that the registered owners of the suit property are currently the 3<sup>rd</sup> and 4<sup>th</sup> Respondent and further that there is no dispute that the rents are currently being collected by the 1<sup>st</sup> Applicant, but it is not accounted anywhere in the affidavit and pleadings. He argued that when those factors are taken into account, it is obvious that neither of the parties to this suit is fit to be trusted to collect rent and the only safe way to ensure that the money collected will be available at the end of the

suit is a third party who has no interest whatsoever in the suit property and who will be accountable to this court for monies collected.

Mr. Musa further referred to Miscellaneous Application No.134 of 2017 whereby the 1<sup>st</sup> applicant's sister complained that the Applicant has been utilizing the rental income for his own use arguing that the credibility of the 1<sup>st</sup> Applicant to continue collecting rent is questionable, as the money already collected has not been accounted for by the 1<sup>st</sup> Applicant.

On my part, I am hesitant to take on board this argument because it is not related to the issue at hand and after all, the outcome of that Miscellaneous Application No.134 of 2017 has not been revealed and is not a subject of the determination before me.

Mr. Musa also argued in line with the granting of the pending Misc. Application No. 601 which is yet to be determined. It is also pertinent to note that the current application was filed first hence my determination of this application will only base on the circumstances of granting the order sought prior to the filing of Misc. Land Application No. 601/2018.

Having said that, the issue remaining is whether from the parties' submissions and the records of this application, should the order of temporary injunction sought be granted or not. It is trite law that the grant of temporary injunction by a court is discretionary and in all circumstances it should be done judiciously on a case to case basis depending on the circumstances of each individual case. As for the current application, Having considered the circumstances of the case including and most importantly so the fact that there are still tenants who are occupying the premises and the fact that there is still this pending suit on the validity of the sale of the suit property, then the tenants and other occupants of the suit premises should



not be disturbed. Although they are not parties to the main suit, but I find that on balance of conveniences, the tenants who have already paid their rents and are running day to day business and living in the suit premises will be more inconvenienced by the rejecting of the application than what will be suffered by the respondents by the granting of this application. Those tenants/occupants of the suit property should hence not be disturbed at this stage.

On those findings, this application is hereby allowed, the respondents, their employees and/or agents are temporarily restrained from causing any interference with operations at the suit premises including the tenants and other occupants on the disputed property to wit; Plot No. 13 Block 30, Nyamwezi Street Kariakoo held under Certificate of Title No. 32350, pending the final determination of the main suit or when this order is otherwise barred by the operation of the law.

***Application Partly Allowed***

Dated at Dar es Salaam this 20<sup>th</sup> day of September, 2019

A handwritten signature in black ink, appearing to be 'S.M. Maghimbi', is written over a horizontal dotted line.

**S.M. MAGHIMBI**

**JUDGE**