

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

MISC. LAND CASE APPLICATION NO 658 OF 2019
(Originating from Misc. Land Application No. 651 Of 2019)

DOTTO LUGWISHA KAJI.....APPLICANT

VERSUS

NATIONAL MICROFINANCE BANK PLC.....RESPONDENT

Date of Last Order: 10.02.2020
Date of Ruling 06.04.2020

RULING

V.L. MAKANI, J

This application is by DOTTO LUGWISHA KAJI. He is seeking for an order of temporary injunction restraining the respondent (the **Bank**) from selling the applicant's properties which are situated at Plot No 369 Block F, Jongo Area, Kilombero District, CT. No. 133262 and Plot No. 370 Block F, Jongo Area, Kilombero District CT. No. 13200 Morogoro Tanzania (the **suit properties**) pending hearing and determination of the application inter-partes. The application is under Order XXXVII, Rules 2 (1) and (4), sections 68(c) and (e) and 95 of the Civil Procedure Code CAP 33 R.E 2002 (the **CPC**) The applicant has also prayed for any other order(s) the court may deem fit.

The application is supported by the affidavit of the applicant, who was represented by Mr. Kusalika, Advocate, whereas the Bank was represented by Ms. Nsangizyo, Advocate.

Submitting in support of the application Mr. Kusalika prayed to adopt the contents of applicant's affidavit and quoted section 68 (e) of the CPC. He said that the cited section makes it mandatory for this Honourable Court to grant any interlocutory order or temporary injunction against the Bank if thinks equitable and convenient to grant. He said that from the contents of affidavit of which stated clearly that the applicant has mortgaged the above stated properties to the Bank, however there is a dispute in terms of the contract which was executed and there is dispute on the procedure within the mortgage deed including excessive interest to the loan, lack of default notice and 14 days' notice. He said that those issues are yet to be determined by this Honourable Court in Land Case No. 241 of 2017 in which the applicant herein is seeking for restoration of the same through Misc. Land Application No 651 of 2019 which is scheduled for mention on 10/02/2020. He added that unless the temporary injunction is granted the applicant will suffer irreparable loss as the Bank herein intends to dispose the suit premises.

He added further that in paragraph 2, 3, 4, 5, 6, 7, and 9 the Bank is intending to dispose the above stated properties while the main suit is yet to be determined so the intervention of this Court is inevitable. He added that the Bank in the counter affidavit has admitted the fact that the properties were mortgaged and no default notice was issued to the applicant as indicated that default notice was issued but the

applicant has not received the same thus as good as not served to the applicant thereto. For clarity he reproduced sections 68(e) and 95 of the CPC. He also cited the case of **Atilio vs. Mbowe (1969) HCD 284** where he said the principles on temporary injunctions are that:

- (a) That there must be a serious question to be tried on the facts alleged and probably that the plaintiff will be entitled to be the relief prayed for.*
- (b) That the Courts interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his alleged rights is established.*
- (c) That on balance of convenience there will be greater hardship and mischief suffered by the plaintiff from the withholding of injunctions than will be suffered by the defendant from granting it.*

He also referred **Halsbury'Law of England (4-ed)** paragraph 955. He added that from the facts of this case as canvassed from the affidavit of the applicant there is a serious question to be determined by this honourable court in the main suit upon being restored. He thus prayed for the grant of this application. He cited the cases of **American Cyanamid Co vs. Ethicon Ltd (4)** at pg 510 and **Noormohamed Jan Mohamed vs. Kassamali Virji (1952) 19 EACA 11**. He prayed for the grant of the application with costs.

In reply Ms. Nsangizyo prayed to adopt the contents of the counter-affidavit taken by Consolatha Resto the Principal Officer of the the Bank. She further stated that for the orders sought in the chamber summons to be granted the applicant must establish and prove three mandatory conditions to wit:

- I. *Whether the Applicants (s)/plaintiff(s) has a prima facie case.*
- II. *Whether the balance of convenience is in favour of the applicant (s)/plaintiffs*
- III. *Whether the applicants/plaintiffs would suffer an irreparable injury if the prayer for temporary injunction is disallowed.*

She said that conditions set out must all be met, meeting one or two of conditions will not be sufficient for the purpose of the court to exercise its discretion to grant injunction. She added that the applicant has failed to establish one and or all essential elements for grant of the injunctive orders. She said that the application should be dismissed as the applicant has not established essential elements for granting injunctive orders. She cited the cases of **Christopher P. Chale vs. Commercial Bank of Africa, Misc. Civil Application No. 635 of 2017, Maithiya vs. Housing Finance Co. of Kenya & Another (2003)1 EA. 133 (CCK).**

On the issue of the existence of prima facie case, she argued that there is no chance of success in Misc. Application No. 651 of 2019 an application for extension of time and application for restoration as the applicant is not disputing that he was issued with the loan facility. She further submitted that all the procedures of recovering the loan were followed by issuing 60 days' notice of default and 14 days' notice. Further the applicant was granted extension of time to service the loan, however the applicant defaulted again. She insisted that all the procedures in recovering the loan from the applicant was adhered to and that the applicant's claim that there is dispute in terms of contract which was executed, disputes on the procedure within the mortgage

deed including excessive interest to the loan should be ignored by the court. She further said that though the injunction order is in the court's discretion but the same has to be exercised judicially by meeting the essential elements. She added that the cases at hand cannot succeed as the applicant failed to service the loan and the Bank followed all the procedures to recover the loan. She said further that the applicant failed to establish the loss which he will suffer if the application will not be granted. She said it was almost four years since the applicant obtained loan from the Bank and failed to repay, further she added that the outstanding loan amount is TZS 153,479,953.79/= as of now.

She insisted that for the Bank to continue being in the banking business she must have funds to lend and which has to be repaid by its debtors, if a bank does not recover its loans it will seriously be an obvious candidate of bankruptcy and that if the injunction order will be granted the Bank will continue to suffer loss than the applicant. She supported her position with the case of **Agency Cargo International vs. Eurafrican Bank (T) Ltd, H.C (DSM), Civil Case No 44 of 1998** (unreported) where the case of **Christopher P. Chale** (supra) was quoted with approval. She insisted that the particulars of irreparable loss have not been stated in the affidavit from which the court can gauge merits hence the application cannot be granted.

On the balance of convenience, she submitted that it is in favour of the Bank (lender) who is in the position to repay the decretal amount in the event the plaintiff/applicant succeeds at the trial. She further

cited the case of **NBC vs. Dar es Salaam Education and Office Stationery [1995] TLR 272 (CAT)**. She concluded by saying that the applicant has failed to prove essential elements for grant of injunctive orders.

There was no rejoinder that was filed by the applicant.

In determining this application, I will be guided by the principles set out in the case of **Atilio vs. Mbowe (1969) HCD 284**, in which it was held that, the plaintiff/applicant has to establish that there is a prima facie case, a balance of convenience, and that he will suffer irreparable injury if the injunction is refused. These principles have been followed in a number of cases, amongst others being that of **Gazelle Trucker Limited vs. Tanzania Petroleum Development Corporation, Civil Application No. 15 of 2006** where Hon. Lubuva, JA (as he then was) had the following observations regarding temporary injunctions:

"As provided for under Rule 1 order XXXVII of the CPC, temporary injunction may be granted where, in any suit, the property in dispute is in danger of being wasted, damaged or alienated by any party to the suit. It is therefore clear that injunctive reliefs are according to the law as act out above, generally invoked at the stage where the trial of a suit is in progress or pending".

The word "may" as used above in the wording indicates discretion of the court to grant or to decline the application for temporary injunction.

In the instant case, the grounds stated in the affidavit for granting the applications are that the applicant's suit properties are subject to sale by the Bank while the claimed loan by the Bank is an excessive amount. Further to that, he claimed that the proper procedures for sale were not followed including issuance of proper notice to the applicant hence the applicant has suffered irreparable loss as the whole business of rice conducted by applicant in the suit land will be paralyzed.

On the issue of prima facie case the applicant has failed to show that he has chances to succeed. His main claim is that the procedure for selling the mortgaged properties was not adhered to. He is not disputing the fact that he entered into the loan contract with the Bank and defaulted the terms of the said contract. According to the Bank, they followed all the required procedures pertaining to the sale of the mortgaged property. Upon default the applicant was served with 60 days' notice and he signed. Upon expiring of the notice days, the applicant was served with 14 days' notice, his whereabouts was not traced and therefore it was published in Mtanzania of 18/10/2019. It is therefore the findings of this court that the Bank followed all the procedural requirements pertaining to the sale of the mortgaged properties. The applicant therefore has no prima facie case against the Bank.

On the balance of convenience, it is obvious that if the injunction order will be granted, the Bank stands to suffer a lot of inconvenience. This is because the outstanding loan balance is part of the Bank's capital. It should be noted that the Bank advances loan to individuals

and financial entities. The Bank's business depends much on repayment of the loan for its business to prosper, such that repayment of the loans must be strictly adhered so as to protect the bank's business which contribute much to the individual and nation's development. In the case of **Zak Import & Export Company Limited vs. Crown Finance & Leasing Ltd, Civil Case No. 27 Of 2000 (HC-DSM)** it was held that:

"The creditors must be protected from borrowers who are not committed to their obligations in paying the loaned money"

Therefore, if debtors' default and seek court's assistance, the banks will run bankrupt, further it is abuse of the courts process. In the case at hand, the applicant intends to delay the loan recovery process through numerous of proceedings as it is undisputed that he received the loan from the Bank and defaulted on the same, and was served with several notices but still he has not made payments and the debt outstanding is now about TZS 153,479,953.79/=.

As for the principle of irreparable loss I do not agree with the applicant that he stands to suffer irreparable loss. As of this date the Bank is in loss because of the failure by the applicant to repay the loan. And if this court grants the injunction the Bank will continue to suffer as it is not known if the applicant will be in a position to compensate the Bank. Therefore, it is the Bank which is in a position to suffer irreparable loss in case the order of injunction is granted.

Basing on the above findings the applicant has not adduced sufficient grounds to warrant this honourable court to invoke its discretionary powers of granting injunction, therefore this application is dismissed with costs in its entirety.

It is so ordered.



V.L. MAKANI
JUDGE
06/04/2020