IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC LAND APPLICATION NO. 487 OF 2020

ISSA BADRU ALLY.....1ST APPLICANT

LULUU GENERAL COMPANY LTD.....2ND APPLICANT

VERSUS

TANZANIA POSTAL BANK.....RESPONDENT

RULING.

S.M. MAGHIMBI, J:

The application beforehand is lodged under the provisions of Order XXXVII Rule 1(a), (b) and 4 of the CPC, Cap. 33 R.E 2019 whereby the applicant is seeking for injunctive orders to restrain the respondent from disposing off the mortgaged property located at Plot No. 270, Block G, Mbezi Beach, Dar es Salaam. The application is supported by an affidavit sworn by Mr. Issa Badru Ally, the Applicant which Mr. Kileile, learned advocate representing the applicants, prayed for this court to adopt as part of this submission. Surprisingly, the respondent did not file any counter affidavit, nor any reply submissions to this application. The ruling is therefore ex-parte of the respondent who was duly represented by Ms. Bertha Mkwawa, learned advocate.

Determination of this application will be based on the principles for the grant of the an application for temporary injunction as precedented in the famous case of **Atilio v Mbowe (1969) HCD 284.** The principle includes:

a) There must be a serious question to be tried on the alleged facts and probability that the Plaintiff will be entitled to the relief prayed,

b) That, the courts interference is necessary to protect the Plaintiff from the kind of injury which may be irreparable before his legal right established.

c) That on the balance, there will be greater hardship and mischief that will be suffered by Plaintiff from the withholding of the injunction than will be suffered by the Defendants from granting it.

Starting with the first principle that there must be a serious question to be tried on the alleged facts and probability that the Plaintiff will be entitled to the relief sought. The applicant's argument was that there exist a serious question be tried by this honourable in main case i.e. Land Case No. 145 of 2020as averred on paragraph 3, 6, 7, 8 and 9; of the affidavit where it has been deposed that the Applicants and Respondent agreed that the repayment of the loan would be made within three (3) years at a monthly installment of Tshs 10,500,000/=. Further, it has been deposed that the parties hereto had a mutual agreement of settling the loan but the Respondent breached the same and that the Applicants herein found that it has been overcharged by the Respondent. That those depositions are serious question to be tried in this matter and that the same as been established in the affidavit in support of the application and no tangible

proof is required as the same shall be dealt with when determining the main case.

On my part, I have considered the history of the case and the fact the loan was advanced to the 2nd applicant in the year 2015 and the terms were agreed to be paid in a period of three years. The loan was smoothly serviced for one year and in 2016 the default started. The applicant has attributed the default to the economic condition, something which could not be predicted as to when it would ease. The applicant did not disclose the time when he was "shocked to find that the interest rate has raised to 22%" as averred on para 8 of the affidavit and the "shock they had" to receive the default notice. However, I don't need to dwell much on this point. The applicant admitted to have been in default since 2016 and his concealed many facts with regard to how and when he was first served with a notice of default. For instance, the applicant did not disclose the fact that there was filed a Land Case No. 192/2017 and a Miscellaneous Land Application No. 482/2017 on the same case or the whereabouts of the case.

As far as the facts are, the applicant has no any reasonable ground against the first respondent to justify the grant of injunction. I find this as a delay tactic for the respondent to exercise his right as a mortgagor.

Having so found that there are no serious triable issues, just mere complaints by the applicant, I find that the remaining conditions on balance of convenience and irreparable damages are redundant. After all, as it was held in the case of **General Tyre East Africa Ltd v. HSBC Bank PLC. [2006] TLR 60** whereby Madame Justice Sheikh (as she then was) examined an application for injunction to restrain a bank from enforcing a debenture (at p. 68H) held:

"In the instant case it is undisputed that this is a straight forward banker/debenture holder borrower, relationship. If there is a breach by the respondent of the contractual obligations under the relevant agreement the applicant can seek redress by way of damages for breach of contract".

In the same not, the current respondent is a banking institution and can make good the loss any to the applicant should it be determined so. The applicant has defaulted for the fifth year now and instead of making good the loan, she is busy abusing the court process by filing endless litigations. I should remind the applicants that there is a reason why the loan was secured by a mortgaged property, in case of any default. It is a contingency on failure to perform the contract so once there is established a breach of loan agreement by defaulting payments, the applicant must adduce very serious grounds as to why the lender should not exercise his right under mortgage given the fact that a sale as one of the remedies available to the respondent. This fact was also known to the parties at the initial stage of signing the agreement.

As for the case at hand, I did not see any triable issues to justify the grant of the orders sought. Consequently this application is hereby dismissed. I have noted that the respondent neither filed a counter affidavit nor or any reply submissions so she does not deserve any costs because she was inactive.

Application Dismissed.

Dated at Dar es Salaam this 12th of March, 2021.

.....

S.M MAGHIMBI.

JUDGE.