

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 454 OF 2020

(Arising from Land Case No. 137 of 2020)

MUUNGANO REINFORCING COMPANY (1975) LTD APPLICANT

VERSUS

AZANIA BANK LIMITED 1ST RESPONDENT

MARK AUCTIONEERS AND COURT BROKERS

COMPANY LIMITED 2ND RESPONDENT

RULING

Date of last order: 18.08.2021

Date of Ruling: 26.08.2021

A.Z. MGEYEKWA, J

This application is brought under a certificate of urgency. The applicant is seeking temporary injunction to restrain the respondents, their workmen, agents, and or transferee in title from evicting the applicant from Plot No. 13A Pugu Road, Industrial Area, Temeke Municipality within Dar es Salaam City pending hearing and determination of the instant

application *interparte*. The application is brought under Order XXXVII Rule 2(1) of the Civil Procedure Code, Cap.33 [R.E. 2019]. The applicant filed an affidavit deponed by Mathew Dominic Missano, Director of the applicant. The respondent feverishly opposed the application. In a counter-affidavit sworn by Endael Mziray, Principal Officer of the respondent.

The material background facts to the dispute are not difficult to comprehend. They go thus: the applicant and the 1st Respondent herein entered into a contract in which the applicant mortgaged her property to secure the repayment of the money advanced by the 1st respondent to Italframe Ltd, the borrower. He failed to repay the loan to the 1st Respondent.

The submissions were by way of written submissions in which the applicant was represented by Mr. Odhiambo Koba, learned Advocate whereas the respondent was represented by Mr. Endael Mziray, learned Advocate.

In his submission, the learned counsel for the applicant argued that her property Plot No. 13A situated at Pugu Road, Industrial Area, Temeke Municipality within Dar es Salaam City, valued at Tshs. 5,700,000,000/= has been auctioned by the 2nd Respondent. She added that the said

property is auctioned to an unknown person at the rate of Tshs. 1,700,000,000/= far below 75% and contrary to the requirement of the below the market price. To support her submission she referred this court to section 133 of the Land Act, Cap.113 [R.E. 2019]. He further submitted that the sale was conducted without issuing any notice to the applicant. He contended that the 60 days' Notice legally as per section 127 (2) of the Land Act, Cap. 113 [R.E. 2019] was not communicated to him. The learned counsel went on to argue that the auction was conducted on 08/08/2020 it was a public holiday, contrary to the law. He stated that she only received a 14 days' notice to vacate the premises.

The learned counsel for the applicant further submitted that this application meets the requirements set in the famous case of **Atilio Vs Mbowe** (1969) HCD 284 in which it was stated that:-

- i. There must be a serious question as 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 that will be suffered by the defendant from granting of it.

He further submitted that in connection to this application, the applicant stands to suffer substantial and irreparable loss if her business establishment built over years ago is deprived of the respondent's denial of her right to redeem her property to which the Applicant has social economic, and sentimental values. He went on to state that the applicant stands to suffer more should the order maintaining *status quo*/granting an injunction not be granted as she has numerous plants and machinery for wood and steel works, construction equipment, tools, vehicles wood, and timber products which cannot be easily vacated to another alternative which is also difficult to get without suffering substantial and irreparable loss.

He added that the Applicant's case has raised seriously triable points of law coupled with overwhelming chances of success. He went on to state that with regard to the irregularities apparent on the action of the applicant's property and the short notice issued to the applicant entailed the laying off of more than 150 employees whose families of more than

600 people will be affected. He continued to state that the applicant will be subjected to numerous labour litigation on unfair termination for want of notice and procedural unfairness and terminal benefits due to short notice.

On the strength of the above submission, the learned counsel for the applicant beckoned upon this court to grant the applicant's application with costs.

In response, the learned counsel for the 1st respondent submitted that the applicant was duty bound to repay the loan after the borrower's defaults. He further submitted that this application has no any triable issue to be determined. He further argued that the legal requirement to provide 60 days' Notice to the applicant was followed whereas the same was issued on 02nd October, 2019 and 10th October, 2020. Fortifying his submission he referred this court to annexure **ABL 3** and **ABL 5**. He stressed that there was no any breach or illegality to conduct the auction on 08th August, 2020.

The learned counsel for the respondent overwhelmingly submitted that there is no irreparable loss on which the applicant is likely to suffer since such ground was not pleaded in the applicant's affidavit. he went on to state that instead the respondent is the one who is likely to suffer more

hardship if this application is granted because it will affect the lending capacity. To back up his argumentation he referred this court to the case of **Agency Cargo International v Eurafrica Bank (T) Limited**, HC (DSM), Civil Case NO. 44 OF 1998 (Unreported) which ruled out that:-

"...The object of security is to provide a source of satisfaction of the debt covered by it. The respondent to continue being in the banking business must have funds to lend and which as to be repaid by its debtors. If a bank does not recover its loans it will seriously be an obvious candidate for bankruptcy....it is only fair that banks and their customers should enforce their respective obligations under the banking system."

The learned counsel for the respondent refuted that the property was sold below the market value at the rate of Tshs. 1,700,000,000/= as alleged by the applicant since the applicant has not shown any evidence to substantiate the same. The learned counsel for the respondent further submitted that the criteria set in the case of **Atilio v Mbowe** (supra) were not met and therefore this application is devoid of merit.

In conclusion, the learned counsel for the respondents urged this court to dismiss the application in its entirety with costs.

Having pondered the submissions from both parties, and after perusing the court records, I will address the issue *of whether the application for temporary injunction is meritorious?*

The records reveal that the said suit property has been sold to the third party who is not a part of this application. That is to say, the 1st respondent has recovered some cash upon that sale, and the only issue is that the applicant has not yet been evicted from the suit property to date.

In determining the prayer by the applicant, I find it reasoned to go through the principles or conditions of temporal injunction as it has been established in various court decisions. Also, both learned counsels have addressed this court on the said conditions which require the court to look at when determining the applications of this nature. The **First**, *prima facie* case, that the court must satisfy that there is a bona fide dispute raised by the applicant and the court must be satisfied that there is bona fide dispute raised by the appellant, that there is a strong case for trial which needs investigation and a decision on merit and on the facts before the court and there is a probability of the applicant be entitled to the relief claimed by him. **Second**, irreparable loss, that the applicant must satisfy the court that he will suffer irreparable loss if injunction, as prayed, is not granted and that there is another remedy open to him by which he can protect

himself from the consequences of apprehended injury. **Third**, the balance of convenience which is likely to be caused to the applicant by refusing the injunction will be greater than what is likely to be caused to the opposite party by granting it.

The Courts have tested the above principles in various cases such notable cases include; **Atilio v Mbowe** (1969) HCD 284. **Agency Cargo International v Eurafrican Bank (T)** (HC) DSM, Civil Case No. 44 of 1998 (unreported), and **Giella v Cassama Brown & Co. Ltd** (1973) to mention just a few.

In determining the first principle that the applicant must establish that there is a *prima facie* case or there is a serious question to be tried. The first condition, the *prima facie case* is established whereby the applicant has a genuine claim against the respondent the property in question are his property because thinking of the nature of the planting machinery on the suit property that is fixed cannot be easily vacated to another place without causing irreparable loss. Therefore his grounds are arguable and the same is properly filed before this court.

Regarding the second condition, irreparable loss, that the applicant must satisfy the court that he will suffer irreparable loss. It is undoubted that the suit property with CT. No. 186073/1, Plot No. 13 A situated at

Pugu Road, Industrial Area, Temeke Municipality Dar es Salaam City, contain numerous plant machinery for wood and steel works, construction equipment, tools, vehicles wood, and timber products which cannot be easily vacated to another place without causing suffering substantial irreparable loss. The 1st respondent has already sold the property to the third party who has not been invited to show the irreparable loss is likely to suffer, for that reason, I am of the view that the respondent is no more in hardship to suffer loss compared to the applicant as far as the situation is concerned. Therefore the 2nd condition irreparable loss is also met.

Next for consideration is on a balance of convenience, after going through the affidavit, counter affidavit, and the submission made by both learned counsels, I have to say from the outset that the applicant will suffer more than the respondent. Speaking on a comparative basis, the applicant properties are in endanger to be disposed of and in case of winning the case, the applicant will face difficulties to recover the said properties. Therefore, in the 3rd condition, the applicant will suffer more than the respondent, the presence of the main case, Land Case No.137 of 2020 in which failure to grant this application will directly affect the merit of the main case to become of no importance.

I hope upon grant of this application and upon determination of the main case, none of the parties will suffer irreparable loss compared to where this application is denied. I hereby proceed to grant the application. Costs to follow the event.

Order accordingly.

Dated at Dar es Salaam this date 26th August, 2021.



A.Z.MGEYEKWA
JUDGE
26.08.2021

Ruling delivered on 26th August, 2021 via audio teleconference whereas Mr. Odhiambo Kobas, learned counsel for the applicant and respondent were remotely present.



A.Z.MGEYEKWA
JUDGE
26.08.2021