

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

MISC.LAND APPLICATION No. 679 OF 2020

(Arising from Land Case number 191 OF 2020)

ROSEMARY CHIZA MALINZI.....APPLICANT

VERSUS

1. **CARGO STAR LTD**
2. **DIONIZ MALINZI**
3. **INTERNATIONAL
COMMERCIAL BANK**
4. **MBUZA AUCTION MART
AND COMPANY LIMITED**

..... **RESPONDENTS**

RULING

Date of last order: 7/8/2021
Date of Judgment: 15/9/2021

T. N. MWENEGOHA, J.

The applicant Rosemary Chiza Malinzi has filed this application under Order XXXVII Rules 1 and 2, Sections 68 (c), (e) and 95 of the Civil Procedure Code, Cap 33, R.E 2019, Seeking for interim orders restraining the respondents, their agents, or any other person working under their instructions from invading, threatening to evict, causing any chaos whatsoever and or auctioning the applicant's matrimonial home at Plot No. 748, Block "J", Mbezi area comprised in the Certificate of Title No. 104516 pending the determination of the Land Case No. 191 of 2020 (the main suit).

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 Joan Mwesiga, Advocate holding brief for Dosca Mutabuzi, Advocate whereas the 2nd Respondent was represented by Kennedy Mgongolwa, Advocate and the 3rd and 4th respondents were represented by Thomas Rwebangira and George Ngemela, Advocates. The 1st respondent did not enter appearance.

Submitting in support of the application Ms. Mwesiga prayed to adopt the contents of applicant's affidavit so that its content can form part of her submission.

Ms. Mwesiga submitted that before the court to decide using its discretionary powers whether to grant or not, it has to make sure that the three conditions necessary are met. She added that the applicant is able to prove before the court the effect which may affect her rights. And that the refusal to grant temporary injunction may affect the issues to be determined in the main suit. Also, that the refusal to grant injunction will necessitate appeal under Section 5(1)(b)(vii) of the Appeals Jurisdiction Act Cap 141 R.E 2019.

In reply, the Advocate for the 3rd and 4th adopted the 3rd respondent's counter affidavit for its content to form part of their main submission.

He further submitted that the applicant's application has not met three conditions/principles necessary before the court can exercise its discretion either to grant injunction or not as it was laid down in the case of **Attilio Vs. Mbowe (1969) HCD 284** and in other different number of cases like in the **SJ3 Iwawa Co.LTD Vs. Access Bank Misc. Civil Application No.387 of 2019 and Kingdom Traders LTD and Another Vs. International Commercial Bank Limited Misc. Land Appl.No.70 of 2019.**

They continued to submit that in their counter affidavit they attached the consent form to prove that the applicant consented the matrimonial house to be mortgaged. That this fact is not disputed by the 2nd respondent who mortgaged the property to secure the loan which was given to Cargo Star Limited (the 1st respondent) as a borrower.

The advocates for the 3rd and 4th respondents continued to submit that the 2nd respondent was the guarantor, the 1st respondent (Cargo Star) the borrower and that the applicant consented to the whole process through her signing the consent form. Therefore, that the issue of disclosure of spouse was complied to according to Section 8(2) (3) of the Mortgage financing Act. That the spouse disclosure was enough, That the bank cannot be blamed for anything. To support their arguments, they cited the case of **Hadija Issa Arerary Vs. Tanzania Postal Bank Civil Appeal No. 135 of 2017.**

They submitted that if injunction is granted it will interfere with the contractual obligations of the parties, as the parties to the agreement are liable to perform their obligations under the contract. To support their argument, they cited the case of **General Tyre E.A LTD Vs. HSBC Bank PLC Misc. Civil Application No. 35 of 2005.**

They further submitted that since the 3rd respondent is doing banking business he has an obligation to recover the money advanced in case of default. That if the sought injunction is not granted and it appears that the applicant suffers loss, the respondent is a reputable Bank therefore it will pay damages. To support this argument, he cited the case of **Kingdom Traders LTD and Another (supra).**

They submitted that the presence of the consent form of the mortgaged property prove that there is no prima facie case in favor of the applicant. That the applicant has failed to present before the court the strong evidence to prove that there is a likely hood of succeeding the main case.

To support this, they cited the case of **General Tyre E.A Limited** (supra). Therefore that the allegation in the applicant's affidavit particularly at paragraph 10 is negated. That if the applicant is injured, she can only put the blame to the 1st and 2nd respondent.

Lastly the advocates for the 3rd and 4th prayed the court to dismiss the application with costs.

When rejoining, Ms. Mwesiga reiterated what she submitted in her submission in chief and added that, the legality of the consent is questioned and that she intends to bring before the court the witness who will testify on the person who signed it.

In determining this application, I will be guided by the principles set out in the case of **Atilio vs. Mbowe** (supra), 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 see **Gazelle Trucker Limited vs. Tanzania Petroleum Development Corporation, Civil Application No. 15 of 2006** and **E.A Industries Ltd Vs. Trufford Ltd [1972] E.A 20**.

It is also the law that, the conditions set out must all be met, meeting one or two of the conditions will not be sufficient for the purpose of the court exercising its discretion to grant an injunction. See **Christopher P. Chale Vs. Commercial Bank of Africa Misc. Civil Application No.635 of 2017** unreported (**Mwandambo, J.**).

Applying the above principles to the present case, it is apparent there is no prima facie case. In the 10th paragraph of the applicant's affidavit she deposed that, she is not the owner or the shareholder of the 1st respondent and that her consent was never sought, this was strongly

rebutted by the 3rd and 4th respondents. In the counter affidavit of the 3rd respondent particularly under paragraph 8 Ms. Mary Magenya deponed that, the applicant was aware of the existing loan and she agreed to it through signing the consent form in order to process the mortgaged property as the security, this is the main reason why advocates for the 3rd and 4th respondents when replying submitted that, the applicant failed to establish the prima facie case. I am in agreement with the advocates of the 3rd and 4th respondent's that from the facts discerned in the affidavit, it is hard to gauge that the applicant has managed to present strong evidence to prove that there is serious issue to be tried with the probability of success. The court's jurisdiction to interfere in the case of contract by granting the interim orders, is limited to cases where it is clear that a breach must result from the acts of the respondent/defendant, in the instant case no breach will result from the act of the respondent executing the mortgaged security as it is his contractual right.

Concerning the irreparable loss, it is a settled principle that courts will only grant injunction if there is evidence that there will be irreparable loss which cannot be adequately compensated by award of damages. In the instant case the applicant in her affidavit particularly under paragraph 12 she deponed that, if the injunction is not granted before the determination of the main suit, she will suffer irreparable loss and great injustice. On their part, the advocates for the 3rd and the 4th respondents submitted that, the 3rd respondent is the Reputable Bank and is ready to pay damages to the applicant incase at the end of the trial of the main suit the judgment is entered in favor of the applicant. The fact before me doesn't show any irreparable injury which the applicant will suffer for which damages are not sufficient as a remedy. 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.

On the balance of convenience, it is obvious that if the injunction order will be granted, the 3rd respondent (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 this application, it is undisputed that she consented to their matrimonial house to be mortgaged through her signature in the consent form, but now she wants the court to restrain the 3rd respondent from realizing and enforcing its security. The object of the security is to provide a source of satisfaction of the debt secured, therefore a grant of temporary injunction would be contrary to the generally established banking principles and securities law.

Basing on the above findings the applicant has not adduced sufficient grounds to warrant this honorable court to invoke its discretionary powers

of granting injunction, therefore this application is dismissed with costs in its entirety.

It is so ordered.

Dated at Dar es salaam this 15th day of September, 2021.




T. N. MWENEGOHA.
JUDGE