**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 572 OF 2021**

*(Arising from Land Case No. 132 of 2021).*

**ISSA HAMAD KIVINA**
**FATUMA ISSA KIVINA** ..... **APPLICANTS**

**VERSUS**

**EQUITY BANK OF TANZANIA LIMITED ..... 1ST RESPONDENT**

**NUTMEG AUCTIONEERS AND PROPERTY MANAGERS COMPANY LIMITED ..... 2ND RESPONDENT**

**RULING**

*Date of the last Order: 22.11.2021*

*Date of Ruling: 03.12.2021*

**A.Z. MGEYEKWA, J**

This application was lodged before this court under the certificate of urgency, under Order XXXVII Rule 1 (a) Sections 68 (c), (e), and Section 95 of the Civil Procedure Code Cap.33 [R.E. 2019]. The applicants are

seeking an order of temporally injection to restrain the respondents or its agents, servants, assigns or whosoever will be acting under the instructions of the respondents from any public auction of the houses situated at plot No. 11 Block J Ilala Area Municipality and plot No. 12 Block J Ilala Area Municipality, Costs and other reliefs that this court may deem fit to grant. The applicants' application was supported by a joint affidavit deponed by Issa Hamad Kivina and Fatuma Issa Kivina, the applicants. The first respondent resisted the application and have demonstrated his resistance by filing a counter-affidavit deponed by Mr. Lucky Titus Kalulo, Principal Officer of the 1st respondent.

When the matter came up for necessary orders on 22nd November, 2021, the applicants enjoyed the legal service of Mr. Mkiria Julius, learned Advocate, whereas the respondent was represented by Mr. Karoli Tarimo learned Advocate.

Submitting in support of the application, the appellant's counsel urged this court to adopt the joint affidavit of the applicants to form part of their submission. Mr. Mahende submitted that the genesis of the saga arose on 9th August 2018 when the 1st Respondent advanced a credit Facility to the Applicants through which Applicants secured the said facility vide collaterals of Applicants properties situated at Plot No. 11 Block Ilala Area

Municipality and Plot No. 12 Block Ilala Area Municipality. He went on to submit that sometimes in March, 2020 the applicants experienced challenges conducting business due to the outbreak of Corona - Virus Pandemic (Covid-19) which caused disruption on importation and exportation of goods in the country and as a result, the applicants business dropped dramatically.

It was the learned counsel for the applicants' further submission that from 19lh February, 2019, 14th January 2020, 21st July 2020, 01sl September 2020, and 12th September 2020, the applicants submitted their requests to the 1st respondent for restructuring the credit facility. To support his submission, he referred this court to the annexure TA. He further submitted that on 6th December, 2020 the applicants realized that the brokers advertised through Mzalendo Newspaper that they will be a public auction of the applicants' houses situated at Plot No. 11 Block 'J' Ilala Area Municipality and Plot No. 12 Block at Ilala Municipality within 21 days from the date of publication of the newspaper.

Mr. Mahende did not end there, he submitted that the applicants and respondents deliberated and agreed to restructure the facility before the said publication. In their agreement, they agreed to restructure the facility as per TA 2. The learned counsel for the applicant went on to state that

on 31st July, 2021 the applicants' realized the 2nd respondent for the second time advertised that they will be a public auction of applicants houses situated at Plot No. 11 Block no 'I' and plot 12 Block No F at Ilala area Municipality and Plot No. 12 Block Ilala area Municipality. He valiantly contended that despite the agreement with the 1st respondent on the restructuring of the loan facility, the 1st respondent wanted to auction the applicants' premises. He claimed that the 1st respondent seems to have bad intentions on the applicant's landed property.

The learned counsel for the applicants believes that the instant application meets the three criteria for grant of a temporary injunction set in the Landmark cases of **Attilio v Mbowe (**1969) H.C.D 284, **Sigqri Investment (T) Ltd & Another v Equity Bank of Tanzania Limited & Another**, Misc. Land Application No 56 Of 2019 Between (Unreported), **Ibrahim v Ngaiza** (1971) HCD 249, **Kibo Match Group Ltd v H.S. Implex Ltd** (2001) T.L.R 152 and **T.A. Kaare v General Manager Mara Cooperative Union** (1984) Ltd 1987 TLR. He added that the authorities require the following conditions to be fulfilled:-

(i) *There must be a serious question to be tiled 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.*

Stressing, the learned counsel for the applicants argued that there are serious questions that await to be determined on the facts alleged in which the applicants are claiming. He claimed that the recovery measures invoked by the 1st respondent show an ill motive of depriving the applicants' mortgaged property while the applicants made all reasonable endeavors to restructure their loan facility, they arranged a meeting with the 1st respondent on the restructuring of the facility. He went on to state that the meeting agreed to restructure the facility but later on 1st respondent refused to adhere to what was agreed by both parties.

Mr. Mahende urged this court to grant an interim order to restrain the respondents from continuing with the auction exercise pending the determination of the main suit. Regarding the second condition counsel for the applicants submitted that the Court's interference is necessary to protect the Applicants from the kind of injury which may be irreparable before his legal right is established. The learned counsel for the applicants submitted that the applicants do not deny the liability accrued from the

loan, they communicated with the Bank to restructure payment milestone, and yet the bank attempted to technically auction their landed property without due notice. It was his respectful view that without this Court's interference by way of the temporary injunction the applicants may suffer irreparable loss if the auction at hand proceeds. Cementing on that the learned counsel for the applicant cited the case of **Kibo Match Group Ltd v H.S. Implex** Ltd [2001] T.L.R.

On the third condition, Mr. Mahende contended that the applicants are the owner of the landed property at Plot. No 11 Block No '1' and Plot No. 12 Block "J" Ilala area, Ilala Municipality. He added that in case this Court will not issue an injunction order, the applicants shall suffer irreparable loss as a consequence of the sale/auction of their landed property. The learned counsel for the applicant courteously submitted that the applicants invested into that landed property and have no other means of redeeming their landed property should the action proceed. Hence, he urged this court to grant the applicants prayers as stated in the chamber summons.

In response, the learned counsel for the respondents agreed that the three conditions for grant of temporary injunction as were cited in the case of **Attilio v Mbowe** (1969) H.C.D 284 must be fulfilled. It was his submission that in the instant application, the said conditions were not met

hence that this court should not grant a temporary injunction as prayed by the applicants. In reinforcing his submission, he started by arguing that temporary injunctions are discretionary remedies but which ought to be used judicially. Fortifying his submission he cited the case of **Jacqueline Donath Kweka Abrahamson v Exim Bank (T) Ltd & others**, Misc. Land Application No. 1084 of 2017.

He further submitted that the basis of the applicants in the said main suit relies on the restructured of the loan payment in which the applicants had offered to pay Tshs. 20,000,000 /= per month while the respondent counter-offered the applicants to pay Tshs. 35,000,000/= per month and that it is from that basis the applicants are forcing the 1st respondent to their new terms after default contrary to their loan facility. He went on to argue that the request for restructuring of the loan facility by the applicant has never been agreed or accepted by the 1st respondent to form a contract capable of being enforced and or sued upon it.

Mr. Karoli continued to submit that the applicants are forcing the 1st respondent to accept the terms of the applicants to form a contract. It was his view that this Court cannot force parties to contract but the duty of courts is to enforce and protect what the parties have agreed. The Counsel for the respondents further submitted that in the applicant's

affidavit specifically paragraph 2, the applicants had acknowledged that are indebted to the 1st Respondent in the sum of Tshs. 1.6 Billion advanced to them as a project finance facility and a term loan in August, 2018. He added that in paragraph 3 of their affidavit, the applicants have stated that they have failed to pay the loan since March 2020 due to the reason of COVID 19. He added that the applicants already defaulted to pay the loan as per the agreement therefore requested the 1st respondent to restructure their loan agreement and they refused hence this application.

The learned counsel for the respondents submitted that the applicants are seeking an injunction because the 1st respondent has appointed the 2nd respondent to sell the mortgaged properties as per the terms and conditions of their mortgage deed. To support his submission he cited the case of **Lukolo Company Limited v Bank of Africa,** Misc. Civil Application No. 494 of 2020, the HC of Tanzania, at Dar es Salaam, (unreported). He also referred this court to the case **Sungurwa Traders Co. Ltd v Equity Bank (T) Ltd,** Misc. Civil Application No. 687 of 2018, the HC of Tanzania, Land Division at Dar es Salaam (unreported).

The learned counsel for the respondents also cited the cases of **Tanzania Breweries Ltd v Kibo Breweries Ltd, and Another** [1999]

EALR 341. **Sango Petrol Station Ltd and others v Stanbic Bank Ltd,** Commercial Case No. 25 of 2013, HC of Tanzania (Commercial Division) at Arusha held that:-

> *"...the quick answer, from the foregoing, is that there is no prima facie case which may be said to have been established by the Applicants herein because, things as they are, it seems to me that they are pleading mercy because of what had befallen then in the course of running their business of the first Applicant. That alone cannot constitute a tribal issue."*

In his further submission, the learned counsel for the respondents consolidated the second and third conditions. Mr. Karoli stated that the plaintiffs in the main suit are litigating an abstract case since they are asking the court to compel the 1st respondent to restructure the loan agreement which is in the proposal stage. It was his view that it is not the duty of the court to compel the 1st respondent to restructure the loan agreement. To support his submission he cited the case of **Lausa A. Salum v National Housing Corporation,** Misc. Application No. 73 of 2014, High Court of Tanzania, at Mwanza (Unreported) which held that:-

> *"...from the above, and before penning off I wish to remind the parties that, temporary orders are normally granted for a*

*purpose, and that is why they are interim in nature. They are not granted simply because the court thinks it is convenient to do so. Courts are duty-bound to do justice to the parties by protecting rights or preventing injury to the parties according to the law. Courts should not be overwhelmed by sentiments on mere allegations by a party that, denial of the relief sought may cause great inconvenience without substantiating the same. One is duty-bound to show that, he/she has a genuine claim in the main suit which ought to be protected, before laying a claim for protection".*

Mr. Karoli also referred this court to the case of **Fatuma Mohamed Salum and Another v Lugano Angetile Mwayose Jengela and Others,** Misc. Land Application No, go of 2015, HC of Tanzania at Dar es Salaam, Land Division (unreported) which held that:-

*"Temporary injunctions are a discretionary remedy but which ought to be used judicially. Courts cannot grant them even when it is convenient to do so if the applicable principles enumerated above have not been fully satisfied."*

Due to the given reasons, the learned counsel for the respondents went on to argue that the facts given by the applicants do not indicate the above principles for granting injunctions. Thus, he beckoned upon this court to

disregard the applicant's prayer.

In his brief, rejoinder, the applicants' Advocate reiterated his submission in chief. Stressing that there is a serious question of law and facts which awaits trial for determination. Supporting his submission he cited the case of **Atilio v Mbowe** (supra). He stated that the applicants have elaborated the bad motive surrounding the sale of the applicants' matrimonial house. He insisted that without this court intervention the applicants as the owner of the suit property will suffer irreparable damage. It was his submission that the respondents will not suffer no effect if his unlawful acts towards the landed property are halted pending the determination of the main application.

After a careful consideration of the submission from both parties, I am guided by the principles in granting temporary injunction as were well established in the case of **Attilio v Mbowe** (1969) H.C.D 284. 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. After going through the affidavit and counter-affidavit, I did not see any triable issue since the parties loan facility is very clear on the terms agreed, no further evidence enforceable by law is submitted to this court subsequent to the loan facility agreement between the parties, even the attached documents; TA -1 and TA-2 are not legally binding as TA-1 was only signed by the applicant and TA-2 was not signed at all. Therefore, all the rest were clearly known and agreed to by the parties, not even the issue

of matrimonial property can be a good ground because the applicants consented to the loan by mortgaging their suit property as a security.

By so doing applicants were aware of their default, the security is subject to sell, and they cannot come before this court to enforce the changes. It worth noting that parties are bound by the terms and conditions of their agreement. Therefore, this court cannot interfere to reschedule the terms and conditions of the parties in favor of either party.

At the time when the applicants agreed to sign and put their suit property as security was an indication that in case of any default and if the property is sold would not incur any irreparable loss. I seek refuge in the cases of **Miriam Maro v Bank of Tanzania,** Civil Appeal No. 22/2017 (unreported), **Unilever Tanzania Ltd v Benedict Mkasa t/a Bema Enterprises**, Civil Appeal No. 41 of 2009 (unreported) in which the Court of Appeal of Tanzania relied on the persuasive decision of the Supreme Court of Nigeria in **Osun State Government v Daiami Nigeria Limited,** Sc 277/2002, it was held that: -

> *"Strictly speaking, under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which parties have agreed between themselves. It was up to the parties concerned to*

*renegotiate and to freely rectify clauses that parties find to be erroneous. It is not the role of the courts to redraft clauses in agreements but to enforce those clauses where parties are in dispute."*

Second condition is irreparable loss, that the applicants must satisfy the court that he will suffer irreparable loss if injunction or court interference is important to protect the applicants. The records reveal that the applicants have not denied the liability accrued from the said loan. In the case of **Paul Mtafikilo v CRDB Bank Ltd and Others**, Land Case No. 89 of 2005 (unreported) this court held that:-

*" ... I think it is very improper for the borrowers to dictate the terms and it is only proper for the courts to discourage this trend by protecting the lenders. In the circumstances, it cannot be said that the applicant has met the first test by showing that there is a serious question to be tried and which could end in his favour."*

The applicants claim that in case this court will not grant their application then they will suffer loss since the respondents will cause damage to the applicant's property. The explanation from the applicants is not enough as to what kind of damage will they suffer. Instead, they want this court to immediately restrain the 1st respondent from continuing to make any improvement pending the determination of this case without explaining

how they will suffer loss.

Applying the above findings and holding in the instant application, it is my considered view that, the applicant has failed to establish that there are triable issues to be determined by this court.

Next for consideration is the last condition that on a balance of convenience the applicant stands to suffer more than the respondent if the injunction is not granted. Reading the affidavit, counter-affidavit, and the submission made by both learned counsels, I have to say from the outset that both parties will suffer. However, speaking on a comparative basis, the applicants claimed that they will suffer greater hardship from withholding of the injection than will be suffered by the respondents. They are afraid that the 1st respondent will sell their landed property while they invested into that landed property and have no other means of redeeming their landed property. They claimed that the respondent will not suffer more than them because the respondent showed the intention to continue servicing the loan.

It is my respectful view that the respondents are the one who is likely to suffer greater hardship if the temporary injunction is granted. It is evident that the Bank will suffer greater hardship since the applicants have already caused a lot of inconvenience to the 1st respondent to recover the

outstanding loan. The evidence reveals that since January, 2021, the applicants were aware that the 1st respondent did not agree with the proposed restructuring. In my opinion that was a wake-up call to the applicants to service their loan. However, the applicants did not take any initiative to service their loan until the end of July, 2021 when the Bank issued a second advertisement for public auction.

Nevertheless, I have considered that the Bank is a business institution, it generates income out of the said loan. Therefore, failure for the 1st applicant to service his loan will render the Bank unprofitable and might be a candidate of bankruptcy as stated in the case of **Mohamed Iqbal Haji & Others v Zedem Investments Limited**, Misc. Land Application No.05 of 2020 that:-

> *" I agree with the counsel for the 2nd respondent that in order for his clients to remain in business it must have funds to lend; and that funds must come from funds repaid by borrowers. It is again true that if a bank does not recover loans it will surely be a candidate bankruptcy ..."*

Under the said circumstances, I am hesitant to suggest that the balance of convenience is in favour of the applicants. All conditions were not met, I, therefore, hold that this is not a fit case for temporary injunction.

In the upshot, I find no merit in the applicants' application, the applicants have failed to meet the conditions in granting a temporary injunction in the event the application is hereby dismissed without costs.

Order accordingly.

DATED at Dar es Salaam this 03rd December, 2021

A.Z.MGEYEKWA

**JUDGE**

03.12.2021

Ruling delivered on 03rd December, 2021 in the presence of Mr. Mkiria Julius, learned counsel for the applicants, and Ms. Victoria Gregory, learned counsel for the 1st respondent and in the absence of the 2nd respondent.

A.Z.MGEYEKWA

**JUDGE**

19.08.2021