

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPLICATION NO.465 OF 2021
(Original Land Case No. 185 of 2020)

ANNA INVESTMENT CO. LTD 1ST APPLICANT
ANNA JEREMIAH KAAYA 2ND APPLICANT
EMMANUEL LUGANO NGALLAH 3^R APPLICANT
JEREMIAH SARUNI KAAYA 4TH APPLICANT

VERSUS

NATIONAL MICROFINANCE BANK PLC1ST RESPONDENT
STARCOM HOTEL LIMITED 2ND RESPONDENT
ADILI AUCTION MART LIMITED 3RD RESPONDENT

RULING

Date of last Order :07.12.2021

Date of Ruling: 10.12.2021

A.Z MGEYEKWA, J

The applicant's application is brought under Order XXXVII Rule (1) (a) of Civil Procedure Code Cap.33 [R.E 2019]. The application was accompanied by an affidavit sworn by Ms. Anna Jeremiah Kaaya, the 2nd applicant.

Opposing the application, the 1st and 3rd respondents filed a joint counter affidavit sworn by Mr. Victor Kikwasi, learned counsel and 2nd respondent filed a counter affidavit sworn by Mr. Henry Abraham Vegula, learned counsel.

When the application was called for hearing on 22nd November, 2021 by the court order, the parties argued the appeal by way of written submissions. The appellants' filed his submission in chief on 26th November, 2021. The respondents' Advocates filed their reply on 3rd December, 2021 and the appellants' Advocate filed a rejoinder on 7th December, 2021.

Ms. Dorothea, learned counsel for the applicants urged this court to adopt the applicants' affidavit to form part of her submission. In her written submission argued that the applicants are praying for temporary injunction and the grounds to be considered are *prima facie* case with a probability of success, irreparable injury which could not adequately be compensated by an award of damages and the balance of convenience favoured the applicant. To support her submission she referred this court to the cases of **American Cyanamid Co v Ethicon Ltd** [1975] AC 396, [1975] 1 ALL ER

504, **Atilio v Mbowe** (1969) HCD 284, and **T.A Kaare v General Manager Mara Cooperative Union** (1984) LTD [1987] TLR 17 HC.

Starting with the first ground, Ms. Dorotheo submitted that it is settled law that a *prima facie* case is established by looking at the affidavit accompanying the application. She added that the applicants on paragraphs 10-14 of their affidavit pleaded that the mortgaged properties are in danger of being sold by the 1st defendant in order to realize the sum of Tshs. 7,913,227,061,30/= while actual balance is Tshs. 3,560,000/=. She claimed that the applicants have never been served with a notice of selling the properties in a public auction, which will occasion the deprivation of the respective properties. The learned counsel for the applicants contended that the facts are serious, thus sufficient to establish a *prima facie* case.

On the ground of irreparable loss, in her submission the learned counsel relied on the case of **T.A. Kaare** (*supra*), Ms. Dorotheo contended that the applicants' properties are located in a prime area with a total worth of more than 10 Billion shillings. She added that applicants will suffer irreparable loss in the event the properties are sold since it will be impossible to get similar prime properties and no damage will buy the similar land. She went on to state that no doubt that it is impossible to recover the land which will be in

the hands of the third parties and the same will attract multiplicity of cases and unnecessary inconveniences. Fortifying his submission, Ms. Dorotheo cited the case of **National Chicks Corporation LTD v National Bank of Commerce**, Misc. Land Application No.222 of 2017. She continued to submit that the 1st respondent will also suffer loss of income and loss of business in the event the said properties are sold. Ms. Dorothea stated that the respective properties are used for business and were used to generate income which was servicing the said loan. She further stated that loss of business/ income was considered as irreparable loss in the cases of **Sigori Investment (T) Ltd v Equity Bank Tanzania LTD**, Land Application No. 56 of 2019 HC, and **National Chicks** (supra). Ms. Dorothea went on to submit that the applicants will also suffer loss of goodwill and trust from their customers and other financial institution.

With respect to the ground of balance of convenience, the learned counsel for the applicants submitted that the applicants are the ones who stand to suffer more than the respondents if their application for an interim order of injunction is not granted. Ms. Dorothea stated that the applicants business will be curable down, the income generated from the properties will vanish, the applicants will lose their prime properties without legal justification as the

1st applicant is not indented the claimed colossal sum and the applicant will lose trust and goodwill to their customers and financial institutions. It was her view that the 1st respondent will not suffer any hardship because the loan is secured. In supporting his ground she referred this court to the case of **National Chicks** (supra).

On the strength of the above submission, Ms. Dorothea Rutta stated that under the said circumstances, the applicants have managed to establish all three conditions in support of their application. She urged this court to grant the applicant's application with costs.

Responding, the learned counsel for the 1st respondent's confutation was strenuous. He came out forcefully opposing the application. Mr. Victor Kikwasi urged for this court to adopt the counter affidavit to form part of his submission. He started by complaining that the Misc. Land Application No. 661 of 2020 is constructively *res judicata*. He submitted that the Lawyer for the 1st applicant after the Misc. Land Application No. 661 of 2020 was rejected for want of merit, prayed to amend the main suit by adding the 2nd, 3rd, and 4th Plaintiffs as parties so the case then she preferred the present application which is similar to Misc. Land Application No. 661 of 2020. He valiantly argued that the applicants are trying to do is like to enter the house through the back door

after discovering the front door has been closed. Mr. Victor urged for this court to find that the applicants' act is an abuse of Court processes and technical delay of the loan recovery process.

Submitting on the three mandatory conditions for grant of injunctions as he stated that in totality the applicant has failed to establish all essential elements for grant of the order sought. He contended that the issue of the existence of the *prima facie* case, the applicant is required first to satisfy the Court that there is a triable issue. It was his view that the applicant has failed to answer this issue in the affirmative because they are not disputing the fact that the period in which the loan in question was to be repaid has long lapsed and that the suit properties were pledged as collateral to the loan granted to the 1st Applicant.

It was his submission that the only reason which the applicants are relying upon the difference of the amount to be realized by the 1st respondent. He added that the applicants' contention that the 1st applicant owes the 1st respondent a sum of Tshs. 3,560,000,000/= only is merely placed. He contended that the applicants have not even explained how they reached the figure, unlike the 1st respondent who uses the Banking and electronically generated system to determine the outstanding balance the system which is controlled by Central Bank. Mr. Victor further submitted that being a big financial

institution the 1st respondent cannot exaggerate the figure to the respondents' detriment. Further to the contents of paragraph 10 above, the 1st and 3rd respondents' Advocate submitted that it is settled principle that a court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage. Fortifying his submission he referred this court to the cases of **Pelican Investment Ltd v National Bank of Kenya Ltd** [2002] 2 E.A. 488 and **NBC v Dar Es Salaam Education and Office Stationary** [1995] TRL 272 CAT.

Concerning the ground of irreparable loss, the 1st and 3rd respondents' Advocate argued that the 1st respondent is continuing to suffer the loss. He stated that the suit properties being pledged as collateral to the loan were subjected to all consequences including sale in the event of default to repay the loan as agreed. He submitted further that the purpose of collateral/security to the loan was well elaborated in the case of **Agency Cargo International v Eurafrican Bank (T) Ltd**, HC (DSM), Civil Case No. 44 of 1998 (unreported), the same was quoted with approval in the case of **Christopher P. Chale v Commercial Bank of Africa**, Commercial Case No. 635 of 2017 (unreported), where the Court had the following to say:-

“...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 have to be repaid by its creditors. If a Bank does not recover its loans, it will seriously be an obvious candidate for Bankruptcy ... t is only fair that Banks and their customers should enforce their respective obligations under the Banking system” (at Pp. 5 and 6).”

It was the 1st and 3rd respondents' Advocate submission that the Applicant having defaulted to repay the loan, the remedy is to sell or deal with the collaterals in a manner convenient to the lender.

With respect to the balance of conveniences, He submitted that if the injunctive orders are granted it is the 1st respondent who will continue to suffer loss than the applicants. Mr. Victor submitted that the balance of convenience is in favour of the 1st respondent who is in a position to reply to the decretal amount in the event the Applicant/Plaintiff succeeds in the main suit. To bolster his submission he cited the case of **Hotel Tilapia Ltd v Tanzania Revenue Authority**, Commercial Case No. 2 of 2000 (unreported), and the case of **Christopher P. Chale v Commercial Bank of Africa**, Commercial Case No. 635 of 2017 (Unreported) the Court held that:-

“... the object of a temporary injunction is to protect the Applicant against injury by violation of his right for which he could not adequately in damages recoverable in the action if the uncertainty were resolved in his favour on the trial...”

The learned counsel for the 1st and 3rd respondents submitted that for an injunction to be granted, all essential elements must exist and/or be proved, . it was his view that the applicants herein have failed to prove one/all or adduce reasons let alone sufficient for this Honourable Court to exercise its discretion in granting this Application.

On the strength of the above submission, he urged this court to dismiss the application for want of essential elements and sufficient reasons with costs.

In reply, the 2nd respondent was brief and straight to the point. It is was his contention that the applicant failed to prove the conditions established in the case of **Attilio v Mbowe** (supra) for the Court to grant the temporary injunction as sought by this Honourable Court. He stated that first and foremost it is important for the Court to note that in order to grant temporally injunction the three conditions established in **Attilio’s case** must be satisfied. It was his submission that the applicants failed to establish irreparable loss, in their submission the applicants relied on the fact that the properties are located in prime areas, and if they are sold it will be difficult to get similar prime properties.

Stressing, he contended that the applicants have failed to establish that their loss if the properties are to be sold will be irreparable by damages. To buttress his submission he cited the case of **T.A. KAARE** (supra) the Court defined irreparable loss to mean:-

"By irreparable injury it is not meant that there must be no physical possibility but merely that the injury would be material, for example, one that could not be adequately remedied by damages."

It was his view that in the present situation the fact that the property is located at the prime area and worth 10 billion as submitted by the Applicants, does not mean that their loss cannot be adequately remedied by damages. He added that it is clear that the loss is quantified and the applicants can be adequately compensated by an award of damages for the loss

Before ending his submission, the learned counsel for the 2nd respondent submitted that the present application is an abuse of Court process as the same was determined by this Court. Madam Judge this Court determined a similar Application for a temporal injunction pending final and conclusive determination of Land Case No. 185 of 2020 between the same parties. Therefore, it was his view that determining the same Application is a total abuse of the Court process and the Court may be justified to reject the same for that reason. To support

his submission he cited the Mulla on the Code of Civil Procedure Act V. of 1908, 18th Edition by Sir Dinshah Fardunji on page 199.

In conclusion, the learned counsel for the 2nd respondent beckoned upon this court to dismiss the application for failure to establish all three conditions of temporary injunction.

In his brief rejoinder, Ms. Dorothea started by clarifying the issue of *res judicata* the Misc. Land Application No. 661 of 2020 between Anna Investment Ltd and NMB Bank PLC and others compared to the current application it was her submission that the first application was not heard and finally decide therefore the application is not *res judicata*.

Regarding the three conditions of a temporary injunction, Mr. Victor reiterated his submission in chief. Stressing that the applicants have established all three conditions for temporary injunction.

Before generally canvassing the grounds of appeal, I have dispassionately considered the so-called preliminary point of objection. The learned counsels for the respondents claimed that the instant application is *res judicata*. With due respect to the learned counsels for the respondents, I do not think if the preliminary point of objection has been raised at the right

instant. When this matter was called for hearing on 22nd November, 2021, Mr. Victor Kikwasa, learned counsel for the 1st and 3rd respondents was present, therefore, he had a chance to raise his preliminary objection but he waived his right to do so. The learned counsels for the respondents were required to follow proper procedure, in case they wanted to challenge this application, they were supposed to challenge by filing a preliminary objection before hearing the application.

For the aforesaid reasons, the respondents' point of law is disregarded. Therefore, I proceed to determine the appeal on merit.

Having heard the submissions of both learned counsels, I should state at the outset that, the issue for determination is *whether the applicants have adduced sufficient reasons to move this court to grant a temporal injunction.*

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, all learned counsels have addressed this court on the said conditions which require the court to look at when determining the applications of this nature. **First**, in *prima facie* case, the court must satisfy itself that there is a bona fide dispute raised by the

applicant 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/she will suffer irreparable loss if injunction, as prayed, is not granted. **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 Eurafrikan 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. I have perused the applicants' affidavit specifically paragraphs 3, 4, 5, 10 11 and 12, and the submission of Ms. Dorothea, I found that the 1st respondent is claiming a balance of Tshs. 7,913,227,061.30 while it is the applicants' knowledge that the outstanding amount is around Tshs. 3,560,000,000/=. Again, the records are silent whether the mandatory notice to service the loan

of 60 days was given to the 2nd, 3rd and 4th applicants since the 1st respondent did not attach the said notice to show whether the same was issued to the 2nd, 3rd, and 4th applicants as prescribed by the law.

Therefore based on the above observation, it is my respectful view that the applicants have established a *prima facie* case. There is an arguable ground before this court as to whether the outstanding amount is Tshs. 7,913,227,061.30 or Tshs. 3,560,000,000/= and whether the applicants were properly been served with a compulsory 60 days' notice after they failed to repay their loan or not and whether they were notified that the 1st respondent intends to sell their properties through a public auction. Therefore, the first condition has met the test of the application.

Regarding the second condition, the applicants are claimed that if the application is not granted they will suffer irreparable loss. It is clear that the averment dealing with irreparable loss is to be found in paragraph 15 of the affidavit, the applicants claim that in the event the respondent will dispose of the suit premises then they will suffer irreparable loss as they will not be able to recover similar properties. It is my view that the properties in dispute are worth a lot of money whereas the irreparable injury could not adequately be compensated by an award of damages. Also, since there is no proof of statutory

notice given to the 2nd, 3rd, and 4th applicants, it is possible for the applicants to suffer irreparable loss. Therefore, the second condition has met the test of the application.

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 the applicants will suffer more compared to the respondents. The applicants will suffer greater loss since it is not clear what properties are still in liability to pay the loan. Therefore, speaking on a comparative basis, I fully subscribe to the learned counsel for the applicants that the applicants are the ones who are likely to suffer greater hardship if the temporary injunction is not granted.

It is evident that the Bank will also suffer loss. I fully subscribe to Mr. Victor's submission that the Bank being in the Banking business must have funds to lend and which have to be repaid by its debtors. However, in the circumstance of this case, the applicants will suffer more than the respondents. I have considered the fact that in case the respondents will win the case they will be able to auction the applicants' properties and recover

their money with interest. Therefore, this last condition has met the test of the application.

In the upshot, I find merit in the applicants' application, the application is allowed without costs.

Order accordingly.

DATED at Dar es Salaam this 10th December, 2021



A.Z.MGEYEKWA

JUDGE

10.12.2021

Ruling delivered on 10th December, 2021 in the presence of Mr. Mudhiri, learned counsel for the applicants, and Mr. Hillal, learned counsel for the 1st & 3rd respondents in the absence of the 2nd respondent.



A.Z.MGEYEKWA

JUDGE

10.12.2021