

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO.523 OF 2021

(Arising from Land Case No, 163 of 2021)

ESTHER JOSEPH OGUTU APPLICANT

VERSUS

EQUITY BANK1ST RESPONDENT

COMRADE AUCTION MART COMPANY LTD 2ND RESPONDENT

RULING

Date of last Order: 16.12.2021

Date of Ruling: 21.12.2021

A.Z MGEYEKWA, J

The applicant's application is brought under Order XXXVII Rule (1) (a) & 2 (1) and sections 68 (c), (e), and 95 of Civil Procedure Code Cap.33 [R.E

2019]. The application was accompanied by an affidavit sworn by Ms. Esther Joseph Ogutu, the applicant.

Opposing the application, the first respondent filed a counter-affidavit sworn by Mr. Lucky Titus Kalulio, Principal Officer of the respondent.

The application is borne from the facts that, there is before this court a pending Land Case No. 163 of 2021. Following the events that transpired on the case, the counsel for the applicant filed this application under the certificate of urgency, praying for this court to grant a temporal injunction to restrain the respondents their agents, or any person acting under their instruction to dispose or interfere with the suit premises, pending the hearing and final disposal of the main suit.

When the application was called for hearing on 16th December, 2021 the applicant enjoyed the legal service of Mr. Samson Ombuya, learned counsel while the 1st respondent enjoyed the legal service of Mr. Kephas Mayenje, learned counsel. By the court order, the parties argued the appeal by way of written submissions. The appellant filed his submission in chief on 21st May, 2021. After obtaining an extension of time, the respondent's Advocate

filed a reply on 04th June, 2021 and the applicant's Advocate filed a rejoinder on 11th June, 2021.

The 2nd respondent did not enter appearance, even though he was served through substitution of service. Therefore, following the prayer by the applicant's Advocate to proceed *ex-parte* succeeding the absence of the 2nd respondent, this court granted the applicant's Advocate prayers. The matter proceeded *exparte* against him.

The learned counsel for the applicant was brief and straight to the point. He argued that the applicant is seeking an order for a temporary injunction to restrain the respondents and or whomsoever purports to act on their behalf of the applicant from depositing the suit premises. He urged this court to adopt the applicant's affidavit to form part of his submission. The learned counsel for the applicant submitted that the applicant is praying for a temporary injunction based on the following grounds; the applicant is the owner of the suit premises which contain a family house and an office. He stated that the applicant has a lending money business registered company namely; M.M Junior Microfinance Ltd. To support his submission he referred this court to paragraphs 1, 2 and 3 of the applicant's affidavit.

Mr. Samson went on to submit that there is a pending Land Case No. 143 of 2021 and the applicant's premises, Plot No. 2003 Block 'F' is in dispute. He added that the triable issue is ownership and liability of parties regarding the alleged mortgage which is purported to have been secured by the same disputed property. He valiantly argued that the applicant will suffer more inconveniences compared to the respondents since 17th September, 2021 when the respondents a public announcement of their intention to dispose of the suit property, therefore, the applicant's family entered into a fear. He went on to submit that the business which was conducted at the suit land has deteriorated, customers are pulling out.

Mr. Samson insisted that the applicant will suffer more loss compared to the respondent who will not suffer if the order of the temporary injunction is granted. He went on to submit that the applicant is likely to lose her property on the allegation that there is someone who has used the said property to obtain a loan from the 1st respondent. Supporting his submission he referred this court to paragraphs 9 and 13 of the applicant's affidavit. He contended that the conduct of the 1st respondent to sell the suit property in order to discharge the loan which the applicant was not a party to the said loan. He added that the 1st respondent action denies the applicant right to

own or use her suit property, the same renders the applicant's family to lose their residential house.

The learned counsel for the applicant continued to state that in cases related to temporary injunction the court has laid down three conditions. To support his submission Mr. Samson cited the landmark case of **Atilio v Mbowe** (1969) HCD 286. He went on to state that the conditions include establishing that there is a triable issue, the balance of the convenience between the parties, and irreparable loss. He asserted that the three conditions are perfectly established in his application.

On the strength of the above submission, Mr. Samson urged this court to grant the applicant's application and to restrain the respondents and their agents to issue instruction pending the hearing and final disposal of the main case. He prayed for this court to order for costs.

Responding, the learned counsel for the 1st respondent's confutation was strenuous. He came out forcefully opposing the application. Mr. Mayenje urged for this court to adopt the counter affidavit to form part of his submission. He submitted that for a court to grant a temporary injunction there must be co-existence of three grounds; *prima facie* case, irreparable

loss, and balance of inconvenience. To begin with the first ground, Mr. Mayenje submitted that the applicant is claiming that she is the owner of the suit premises; Plot No. 2003 Block 'F' at Tabata, Ilala District within Dar es Salaam Region. He added that the attached certificate and alleged Certificate of title indicates that it was registered on 8th July, 2021. He went on to state that their counter affidavit is accompanied by a search report indicating that the owner of the suit premises is one Mr. Keneth Kyando. He stated that search was conducted on 24th September, 2021 and the alleged Certificate of Title was registered on 8th July, 2021, thus the current status indicates that Keneth Kyando is the owner of the disputed plot.

Mr. Mayenje continued to submit that the suit plot has incumbrancers and the same is mortgaged to Equity Bank Ltd. It was his submission that in accordance to the search report, the applicant is not the owner of the suit land. He added that the applicant had a chance to dispute the search report since she received a copy of the 1st respondent's counter-affidavit but she opted not file a reply to the counter affidavit to dispute the said fact.

Submitting on the second ground, Mr. Mayenje contended that saying the applicant has filed a suit is a submission from the bar. He contended that

parties are bound by their affidavit therefore as long as the same is not featured in the affidavit, it cannot stand. He complained that filing of a suit is not a ground for temporary injunction.

On the 3rd ground, issue of inconveniences, the learned counsel for the 1st respondent contended that the affidavit in support of the application has not stated any inconvenience which the applicant is going to suffer rather the words from the bar made by the applicant's Advocate.

In regard to the issue of irreparable loss, the learned counsel for the 1st respondent argued that the 1st respondent is a bank institution, running a business all over the country, in case the applicant will incur loss then the Bank will be in position to compensate the applicant. He added that the affidavit in support of the instant application has not indicated the grounds of temporary injunction to move this court to grant her application.

On the strength of the above submission, Mr. Mayenje beckoned upon this court to find that the applicant has failed to establish the three conditions which must exist for granting injunction application thus he invited this court to dismiss the application in its entirety with costs.

In his rejoinder, Mr. Samson reiterated his submission in chief. He heroically submitted that the issues regarding search report, and the Certificate of Occupancy are issue to be resolved in the main case and not at the stage of temporary injunction. He also submitted that the issue that the applicant has not disputed the 1st respondent counter affidavit is a matter to be determined at the hearing of the main case.

Insisting, Mr. Samson argued that Land Case No. 163 of 2021 is pending before this court. To support his submission he referred this court to paragraph 13 of the affidavit. The learned counsel for the applicant stressed that filing a suit is among the ground of temporary injunction. Fortifying his submission he referred this court to Order XXXVII Rule 1 (a) of the Civil Procedure Code Cap.33. Mr. Samson maintained that the applicant on paragraphs 10 -11 of her affidavit has listed the inconveniences which she is going to suffer in the event when her application is not granted. He urged this court to observe justice by issuing a temporary injunction instead of waiting for the applicant to incur loss.

In conclusion, the learned counsel for the applicant urged this court to grant the applicant's application with costs.

Having heard the submissions of both learned counsels, I should state at the outset that, the issue for determination is *whether the applicant has 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, **T.A Kaare v General**

Manager Mara Cooperative Union (1984) LTD [1987] TLR 17 HC, and **Agency Cargo International v Eurafrikan Bank (T)**, Civil Case No. 44 of 1998 HC at DSM (unreported) to mention just a few.

In determining the first principle, the applicant must establish that there is a *prima facie* case or there is a serious question to be tried. The applicant's Advocate submitted that the applicant is prompted by the great threat by the 1st respondent who intends to dispose of the applicant's property; Plot No. 2003 situated at Tabata by public auction. To verify that she is the lawful owner she attached a copy of a Certificate of Title which state that the owner is Esther Joseph Ogutu. The respondents' Advocate on his side claimed that the Certificate of Title as per the search report dated 3rd September, 2021 indicates that the owner of the suit premises is Keneth Kyando.

From the foregoing, I fully subscribe to the submission of Mr. Mayenje. It is doubtful if the applicant is the real owner of the suit land since the search dated 3rd September, 2021 indicates that one Keneth Kyando is the lawful owner. However, as long as the applicant who is the complainant has also shown that she is the owner of the suit land. The applicant lodged a suit before this court to prove that she is the owner of the business premises and

their family house in dispute. In my respectful view, these grounds suffice to prove that there is a *prima facie* case to be determined by this court.

In so far as the second condition is concerned, the applicant claimed that if the application is not granted she will suffer irreparable loss. It is clear that the averment dealing with irreparable loss is to be found in paragraph 12 of the affidavit. The applicant claims that if the 1st respondent will dispose the suit premises then she will suffer loss since her family will be homeless, she will lose her business and profit thereon and she will not be able to maintain and circulate the capital of her business. Thus, it is my view that in case his properties will be disposed by the 1st respondent, the applicant will 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 applicant will suffer more. Speaking on a comparative basis the applicant is not the one who took the said loan and she is not a customer of

the Equity Bank. The applicant came to learn later on that the 1st respondent made a public announcement to dispose her premises.

For the aforesaid reasons, I fully subscribe to the learned counsel for the applicant that the applicant is the one who is likely to suffer greater hardship if the temporary injunction is not granted. It is evident that the Bank will suffer greater hardship, however, the hardship might not be the same because the applicant alleges that she is not the one who obtained the said loan from the 1st respondent, therefore, the Bank will still demand Kenneth Kyando to pay his debts. I have considered the fact that in case the applicant loses the case it will be easier for the bank to proceed with auctioning the suit premises.

All said, this application is allowed without costs.

Order accordingly.

DATED at Dar es Salaam this 21st December, 2021

A.Z.MGEYEKWA

JUDGE

21.12.2021



Ruling delivered on 21st December, 2021 via audio teleconference whereas Mr. Samson Wambuya, learned counsel for the applicant and Mr. Kephas Mayenje, learned counsel for the 1st respondent were remotely present.


A.Z.MGEYEKWA

JUDGE

21.12.2021

