

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 625 OF 2021

(Arising from Land Case No.190 of 2021)

EMMANUEL GITIGAN GHERABASTER APPLICANT

VERSUS

CRDB BANK PLC 1ST RESPONDENT

BANI INVESTMENT

AUCTION MART 2ND RESPONDENT

SAID NASSOR SAID 3RD RESPONDENT

RULING

Date of Last Order: 25/11/2021 &

Date of Ruling: 13/12/2021

A. MSAFIRI, J

This is an application for an order of temporary injunction to restrain the 1st and 2nd Respondent, from attaching and selling the two mortgaged properties which are; Residential Plot No. 245 Block I, Title No. 46914, LO. No. 164027, and Plot No. 243 Block I Title No. 46915, L.O No.164022 both situated at Temeke Municipality, Dar es Salaam. The injunctive relief is sought pending the determination of the Land Case No.190 of 2021. The application is by way of a chamber summons supported by the affidavit sworn by the applicant himself. The application is brought under Order XXXVII Rule (1) (a) (b) and (2) (1) and section 68 (e), (e) and 95

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of Civil Procedure Code Cap.33 [R.E 2019]. On record only the 3rd respondent challenged the applicant's affidavit by filing counter affidavit.

The Application was heard by way of oral submissions. On the date of hearing interparte, Mr. Samson Rusumo, learned advocate appeared and argued the application on behalf of the applicant. Mr. Alex Felician learned counsel appeared for 1st respondent, and advocate Mlyamberere Mweli, appeared for the 3rd respondent while the 2nd respondent was absent after having been served and failed to appear.

In their oral submissions, both learned counsel for the applicant and for the respondents recognized the principles for granting injunction as laid down in the now famous case of ***Atilio vs. Mbowe*** (1969) HCD 284 whereby Georges, CJ (as he then was) laid them down as follows:

- (i) There must be a serious question 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 than will be suffered by the defendant from the granting of it.*

A summary of Mr. Samson submissions reveals that his client is about to be evicted from the two mortgaged properties and there is a 30 days' notice by the 3rd respondent dated 28th September 2021 with that intention. He pointed that there is triable issue which are supposed to be

determined by the Court and the properties are the residential properties as the family of the applicant reside on. That if temporary injunction is not granted the applicant and his family will become homeless therefore temporary injunction is necessary. He tests his arguments based on the case of **Atilio vs. Mbowe** (supra).

Mr. Alex for the 1st respondent replied to the above submission that the Bank was duly served and they don't contest the application since it is beyond their scope as the dispute property is already sold through auction to one Said Nassor Said (3rd respondent) way back in the year 2013. He pointed that the Bank only contests the Land Case No. 190 of 2021.

Mr. Mweli for the 3rd respondent submitted that, this application is misconceived as it was not supposed to be a prayer for temporary injunction to restrain the 1st and 2nd respondents from attaching and sell the two mortgaged properties but rather be a prayer for maintenance of status quo. He reasoned that the disputed property has been sold to his client since the year 2013.

He further argued that, since in the affidavit the applicant admits the sale has been conducted, therefore it is wrong for the Court to grant a prayer which is not prayed for under the chamber summons. He further added that the applicant counsel has failed to evaluate the three tests under the case of **Attilio vs. Mbowe**. In his opinion the triable issue is based on failure to issue 14 days' notice, but under paragraph 6 and 7 of the affidavit, the applicant admits to have received a notice from the 1st respondent. And there is nowhere where applicant proved to have suffered irreparable loss if prayer is not granted. It is the 3rd Respondent who will suffer loss if the prayer is granted for the reasons that he purchased the mortgaged property since the year 2013 but he has not been able to live in the suit premise as the applicant has refused to vacate

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the same. Mr. Mwelil pointed that, until this moment his client has no permanent place to reside which caused him to incur costs to rent other premises while his properties are occupied by the applicant.

He added that on point of great hardship, the applicant has failed to prove it, and it is the 3rd respondent who will suffer great hardship if temporary injunction will be granted.

In rejoinder the applicant's counsel repeated his submission and added that the 1st respondent never disclosed the purchaser of the disputed property.

Having heard the submissions by learned counsels and gone through the chamber summons and the affidavit accompanying it, this court is being moved for the orders of temporary injunction and not to for maintenance of the *status quo*, meaning that the applicant does not seek to let matters stand as they now are, at whatever stage they might have reached as of now, pending determination of the main suit but he seek to stop the intended attachment and sale of a mortgaged property by the 1st and 2nd respondents. At the same time the applicant is acknowledging the fact that the Mortgaged properties are already sold as averred under paragraphs 7, 8,9,10 of his affidavit.

While determining the prayers, the question in my mind was whether the applicant is asking the Court to order that the properties not to be sold again? However, I was relieved also to see the 1st respondent through his advocate clearly indicating on record that he has no interest on the application as the suit property as already been sold for failure by the applicant to pay the debt. The issue is now whether court interference is necessary to protect the plaintiff from any kind of injury which may be

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irreparable before his legal right is established.

In the present application, I don't think the court has power to take immediate action as requested by the applicant. I say so because in the application, the principal prayer is for an order that to restrain the 1st and 2nd respondent from attachment and sale of the Mortgage properties while it is the fact that sale has already been conducted way back in the year 2013. That means that the auction has already taken place. There is no way the prayer under the chamber summons can be implemented at this juncture. I say so because this application was over taken by event, and this court should refrain from giving what is already done or giving what has not been prayed for.

The same has been decided by the Court of Appeal in the case of **National Bank of Commerce vs. Dar es Salaam Education and Office Stationery, (1995) TLR 272**, where it was held that temporary injunction order cannot be granted where the prayer of what to be restrained has already been implemented or executed for instance one cannot apply for an order to restrain attachment and sale of the suit property while it has already been sold.

In my opinion the relief order sought by the applicant by his chamber summons if given by this court will not serve any purpose, since the disputed property has already been sold by the 1st respondent to the 3rd respondent by way of auction since 2013 and the said chamber summons seeks to restrains the 1st and 2nd respondents to attach and sale mortgaged properties. In my view, once the auction was opened and concluded, the inevitable effect was that the process had reached a stage where it could hardly be restrained. It is a bit difficult to comprehend the

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sense behind the idea of restraining the sale which the applicant is aware that it has already been concluded since 2013.

Furthermore, it is a trite law that parties are bound by their pleadings. And the pleadings of this Application is the chamber summons supported by the applicant's affidavit. The court therefore cannot grant orders which were not prayed for as per the pleadings.

Basing on the above reasons, I hesitate to grant the application and I hereby dismiss it accordingly. Costs shall be in the main cause.

It is so ordered.

Dated at Dar es Salaam this 13th Day of December 2021.



A handwritten signature in blue ink, appearing to read "A. Msafiri". The signature is written in a cursive style and is positioned above a horizontal dotted line.

A. MSAFIRI
JUDGE