

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

**MISC. LAND CASE APPLICATION NO. 328 OF 2021**

(Originating from Land Case No. 94 of 2021)

**LILIAN STEPHEN IHEMA** (Executrix of the Estate of  
the Late STEPHEN ERNEST IHEMA).....**APPLICANT**

**VERSUS**

**RECEIVER & MANAGER OF  
SKY DEVELOPERS LIMITED**.....**1<sup>ST</sup> RESPONDENT**  
**I & M BANK (T) LIMITED**.....**2<sup>ND</sup> RESPONDENT**

Date of Last Order: 06.12.2021  
Date of Ruling: 20.12.2021

**RULING**

**V.L. MAKANI, J**

The applicant herein has filed this application seeking for the following orders:

- 1. That this honourable court to issue eviction order against the (Receiver Manager) from the rental property known as Plot No. 270 Msasani/Dar es Salaam Title No. 118650 due to failure to fulfilling its obligation to pay rental arrears since January, 2019 and for unlawful attempts to public auction the said premises pending determination of the main suit.*
- 2. That this honourable court be pleased to restrict the respondents from collecting rentals income from property known as Plot No. 270 Msasani/Dare es Salaam Title No. 118650 and the same be paid to the applicant.*

In the alternative to prayer 2 hereinabove:

- 3. The rental income from the property known as Plot No. 270 Msasani/Dare es Salaam Title No. 118650 be deposited direct to the court pending determination of the main suit.*
- 4. Costs of this application.*
- 5. Any other order (s) as this honourable court may deem fit and just to grant in favour of the applicant.*

The application is made under Section 109(1) (c) & (d) and section 128 (8) (a) of the Land Act CAP 113 RE 2019 and sections 68 (c) and (e) and 95 and Order XXXVII Rules 1(a) and 2(1) of the Civil Procedure Code CAP 33 RE 2019 (the CPC). The application is supported by the affidavit of the applicant herein. The respondents filed a joint counter-affidavit that was sworn by Dr. Onesmo Michael Kyauke the Receiver Manager of the 1<sup>st</sup> respondent as appointed by the 2<sup>nd</sup> respondent.

With leave of the court the application was argued by way of written submissions. Mr. Deogratius Ringia, Advocate drew and filed submissions on behalf of the applicant. In his submissions in chief, he gave a brief history of the matter. He said on 01/08/2013 the late Judge Stephen Ernest Ihema entered into long term lease agreement with one Tarek Hani Farhat who vide an addendum dated 04/12/2015

was replaced by Sky Developers Limited as an investor cum tenant. On 20/04/2016 the late Judge Ihema entered into a mortgage agreement with the respondents to develop and operate the property in dispute commercially. Mr. Ringia pointed out the gist of the application to be failure by the 1<sup>st</sup> respondent to fulfil his obligations of payment of rental arrears since 2019 and further for the unlawful attempt of the respondents to auction Plot No. 270 Msasani, Dar es Salaam Title No. 118650 (the **suit property**).

According to Mr. Ringia, since the 1<sup>st</sup> respondent is in breach of the conditions of the lease for failure to honour his obligations to pay rental arrears to the applicant since 2019 despite new payment schedule, the applicant may commence an action for injunction under section 109(1)(c) of the Land Act. He further said the 1<sup>st</sup> respondent is obliged under the law (section 128(8) of the Land Act) to pay rental arrears to the applicant but the same has not be done. And lastly, he pointed out that the suit property is in danger of being alienated for failure by the 1<sup>st</sup> respondent to honour his obligations hence Order XXXVII Rule 1(a) and 2(a) of the CPC.

Mr. Ringia said grant of an injunction order is the discretion of the court but such discretion must be exercised judicially. He said the case of **Atilio vs. Mbowe (1969) HCD 284** set out the conditions for grant of temporary injunction.

As for the first condition, Mr. Ringia said there is a prima facie case to be answered in respect of the rental arrears that the 1<sup>st</sup> respondent has failed to pay since January, 2019 to the tune of USD 202,500.00.

As for the second condition, Mr. Ringia said the applicant and the family of the late Judge Ihema would suffer irreparable loss for the actions of the 1<sup>st</sup> respondent of failure to pay the rentals in arrears and the wrongful advertisement of the public auction of the suit property. He said such illegality would cause irreparable loss if an injunctive order is not granted.

He said on the third condition, if an order for temporary injunction is not granted the applicant would suffer greater hardship compared to the respondents in that the respondents are to benefit more from non-payment of the rent compared to the applicant and further upon successful auction the applicant is at stake to incur more loss

financially and mentally compared to the respondents. Mr. Ringia relied on the cases of **Oasis Consulting Limited vs. Salome Festo Kahamba, Misc. Land Case Application No. 329 of 2020 (HC-Land Division, DSM)**(unreported) and **Zubeda Abdallah vs. Aluwa Abdallah Baawi & Others, Misc. Land Case Application No. 97 of 2018 (HC-Land Division, DSM)** (unreported). In conclusion Mr. Ringia prayed for the application to be granted and the 1<sup>st</sup> respondent be evicted from his position as a receiver manager or alternatively the rental income from the suit property be deposited directly in court pending the hearing of the main suit.

Dr. Onesmo Kyauki drew and filed submissions in reply on behalf of the respondents. He said he has identified the application as a purported application for interim injunction because it is not an application for injunction properly so called considering the prayers contained in the chamber summons critically analysed vis a viz the cited provisions of the law. He said section 109 (1) (c) and section 128 (8)(a) of the Land Act is by its nature not an enabling provision of the law for temporary injunction. He said the provisions are irrelevant in so far as the remedies sought are concerned. He said section 128 (8) of the Land Act requires the Receiver to give priority

in application of the moneys he has received from the property under receivership. He said this provision goes to the root of the reliefs prayed in the main case and not for the application for temporary injunction. He said the citing of these provisions in the application are fatal because they would render the hearing of the main case an academic exercise especially if the temporary injunction is granted. He said section 68 (c) and (e) of the CPC are also irrelevant and so is section 95 of the CPC which provides for the inherent powers of the court and it is inapplicable where there is a specific provision say for temporary injunction Order XXXVII of the CPC. He said Order XXXVII Rule 2 (a) of the CPC is also not applicable. The applicable provision is Order XXXVII Rules 1(a) of the CPC. He relied on the case of **Abla Estate Developers & Agency Co. Limited vs. KCB Bank Tanzania Limited, Misc. Land Application NO. 604 of 2017 (HC-Land Division, DSM)**.(unreported)

Dr. Kyauki went further to state that an application for injunction sought under the provisions of section 68(c) of the CPC read together with Order XXXVII Rules 1(a) of the CPC is not sustainable because granting them will finally and conclusively determine the matter at controversy between the parties. He said this argument is based on

the prayers in the Chambers Summons which are reliefs which conclusively determine the matter in controversy between the parties and cannot be temporary reliefs. He said the application is tainted with illegality because it is praying for reliefs which are not maintainable based on the provisions of the law filed herein. He said the prayers go to the roof of the dispute and the merits of the main case that is Land Case No. 94 of 2021. He cited the case of **Vodacom Tanzania Public Limited Company vs. Planetel Communications Limited, Civil Appeal No. 43 of 2018 (CAT-DSM)**(unreported).

As for the conditions for temporary injunction, it is Dr. Kyauki's submissions that the issuance of an injunction against the respondents would delay and jeopardize the interests of the estate of the late Judge Stephen Ihema as the appointment of the 1<sup>st</sup> respondent to find an investor to buy the remaining lease would indeed benefit the Bank and the estate of the deceased. He said Land Case No. 94 of 2021 has not established a prima facie case with the probability that the applicant would be entitled to the reliefs sought. He said there is no justification for grant of temporary relief because the 1<sup>st</sup> respondent is appointed by virtue of powers conferred upon

the 2<sup>nd</sup> respondent by the mortgage deed and section 128 of the Land Act.

Dr. Kyauki further said on balance of convenience the grant of injunction on grounds of the remedies sought in the Chamber Summons would be of no use to the applicant because these are the same remedies claimed in the main suit. He said both the applicant and the 2<sup>nd</sup> respondent would suffer in the event there is an order to stop the sale of the mortgaged lease because the applicant will not get the rental income from the leased suit property and the bank will not be paid its loan. he said the applicant and the 2<sup>nd</sup> respondent have a common interest as shown in the minutes and the 1<sup>st</sup> respondent has not failed to pay the alleged rent of USD 202,500, but sale of the mortgaged lease can fetch more rent to the applicant and the loan and interest to be paid. He said the application and suit are frivolous and vexatious hence the applicant is not entitled to the temporary relief that is sought. He said the application is intended for the applicant to interfere with the contractual as well as legal and obligations under the loan which is now in default. He said the instant case would not only rescue the applicant and the entire estate of the late Stephen Ernest Ihema from unbearable losses in terms of rental

and income, but will enable the new lucrative investor to get tenants and fetch rent. In conclusion, Dr. Kyauki prayed for the application for injunction by the applicant be dismissed.

In rejoinder, Mr. Ringia reiterated his submissions in chief. He further said that since the application rose through the main case then the application of section 109 (1) (c) (d) and section 128 (8) of the Land Act are not temporary in nature but are rooted to the reliefs prayed for in the main case. He said the court has the discretional powers to grant such orders as it may deem fit under section 68 (e) of the CPC. As for Order XXXVII Rule 2(1) of the CPC he said the applicant is executrix of the estate of the late Judge Ihema and so she has a duty to step into the shoes of the deceased and so she has a duty to collect, preserve and distribute properties of the deceased. He said the law does not only look at breach of contract but also allows the applicant to seek for a temporary injunction if there is any injury related to the properties of the deceased. The applicant therefore did not make any mistake to file this application and the main suit. He reiterated the prayers in the main submissions.

I have gone through the affidavit, counter affidavit and submissions by the learned Advocates. The main issue for consideration is whether this application is meritorious.

There is no dispute that this application is for restraint orders by the applicant as against the respondents. Though as observed by Dr. Kyauke, the orders in the chamber summons extend to the main case, but he also admitted that the proper provisions applicable for temporary injunctions are Order XXXVII Rules 1(a) and section 68(c) of the CPC which have been duly cited. On the basis thereof, the other provisions cited are currently redundant as they relate to the main case. As Order XXXVII Rules 1(a) and section 68(c) of the CPC have been cited then, this court is properly moved to consider and determine the application.

The guiding principles of temporary injunction are set out in the case of **Atilio Mbowe** (supra). In the said principles the applicant must establish that there is a prima facie case, that he will suffer irreparable loss and balance of convenience if the injunction is refused. These principles have been followed in several cases including those cited by the Counsel herein.

As for the first condition it is evident that there is a prima facie case. The applicant as an executrix is claiming in the affidavit that rent in respect of the Long-Term Lease has not been paid by the 1<sup>st</sup> respondent since 2019 and this has not been controverted by the respondents. This alone raises a prima facie case, though there are other things such as default in the loan resulting for non-payment of the rent and the sale of the lease which are also matters to be considered in the main suit. In that regard the first condition has been complied with.

As for the second principle on irreparable loss. It is claimed by the applicant in the affidavit that no rent has been received by the applicant since 2019. According to the submissions by Dr. Kyauke the rent would be paid and there would be more pay coming the applicant's way if the remaining period of the Lease is sold. However, looking at the arguments of Counsel there is nothing concrete on the table despite several meetings by the parties therefore there is nothing tangible which has been agreed upon and can be relied upon by the applicant. On the other hand, while the applicant says there is a notice of sale of the premises, Dr. Kyauki has explained that there is a mere sale of the lease and not otherwise. In such circumstances, where matters are not very

well-defined, the applicant and the family of the late Judge Ihema are destined to suffer more if an order of injunction is not granted.

On balance of convenience, it is quite clear that the applicant and the deceased family would suffer more if an order for temporary injunction is not granted so that the things related to the lease, the loan in favour of the 2<sup>nd</sup> respondent and the appointment of the 1<sup>st</sup> respondent as receiver are lucidly sorted out.

For the foregoing explanations, the three conditions for grant of a temporary injunction have been complied with.

In the result the application is granted to the extent that the respondents are restrained from sale, disposition or any change of status related to the suit property (Plot No. 270 Title No. 118650, Msasani, Dar es Salaam). This order shall remain in force for the initial six months from the date of this ruling in terms of Order XXXVII Rule 3 of the CPC. Costs shall be in the cause. It is so ordered.

  
**V.L. MAKANI**  
**JUDGE**  
**20/01/2021**

