

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC.LAND APPLICATION No. 388 OF 2021**

(Arising from Land case number 239 of 2017)

**SALUM A. KUNGUGE.....APPLICANT**

**VERSUS**

**MAENDELEO BANK PLC ..... 1<sup>ST</sup> RESPONDENTS**

**DESTENI COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULLING**

**Date of last order: 8/9/2021**  
**Date of Judgment: 7/10/2021**

**T. N. MWENEGOHA, J.**

The Applicant Salum A. Kunguge has filed an application under Section 68 (e) of the Civil Procedure Code Cap 33 R.E 2019 (Herein after **the C.P.C**), Seeking for an Order of temporary injunction restraining the 1<sup>st</sup> and the 2<sup>nd</sup> respondents from effecting execution against the applicant's loan collateral. The application is supported by the applicant's affidavit dated 28/07/2021. This application proceeded by way of written submissions. During the hearing the applicant and the 1<sup>st</sup> respondent were represented, while the applicant was represented by Josephine R. Asenga, Advocate the 1<sup>st</sup> respondent was represented by James A. Bwana, Advocate. The 2<sup>nd</sup> respondent did not file his submission and he never entered appearance.

submitting in support of the application Miss. Asenga started her submission by praying for this Court to adopt the applicant's affidavit so that it can form part of her submission.

Miss Asenga submitted that this Court be pleased to order temporary injunction restraining the respondents from effecting what they termed to be unlawful execution against the applicant's collateral which she submitted that it contravenes the terms and conditions set forth in the Deed of settlement of the applicant and the 1<sup>st</sup> respondent dated 15/03/2019. Miss Asenga continued to submit that it is a trite law that once parties enter into Deed of Settlement no party is entitled to execute it contrary to its terms and conditions. That the execution intended to be carried out by the 1<sup>st</sup> Respondent through the 2<sup>nd</sup> Respondent contravenes the law since the parties agreed to settle their dispute at a tune of Tsh.119,000,000/= and not Tsh.164,972,419.332/= which is not provided for in the parties' agreement.

Miss Asenga submitted further that Section 95 of the C.P.C provides for the inherent power of the court to make necessary orders to meet the end of justice. Therefore, that it empowers this court to order the 1<sup>st</sup> respondent refrain from attachment and sell of a collateral mortgaged by the applicant to the 1<sup>st</sup> Respondent for loan since the intended attachment and sale contravenes terms and conditions of deed of settlement filed by the applicant and the 1<sup>st</sup> respondent in this Honourable Court.

Miss Asenga finalized her submission by submitting that this court be pleased to order the 1<sup>st</sup> respondent to honor terms and conditions of the deed of settlement.

In reply Mr. Bwana started his submission by adopting the contents of the counter affidavit sworn by Mr. George Kihongozi, the principal Officer of the 1<sup>st</sup> respondent.

Mr. Bwana continued to submit that the applicant brought his application under Section 68 (e) of the C.P.C but looking at the reliefs sought the applicant seeks injunctive reliefs to restrain the respondents from disposing his house that secured the loan given to him by the 1<sup>st</sup> respondent. That the relief of temporary injunction is provided for under Section 68 (c) and order XXXVII of the C.P.C therefore that the applicant has not preferred to bring this application under those provisions.

Mr. Bwana continued to submit that Section 68 of the C.P.C is under part VI of the C.P.C titled Supplemental proceedings. That in India the same is found under Section 94 of their Civil Procedure Code. That Mulla in Code of Civil Procedure, 17<sup>th</sup> Edition Volume 1 at page 1030 opined that a temporary injunction may be granted under Section 94 (c), only if a Case satisfying requirements of Order XXXIX Rule 1 and 2 is made out, that it is not correct to say that the court has two sources of power to grant temporary injunction, one under Section 94 (c) and the other under order XXXIX Rule 1 and 2 or that the court may opt to one of the other. He submitted further that Order XXXIX Rule 1 and 2 is in parimaterial with Order XXXVII Rule 1 and 2 of the C.P.C.

Mr. Bwana continued to submit that it is a settled law that for the orders of temporary injunction to be granted three conditions must be met, those conditions are as follows; existence of prima facie case, establishment of the necessity of the grant in preventing irreparable loss and finally balance of

convenience. To support this, he cited the case of **Mikali Msuya and Ano Vs. Maendeleo Bank and 3 Others, Misc. Land Application No. 719 of 2020 unreported.**

Mr. Bwana further submitted that in his affidavit the applicant has failed to establish the presence of the prima facie case between him and the 1<sup>st</sup> respondent. That in the absence of the serious triable issue, injunction cannot be issued. To support his argument, he cited the case **of Ramji Vs. Savings and Finance Ltd [2002] TLR 121.** Mr. Bwana continued to submit that the applicant conceded that the Land Case No. 239 of 2017 ended by the parties executing and recording the Deed of settlement. (Annexure A) That in that Deed of settlement the applicant was required to make monthly deposit of Tshs. 2 Millions for 18 months and 4 Million until full payment of the loan set at 119 Million. Mr. Bwana further submitted that 18 Months ran from May 2019 to November, 2020 and that the applicant failed to comply with the terms and conditions of the Deed of Settlement as he failed to deposit the money as agreed, that he never deposited any amount. Therefore, that there is no prima facie case and the applicant does not deserve an equitable protection as he has no clean hands. Mr. Bwana continued to submit that under paragraphs 4 and 5 of the applicant's affidavit, the applicant tried to demonstrate as to why he failed to comply with the terms and conditions of the Deed of Settlement that it is because of the change in the Regulations of Medical Store business that knocked out his business. But that he failed to present any evidence from the Tanzania Foods and Drugs Authority that impaired his business nor produced any evidence to prove that ran medical store business which used to service the

loan. Also, that the applicant has failed to show why he needs temporary injunction to be granted, that one would expect that the applicant to show the reason behind his prayer for temporary injunction showing how reasonable he has paid the loan and how he expected to clear the remaining loan within a reasonable time frame. More so since the prayer sought is temporary in nature, a mere averment that he is still committed to repay the loan (paragraph 8 of the affidavit) without giving out the details on how the same is to be enforced is not sufficient.

Mr. Bwana further submitted that the 2<sup>nd</sup> condition which call for necessity of preventing irreparable loss to the applicant is not established. That the applicant failed to show how the intended execution/ disposition by the bank will accession irreparable losses to him. That an averment under paragraph 9 of the applicant's affidavit should be followed by material loss that he would suffer which is incapable of being atoned by damages. To support his argument, he cited the case of **Mwakeye investment Ltd Vs. Access Bank (T) Ltd Misc. Land Application No. 654 of 2016 unreported.**

On the 3<sup>rd</sup> condition on the balance of convenience Mr. Bwana submitted that it is the 1<sup>st</sup> respondent who is suffering from the applicant's failure to repay the loan and will continue suffering if the instant application is granted.

He finalized his submission by submitting that the required amount includes the interests that has naturally accrued following the said defaults. Therefore, he prayed this court to dismiss the application with costs.

Having heard the submissions by both sides the central point for determination is whether this application is meritorious.

Section 68 and Order XXXVII Rule 1 and 2 the C.P.C provides for the circumstances within which one can apply for the temporary injunction. The wording of these provisions of law suggest that the application for temporary injunction is maintained where there is a pending suit for the "momentary" or "transitory "temporarily" orders pending the decision of the main suit. The provision of Order XXXVII Rule 1 and 2 provides as follows;

1. *Where in **any suit** it is proved by affidavit or otherwise—*

*(a) that any property in dispute in **a suit** is in danger of being wasted, damaged, or alienated by any party to the suit of or suffering loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree; or*

*(b) that the defendant threatens, or intends to remove or dispose of his property with a view to defraud his creditors, the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of the property as the court thinks fit, until the disposal of **the suit** or until further orders: (the emphasize is mine)*

It is settled law that in special circumstances an application for temporary injunction can be applied and also granted without a pending suit. This is by virtue of the cases of **Issa Selemani Nalikila and 23 Others vs. Tanzania National Roads Agency & Attorney General Misc. Land Application, No. 12 of 2016 (HC-Mtwara)** (unreported) and **Tanzania**

**Sugar Producers Association vs. The Ministry of Finance of the United Republic of Tanzania and The Attorney General, Miscellaneous Civil Case No. 25 of 2003 (HC- Commercial Division, Dar es Salaam)** (unreported) where Hon. Kalegeya, J (as he then was) explained clearly the genesis of such applications. He quoted with approval the cases of **Nicholas Nere Lekule vs. Independent Power (T) Limited and The Attorney General, Misc. Civil Cause No. 117 of 1996** and **Tanganyika Game Fishing and Photographic Limited vs. The Director of Wildlife, The Attorney General and Muanauta & Company (T) Limited, Misc. Civil Cause No. 48 of 1998**. In these latter cases, Hon. Kaji and Katiti, JJ (as they then were) held that a court has jurisdiction to issue an interim order where there is no pending suit. In England applications of this nature are known as "Mareva injunctions" having its roots in the famous case of **Mareva Compania Naviera SA v International Bulk Carriers SA [1980] 1 All ER 213**. The reasoning in this case was followed in the case of **Nicholas Lekule** (supra) where the court held that Mareva injunctions are also applicable in our courts and can be brought under section 2(2) (now section 2(3) of the Judicature and Application of Laws Act Cap 358 R.E 2019 (JALA) and section 95 of the C.P.C. In the present application, the court is wrongly moved under section 68 (e) of the C.P.C as there is no pending suit, the case in which the application is alleged to originate from, that is Land Case No. 239 of 2017 is no longer pending before the court, it ended when parties decided to enter into the deed of settlement on the 15<sup>th</sup> March 2019. The application at hand cannot

be termed to be mareva injunction as it does not fall within the requirement given in the case of **Nicholas Lekule** (supra).

I have noted the applicant's submission on Section 95 of the C.P.C. With due respect to the learned counsel the court is moved by chamber summons and not through submissions. Therefore, Section 95 of the C.P.C as stated by the applicant in his submission cannot be taken to have moved this court.

Moreover, even if the application was properly filed before the court, it was bound not to succeed, as correctly submitted by the counsel for the 1<sup>st</sup> respondent that the applicant failed to satisfy the court on the three requisite conditions set out in the case of **Attilio Vs. Mbowe (1969) HCD 284** which are; one, existence of prima facie case, two, establishment of the necessity of the grant in preventing irreparable loss and finally balance of convenience. The applicant, in his affidavit failed to establish the presence of the prima facie case between him and the 1<sup>st</sup> respondent. In the absence of the serious triable issue, injunction cannot be issued.

Going through the records of this application it is clear the applicant conceded to the fact that the Land Case No. 239 of 2017 ended by the parties executing and recording the Deed of Settlement (**Annexure A**). In that Deed of Settlement, the applicant was required to make monthly deposit of Tshs. 2 Million for the period of 18 months and after the expiry of the period of 18 months the applicant was supposed to make monthly deposit of 4 Million until full payment of the loan set at 119 Million. The time frame for the 18 Months ran from May 2019 to November, 2020. The applicant never deposited any amount.



Under paragraphs 4 and 5 of the applicant's affidavit, the applicant tried to demonstrate the reasons why he failed to comply with the terms and conditions of the Deed of Settlement, he said that change in the Regulations of Medical Store business knocked out his business. However, he failed to present any evidence (the changed regulation) from the Tanzania Foods and Drugs Authority that impaired his business nor produce any evidence to prove that he used to operate the medical store business which enabled him to service the loan. In that sense the applicant failed to prove the presence of the prima facie case and that (even without discussing the other remaining two conditions) renders his application to fail as it is settled law that all three conditions must be met for the court to exercise its discretion in granting injunction. In the case of **Christopher P. Chale Vs. Commercial Bank of Africa Misc. Civil Application No.635 of 2017** unreported **Mwandambo, J.** held that

*"it is also the law that the conditions set out must all be met and so meeting one or two of the conditions will not be sufficient for the purpose of the court exercising its discretion to grant an injunction"*

For the reasons stated above I find no merit in the application which is accordingly dismissed with costs.

**It is so ordered.**

**Dated at Dar es salaam this 07<sup>th</sup> day of October, 2021.**



  
**T. N. MWENEGOHA.**  
**JUDGE**