IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 457 OF 2021
(Arising from Land Case No. 146 of 2021)

HASHIM IBRAHIM LEMA ..... APPLICANT

VERSUS

MAXCOM AFRICA LIMITED..... 1ST RESPONDENT

NATIONAL BANK OF COMMERCE LIMITED ..... 2ND RESPONDENT

MAS & ASSOCIATES CO. LIMITED & COURT BROKER ... 3RD RESPONDENT

Date of last Order: 10/06/2022

Date of Ruling: 24/06/2022

RULING.

I. ARUFANI, J

The applicant filed in this court the present application under Order XXXVII Rule 1 (a); 2 (1) and (4), sections 68 (e) and 95 of the Civil Procedure Code, Cap 33 [R.E 2019] and any enabling provisions of the laws. The applicant is seeking for an order of temporary injunction to restrain the respondents, their servants, workmen, agents, and whosoever purporting to act on behalf of the second and third respondents from selling or disposing of the applicant's property with certificate of title No. 90885, Plot No. 547 Block 45C, Kijitonyama Area, Kinondoni Municipality, Dar es Salaam (hereinafter referred as a suit.

property) pending hearing and determination of the main suit, Land Case No. 146 of 2021.

The application is supported by an affidavit affirmed by the applicant and is opposed by counter affidavit affirmed by Ahmed Salum Lussasi, Principal Officer of the first respondent and the counter affidavit sworn by Dickson Ikingura, Principal Officer for the second respondent. Third respondent never filed any counter affidavit to oppose the application. While the applicant was represented in the matter by Mr. Selemani Almas, learned advocate, the first respondent was represented by Mr. Ahmed Salum Lussasi, Principal Officer of the first respondent and the second respondent was represented by Mr. Godwin Nyaisa, learned advocate. By consent of the parties' representatives the court ordered the matter to be argued by way of written submission.

The counsel for the applicant gave a brief background of the matter which is to the effect that, on 14th April, 2019 the second respondent approved and advanced an overdraft facility of Tshs. 370,000,000.00 to the first respondent for use as a working capital. The applicant guaranteed the said overdraft facility and his house which is suit property in this application was mortgaged as a security for the overdraft facility. On 5th July, 2019 the first respondent requested the second respondent to release the suit property as other properties mortgaged for the overdraft

were enough to secure the overdraft and the applicant stated the said request was accepted.

It was stated further by the counsel for the applicant that, while waiting for the formalities of discharging the house of the applicant mortgaged as a security for the overdraft and without any notification to the applicant the second respondent appointed the third respondent to sale the suit property on allegation that the first respondent had defaulted to service the overdraft. He stated that, in accomplishing the stated move the third respondent has illegally published in the Raia Mwema Newspaper of 18th August, 2021 a fourteen days' notice of selling the suit property.

The counsel for the applicant went on arguing that, the issue as to whether to grant or refuse an order of temporary injunction is upon the court exercising its discretion by considering the factors and principles for granting the order sought. He stated the said principles have been outlined in a famous case of **Attilio V. Mbowe** (1969) HCD no. 284 referred in various cases decided by this court. He mentioned some of the cases to be **Barreto Hauliers (T) Limited V. Joseph E. Mwanyika & Another,** Misc. Civil Application No. 253 of 2016 (all unreported) where it was stated that: -

1. *There must be serious question to be tried on the facts alleged, and probability that the plaintiff will be entitled to the relief prayed;*
2. *That the court interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established, and*
3. *That on the balance of convenience there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendant from the granting of it.*

The counsel for the applicant argued in relation to the first principle that, it is not disputed that there is a land Case No. 146 of 2021 between the parties which is yet to be resolved by the court. He argued that, paragraphs 5, 6, 7, 8, 9, 10 and 11 of the affidavit supporting the application shows there is a triable issue to be determined by the court in the main suit. He stated that, as disclosed to him by the first respondent the suit property has already been released from being security for the overdraft facility advanced to the first respondent.

He went on arguing that, although the second respondent disputed at paragraph 5 (ii) of the counter affidavit that they have never received the request letter for discharging the suit property from being security of the overdraft but annexure HIL – 2 in the affidavit supporting the application shows the name of Fatma Hassan who is an employee of the

second respondent received the first respondent's letter on 12th July, 2019. He submitted that shows there is a serious issue for the court to determine as to whether the suit property has been released from being a mortgage to the overdraft facility or not. He referred the court to the case of **Dominic Daniel & Another V. CRDB Bank PLC Limited,** Commercial Case No. 39 of 2011, HC Com. Division, at DSM (unreported) where it was stated that, in dealing with proceedings of interlocutory injunction a judge should not decide issue which will be resolved and determined in the main suit.

He argued in relation to the second principle that, paragraphs 13 and 14 of the affidavit supporting the application proved to the balance of probability that the court interference is necessary to protect the suit property from unlawful sale by the second and third respondents. He argued that, the applicant has stated the suit property is not part of the security for the overdraft facility as it was released from that status. He argued that, sale of the suit property will not only automatically relieve the applicant from its ownership without justifiable cause but he will also lose the family residential house which will create chaos in relocation of members of his family. He submitted that loss of a family residential house is a loss which cannot be compensated by any monetary form of damage.

He argued in relation to the third principle that, on the balance of convenience the applicant will be in greater hardship and mischief from withholding of the injunction than will be suffered by the second respondent. He submitted that, Paragraphs 13, 14 and 15 of the applicant's affidavit shows clearly the hardship and mischief the applicant will suffer if the order of temporary injunction will be withheld. He argued that, if the order of temporary will be withheld and the judgment is entered in favour of the applicant, the applicant will have greater hardship in reversing the ownership of the suit property which will not be compensated in monetary form.

To support his argument, he referred the court to the cases of **Vallence Simon Matunda (**suing via Power of Attorney of **Mussa Yusuf Mamuya) V. Sadallah Philip Ndosy & Two Others,** Misc. Land Application No. 55 of 2019 and **Freda Andrew Kaiza & Two Others V. Nassoro Mshewa & Forty Others,** Misc. Land Application No. 332 of 2021, HC Land Div. at DSM (both unreported). At the end he prayed the court to grant the application to restrain the respondents from selling the suit property pending final determination of the main suit and be granted costs of the application.

The first respondent supported the application and stated even their counter affidavit is supporting the application for temporary injunction be

granted. The first respondent stated that, the reason behind for grant of the application is because the suit property is no longer part of the securities for the overdraft facility advanced to them as it was released from being security of the overdraft facility. He submitted that, the second and third respondents have no legal justification to sale the suit property and stated the application has merit and deserve to be granted.

On their part the counsel for the second respondent stated that, the overdraft facility advanced to the first respondent of Tshs. 370,000,000.00 was for twelve months only. He stated the applicant and the first respondent defaulted to repay the overdraft facility and despite being served with demand letters and notice of default the overdraft facility has not been repaid to date hence the interest, penalties and costs are continuing to accrue. He prayed to adopt their counter affidavit and stated the applicant has not managed to give sufficient materials for the court to grant the order sought in the chamber application.

He argued that, granting or refusing temporary injunction is a matter of courts discretion but that discretion has to be exercised judiciously. He added that, in order for temporary injunction to be granted there must be an equitable ground and stated the conditions outlined in the case of **Attilio V. Mbowe** (supra) must be satisfied. He referred the court to the case of **Mlela Fundikira Said V. Equity Bank Tanzania**

Limited and Three Others, HC Misc. Land Application No. 750 of 2016 (unreported) where it was stated that, the three conditions for granting temporary injunction must be proved to exist conjunctively before a temporary injunction is granted.

He argued in relation to the first condition of triable issue or prima facie case that, the allegation that the suit property was released from being security for the overdraft facility and that the applicant was not served with sixty days' notice are seriously flawed contentions. He stated that, the question of triable issue is a legal question and stated the biggest test of triable issue regarding injunction is the question of genuineness and the court is required to look at the pleadings and all factors surrounding the application. He argued that, the contention by the applicant that the suit property cannot be sold as it was released from security of the overdraft facility is a total lie and the applicant failed to prove the same.

He argued the second respondent has no knowledge of the letter written by the first respondent requesting for the release of the suit property from being security of the overdraft facility. He stated that, even the letter annexed to the affidavit does not prove the knowledge of the second respondent to clarify receipt of the letter. He stated that, the obligation to pay the defaulted amount of the overdraft facility lies to the

applicant who voluntarily acted as a guarantor while knowing the consequence of default would have been disposition of the suit property.

He referred the court to the case of **Alex Ndibalema & Another V. CRDB Bank PLC and Two Others,** Land Case No. 19 of 2010 (unreported) where it was stated the court is not empowered to change a mortgaged property. He also referred the court to the case of **Paul Mtatifikolo V. CRDB Bank Ltd & Others,** Land Case No. 89 of 2005 (unreported) where it was stated that, it is improper for the borrower to dictate the terms of the loan and it is only proper for courts to discourage this trend by protecting the lenders. He stated the court has no power to alter an agreement that was entered by the parties.

As for the issue of service of sixty days' notice the counsel for the second respondent argued that, the allegation is total lie as the formal sixty days statutory notice was served to the applicant through registered mail on 25th March, 2020 to his respective address and the said notice is annexure NBC 2 in the counter affidavit. He argued the stated statutory notice was followed by a fourteen days public notice of expression of intention to dispose of the suit property which is annexure NBC 3 in the counter affidavit.

He submitted that, from when the notice was served to the applicant there is no any instalment which has ever been deposited to repay the

overdraft facility. He stated that is a clear breach of the loan agreement and the mortgaged deed. He stated that shows clearly that there is no triable issue to be determined by the court in favour of the applicant. To support his argument, he referred the court to the case of **Victoria Water Company Limited & Another V, Equity Bank Tanzania Limited & Another**, Misc. Civil Application No. 635 of 2018 (unreported) where it was stated that, injunction cannot be granted as a weapon to protect the party who is in breach of the contract against the leader. He stated that, absence of serious triable issue negates the importance of granting an interim injunction.

He argued in relation to the second condition of irreparable loss to be suffered that, the facts before the court do not show any irreparable injury that the applicant will suffer which cannot be adequately compensated in monetary form. He submitted that the applicant knew that the property he was mortgaging was a residential house therefore the argument that he will lose a residential family house does not amount to irreparable loss and it can be compensated by way of damage. He stated all what the second respondent is doing is to exercise a lawful right arising from contractual agreement. He referred the court to the case of **Jane Paul Mwakibete V. Paul Mwakibete & six Others**, HC Land Case No. 82 of 2011 where it was stated that, in banking business there

is nothing like irreparable loss if there is a bona fide claim of rights arising from breach of financial contractual terms.

He went on arguing that, the second respondent's interest must also be considered as if it will not be considered, the second respondent will go bankrupt and the lending business will come to stand still if the injunction will be granted. He stated that, in event the applicant is successful in the suit, the respondent shall be able to adequately compensate him. He argued that, if temporary injunction will be granted the loss that will be incurred by the second respondent in future will surely be irreparable loss that cannot be atoned by monetary value. He referred the court to the case of **Victoria Water Compnay Limited & Another V. Equity Bank Tanzania Limited & Another**, Misc. Civil Application No. 636 of 2018 where it was stated inter alia that, if the order of injunction will be granted will be an interference of freedom of contract which is contrary to sections 10 and 13 of the Law of Contract Act, Cap 345 R.E 2019.

He contended that, no loss will be suffered by the applicant if injunction will not be granted because there is no breach of terms of the loan agreement and mortgage deed committed by the second respondent. He supported his submission with the case of **Mohamed Iqbal Haji & Others V. Zedem Investment Limited**, Misc. Land Application No. 05

of 2020, HC Land Div. at DSM (unreported) where the question about who stands to lose when temporary injunction is granted and the principal sum remain unpaid was answered.

He argued in relation to the principle of balance of convenience that, the second respondent is a bona fide purchaser who has already been so much inconvenienced by the applicant's failure to repay the loan. He stated that, granting of temporary injunction will mean adding more sault to the wound. He submitted that, the balance of inconvenience tilts more in favour of the second respondent than to the applicant. He submitted further that, the applicant will not be able to adequately compensate the second respondent who has already suffered and the second respondent will continue to suffer in case the main suit will be determined in its favour.

He cited in his submission the case of **Fatuma Mohamed Salum & Another V. Lugano Angetile Mwakyosi Jengela & Three Others,** Misc. Land Application No. 90 of 2015 which quoted with approval the case of **Charles D. Msumari and 83 Others V. The Director of Tanzania Habours Authority,** Civil Appeal No. 18 of 1977 where it was stated that, courts cannot grant temporary injunction simply because they think it is convenient to do so. Convenience is not our business. Our business is doing justice to the parties.

He also referred the court to the case of **Florence Shanel Mareale** (supra) where it was stated that, an order for temporary injunction cannot be granted by the court only because there is balance of conveniences. It was stated courts have a duty to grant such order if any when it is appropriate to do so. At the end he stated the applicant has by far not met the tests established in the case of **Attilio V. Mbowe** to warrant him access to temporary injunction. Finally, he prayed the application be dismissed with costs for want of merit.

In rejoinder the court has found in principle the counsel for the applicant reiterated what he argued in his submission in chief hence there is no need of restating what is submitted therein and instead of that the court will be referring to what is submitted therein in the course of determining this application.

After considering the submissions from both sides the court has found the issue to determine in this matter is whether the applicant deserve to be granted the order of temporary injunction is seeking from this court. The court has found that, as rightly argued by counsel for the parties the conditions governing grant of temporary injunction in our jurisdiction were well laid down in the famous case of **Attilio V. Mbowe** (supra) to be as follows: -

(i) *There must be a serious question to be tried on the facts alleged, and the probability that the plaintiff will be entitled to the relief prayed.*

(ii) *The applicant stands to suffer irreparable loss requiring the courts intervention before the applicant's legal right is established.*

(iii) *On the balance of convenience, there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendant from granting of it.*

Starting with the first condition the court has found it is required to be satisfied there is a triable issue or in other words the applicant has a cause of action against the respondent. The court has found that, as stated in the case of **Surya Kant D. Ramji V. Saving and Finance Ltd & 3 Others**, Civil Case No. 30 of 2000, HC Commercial Division at Dar es Salaam (unreported), in determining whether there is a prima facie case or serious issue for determination in the main suit the court is required to use the facts as disclosed in the plaint and in the affidavit supporting the application.

The court has found that, as argued by the counsel for the applicant, and as appearing in the plaint filed in this court by the applicant, the applicant wants the court to determine whether the first and second respondents have breached the overdraft facility agreement and the

legality of the act of the second and third respondents to sale the suit property which the applicant and first respondent states it has already been released from being a security for the overdraft facility advanced to the first respondent.

To the view of this court there is no justifiable reason to say the above stated issues, which are derived from the plaint and the affidavit supporting the application at hand have not established a prima facie case between the parties which is required to be determined by the court. The court has arrived to the above finding after being of the view that, as rightly argued by the counsel for the applicant, the applicant has averred at paragraph 8 and 9 of the plaint that the first respondent requested the suit property to be released from being security for the overdraft facility as other mortgaged properties were enough to cover the overdraft facility and the request was accepted and the suit property was released.

The court has found that, although the counsel for the second respondent argued his client has never received any request letter from the first respondent to release the suit property and he has stated the suit property has never been released from being security for the overdraft facility but it is the view of this court that, the stated issues is an issue which can only be properly determined after receiving evidence from the parties in the full trial of the case. The court has arrived to the above

finding after seeing it is deposed in the affidavit supporting the application that, the request letter was served and received by the second respondent's employee namely Fatma Hassan.

Therefore, the question as to whether the letter requesting for the suit property to be released from being security for the overdraft facility was received by the second respondent or not; the issues raised by the counsel for the second respondent asking whether the suit property is forming party of the securities for the overdraft and whether the applicant was served with sixty days statutory notice cannot be determined in the application at hand where the applicant is just seeking for an injunctive order. To the view of this court those issues are supposed to be determined in the main suit where the evidence to support and rebut them will be adduced.

The court has come to the above stated view after seeing it was stated in the cases of **Dominic Daniel and another** and **Surya – Kant D. Ramji cited** (supra) cited earlier in earlier in this ruling that, in determining whether there is a serious question for determination, it is not conclusive evidence which is required but rather the facts as disclosed by the plaint and the affidavit and so the standard of proof required would be somehow below the expected standard of full trial. In the premises the court has found the first condition for granting an order of temporary

injunction which is an establishment of existence of prima facie case or triable issue in a case has been established in the present application.

Coming to the second condition for granting an order of temporary injunction which is irreparable loss to be suffered if the order is granted or not granted the court has found that, as stated in the case of **T. A. Kaare V. General Manager Mara Cooperative Union,** [1987] TLR 17, the court is required to consider whether there is a need to protect either of the parties from the species of injuries known as irreparable injury before right of the parties is determined. It was also stated in the book of **Sohoni's Law of Injunction**, Second Edition, 2003 at page 93 that: -

> *"As the injunction is granted during the pendency of the suit the court will interfere to protect the plaintiff from injuries which are irreparable. The expression "irreparable injury" means that, it must be material one which cannot be adequately compensated for in damages. The injury need not be actual but may be apprehended."*

Under the guidance of the position of the law stated in the above cited case and the referred book the court has found that, although the counsel for the second respondent argued the facts adduced by the applicant before the court have not shown any irreparable injury that the applicant will suffer which cannot be adequately compensated in damages, but the court has found the applicant has stated the irreparable

injuries he will suffer if the suit property will be sold by the second and third respondents. Those facts can be seeing at paragraphs 14 and 15 of the affidavit supporting the application where it is deposed that, if the sought temporary injunction is withheld thereby leaving the respondents to accomplish their mission of selling the suit property the applicant will lose ownership of the suit property which is his family residential house.

He has stated further that, if the suit property will be disposed of it will also create great chaos to the applicant on finding another house for relocating himself and members of his family. He added that, if the sought temporary injunction is withheld and the respondents left to accomplish their mission of selling the suit property and the suit is determined in his favour, he will be subjected into a difficult situation in reversing ownership of the suit property to him.

The court has found that, the counsel for the second respondent argued that, as the first respondent defaulted to repay the overdraft facility and the applicant was served with default notice the applicant do not deserve to be granted the injunctive order is seeking from the court. The court has found the applicant disputed the stated argument as he deposed in his affidavit and it was stated by his counsel in his submission that the suit property is not a security for the overdraft facility advanced

to the first respondent as it was released following the request made to the second respondent by the first respondent.

The court has considered the argument by the counsel for the second respondent that there is no loss which the applicant will suffer if the sought injunctive order will be withheld which cannot be atoned by way of monetary compensation by the second respondent but find the circumstances of what the applicant has pleaded in his plaint and what is deposed in the affidavit supporting the application as demonstrated hereinabove shows the loss which the applicant will suffer cannot be atoned by way of monetary compensation.

The court has arrived to the above view after seeing it was stated in the case of **Ramadhani Ally V. Shaban Ally,** Civil Appeal No. 3 of 2008 (unreported) that, although compensation can be ordered but money substitute is not equivalent to the house. It was stated further in the quoted case that, the difference between the physical house and money constitutes irreparable injury. (See also the case of **Deusdedit Kisisiwe V. Protaz B. Bikuli,** Civil Application No. 13 of 2001 (unreported).

The court has considered the position of the law stated in the cases cited by the counsel for the second respondent to establish the second respondent will suffer irreparable loss if the temporary injunction is granted but found they are not fit in the circumstances of the present

application where the applicant has stated the suit premises has been released from being security for the overdraft facility. It is because of the above stated reasons the court has found the loss which the applicant will suffer if the order of temporary injunction will be withheld cannot adequately be compensated by way monetary payment.

As for the third condition for granting an order of temporary injunction which is balance of convenience the court has found that, as stated in the book of **Solonis Law of Injunction** (supra) the court is required to balance and weigh the mischief or inconvenience to be suffered by the parties before issuing or withholding the sought injunction. After considering the submissions made to the court by the counsel for the parties and all what is deposed in the affidavit supporting the application, counter affidavit of the respondents together with what is averred in the pleadings filed in Land Case No. 146 of 2021 the court has found the applicant is the one stand to be more inconvenienced than the second respondent if the order of temporary injunction will not be granted.

The court has come to the above finding after seeing that, although the counsel for the second respondent argued when the applicant mortgaged the suit property was aware of the consequences in case the first respondent would have defaulted to repay the loan but the court has

found the applicant has argued the suit property has been released from being security for the overdraft facility advanced to the first respondent. That being the basis of the suit filed in this court by the applicant the court has found that, if the suit property which the appellant stated in his affidavit is a family residential house there is a likelihood of the applicant to be more inconvenienced than the second respondent.

It is because of the above stated reasons the court has found all the three conditions for granting an order of temporary injunction laid in the case of **Attilio V. Mbowe** (supra) have been established in the application at hand. Consequently, the application is granted and the order of temporary injunction to restrain the respondents, their workmen, employees, licensees, agents and whoever is acting under the instruction of respondents from selling or disposing of the suit property with certificate of title No. 90885, Plot 547 Block 45C, Kijitonyama Area, Kinondoni Municipality, Dar es Salaam pending hearing and determination of Land Case No. 146 of 2021 filed in this court by the applicant. Each party to bear his own costs in this applicant. It is so ordered.

Dated at Dar es Salaam this 24th day of June, 2022

I. Arufani

JUDGE

24/06/2022

Court:

Ruling delivered today 24th day of June, 2022 in the presence of Mr. Selemani Almas, learned counsel for the applicant, in the presence of Mr. Method Nestory, learned counsel for the second and third respondents and in the absence of the first respondent. Right of appeal to the Court of Appeal is fully explained.

I. Arufani

JUDGE

24/06/2022