

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPLICATION NO. 516 OF 2022
(Arising from Land Case No. 210 of 2022)

CELINA MALU MHUMBIRA 1ST APPLICANT

DEOGRATIUS FELIX MHUMBIRA 2ND APPLICANT

VERSUS

PREMJI R. PINDORIA 1ST RESPONDENT

M/S DEZO CIVIL CONTRACTORS COMPANY LTD .. 2ND RESPONDENT

DIAMOND TRUST BANK TANZANIA 3RD RESPONDENT

RULING

Date of last Order: 30.09.2022

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A.Z MGEYEKWA, J

The applicants' application is brought under a certificate of urgency. The same is made under Order XXXVII Rule (1) (b), (2) (1), sections 68 (c) and (e), of Civil Procedure Code Cap.33 [R.E 2019]. The application was

accompanied by a joint affidavit sworn by Celina Malu Mhumbira and Deogratius Mhumbira, the applicants. Opposing the application, the 1st respondent filed a counter affidavit sworn by Joyceline Kaika, Principal Officer of the 3rd respondent. The 1st and 2nd respondent's counsel conceded to the application.

When the matter was called for hearing on 29th September, 2022, the applicants enlisted the legal service of Ms. Lizzy Minja, learned counsel, the 1st and 2nd respondent had the legal service of Ms. Ganjatuni Kilemile, learned counsel and the 3rd respondent had the legal service of Mr. Franco Mahenje, learned counsel.

The application is borne from the fact that there is a pending Land Case No. 210 of 2022 before this court whereas the applicants are praying for an injunctive order to restrain the respondents, its workmen, agents, and assignee from selling or transferring the ownership of the suit property from the applicants. Name or evict the applicants from the suit property pending the determination of Land Case No. 210 of 2022.

Having stated the background to the application, the learned counsel for the applicants started to kick the ball rolling. He submitted that the reasons for temporary injunction as prayed by the applicants are based on the facts

advanced in the applicant's joint affidavit in support of the Application filed on 10th June, 2022. He urged this court to adopt the applicants' joint affidavit to form part of his submission.

The learned counsel for the applicants submitted that it is the discretion of the court to issue injunctive order. Fortifying her position she cited the case of **Aloyce Anthony Duwe v Ally Juuu ya Watu** (1969) HCD. Ms. Lizzy went on to submit that the applicants are required to prove the existence of three principles underlined in the case of **Atilio v Mbowe** [1969] HCD 284. Ms. Lizzy listed the three conditions as follows; there must be a serious question to be tried on, the Court's interference is paramount to protect the Plaintiff from the kind of injury which may be irreparable, and the balance of convenience, there will be greater hardship and mischief suffered by the Plaintiff from withholding injunction than will be suffered by the defendant from the granting of it.

Submitting on the first issue, Ms. Lizzy submitted that the applicants jointly granted a Power of Attorney to the 1st respondent, the Director of the 1st respondent's Company. She went on to state that it is alleged that the Power of Attorney has been used by the 1^{stand} 2nd respondents to approach the 3rd respondent to secure a mortgage and the 1st respondent used the said

Power of Attorney to secure a loan facility and he enhanced the loan without the consent of the applicant. The counsel contended that the said facility was unlawful and illegally procured due to existing fraud and misrepresentation by the respondent because the Power of Attorney was not communicated. She added that in case the bank wanted to rely on Power Attorney then they were required to ensure that there was a project to be implemented by the 1st and 2nd respondents. In his view, she claimed that since there was no any implementation of the project thus the loan was not issued to the 2nd respondent.

On the second principle, the learned counsel for the applicants submitted that the court's interference is necessary to protect the Plaintiff from the injury otherwise the applicant will suffer irreparable loss. She added that the applicants are the lawful owner of the suit premises and they depend on it the 3rd respondent has issued them with a copy of Notice Default which expired thus the applicants are afraid that the Bank can auction the suit premises anytime.

As to the third principle, Ms. Lizzy argued that on the balance of convenience, the Plaintiffs stand to suffer more if the injunction is refused than what the defendants would suffer if granted. She submitted that there

is a lot of irregularities in the said mortgage. She added that the applicants have not benefited from the alleged mortgaged facilities and the whole process of granting the mortgage facilities was not transparent. Stressing, she argued that if the property will be transferred to the buyer then they will suffer greater hardship.

Responding, the learned counsel for the 3rd respondent's confutation was strenuous. Mr. Mahenje contended that the applicants in paragraph 6 of their affidavit have admitted to having granted the mortgaged facilities. Stressing, Mr. Mahenje argued that the applicants confirmed that they have guaranteed. Regarding enhancement of the loan, Mr. Mahenje argued that in the previous mortgage agreement was continued security and the Deed of Variation was signed by an authorized person. To bolster his submission he referred this court to paragraph 12 of the affidavit reading together with paragraph 6 of the applicant's affidavit.

Mr. Mahenje continued to argue that all credit facilities in which Plot No. 186162/61 were used as a security and endorsed by the applicants, he added that the signatures resemble the signatures of the applicants appended to their affidavit. The learned counsel for the 3rd respondent asserted that the applicants have contradicted themselves as in paragraph

9 of the affidavit the applicants are alleging that the renewal was illegally and there was no consent while in paragraphs 11, 12 & 13 the applicants are admitting to have guaranteed the mortgage but they are pleading mercy to this court which is not a condition to grant the injunction.

The counsel went on to argue that all the allegations of fraud and misrepresentation are an afterthought. He stressed that all the facts pleaded in the affidavit vivid show that the applicants guaranteed. He added that the issue of Power of Attorney on the 1st issue that the Power of Attorney was for special activity is not featured in the applicants; affidavit, the same is submitted from the bar.

On the second principle; irreparable loss the counsel for the 3rd respondent contended that the applicant's counsel has submitted generally. He submitted that a Bank is an institution and the same will suffer more than the applicant. To bolster his submission he cited the case of **Lukole Company Ltd v Bank of Africa**, Misc. Civil Application No. 494 of 2022 and the case of **NBC v Dar es Salaam Education & Office Stationary**, (1995) TLR 272.

On the strength of the above submission, the learned counsel for the 3rd respondent urged this court to dismiss the application with costs.

In her rejoinder, the applicants' counsel reiterated his submission in chief. She added that the 3rd respondent's counsel did not mention in his counter affidavit that this application is demerit and in their counter affidavit, the 3rd respondent did not state that the bank will suffer more than the applicant. Ending. Ms. Lizzy urged this court to grant the applicant's application pending the determination of the main case.

Having heard the submissions of both learned counsels for the applicant and the respondents. In determining this matter, I will be guided by the principle governing a temporary injunction. The Courts have tested the above principles in various cases such notable cases include; **Atilio v Mbowe** (1969) HCD 284. **Agency Cargo International v Eurafrikan Bank (T)** (HC) DSM, Civil Case No. 44 of 1998 (unreported), and **Giella v Cassama Brown & Co. Ltd** (1973) to mention just a few.

Relating the facts before me and the said principle I should take note that at this point I do not have the full evidence before me. The standard of proof required would be somehow below that which is generally required upon full trial. For example, whether the 1st applicant is a lawful owner of the suit landed property and whether the respondents are trespasser needs to be proved at the main suit.

On the first condition, the applicants in paragraph 5 of the affidavit alleged that there is a triable issue based on Power of Attorney which was granted by the applicants to the 1st respondent, the Director of the 1st respondent to act on their behalf for the purpose of attending several formalities of the Government Department and sign the documents, however, it is alleged that the 1st and 2nd respondent used the said Power of Attorney to secure a mortgage with the Bank. The learned counsel for the applicant claimed that the said Power of Attorney was used in obtaining loan facilities for the 3rd respondent and they enhanced the loan without the consent of the applicant.

As rightly stated by Mr. Mahenje reading the 6th paragraph of the applicants' affidavit, it seems the applicants were aware that the 2nd respondent took a loan from the 3rd respondent. However, they are disputing the enhancement of loan facilities. They are complaining that the same was obtained without their consent hence they are claiming that they were fraudulent and misrepresented caused to sign the conditional contractual agreement. The applicants do not dispute the fact that they signed the documents However, there is a triable issue to be determined by this Court as to whether the applicants were fraudulently caused to sign the said document. Therefore,

in my view as long as there is a dispute then this first condition is established.

On the second principle, the applicants who claim to be on the brink of suffering irreparable loss must not only establish that they will suffer irreparable loss but are duty bound to demonstrate that, the kind of injury to be suffered cannot be atoned through monetary means. It is noteworthy that the balance of convenience should be parallel and tilt to the favour of the applicants.

In the applicants' joint affidavit and submission, the applicants have argued in paragraph 13 of their joint affidavit that they have suffered so much and were damaged for failure to receive financial assistance and earn income from the said property. Miss Lizzy contended that the applicants will suffer loss because they are owners of the suit property and the Bank has issued a notice which has expired, thus, in case the Bank will auction their property then the applicants will not recover it. On his side, Mr. Mahenje submitted that the Bank will suffer more than the applicants. I am in accord with the counsel for the applicants that since the applicants are alleged lawful owners of the suit premises, therefore, in case the Bank will auction their property then the loss will not be compared to compensation. I believe money

substitute is not the same as the physical house. In the case of **Deusdedit Kisisiwe v Protaz B. Bilauri**, Civil Application No. 13 of 2001 (unreported) the Court of Appeal of Tanzania held that:-

"The attachment and sale of immovable property will invariably, cause irreparable injury. Admittedly, compensation could be ordered should the appeal succeed but money substitute is not the same as the physical house. That difference between the physical house and the money equivalent, in my opinion, constitutes irreparable injury."

Applying the above authority in the matter at hand, it is vivid that, the second condition is established.

On the third principle, on the balance of convenience. In determining this condition, I find that each case has to be decided based on its underlying facts. The facts in the application at hand show that the applicants were not directly involved in the said saga, other parties caused the chaos. The applicants are alleging that they are the owners of the suit land and they have alleged that there are a lot of irregularities in the process of obtaining the second loan. There is no dispute that if this Court will grant the application, then the 3rd respondent will also suffer loss but I believe the applicants will suffer more because they have no any other means to rescue

their property from being auctioned. In case the Bank will win the case they will be able to recover their debts with interest. Therefore, I fully subscribe to the applicant's learned counsel that the applicants will suffer more hardship compared to the 3rd respondent.

Having weighed the different probabilities in this application, it appears that the applicants have met all three conditions for temporary injunction.

In sum, I grant the application for temporary injunction pending the determination of Land Case No. 210 of 2022 on merit. No order as to costs. Order accordingly.

DATED at Dar es Salaam this 30th September, 2022.



A.Z.MGEYEKWA

JUDGE

30.09.2022

Ruling delivered on 30th September, 2022 through audio teleconference whereas Ms. Lizzy Minja, learned counsel for the applicants and Ms. Ganjatuni Kilemile, learned counsel for the 1st and 2nd respondent were remotely present.



A.Z.MGEYEKWA

JUDGE

30.09.2022