

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 506 OF 2022**

**PAUL EDWARD SHAYO ..... 1<sup>ST</sup> APPLICANT**

**LUSEKELO MBWELE ..... 2<sup>ND</sup> APPLICANT**

**VERSUS**

**ECO BANK TANZANIA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**STEAM GENERATION RECOVERIES LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

*Date of last Order: 16.09.2022*

*Date of Ruling: 16.09.2022*

**A.Z MGEYEKWA, J**

The applicants' application is brought under Order XXXVII Rule (1) (a), (2), & (4), section 68 (c), (e), and 95 of Civil Procedure Code Cap.33 [R.E 2019].

The application was accompanied by a joint affidavit sworn by Tonny Richard

Mushi, applicant counsel. Opposing the application, the first respondent filed a counter affidavit sworn by Hope Liana, Principal Officer of the respondents.

The application is borne from the facts that, there is a pending Land Case No. 217 of 2022 before this court whereas the applicants are praying for an injunction to restrain the respondents and their agents from evicting or selling the applicants' house located at Plot No. 2058 Block H in Mbezi Beach within Dar es Salaam City pending final and conclusive determination of the main suit.

When the application was called for hearing on 16<sup>th</sup> September, 2022, the hearing was conducted through video conferencing whereas the applicants enjoyed the service of Mr. Tonny Richard Mushi, learned counsel while the respondents enjoyed the service of Ms. Ernestilla Bahati, learned counsel.

The learned counsel for the applicants was brief and straight to the point. He submitted that the application is brought under the certificate of urgency to restrain the respondents from disposing the House in Plot No.258 Block 'H' Mbezi Beach at Dar es Salaam until the determination of Land Case No. 217 of 2022. He submitted that in the application for interlocutory injunction, the court in a famous case of **Atilio v Mbowe** (1969) HCD 286 outlined three conditions which must be met; serious question to be tried, the interference

of the Court to protect the applicant's right and irreparable loss. He submitted that in the application at hand there are triable issues to be determined by this Court. He asserted that it is true that the applicants took a loan from the Bank to the tune of Tshs. 250,000,000/= but unfortunately the applicant had some problems and was arrested and put in remand prisons and their account was suspended thus, they were not able to pay the loan.

He went on to submit that the applicants communicated with the Bank for restructuring the loan, and the Bank asked for Tshs. 70,000,000 as a down payment before discussing their loan status. He added that the applicants were not able to repay the down payment, thus, the Bank was in the process to auction the suit premises. Hence the applicants filed the instant application. He added that the applicants are willing to pay the outstanding payment.

Submitting on the second principle, the counsel simply stated that it is important for this court to intervene because the Bank was in the process to conduct an auction while the applicants are willing to pay the loan, therefore, they had to apply for a temporary injunction to restrain the respondents from selling the suit premises.

As to the 3<sup>rd</sup> condition, Mr. Tonny submitted that the outstanding amount is Tshs. 60,000,000/= and 1/3 of the outstanding amount was paid to the 3<sup>rd</sup> respondent. He asserted that the Bank wants to auction the family house while the family is residing in the said suit premises. He added that selling the family house will cause a huge loss on their party because they will fail to run the business, as a result, the applicant will suffer more since the applicants have already paid 70 % of the loan. To fortify his position he cited the case of **Deusdedct Kisisiwe v Protaz B. Bilauri**, Civil Application No. 13 of 2001, Tanzlii [2003] TZCA16.

On the strength of the above submission, Mr. Tonny urged this Court to find that all conditions for the granting of this application were duly met. He beckoned upon this Court to grant the applicant's application and restrain the respondents from disposing of the suit premises.

In reply, the learned counsel for the respondents resisted the application with some force. Ms. Bahati argued in the case of Atilio Mbowe (*supra*) the Court outlined three conditions; the applicant has failed to fulfill the first condition. She stated that the applicants in their affidavit have not shown that there is a tribal issue. She argued that the applicant's claims that they paid 70 % of the loan and they applied for a Bank Statement are not featured in the affidavit thus the submissions from the bar. The learned counsel for the

respondents argued that the facts were in his knowledge but the counsel did not rely on the said fact and the same are not stated in his affidavit. She stressed that the applicants did not dispute that they took a loan from the Bank. She insisted that the applicants have failed to establish a *prima facie* case.

As to the second condition, the counsel for the respondents contended that in case the applicants will succeed in the main case then the 1<sup>st</sup> respondent will compensate the applicants. Ms. Bahati contended that the suit premises arise from the contractual agreement of the parties, thus, it was her view that this Court has no jurisdiction to interfere with the purported suit premises. To buttress her position she cited the case of **Rosemary Chiza Malinzi v Cargo Star Ltd & 3 others**, Misc. Land Application No. 679 of 2020, this Court cited with approval the case of **Zack Import & Export Company Limited v Crown Finance & Leasing Ltd**, Civil Case No. 27 of 2000 HC at Dar es Salaam, it was held that:-

*“The creditors must be protected from borrowers who are not committed to their obligations in paying the loaned money”.*

Ms. Bahati spiritedly argued that the applicants have not attached any document to prove that they have taken any necessary steps to service the said loan. She added that the reason that they were charged with an

economic crime is not a justifiable reason to move this Court to grant their application and in case the determination and finalization of the main case take 5 years that means the Bank had to wait for 5 years to generate its income.

On the balance of convenience, Ms. Bahati contended that the respondent will suffer more loss compared to the applicants.

In conclusion, the counsel for the respondents beckoned upon this Court to dismiss the application because the applicants have failed to meet the three conditions stipulated in the case of **Atilio Mbowe** (supra).

In a brief rejoinder, Mr. Tonny reiterated his submission in chief and rejoined further by addressing, the issue of supporting documents that the applicants were not able to attach all relevant documents because some of the documents were issued to them after the filing of this case and he has the document in place. He insisted that the applicants committed themselves to service the loan. Ending, Mr. Tonny urged this Court to grant the applicants' application.

Having considered the competing submissions, the task ahead of me is to determine the issue; whether the applicants have satisfied the necessary conditions or prerequisites for the grant of a temporary injunction. It is worth

noting that in granting the Temporary Injunction, the court has to exercise its discretion by considering the factors and principles for granting the sought order. The principles of Temporary Injunction have been outlined in the famous case of **Atilio v Mbowe** (1969) HCD 286 and **Barretto Haulliers (T) Ltd v Joseph E. Mwanyika & Another**, Misc. Civil Application No. 253 of 2016. In the case of **Barretto Haulliers** (supra) the court listed three conditions 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 reliefs 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.*

As to the first condition, whether there is a *prima facie* case, without wasting the time of the Court, I have to say that in the instant application, there is no doubt that, the applicants have a *prima facie* case in their main pending suit. This is based on the fact that the applicants are the lawful owner of the suit premises and the respondents want to auction the

applicants' premises. In my view, I find that there is a triable issue that requires the interference of this court.

On the second condition, the applicants must satisfy the Court that they will suffer irreparable injury if an injunction, as prayed, is not granted. The applicants are not disputing that they took no dispute that the applicants. I am in accord with Ms. Bahati's submission that the applicants are supposed to pay their loan because they had a contractual agreement with the 1<sup>st</sup> respondent. However, it is worth noting that not in all cases of contractual relations halt the Court to interfere, each case has to be decided based on its underlying facts. In the matter at hand, the applicants in paragraph 8 of their affidavit have stated that at all material times they were abiding with the terms and conditions of the loan agreement and paid their monthly installments as per the agreement. Unfortunately, the applicants' business accounts were suspended, as a result, they could not withdraw or transfer money from their accounts. I think the applicants are caught in a web where at this juncture they are not in a position to pay their loan as per their contractual agreement with the 1<sup>st</sup> respondent. In paragraph 13 of their affidavit, the applicants stated that if the order sought in the chamber summons is not granted then the dwelling house will be auctioned and the



said families have no any other alternative place to live. They are not financially stable to rent a house.

In case this court will not grant the application, the respondents will auction the suit premises, and the sale of the suit premises will invariably cause irreparable loss to the applicants as they have no other shelter. If the application is refused and the applicants happen to suffer loss, such loss will be irreparable because, in the circumstance of the case at hand, compensation will not serve the purpose. 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.

With respect to the third condition, a balance of convenience that is likely to be caused to the applicants by refusing the injunction will be higher than

what is likely to be caused to the opposite party by granting it. Having determined the first two conditions in favour of the applicants, I fully subscribe to the learned counsel for the applicants' submission, the applicants will suffer greater hardship than the respondents because they alleged that they are the lawful owners. To confirm that they are lawful owners, they have attached certificates of title. It is my considered view that in case the respondents win the case then respondents will auction the suit premises and recover their debt plus interest.

In sum, I proceed to grant the temporary injunction to the applicants pending the hearing of Land Case No. 217 of 2022 on merit. No order as to costs.

Order accordingly.

DATED at Dar es Salaam this 16<sup>th</sup> September, 2022



A.Z.MGEYEKWA

JUDGE

16.09.2022

Ruling delivered on 16<sup>th</sup> September, 2022 via video conferencing whereas Mr. Tonny Mushi, learned counsel for the applicants, and Ms. Ernestilla Bahati, learned counsel for the respondents were remotely present.



A.Z.MGEYEKWA  
JUDGE  
16.09.2022