

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

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 133 OF 2021**

**PHILIP KIMBWEREZA (Appointed Attorney  
of ANUP BHIKHU JETHWA) .....APPLICANT**

**VERSUS**

**INTERNATIONAL COMMERCIAL BANK**

**(TANZANIA) LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**CHAMPION AUCTION MART LIMITED .....2<sup>ND</sup> RESPONDENT**

**YONO AUCTION MART CO. LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

*Date of last Order: 27/09/2022*

*Date of Ruling: 06/10/2022*

**KHALFAN, J.**

By way of Chamber Summons, the applicant has moved this Court to issue injunction Order restraining the respondents, by themselves, their agents, assignees, and/or servants from disposing and selling the applicant's property located under Plot No. 573, Mindu Street, Upanga Area, Ilala Municipality, Dar es Salaam and comprised under Certificate of Title No. 186170/5/59 pending hearing and determination of the of



the application (*albeit* suit) inter parties which is currently pending before this Court.

The applicant has supported this application by affidavit of Philip Kimbwereza. The application was resisted by the first respondent, who filed counter affidavit. I take note that the second and third respondent were summoned vide substituted service by publication, but they neither filed their respective counter affidavits nor entered appearance.

At the commencement of the hearing of the application, the applicant was represented by Mr. Eliya Rioba, learned Advocate, while the first respondent enjoyed the service of Mr. Juventus Katikiro, learned Advocate. The second and third respondents were absent.

Mr. Rioba, made his submission by adopting the affidavit in support of the application. He submitted by relying on the criteria in the case of **Atilio vs. Mbowe, [1969] HCD n. 284**. Firstly, the presence of prima facie case or triable issues, that the applicant will be entitled to reliefs. Secondly, the presence of irreparable injury that cannot be atoned by



monetary terms, and thirdly, the balance of inconvenience in case the injunction is not granted.

Mr. Rioba submitted as to the first criterion that the applicant has filed the main suit. The said suit raised triable issues; firstly, whether the first respondent has exercised her power legally in selling the chattel mortgage. Secondly, whether the first respondent is justified to dispose of the applicant's mortgage.

He argued on the second criterion regarding irreparable injury, that the applicant will suffer irreparable loss in case the application is denied. He invited the Court to look at the pleadings and annexures as he believes that, the Court will come to a conclusion that granting a temporary injunction would suffice the interest of justice of the parties. He further submitted that the applicant will suffer irreparable injury that cannot be atoned by monetary compensation.

As to the third criterion in respect to the balance of convenience, Mr. Rioba contended that the only property left is the applicant's home to which he relies on. He emphasized that, if the same is disposed of and



by the time the applicant returns from treatment, he will be rendered homeless. That the applicant will suffer more than the first respondent.

When Mr. Katikiro took the floor, he started his submission in reply as to the second criterion. He argued that the first respondent is the one who has suffered more than the applicant as it being a financial institution it did not get income from the advanced loan.

He then belatedly, adopted the contents of counter affidavit. He further submitted against the first criterion that the applicant's admission of the debt to a total sum of USD 143,047.04 makes it clear that the applicant himself has breached the agreement.

He continued submitting pursuant to the guiding principle, that parties are bound by their agreements and to cement his submission he cited the case of **Joyce Mboyi Sabini vs. CRDB Bank PLC and Others**, Land Case No. 85 of 2018 (unreported).

In opposing the first criterion, he submitted that there is no prima facie case as the same arises when there is a breach of agreement on the part of the first respondent who is seeking to execute or take action on the subject matter. He insisted that prima facie case does not exist.



In response to the third criterion, Mr. Katikiro submitted that the first respondent depends on the loan advanced to the applicant who has taken more than six years since its advancement and three years since its expiry. He further argued that the weight of balance of inconvenience of losing capital is heavier on the first respondent than the applicant. He finally prayed for dismissal of the application with costs.

In his rejoinder, Mr. Rioba submitted that, the applicant stands to suffer irreparable loss because the first respondent has already sold the applicant's properties whose value is in excess of the pending debt. Mr. Rioba reiterated his submission in chief on the criteria of prima facie, irreparable injury and on the balance of inconvenience.

He further distinguished the case of **Joyce Mboyi (supra)** as irrelevant to the current circumstances of this application. He argued that the application is on temporary injunction and not the main suit that will determine the rights of parties conclusively. He therefore prayed for this application to be allowed.



Having heard the submissions of both parties, the issue for determination is whether the applicant has adduced sufficient reasons to move this Court to grant a temporary injunction. In determining the application, I will start with the principles of temporary injunction as established in various Court decisions.

In their rival submissions, the learned Advocates have submitted at length on the said established conditions. Starting with *prima facie*, the Court must satisfy itself that there is a *bona fide* dispute raised by the applicant that needs investigation, a decision on merit and on facts before the Court, and that there is a probability of the applicant to be entitled to the relief claimed by him.

Secondly, on the presence of irreparable loss, the applicant must satisfy the court that he/she will suffer if the injunction is not granted. And thirdly, the balance of inconvenience which is likely to be caused to the applicability by refusing the injunction will be greater than what is likely to be caused to the opposite party by granting it.

The above principles were tested by the Courts in a number of cases including **Atilio vs. Mbowe (1969)** HCD n. 284, **Agency Cargo**



**International vs. Eurafrican Bank** (T) Ltd, HC (DSM), Civil Case No. 44 of 1998 (unreported) and **Giella vs. Cassman Brown & Co. Ltd (1973)** EA 358.

Starting with the first principle, the applicant must establish that there is a prima facie case or there is a serious question to be tried by the court. I have perused the applicant's affidavit specifically paragraph 10 and submission of Mr. Rioba, the applicant averred that until the 21<sup>st</sup> April 2020, the outstanding principal and interest due in Anup Bhikhu Jethwa's Account held with first respondent was USD 156,399.12. I have found further that the first respondent in paragraph 10 of his counter affidavit is claiming that by 8<sup>th</sup> April 2020, the outstanding loan was USD 143,047.04.

Again, the records are silent on whether the mandatory notice of default and/or to service the loan was served to the applicant since the attached annexure AA3 though attached to the first respondent's counter affidavit, does not show whether the same was issued and duly served to the applicant as prescribed by the law.



It is my considered view based on the above observation that, the applicant has established a prima facie case. I am satisfied that, there is an arguable case ground before this Court as to whether the outstanding amount is USD 156,399.12 or USD 143,047.04 and whether the applicant has properly been served with a notice to service the loan after the applicant failed to repay the loan. Another arguable issue is whether the first respondent legally exercised the right of sale of chattels mortgage as provided by the law.

As regard the principle of irreparable injury, the applicant claimed that if the application is not granted, he will suffer irreparable loss. It is apparent that the averment in respect of the irreparable loss is established vide paragraph 18 of the affidavit as amplified by the submission of Mr. Rioba, to the effect that the applicant will be rendered homeless.

It is my considered view, based on the available evidence on record, that, the landed property in dispute is worth a lot of money whereas the irreparable injury cannot be atoned by way of monetary terms. It is my finding that the applicant has fulfilled the second condition.





In respect to the third condition on a balance of inconvenience is that, the applicant stands to suffer more than the respondent if the injunction is not granted. Based on the available evidence on record, I am thus settled that the applicant stands to suffer more than the first respondent.

Mr. Katikiro submitted that the first respondent being a financial institution depends on the money to lend money to customers to run various projects hence its survival in business. Understandably, that makes it clear that the first respondent will also suffer loss. However, in the circumstance of this case, the applicant will suffer more than the first respondent.

I am mindful of the fact that, in the event the first respondent wins the suit, it will be able to exercise its power of sale under the Mortgage, subject to acceptable legal procedure and auction the applicant's properties. I find, therefore that the third condition has been met by the applicant.

In fine, I find this application with merit. The applicant has succeeded to establish conditions for an order of temporary injunctions as established



in the applicant's affidavit. The respondents, by themselves, their agents, assignees, and or servants are restrained from disposing of and selling the applicant's property located at Plot No 573, Mindu Street, Upanga Area, Ilala Municipality, Dar es Salaam comprised under Certificate of Title No. 186170/5/59 pending hearing and determination of the main suit inter parties. Costs to follow events.

**Dated at Dar es Salaam** this 6<sup>th</sup> day of October, 2022.



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**F. R. KHALFAN**

**JUDGE**

**06.10.2022**

**Court:**

Ruling delivered this 6<sup>th</sup> day of October, 2022 in the presence of Mr. Eliya Rioba, learned Counsel for the applicant who is also holding brief for Mr. Joventus Katikiro, learned Counsel for the first respondent.



A handwritten signature in blue ink, appearing to read "F. R. Khalfan", is written over a horizontal line.

**F. R. KHALFAN**

**JUDGE**

**06.10.2022**