

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. LAND APPLICATION NO. 192 OF 2022

(Arising from Land Case No. 90 of 2022)

HUSSEIN ABDULKARIM.....APPLICANT

VERSUS

CRDB BANK PUBLIC LIMITED COMPANY.....1ST RESPONDENT

**NASRA HUSSEIN ABDULKARIM
@ NASRA ABDALLAH MOHAMED.....2ND RESPONDENT**

**AHMED HUSSEIN ABDULKARIM
T/A KISHAN INDUSTRIES3RD RESPONDENT**

YONO AUCTION MART.....4TH RESPONDENT

Date of Last Order: 03.10.2022
Date of Ruling: 24.10.2022

RULING

V.L. MAKANI, J.

The applicant HUSSEIN ABDULKARIM is praying for orders of temporary injunction against the defendants. He has moved this court by way of a Chamber Summons under Order XXXVII Rule 1(a) and 2(1) and sections 68 (e) and 95 of the Civil Procedure Code CAP 33 RE 2019 (the **CPC**). The application is supported by the affidavit of the applicant herein. The 1st and 2nd respondents filed their counter-

affidavits to oppose the application herein, however, the 3rd and 4th respondents did not enter appearance or file counter-affidavits though they were duly served. The application therefore proceeded ex-parte against them.

Mr. Rashid Juma Kasisiko, Advocate appeared for the applicant. and during the hearing, which proceeded orally, he adopted the contents of the affidavit of the applicant. Mr. Kasisiko gave a brief background of the matter that the 3rd respondent took a loan from the 1st respondent herein (the **Bank**) and the 2nd respondent guaranteed the said loan. He said in 2020 the loan was disbursed in three phases. He said there was a variation in April, 2021 and another one in 29/07/2021. He said that the exhibits show that the house is a matrimonial house between the applicant and the 2nd respondent herein. He said once a house is a matrimonial house there must be consent in the taking of a loan by the spouse. He said **Annexure CRDB 3** in the Written Statement of Defence shows that consent on the third variation was by Hussein Abdul Karia who is not the spouse of the 2nd respondent and it is the Bank and the borrower who knows the said spouse because the applicant never consented to the variation. He said the applicant has interest and right over the

matrimonial home which is security to the loan. He said if the sale of the property proceeds, the applicant would suffer as this is his matrimonial home, as per paragraph 11 of the affidavit, which loss cannot be atoned to payment of damages as the suit property is a family home and members of the family would remain homeless. He said the basis of the submission are on the conditions set out in the case of **Atilio vs. Mbowe [1969] HCD 284**. He said the arguments are valid to warrant the intervention of the court to grant injunction pending the main suit.

Mr. Chiro, Advocate representing the Bank prayed to adopt the counter-affidavit that was sworn by the Principal Officer of the Bank. He said there are principles that are set out in the case of **Atilio vs. Mbowe** (supra). He said the first condition is a triable issue and according to the affidavit, the applicant concedes that a loan was taken by the 3rd respondent and the 2nd respondent guaranteed the said loan. But the only issue advanced by the applicant is that there was no consent. He said in paragraph 4 of the Counter-affidavit it reflects that there was consent in the first loan 09/04/2020 and the variations of 29/07/2021 and 09/09/2021. He said the fact that the 2nd respondent brought the consent meant that the procedures were

adhered to. The guarantor, the 2nd respondent was obligated to bring the consent and she did so. He relied on the cases of **Jane Samson Kuja vs. Samson Mtawala Kuja & Others, Misc. Land Application No. 585 of 2015 (HC-Land Division)** (unreported) and also **Fatuma Mohamed Salum & Others vs. Lugano Angetile Mwayosi Jengela & Others, Misc. Land Application No. 90 of 2015 (HC-Land Division)** (unreported). He said the cases quoted section 8(3) of the Mortgage Financing (Special Provisions) Act No. 17 of 2008 (now Section 114 of the Land Act CAP 113 RE 2019). In that respect there was consent so there is no triable issue.

As for the second principle of irreparable loss Mr. Chiro said it is obvious that the borrower defaulted, and he requested for rescheduling, and he was given that opportunity, but he failed to make good the payments of the loan. He was also reminded by demand letters and also statutory notice of 60 days but despite the reminders the loan was not repaid. He pointed out that it is the Bank that is suffering loss because the loan has already been given out and the default is continuing to give loss to the Bank which will fail to operate itself. He relied on the case of **Mohamed Iqbal Haji &**

Othes vs. Zedem Investment Limited & Others, Misc. Land Application No. 5 of 2020 (HC-Division) (unreported) and also **Jane Samson Kuja** (supra) and **General Tyre EA Limited vs. HSBC Bank Plc [2006] TLR 60.**

On balance of convenience Mr. Chiro said the Bank is the one that is inconvenienced because people tend to take loans legally but when they default, they come to court to seek for injunctions as a cover so that the loan cannot be repaid, and the banks are barred from any recovery measures. He relied on the case of **Mohamed Iqbal Haji** (supra) and **Fatuma Mohamed** (supra) which quoted the case of **Charles Msumuri & 33 Othes vs. Director of Tanzania Harbours Authority, Civil Appeal No. 18 of 1977 (HC-Tanga)** (unreported). He said the grant of the injunction does not consider only one principle, but all the principles set out must be satisfied. He stressed that the cases in respect of the temporary injunction has not been satisfied by the applicants. He said the application has no merit and it ought to be dismissed with costs as it has failed to meet the principles of temporary injunction set out in **Atilio vs. Mbowe** (supra).

The 2nd respondent adopted the contents of her affidavit. Being a layperson, she did not have anything useful to say but that the house which is security is the one which they are currently living and they think if they get the time they can repay the loan. She said the house is the only property.

In rejoinder Mr. Kasisiko said the case of **Fatuma Mohamed Salum** and **Jane Kuja** (supra) all talk of consent but they are distinguishable because in the present case, the applicant is not the one who gave consent but it was Hussein Abdul Karia. He said this is a triable issue for the court to investigate and make a decision. He said it is the 2nd and 3rd respondents who benefitted from the loan and not the applicant who also have interest in the matrimonial house. On balance of convenience, Mr. Kasisiko said, the Bank has the Certificate of Title, and she will not suffer because the subject matter is still under her custody. He emphasized that the application before the court is not to suppress the Bank's right but to ensure that the loan transaction was lawful. He said the right should not be assessed from one side but also from the applicant's perspective as he too has the right over the property. He reiterated his prayer for the grant of the application.

The conditions for grant of a temporary injunction are laid in the case of **Atilio vs. Mbowe** (supra) in which it was held that, the plaintiff/applicant has to establish that there is a prima facie case, a balance of convenience, and that he will suffer irreparable injury if the injunction is refused. All these three conditions must be met before a temporary injunction can be granted. The granting of such an injunctive relief is one of discretionary nature but has to be exercised judicially upon satisfaction of the principles governing such reliefs.

I have listened to Counsel and the 2nd respondent herein and have gone through the affidavit and counter-affidavits filed in court. The main issue for determination is whether the applicant has met the three conditions stated above.

In paragraph 10 of the affidavit, it shows that there is Land Case No.90 of 2022 pending in this court in which the applicant is questioning the validity of the mortgage transaction between the Bank, the 2nd and 3rd respondents and seeking in the plaint for the mortgage to be declared null and void because there was no consent

from the applicant. This relief is capable of being awarded by the court and in my view where the whole transaction of issuance of mortgage is questionable then a prima facie case has been established in satisfaction of the first principle laid in **Atilio Mbowe's** case (supra).

On the principle of irreparable loss, the applicant has contended that the house that has been offered as security is a matrimonial home and if it is sold it will render the family homeless. The 2nd respondent also confirmed that they still reside in the same house. Indeed, if the house is auctioned then the applicant and family will face irreparable loss as opposed to the Bank who are secured as they still have the Certificate of Title in their possession. In that regard, if an order for temporary injunction is not granted the applicant would suffer irreparably as the family would be destabilized and the property may not be easily recoverable if it passes to a third party before the main suit is concluded. The test for irreparable loss has therefore been met.

On balance of convenience, it is apparent that if the temporary injunction is not granted the applicant would suffer greater hardship.

As said above, the house is family house and the applicant, and his family still resides in the said house. The balance therefore tilts in favour of the applicant.

Since all the three principles for grant of temporary injunction have been satisfied, then this warrants the court to exercise its discretion in the grant of the order of injunction.

In view of the above, the application for temporary injunction is hereby granted. The respondent, her agents, work persons or any other person working under her instructions are prevented from taking possession, issuing order of any nature on effect to the property, disposing and/or auctioning the landed property under Certificate of Title No. 84309, Plot 137/1, Block "R", Magomeni Area, Dar es Salaam pending the hearing and determination of Land Case No. 90 of 2022. Costs to follow events.

It is so ordered.



V.L. Makani
V.L. MAKANI
JUDGE
24/10/2022