

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPLICATION NO. 637 OF 2022

RICHARD KIMWAGA STIKA APPLICANT

VERSUS

NCBA BANK 1ST RESPONDENT

BENS AGROSTAR CO. LTD 2ND RESPONDENT

RULING

Date of last Order: 23.11.2022

Date of Ruling: 25.11.2022

A.Z MGEYEKWA, J

The applicants' application is brought under Order XXXVII Rule (1), (b), and section 95 of Civil Procedure Code Cap.33 [R.E 2019]. The

application is accompanied by an affidavit sworn by Richard Kimwaga Stika, the applicant. Opposing the application, the 1st respondent filed a counter affidavit sworn by Lilian Mndeme, Principal Officer of the 1st respondent. The Applicant is seeking from this court the following orders:

A temporary injunction order against the respondents, and their agent restraining the Respondents, its directors, employees, servants, agents, assignees, and any person from disposing the disputed landed property Plot No. 993 Kunduchi Area Dar es Salaam pending the hearing and determination of the main suit.

When the application was called for hearing on 15th November, 2022, the applicant enlisted the legal service of Mr. Godfrey Hossa, counsel and the respondent enjoyed the legal service of Mr. Samson Mbamba, counsel. Pursuant to the Court order, the application was argued the application through written submission whereas both counsels complied with the Court order.

The learned counsel for the applicant started to narrate the background of the matter which I am not going to reproduce in this application. Mr. Hossa. The applicant is praying for an Interim Order since there are triable issues in the main suit pending before this Court in Land Case No. 308 of 2022. The counsel stated that the scenario of this case is referred to the case of

Atilio v Mbowe (1969) HCD 286, this Court developed three cardinal principles for granting temporary injunction; establish there is a triable issue, the balance of the convenience between the parties and irreparable loss. It is the Applicant's contention that there are pending triable issues in the main suit to be ascertained by this Court such as the 1st respondent and the 2nd respondent did not issue a notice transpiring the performance of the loan or the notice for the default until the notice of intention to sale the landed property and the relationship of the 2nd respondent and the applicant was based on the contract of usage of the title deed for three years only.

Submitting on irreparable loss, the counsel submitted that in case the Court will not grant a temporary injunction, then the applicant will suffer irreparable loss since the landed property is the patrimonial assets and also it is a place where family economic activities are conducted. To support his submission he referred this Court to paragraph 6 of the applicant's affidavit.

Regarding the balance of convenience between the parties if the said landed property will be disposed of the applicant will suffer much more than the 1st and 2nd respondents. He claimed that the suit's landed property is a matrimonial asset where the family of the applicant resides and they

depend on it for shelter and is the only place where the family generates income for their survivor. The counsel submitted that the 1st and 2nd respondents will not suffer more than the applicant due to the fact that the 1st respondent is a financial institution whereby it has multi-millions of money and clients on which it can depend on. He added that the 2nd respondent has nothing to lose simply because she was the one who benefited from the said loan and she is supplying agrochemicals to the Government. To buttress his contention he cited the case of **Esther Joseph Obuty v Comrade Auction Company**, Misc. Land Application No. 523 of 2021 and **Chai Bora Ltd v Alvic Builders (T) Ltd & Another**, Misc. Civil Application No. 133 of 2021. The applicant's counsel went on to submit that they have received an official written letter from Nampula Auction Mart & Company Ltd, he is given 14 days' notice to react to the said notice and the said 14 days lapsed. He added that the applicant is threatened to dispose his property thus under Order XXXVII Rule 1 (b) of the Civil Procedure Code Cap. 33 [R.E 2019] this Court can grant a temporary injunction to restrain such defrauding acts.

On the strength of the above submission, Mr. Hossa beckoned upon this Court to grant the applicant's application with costs.

In reply, Mr. Mbamba, the learned counsel for the 1st respondent resisted the application with some force. Mr. Mbamba started by citing relevant authorities related to a temporary injunction; **Abdi Ally Salehe v Asac Care Unit Ltd & Others**, Civil Revision No.3 of 2012 (unreported).

Also he cited the case of **Atilio Mbowe** (supra). He went on to submit that the issue of determination in the application is whether the applicant has demonstrated the cumulative existence of the condition stipulated in the cases of **Atilio Mbowe** (supra) and **Abdi Ally Salehe** (supra). Mr. Mbamba contended that in the first condition of prima facie, what is meant is that the applicant must show the existence of a genuine claim of the contest. To fortify his stance he cited the case of **Abdi Aly Salehe** (supra).

He went on to submit that in the present case the applicant in his affidavit has admitted to having guaranteed the loan and the said loan was not paid. To support his submission he referred this Court to paragraphs 4, 5, and 7 of the applicant's affidavit. Mr. Mbamba went on to submit that there is a need to be made a casual glance at the plaint, the Court will note that there is also an admission of liability in the Plaint vide paragraphs 6, 8, 9, and 10. He added that the applicant in his affidavit also admits liability and indebtedness hence one cannot say that there is a demonstration of a prima facie case.

It was his further assertion of the respondent's counsel that the applicant has no clean hands to be rewarded with an order of injunction since he admitted that the loan which he guaranteed. In his view, the admission is acquiescence to the consequences of default to repay the loan which is the sale of the security surrendered. He went on to submit that there is a delay to file the application since the notice was issued on 27th September, 2022 and he filed the instant application on 6th October, 2022 after expiry of two weeks. He spiritedly argued that the diligence and seriousness of the applicant are questionable.

It was his further assertion that failure to prove the existence of a prima facie case, lack of clean hands, acquiescence to the risk and consequences from failure to repay the loan, and demonstration of bad faith by reason of delay to file the application, the remaining two conditions for issuance of injunction which are the balance of convenience and irreparable injury cannot by themselves be taken into account. He ended by stating that irreparable injury, is an injury that cannot be compensated by a monetary award by way of damage.

The second, applicant in her submission had not much to say. She had no objection to this Court granting the applicant's application pending the hearing of the main suit.

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.

I have taken note of the raised grounds supporting the Application but I am of the view that these grounds can be adequately summarized under the question of whether the conditions for granting a temporary injunction had been met in this case.

The law on temporary injunctions is spelled out under Order XXXVIII Rule 1 (a) and (b), 2(1) of the Civil Procedure Code, Cap. 33 [R.E 2019] and the same state as follows:-

" Where in any suit it is proved by affidavit or otherwise-

(a) that any property in dispute in a suit is in danger of being wasted.

Damaged, or alienated by any party to the suit or suffering loss of value by reason of its continued use by any party to the suit or wrongly sold in execution of a decree or;

(b) that the defendant threatens or intends to remove or dispose of his property to defraud his creditors; the court may by order grant a temporary injunction to restrain such action or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of the property as

the court may deem fit, until the disposal of the suit or until further orders".

From the above-quoted provisions of the law, it can be deduced that the purpose of the temporary injunction order is to preserve the *status quo* of the suit property until the parties' rights in the subject matter are determined in the main suit. It is worth noting that in granting the Temporary Injection, the court has to exercise its discretion by considering the factors and principles for granting the sought order. In the case of **Barretto Haulliers (T) Ltd v Joseph E. Mwanyika & Another**, Misc. Civil Application No. 253 of 2016, 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 that will be suffered by the defendant from the granting of it.*

Applying the above principles to the instant case, as to the first condition, whether there is a *prima facie* case; it is apparent there is a *prima facie* case. The applicant deponed that, he was aware of the existing loan. The applicant has claimed that he is the lawful owner of the suit property therefore there is a matter which attracts the attention of this Court since the applicant has shown interest in the suit property. Therefore, the first condition is established.

As to the second condition, the applicants must satisfy the Court that they will suffer irreparable injury if injunction, as prayed, is not granted. The applicant's counsel in his submission contended that the applicant will suffer irreparable loss because the suit landed property is a matrimonial asset and it is where the family's economic activities are conducted. The applicant in his affidavit raised the same concern in paragraph 6. I do agree that in case the landed property is disposed of then the applicant will suffer irreparable loss. Therefore the second condition is established.

Last for consideration is the balance of convenience. The applicant in his affidavit and submission made by his counsel is claiming that he will suffer more compared to the respondent because the mortgaged house is a matrimonial house and they fully depend on it to generate income. In

paragraph 3 of his affidavit, he deposed that he entered into an agreement with Bens Agrost AR Co. Ltd by surrendering his title deed as a 'guarantor' so that it can be used as collateral to the bank for securing a loan amounting to USD 250,000/= The applicant on paragraph 4 admitted that the borrower defaulted to refund the secured loan since 2018 and those are the reasons why the counsel for the respondent in his reply strongly opposed the application.

The records show that from 2018, no efforts have been taken by the applicant, the guarantor nor the 2nd respondent to pay the debt. I fully subscribe to the submission made by Mr. Mbamba, counsel for the 1st respondent that from the facts quantified in the affidavit, it is hard to gauge that the applicant has managed to present strong evidence to prove that there is a serious issue to be tried with the probability of success.

It is my respectful view that, the applicant will suffer loss but it is evident that the Bank, 1st respondent will suffer greater hardship since the applicant and 2nd respondent already caused a lot of inconvenience to the 1st respondent to recover the outstanding loan. The evidence reveals that since 2018, the applicant was aware that 4 years had lapsed since the last date of servicing the loan and they did not do anything to service the said

loan considering the fact that the 2nd respondent is a businesswoman, she earns money, therefore, she is supposed to pay the loan.

Nevertheless, I have considered that the Bank is a business institution, it generates income out of the said loan. Therefore, failure of the 1st applicant to service his loan will render the Bank unprofitable and might be a candidate for bankruptcy as stated in the case of **Mohamed Iqbal Haji & Others v Zedem Investments Limited**, Misc. Land Application No.05 of 2020 that:-

“ I agree with the counsel for the 2nd respondent that in order for his clients to remain in business it must have funds to lend; and that funds must come from funds repaid by borrowers. It is again true that is a bank does not recover loans it will surely be a candidate bankruptcy ...”

Under the said circumstances, I am hesitant to suggest that the balance of convenience is in favour of the applicant. It is also the law that the conditions set out must all be met, meeting one or two of the conditions will not be sufficient for the purpose of the court exercising its discretion to grant an injunction. See the case of **Christopher P. Chale v Commercial Bank of Africa**, Misc. Civil Application No.635 of 2017 (unreported).

In the upshot, I hold that this is not a fit case for temporary injunction.

Thus, I proceed to dismiss the instant application without costs.

Order accordingly.

DATED at Dar es Salaam this 25th November, 2022.



Z.MGEYEKWA

JUDGE

25.11.2022

Ruling delivered on 25th November, 2022 via video conferencing whereas

Mr. Godfrey Hossa, learned counsel for the applicant also holding brief for

Mr. Mbamba, counsel for the 1st respondent was remotely present.



A.Z.MGEYEKWA

JUDGE

25.11.2022