

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 12 OF 2022

(Originating from Land Case No. 06 of 2022 in the High Court of Tanzania at Land
Division)

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| THEREZIA KENAN MAKINDA | | 1ST APPLICANT |
| KENAN TONY MAKINDA | | 2ND APPLICANT |
| ANNE SEMAMBA MAKINDA | | 3RD APPLICANT |
| VERSUS | | |
| AZANIA BANK LIMITED | | 1ST RESPONDENT |
| MARK AUCTIONEERS AND COURT | | |
| BROKERS COMPANY LIMITED..... | | 2ND RESPONDENT |

RULING

**Date of Last Order: 22/02/2022 &
Date of Ruling: 01/03/2022**

A.MSAFIRI, J

There is before this Court, Land Case No. 06 of 2022 filed by the applicants. That main suit forms the basis of this Application. Filed under certificate of urgency, the applicants are moving this Court by way of chamber summons supported by the affidavit of Evodia Beyanga Nino, the learned advocate under section 68 (e), Order XXX VII Rule (1) (a) of the Civil Procedure Code Cap 33 R.E 2019 (Herein after the CPC) praying for the order that;

Pending the hearing and determination of the main suit, this Court should issue order to restrain the 1st respondent, his agents or anyone acting on their behalf from disposition of the suit premises.

Adls.

The Application was argued by way of oral submissions whereby the applicants were represented by Edson Kilatu, learned advocate while the 1st respondent was represented by Upendo Mbaga, learned advocate. The hearing proceeded in absence of the 2nd respondent who were served but for the reasons known to themselves, chose not to enter appearance in court to defend the matter against them.

Submitting for the Application, advocate Kilatu started by praying that the affidavit and reply to the counter affidavit with the annexures be adopted and form part of his submissions. He stated that, the respondent is intending to dispose of the suit property Plot no. 378,380 Block A, Mikocheni in Kinondoni Dar es Salaam as well as Plot No. 4 located at Olorieni, Arusha. That, there is a notice issued for public auction on 24/12/2021. He has stated that the necessary conditions for granting injunctions relief as stipulated in the case of **Attilio vs Mbowe (1968) HCD 288**, have been met. He went on to explain on how the three conditions have been met.

For the first condition, he explained that there is triable issue in Land Case No. 06 of 2022 pending before this Court, and among the issues reflected in the affidavit is the issue of spouse consent. That, there is spouse consent on the 1st overdraft facility but no spouse consent on a converted overdraft facility between the 3rd applicant and the 1st respondent as it was different from the 1st agreement in terms of its implications. He further argued that despite being aware that the 1st applicant was the only spouse of the 2nd applicant, the 1st respondent did not obtain the spouse consent to cover the term loan, instead they obtained the purportedly spouse consent from a different person who is not the 1st *Alle*

applicant who is known as Teresia Kenan Makinda while the true wife of 2nd applicant is Therezia Kenan Makinda. Further, the applicants were not served with the default notice. He is of the opinion that this controversy can only be resolved during full trial of the main case. He cited the case of **Abdi Ally Salehe vs. Asac Care Unit Ltd & 2 others**, Civil Revision No. 03 of 2012. He argued that the prima facie case has been made for the injunction order to be granted.

For the second condition, he argued that, there is irreparable injury if the order is not granted on the sense that, since the suit properties are residential, if sold, they cannot be redeemed back, and that, the title will pass to the 3rd party and the applicants will have no control with the said property as reflected in paragraph 8,9 and 10 of the applicants' affidavit. He argued further that, if the suit property will be sold, it will defeat the ends of justice and the case will be overtaken by the events.

On the third condition, which is on balance of convenience, he stated that it is the applicants who are likely to suffer more compared to the 1st respondent, as the same is the credits facility and can always gain their money compared to the applicants who cannot redeem back their houses (suit property).

In reply to the submission above, advocate Upendo opposed the Application arguing that, the conditions provided for granting of temporary injunction were not met in this application since the applicants have admitted to have received loan from the 1st respondent as averred in paragraph 3 of their affidavit.

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For the first condition, she replied that there is no triable issue, the applicants have failed to establish prima facie case as they admit to have procured a loan and the 1st applicant gave spouse consent and the name Teresia Kenan Makinda and the one appearing in the consent is the same. She stated that, the 1st applicant gave the spouse consent and her signature and her name appears on the form dated 18/09/2017 and the loan is yet to be paid. She added that the applicant has admitted to receive the default notice via paragraph 6 of applicant's affidavit dated 01/10/2021, and that mark the evidence that the respondent complied with Section 122 of the Land Act.

On the second condition, she stated that, the applicants have failed to establish irreparable loss in their affidavit and the alleged paragraphs 8,9,10 does not show how the applicants will suffer the loss. That the applicants are required to show in their affidavit how they will suffer irreparable loss and that, the mere words from submission cannot be termed as part of the affidavit therefore the submission should be disregarded.

On the third condition, she is in opinion that, the applicants failed to establish balance of convenience. The 1st respondent is likely to suffer more than the applicant. That, the 1st respondent being financial institution and doing business of lending money to other people, the delay in payment makes the lending capacity to collapse and it may lead to bankruptcy. The amount claimed is huge amount and the 3rd applicant failed to observe her contractual obligation of payment since 2018. She prayed that the Application be dismissed. Adelle

In rejoinder Advocate Kilalu repeated what was stated in the submission in chief.

Having gone through the pleadings and the submission for and against this Application, the question is whether to grant or refuse an order of temporary injunction as prayed for? It is trite law that, the court has to exercise its discretion by considering the factors and principles for granting the sought order. That in the application for interlocutory injunction, the principles have been outlined in the famous case of **Atilio vs. Mbowe** (1969) HCD 286. Furthermore, the case of **Atilio** (supra) was referred in various decisions of this court such as the cases of **Dominic Daniel & Another vs. CRDB Bank PLC Ltd & Another**, Commercial Case No. 39 of 2011, **Valence Simon Matunda (Suing via Power of Attorney of Musa Yusuf Mamuya) vs. Sallah Philip Ndosy & 2 Others**, Misc. Land Application No.55 of 2019 and **Barretto Haulliers (T) Ltd vs. 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 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* *Acts.*

the injunction than will be suffered by the defendant from the granting of it.

It is legally principle that, the court cannot grant the order sought of temporary injunction unless all the above conditions are satisfied.

On the first condition that there must be serious question to be tried on the facts alleged, and a probability that the plaintiff will be entitled to the reliefs prayed, Advocate Kilatu has argued that, there is an issue of spouse consent and the second one being the issue of failure to issue default notice. For the 1st one he argued that the 1st applicant being the wife of 2nd applicant, did not give spouse consent on a converted overdraft facility as it was different from the 1st agreement in terms of its implications. Even the name which appears in the consent form is not hers on the sense that, the spouse consent was obtained from Teresia Kenan Makinda while the true wife of 2nd applicant is Therezia Kenan Makenda (1st applicant).

With all these explanations, my eyes are focused on paragraph 6 of the applicant affidavit and I wish to reproduce hereunder;

"THAT, the 2nd and the 3^d plaintiff have never default mortgage and loan facility agreement dated 22nd December 2020 as claimed in the default notice dated 1st October 2021 which was communicated to them, thus the default notice surprised both the 2nd and the 3^d plaintiff"

It is trite law that parties are bound by their pleadings and not submissions. This statement on paragraph 6 of the affidavit proves that, the applicants were duly served with the default notice dated 1st October 2021. It is not clear as to how many default notices the applicants were

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supposed to be served with but they were served with the one dated 1st October 2021. Furthermore, it is in agreement by the applicants that, the 1st applicant being the spouse of the 2nd applicant, gave her spouse consent on 18/ 09/2017 which covered the overdraft facility not term loan. The applicants agrees further that, they have received an extended overdraft by the 1st respondent to the 3rd applicant and the same was secured by mortgage over the suit properties. This is reflected in paragraph 3 of the applicant's affidavit. It was not disputed by the applicants that they have defaulted to service the overdraft facility since 2018 as claimed by the 1st respondent.

From the reflection of the above analysis, in my opinion, the applicants have failed to establish that there is a prima facie case which they are likely to succeed. Therefore, I find that the first condition necessary for granting an order of temporary injunction has not been met.

On the second condition, it is reflected in the applicants' affidavit at paragraphs 8,9 and 10 that there is a pending suit which will be defeated if the application will not be granted. Furthermore, it is stated that the applicants will suffer greater inconveniences, disturbances, substantial and irreparable loss in the event the application will not be granted. However, the applicants in their affidavit, have not stated on how they will suffer irreparably if this application is not granted. In his submissions, Mr. Kilatu stated that since the suit properties are residential, when sold they cannot be redeemed back, that, the title will pass to the 3rd party. The applicants did not give more elaboration on how they will suffer irreparably. I am aware that an injury capable of being compensated by money is not an irreparable one. I find that the applicants' arguments *Acly.*

does not indicate any irreparable loss that cannot be compensated by damages. After all the bank being the financial institution is capable of indemnifying the applicants if they succeed in the main suit. It is in a better position of paying damages to the applicants if they succeeds, compared to the applicants. And since the applicants do not deny the loan facility then granting this Application will not be fair on the side of the 1st respondent. On the same breath, I proceed to find that the second condition has not been satisfied.

Lastly, on third condition, which is on the balance of convenience, the test is on whether 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. In this, having considered the submissions by both parties, I am of the opinion that the balance of convenience lay on the respondents' favour i.e. from withholding the injunction as the 1st respondent will suffer more on the move to enforce the recovery measures than the applicants who have defaulted payment since 2018. I find that the applicants have failed to establish the third condition.

Basing on the above findings, I declare that the application is not granted and it is hereby dismissed accordingly. Costs to follow the main cause.

It is so ordered.

Dated at Dar es Salaam this 1st Day of March 2022.




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A. MSAFIRI
JUDGE