

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

**MISC.LAND APPLICATION NO. 739 OF 2021.**

*(Originating from land Case No.245 of 2021 High Court Land Division)*

**QUALITY GROUP LTD ..... APPLICANT**

**VERSUS**

**KNIGHT FRANK (T) LTD ..... RESPONDENT**

*Date of last Order: 08/03/2022*

*Date of Ruling: 15/03/2022*

**RULING**

**I. ARUFANI, J.**

This is an application for temporary injunction filed in this court under section 68 (c) and Order XXXVII Rule 1 (a) and 4 of the Civil Procedure Code Cap 33 [R.E 2019] and any other enabling provision of law. The applicant beseeches the court to issue an interim injunction order restraining the respondent by themselves, their agent, and or servant from proceedings with further marketing /promoting offer for sale of the property situated in Plot No. 25 Nyerere Road, Dar es Salaam, pending hearing and determination of the main suit pending before this Court.

The application is supported by an affidavit sworn by Eliya Rioba, advocate for the applicant and is opposed by a counter affidavit sworn by Mnaina Msafiri, Principal Officer of the respondent. When the application came for hearing the applicant was represented by Mr. Eliya Rioba, learned advocate and the respondent was represented by Mr. Pladius Mwombeki, learned advocate and the application was heard orally.

The counsel for the applicant prayed the affidavit supporting the application to form part of his submission. He argued that, the applicant is seeking for the above stated order because the respondent has initiated a move of selling the applicant's building located at Plot No. 25, Nyerere Road in Dar es Salaam by affixing a banner of inviting interested purchasers to offer to purchase the property. He argued that, granting temporary injunction is a matter of court's discretion which ought to be exercised judiciously in consideration of factual and legal grounds. He referred the court to the famous case of **Atilio V. Mbowe** (1969) HCD No. 284 where grounds to be considered by the court in determining application of this nature were laid. He submitted that, the grounds laid in the cited case are; (1) serious question to be tried or a prima facie case, (2) irreparable loss and (3) balance of convenience.

He submitted in relation to the present application that, there is a Land Case No. 245 of 2021 pending in this court. He stated that, the

applicant is challenging legality of the respondent to enter into her property without her knowledge, consent or permission and placing an advertising banner on the property in an attempt to sell the property. He argued that, paragraphs 4 and 5 of the affidavit in support of the application read together with paragraphs 7 and 8 of the counter affidavit shows the respondent trespassed into the applicant's property though he asserted there is justification for doing so. He submitted that the said trespass is sufficient to show there is an issue to be tried by the court.

In arguing the second ground which relates to irrepealable loss the counsel for the applicant referred the court to the case of **Abdi Ally Salehe V. Asac Care Unit Ltd & 2 Others**, Civil Revision No. 3 of 2012 CAT (unreported) where it was stated that, in determining the said ground it is expected that, without intervention by way of injunction the position of the applicant in some way will be changed to worse. In other word he will suffer damages as consequences of the respondent. He submitted in relation to the present application that, the respondent is promoting to sale the property of the applicant and if the property will be sold the applicant will suffer irreparable loss while the respondent stands to suffer nothing.

As for the ground relating to balance of convenience the counsel for the applicant referred the court to the case of **Abdi Ally Salehe** (supra)

where it was stated that, the court is required to see whether the plaintiff will suffer greater damage or loss if the injunction is refused than the defendant. He argued that, the applicant stands to suffer great damage if the application will not be granted than the injuries which will be suffered by the respondent. It is because of the above stated reason the counsel for the applicant prayed the court to grant the application with costs.

In reply the counsel for the respondent stated that, for the order of temporary injunction to be granted there are three principles which are supposed to be satisfied as laid down in the case of **Atilio V. Mbowe** (supra). He stated the said principles are as follows; (1) there must be a prima facie case (2) the applicant will suffer an irreparable loss (3) balance of convenience. Starting with the first principle of prima facie case the counsel for the respondent referred the court to the case of **Chai Bora Limited V. Alvic Builders (T) Limited**, Misc. Civil Application No. 133 of 2021, HC at DSM (unreported) which elaborated the above stated principles in detail.

He argued that, the things which are supposed to be shown by the applicant is that the relief sought in the main suit is one which the court is capable of awarding the same. He stated further that, the applicant should at a very minimum show in the pleadings that in absence of any rebuttal evidence he/she is entitled to the said relief. Submitting in respect

of the present application the counsel for the respondent stated that, the applicant is not entitled to the reliefs sought in the main suit.

He contended that, the applicant is no longer the owner of the property on plot No. 25 with CT No. 181681/42 situated at Nyerere Road. He stated that, the said property was ordered by the High Court of Tanzania, Commercial Division in Commercial Case No. 174 of 2018 to be delivered to the joint appointed receiver managers. He stated that, the said fact is substantiated by annexure CRB 2 in the counter affidavit of the respondent which shows the respondent in the present application is just an agent.

He submitted that, in order for the injunction to be granted the main suit must not be frivolous or vexatious and stated the present application has no legs to stand on as the applicant has no interest in the subject matter. To support his submission, he referred the court to the case of **ABLA Estate Developers & Agency Company Ltd V. KCB Bank (T) Limited**, Misc. Land Application No. 604 of 2017, HC at DSM (unreported).

Arguing in relation to the second principle the counsel for the respondent submitted that, paragraphs 5, 6, 7 and 8 of the counter affidavit shows who is the real respondent in the application and stated the respondent is just an agent of the bank. He stated that, the

respondent being a mere agent of the receiver managers who are employed by the bank, they are in a position to compensate the applicant thus the applicant is not deserving to be granted the injunction is seeking from the court as he stands to suffer no irreparable loss.

As for the third criteria the counsel for the respondent submitted that, the applicant being not in possession of the property as the court has already ordered the property to be handed to the receiver/Managers the applicant stand to suffer no damage. The counsel for the respondent referred the court to the case of **Chai Bora Limited** (supra) where it is stated how the proceedings of this nature should be handled. He stated that, the affidavit and counter affidavit are the one required to be looked to see the fact which will lead the court in granting the injunction. He submitted that the case cited by the counsel for the applicant to support his submission is distinguishable from the case at hand because the applicant is not entitled to any relief in the main suit pending in this court.

In his rejoinder the counsel for the applicant reiterated his submission in chief in relation to the principle of the prima facie case and invite the court to examine the matter before it and not to dwell on the facts of the main case. He argued that, the respondent admitted in his counter affidavit that the applicant is the owner of the property in question. He stated that, the assertion that the applicant handed the

property to the receiver managers of the bank is not true and the counsel for the respondent is misleading the court and stated the said issue is supposed to be discussed and determined in the main suit and not in this application.

After considering the submissions from the counsel for the parties the court has found the issue to determine in this matter is whether the application is meritorious and deserve to be granted. The court has found that, as rightly argued by both counsel for the parties the principles governing grant of temporary injunction were laid in the famous case of

**Atilio V. Mbowe** (supra) to be as follows: -

- (i) *There must be a serious question to be tried on the facts alleged, and the probability that the plaintiff will be entitled to the relief prayed.*
- (ii) *The applicant stands to suffer irreparable loss requiring the courts intervention before the applicant's legal right is established;*
- (iii) *On the balance of convenience, there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendant from granting of it.*

Starting with the first principle of existence of a prima facie case the court has found that, as rightly argued by the counsel for the applicant

and as stated in the case of **ABLA Estate Developers & Agency Company Limited** (supra) what the court is required to be satisfied in looking for prima facie case is not necessarily that the applicant must establish she will win the suit or obtain a decree against the respondent. The court is required to be satisfied there is a triable issue or in other words the applicant has a cause of action against the respondent and the suit against the respondent is not frivolous or vexatious.

The court has arrived to the above view after seeing it was stated by the Court of Appeal of Tanzania in the case of the **CPC International Inc V. Zainabu Grain Millers Ltd**, Civil Appeal No. 49 of 1999, (unreported) that, it will be premature to dwell in determining the applicant will win the main suit or will obtain a decree at this stage as the parties have not adduced any evidence to prove or disprove the reliefs the applicant is seeking from the court. The above view is also being bolstered by what was stated by Lord Diplock in the case of **American Cyanamid Co. V. Ethicon Ltd**, (1975) 1 All ER 504 which is a leading case in this aspect that:-

*"It is not part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration. These are matters to be dealt at trial".*



That being what is required to be looked by the court, the court has gone through paragraphs 4 and 5 of the affidavit supporting the application which the counsel for the applicant states they are establishing a prima facie case against the respondent. The court has found it is deposed in the mentioned paragraphs that, the respondent has trespassed the property of the applicant situated at Plot No. 25, Nyerere Road, Dar es Salaam, registered under Certificate of Title No. 181681/42.

The court has found it is deposed in the affidavit supporting the application that, the respondent has trespassed the disputed property as the respondent has affixed thereon an advertisement banner showing the property in dispute is being sold and is inviting interested purchasers to purchase the property in dispute without the knowledge and consent of the applicant. The court has also gone through the main suit and find among the reliefs the applicant is claiming against the respondent in the main suit is a declaratory order that, the act of the respondent to promote to sale the property in dispute without the knowledge and consent of the applicant is illegal.

The court has found the reply by the respondent as appearing at paragraphs 7 and 8 of the counter affidavit shows the respondent is maintaining she is an agent engaged by the receiver managers appointed

to undertake the duty of selling the property in dispute. The respondent is disputing the applicant's allegation that she is not aware that there is a court order which directed the applicant to deliver possession of the property to the appointed receiver managers. It is deposed further in the counter affidavit of the respondent that the applicant is well aware of the said court order because the applicant filed an application at the High Court Commercial Division for leave to appear to defend the suit which was pending in that court. It is further deposed that the said application was dismissed and the court ordered the applicant to hand over the property to the appointed receiver managers.

That being what is averred in the pleadings of the parties the court has found there is no way it can be said there is no triable issue in the main suit. To the view of this court there is a triable issue in the main suit which is whether the respondent has justification for advertising to sale the property in dispute. The court has arrived to the above finding after seeing that, as stated in the case of **Chai Bora Limited** (supra) in determining establishment of a prima facie case the court is required to see the applicant has shown two things, which are; (i) Relief sought in the main suit is one which the court is capable of awarding and (ii) The applicant should at a very minimum show in the pleading that in the absence of any rebuttal evidence she is entitled to such relief.

The court has found there is nothing to show the court is not capable of awarding the relief the applicant is claiming against the respondent in the main suit if there will be no any defence evidence adduced the respondent to rebut the evidence which will be adduced by the applicant to support her claims. To the view of this court if there will be no defence evidence to rebut the claim of the applicant there is a probability of the applicant to be entitled to the relief sought. From the above view it is the finding of this court that, the applicant has managed to establish the first principle that there is a triable issue in the main suit which need to be determined by the court.

Coming to the second principle of irreparable loss the court has found that, a mere existence of a prima facie case alone does not entitle the applicant to be granted a temporary injunction. The applicant is required to satisfy the court that he will suffer irreparable loss if the injunction prayed is not granted. He must also satisfy the court that there is no other remedy open to him by which he can protect himself from the consequences of the apprehended loss. The stated position can be seeing in the case of **Abdi Ally Salehe** (supra) where it was stated that:-

*"Once the court finds that there is a prima facie case, it should then go on to investigate whether the applicant stands to suffer irreparable loss, not capable of being atoned by way of*

*damages. There, the applicant is expected to show that, unless the court intervenes by way of injunction, his position will in some way be changed for the worse."*

The court has found in establishing the applicant will suffer irreparable loss if the injunction sought will not be granted the counsel for the applicant cited the above case of **Abdi Ally Salehe** (supra) and stated that, the applicant will suffer irreparable loss if injunction will not be granted. He didn't give any further explanation about how the applicant will suffer the alleged loss.

The court has found that, it is not disputed that the respondent has affixed an advertisement banner on the property in dispute showing the house is being sold and the respondent has announced in the newspaper that the house is being sold and the respondent has invited interested purchasers to purchase the property. The court has also found that, it might also be said that, if the disputed property will be sold and later on is decided by the court that the respondent had no justification of selling the disputed property, the applicant will incur costs of seeking for the property to be restored back to them.

However, the court has found the loss which will be incurred by the applicant to seek for restoration of the dispute property if it will be sold is not a loss which is irreparable. To the view of this court, it is a loss which

can be compensated by a way of monetary form. The court has found that, as the respondent states is an agent of receiver managers appointed by the bank to sale the property in dispute it cannot be said the damages which will be suffered by the applicant if she will succeed in the main suit cannot be indemnified by way of monetary form.

The court has also arrived to the above finding after seeing that, it is deposed at paragraph 8 of the respondent's counter affidavit that the process of the respondent to advertise to sale the property in dispute is backed up by the order issued by the High Court Commercial Division in Commercial Case No. 174 of 2018 which ordered the applicant to hand over the property in dispute to the receiver managers appointed by Trade and Development Bank (TDB) who engaged the respondent to sale the said property.

If there is such an order of the court it is the view of this court that, it is not only that the applicant cannot claim she will suffer irreparable loss for the property which there is an order of the court directing the disputed property to be handed over to the receiver managers who have engaged the respondent to sale the same but also if the injunction sought by the applicant is granted will be in conflict with the order made by the High Court Commercial Division in Commercial Case No 174 of 2018.

The court has found that, although the counsel for the applicant argued the property in dispute has never been handed over to the receiver managers in compliance with the said order of the court but there is nowhere stated the said decision of the court is not in existence or it has ever been overturned by a competent court. To the view of this court if there is such a decision of the court which is in existence the applicant has another forum which she can use to seek for execution of the said order to be stayed which to the view of this court is the most appropriate forum than the forum of seeking for an order of temporary injunction is seeking from this court. In the premises the court has found the applicant has not managed to establish she will suffer irreparable loss if the order of temporary injunction is seeking from this court will not be granted.

Turning to the third principle of balance of convenience the court has found that, as rightly argued by the counsel for the applicant it is well stated in the case of **Abdi Ally Salehe** (supra) that, here the court is required to see the applicant will suffer greater damages or loss than the respondent if the injunction sought will be refused. The court has found it was stated in the case of **American Cyanamid Co.** (supra) that, in determining to grant or refuse an order of temporary injunction the court is required to weigh one need against another and determine where the balance of convenience lies.

Back to the application at hand the court has found that, as it has already been found the applicant has not managed to establish the second condition of irreparable injury or loss it cannot be said the applicant will be more inconvenienced than the respondent if the order of temporary injunction is seeking from the court will not be granted. To the view of this court the balance of inconvenience will be more to the respondent if the injunction will be granted as the respondent will be prevented to exercise the legal rights stated has been declared by the court. That caused the court to find the applicant has not managed to establish the third condition for the order of temporary injunction to be granted.

As the applicant has not managed to establish two out of the three conditions required to be established to enable the court to grant the order of temporary injunction is seeking from the court, the court has found as held in the case of **Tanzania Breweries Limited V. Kibo Breweries Limited & Another**, (1998) EA 341 the order of temporary injunction the applicant is seeking from the court cannot be granted.

Consequently, the court has found it has not been satisfied there is sufficient and justifiable reason for exercising its discretionary power to grant the order of temporary injunction the applicant is seeking from this court. In the upshot the application is hereby dismissed in its entirety with costs. It is so ordered.

Dated at Dar es Salaam this 15<sup>th</sup> day of March, 2022.

  
**I. ARUFANI**

**JUDGE**

**15/03/2022**

**Court:**

Ruling delivered today 15<sup>th</sup> day of March, 2022 in the presence of Mr. Eliya Rioba, learned advocate for the applicant and in the presence of Mr. Pladius Mwombeki, learned advocate for the respondent. Right of appeal to the Court of Appeal is fully explained.



  
**I. ARUFANI**

**JUDGE**

**15/03/2022**