

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

MISCELLANEOUS LAND CASE APPLICATION NO.413 OF 2019
(Originating from Land Case No. 124 of 2020)

LUSHOTO TEA COMPANY LIMITED.....APPLICANT

VERSUS

NMB BANK PLC.....1ST RESPONDENT

**DOLPHIN GENERAL BUSINESS
ENTERPRISES COMPANY LIMITED.....2ND RESPONDENT**

R U L I N G

Date of Last Order: 06.12.2021

Date of Judgment: 28.02.2022

T. N. MWENEGOHA, J.

Pending the hearing and final determination of the main suit which is Land Case No. 124/2020, the applicant, Lushoto Tea Company, is seeking for an injunction order. She wants this Court to restrain the respondents, their agents or workmen, employees and all other persons acting under their instructions, from entering, attaching and or unlawfully selling a landed property, registered under a Certificate of Title Number 186063/53, located at Plot No. 2214/202, Gerezani Area, Ilala Municipality, Dar Es salaam. This application was preferred under **Order XXXVII Rules 1(a) and (b), 2 (1), 4 and Section 68 (1)(e) of the Civil Procedure Code, Cap 33 R. E. 2002** and supported by the affidavit of Yusuf Nawab Mulla, a Director to the applicant's company.

The genesis of the case is that, the applicant and Usambara Tea Growers Association are joint shareholders in Mponde Tea Estate Limited. Before the formation of the joint venture between the two, Usambara Tea Growers Association had an understanding with the government of Tanzania to purchase the Mponde Tea Factory located at Lushoto District in Tanga. The facts further show that, at the time when the said understanding was being reached, the Mponde Tea Estate Limited was indebted to the 1st respondent to the tune of 600,000,000/=. As security for the said loan, Mponde Tea Estate gave under mortgage its landed property, that is Farm No. 1111, with Certificate of Title No. 21611, located at Mponde, Lushoto.

In December, 2018, the applicant being the new owner of the factory, took over the liabilities of repaying the said loan between Mponde Tea Estate Company and the 1st respondent. At that time, the outstanding balance of the said loan was about 1,800,000,000/=. A landed property, Plot No. 2214/202, with Certificate of Title Number 186063/53, located at Gerezan Area Ilala Municipality, Dar es salaam was mortgaged by the applicant to the 1st respondent as security for the loan in question. Unfortunately, the applicant failed to repay the loan as agreed. Consequently, the 1st respondent has threatened to auction the mortgaged property to recover the amount due. Hence this application was filed following the institution of the main suit herein above mentioned.

The application was disposed by written submissions. Advocate Said Nassor appeared for the applicant, while the respondent enjoyed the legal services of Advocate Victor Kikwasi.

Submitting in support of the application Advocate Nassor relied on the case of **Atilio vs. Mbowe (1969) HCD 284**, in which the three conditions precedent to the grant of temporary injunction were outlined as follows:-

The first condition is the existence of a serious question to be tried by the court of law. The applicant's counsel was of the view that, the dispute in the main case is focused on looking as to whether the applicant has defaulted in repaying the loan due and further that, if the 1st respondent's move to auction the said property is legally justified.

Second is that, the applicant will suffer irreparable loss if the application is not granted. The applicant's counsel was of the view that, the court's interference is necessary because if the property in question is auctioned, the applicant will lose control permanently over it as the same will be under the ownership of the 3rd party, the one who will purchase it at the auction. He relied in the case of **Valance Simon Matunda(suing via the power of Attorney of Musa Yusuf Mamuya) versus Sadallah Philip Ndosy and 2 Others, Misc. land Application No. 55 of 2019, High Court of Tanzania at Dar es Salaam, (unreported)**, where the court referred the case of **Colgate-Palmolive Company versus Zacharia Provision Store & Others** and observed that....

"In the instant case, injunction is sought against a pending auction which if successful conducted will vest the title of the suit property in the third person. This is in my settled opinion, will render the suit nugatory and the property would have changed hands to a person who is not a party and this warrants the intervention of this court"

The third principle is based on the balance of convenience and it was argued by counsel for applicant that, the applicant stands to suffer greater hardships and mischief if the order is not given against the respondent. That the applicant is at risk of losing the property in question while the 1st respondent's business is not affected in anyway by the preventive measures sought by the applicant as far as their dispute is concerned. Therefore, a court intervention by granting injunction pending final determination of the suit is inevitable.

In reply Mr.Kikwasi for the 1st respondent prayed for the counter affidavit sworn by the principle officer of the 1st respondent to be adopted and then contended that, the ingredients mentioned in **Atilio versus Mbowe, supra** are not in favour of the applicant. Firstly, the applicant has no triable issues as she failed to show the Court if there is any wrong being committed by the respondents in their intended action in respect of the suit property. That, after all the property which the respondents intend to sell was not at all disputed by the applicant to be collateral for the loan due.

He went on to argue on the 2nd issue that, since the 1st issue of existence of a *prima facie* case against the respondents was not established, the 2nd issue of the loss to be incurred on part of the applicant if the application is denied and also fails. Therefore, the Court should uphold the rules established in the case of **NBC versus Dar es salaam Education and Office Stationary (1995) TLR 272**, where Court of Appeal of Tanzania stated:

"Where a mortgagee is exercising its power of sale under the Mortgage deed, the court cannot interfere unless there was

corruption or collusion with the purchaser in the sale of property".

On the balance of convenience rule, it was submitted by the counsel for the 1st respondent that, it is the 1st respondent who stands to suffer if the application is allowed than the applicant. Therefore, the balance of convenience rule favors the 1st respondent much as a lender than the applicant. It is on the basis of these arguments, the counsel for the 1st respondent insisted that, this application should not be allowed. His reasons being that, the essential elements for the same were not at all met.

In his brief rejoinder, Advocate Nassor for the applicant reiterated his submissions in chief and insisted that, the 1st respondents' arguments are misplaced and misconceived on the premise that, the applicant has successfully established all elements for injunctive orders to be granted in her favour and against the respondents.

I have considered the submissions of both parties through their respective counsels and also gone through the affidavit and counter affidavit as adopted by the parties through their submissions. The only issue worth of determination is whether the application at hand has merit or not.

Both parties have placed their reliance on the rules propounded in, in **Atilio's case, supra**. The 1st respondent on the other hand through her learned counsel, Mr. Kikwasi insisted that, the applicant had not met the requirements of injunction as stated in the said case. He was of the view that, the applicant has not shown if there exist any triable issues between her and the 1st respondent warranting the interference of this court. To him, that has led to the failure of the 2nd issue automatically as it depends

on the existence of the prima facie case between the parties. He insisted that, above all, looking on the balance of convenience, it is the 1st respondent who stands to suffer much compared to the applicant in case the application is allowed.

However, and with all due respect, I beg to differ with learned counsel for the 1st respondent in his arguments. In my settled opinion, I find the applicant has met the test provided in **Atilio's case supra**. She managed to establish that there are triable issues worth of court's attention. The case for the same is still pending and that is the Land case No. 124 of 2020. It is clear that there is a dispute between the parties over the payment of the loan due. The applicant has insisted to have not defaulted on servicing the same. Unfortunately, at this juncture we cannot go into depth over this issue. Either, basing on the already explained facts, the courts also have been invited to look of the justification of the intended auction by the 1st respondent over the suit property. These two issues clearly prove the existence of triable issues between the parties in this application.

That being the case, I turn to the 2nd rule on whether the applicant will suffer irreparable loss if the application is not granted. This is obvious, if the property is sold, the whole case will be nugatory see **Valance Simon Matunda's case, supra**. Therefore, this court's intervention is necessary to protect the rights and interests of the applicant over the property in question until the final determination of the main case.

Lastly, the balance of probability rule favors the applicant whose property is about to be disposed off her hand. The 1st respondent on the other

hand, won't lose anything in by having a little patience for the time this Court is set to settle their dispute.

Under these circumstances and for reasons given in the analysis herein earlier, I allow this application with costs as the same has merit.

The respondents, their agents or workmen, employees and all other persons acting under their instructions, are restrained from entering, attaching and unlawfully selling a property under certificate of Tittle Number 186063/53, located at Plot No. 2214/202, Gerezan Area or dealing in any manner of a suit land, Plot No. 105, registered under C.T No. 44512, located at Gerezani Area, Ilala Municipality, Dar Es salaam.

It is so ordered.

Dated at Dar es salaam this **28th** day of **February, 2022**




T. N. MWENEGOHA
JUDGE