

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

MISC. LAND APPLICATION NO. 726 OF 2021
(Originating from Land Case No.241 of 2021)

**SILAS GEORGE MALIPULA t/a
SILMAL INVESTMENTS.....APPLICANT**

VERSUS

NATIONAL BANK OF COMMERCE LIMITED.....1ST RESPONDENT

**GADAU AUCTION MART &
COMPANY LIMITED LIMITE.....2ND RESPONDENT**

R U L I N G

Date of Last Order: 15. 05. 2022

Date of Ruling: 31. 05. 2022

T. N. MWENEGOHA J.

The applicant's house, located at Plot No. 1023, Mbezi-Kawe Area, within Kinondoni Municipality and Dar es Salaam region, having a certificate of Tittle No. 59650, is about to be sold on auction by the 2nd respondent acting on behalf of the 1st respondent. Hence, the applicant is before this court seeking for an order of temporary injunction against the respondents or any person working under their instructions or authority from selling or disposing in whatever manner of the property in question. The application is brought under Order XXXVII Rule 1(b), also Sections 68 (e) and (c) and 95, of the Civil Procedure Code, Cap 33 R. E. 2009 and supported by the Applicant's affidavit.

The application was heard through written submissions. Cleophas Manyangu, learned counsel appeared for the applicant while the 1st and 2nd respondents were represented by Advocate John Ignas Kitauli Laswai.

Submitting in support of the application Advocate Cleophas Manyangu, 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 prima facie case. He insisted that there are triable issues in the Land case No. 241 of 2021. That, the actions by the 1st respondent to recall the term of mortgage loan facility/overdraft facility and proceed to appoint a broker to attach and sale the mortgaged property is illegal and unjustifiable. Therefore, the court is invited to decide on the matter.

The second principle is based on the balance of convenience, it was argued by the counsel for applicant that, the applicant and his family are using the suit property as a dwelling house. If the same is sold, they will remain homeless. Looking on the balance of convenience, the applicant will suffer great loss of than the respondents if this application will not be allowed. That, the 1st respondent in particular will not suffer anything and her banking business will continue to operate.

Thirdly, is the fact that the applicant will suffer irreparable loss that cannot be compensated by monetary terms in case the instant application is not allowed. As pointed out here in earlier, the applicant and his family are likely to lose a home if the application is denied. Above all, the landed property in question is over and above the outstanding term loan facility by 90 percent.

In reply Mr. Laswai for the respondents contended that the application is untenable, both in law and in facts. He went on to argue that, the applicant has used Order XXXVII Rule 1(b) and Section 68 (c) of the Civil procedure Code, Cap 33 R. E. 2019 as enabling provisions for this application. However, the same doesn't support the application. That, according to Section 68 (c) it has been provided that;-

*68. "In order to prevent the ends of justice from being defeated the court may, subject to any rules in that behalf;-
(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof as a civil prisoner and order that his property be attached and sold."*

While Order XXXVII Rule 1(b) says as follows;-

*1. "Where in any suit it is proved by affidavit or otherwise
(b) that the defendant threatens, or intends to remove or dispose of his property with a view to defraud his creditors, the court may by order grant a temporary injunction to restrain such act 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 thinks fit, until the disposal of the suit or until further orders"*

It was his argument therefore, that looking at the meaning of the provisions quoted herein above and the application at hand, the two are incompatible. The instant application is defeated by the very provisions on which it is based. Above all, the application has not met the conditions made in Atilio's case (supra, hence it has to be dismissed.

In his brief rejoinder, Mr. Manyangu for the applicant reiterated his submissions in chief and insisted that, the applicant has proved beyond reasonable doubts that all the conditions for granting the injunction order have been fulfilled in this application.

Having considered the submissions by parties and also looking at the affidavit in support of the application as well as the counter affidavit opposing this application, the issue worth of determination is whether the instant application has merit.

However, before I venture into answering the issue raised above, let me first look into the tenability of the application itself. It was the argument of the respondents' counsel in his reply submissions that, this application was brought under a wrong enabling provision of law. The same do not support it. The applicant's counsel had the opportunity to address this argument through his rejoinder submissions. However, he chose not to address the same. He turned a blind eye on the fact touching the competence of the application at hand and went on to argue on other issues in relation to the application itself.

It is true that, the application came under Order XXXVII Rule 1(b), and sections 68 (e) and (c) and 95, of the Civil Procedure Code, supra. As pointed out by the counsel for the respondent, the enabling provisions used by the applicant do not support the application at hand. To start with Order XXXVII Rule 1(b) supra, the respondent, 1st respondent in particular who is the 1st defendant in the main suit is a creditor to the applicant. Her actions with regard to the suit property as stated in the Affidavit and Counter affidavit submitted along with the application do not amount to the circumstances stated in the said provision. Her intentions as a financial institution if at all the actions are justifiable, is to secure the monies

advanced to her debtor and not to defraud her creditors. Therefore, this provision do not apply in the circumstances at hand.

Coming to Sections 68 (e) and (c), these are general provisions allowing the Court to grant injunction and also to make any other interlocutory orders as may appear to the Court to be just and convenient. It is settled that, where there is a specific provision for a particular issue in law, the same is more preferred than those provisions giving general directions.

Having so observed, I agree with the respondents 'counsel in his arguments that the instant application is untenable. It lacks proper enabling provision to support the same. This position has been given in a number of authorities including the case of **Citibank Tanzania Limited vs. Tanzania Telecommunications Company Limited and Others, Civil Application No. 64 of 2003 (unreported)**, and **National Bank of Commerce vs. Sadrudin Meghji, Civil Application No. 20 of 1997 (unreported)**.

In the upshot, the application is struck out for want of competence. Costs to follow the event.

Ordered accordingly.




T. N. MWENEGOHA
JUDGE
31/05/2022