

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 573 OF 2021

EMMANUEL FREDRICK MLAPONI APPLICANT

VERSUS

EMMASAI TANZANIA

ENTERPRISES LIMITED 1ST RESPONDENT

ECOBANK TANZANIA LIMITED 2ND RESPONDENT

CDJ CLASSIC GROUP LIMITED 3RD RESPONDENT

RULING

Date of Last Order: 26/01/2022

Date of Ruling: 22/02/2022

A. MSAFIRI, J

This is an Application for an order of temporary injunction to restrain the respondents and whoever purporting to act on their behalf, from selling or disposing the applicant's property situated on Plot No. 147 Block A at Kinyerezi Area, Ilala City Council Dar es Salaam (herein as suit property) which is in the name of Emmanuel Fredrick Mlaponi, the applicant.

The Application is by way of chamber summons supported by the affidavit sworn by the applicant. The applicant was represented by Victoria Mgonja advocate. The 2nd and 3rd respondents filed their counter affidavit and was represented by Joseph Mbogela, Advocate.

The matter was argued for and against by way of written submissions and the parties complied with the court's schedule. However, for the reasons

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known to itself, the 1st respondent has never entered an appearance in Court nor filed their counter affidavit. So the court has drawn an inference that they don't contest this Application.

Submitting for the applicant, Ms. Mgonja stated that the suit property is lawfully owned by the applicant and has never been guaranteed to any loan or been put therein for, in effecting any loan for 1st respondent from the 2nd respondent. That, the 2nd respondent by the reasons known to itself, used the 3rd respondent to issue a notice to sell the suit property which is lawfully owned by the applicant.

Ms. Mgonja argued that the intention to sale the suit property is unlawful as the same is not guaranteed to the loan of the 1st respondent neither the property belongs to the 1st respondent. She cited the case of **Attilio vs. Mbowe** (1969) HCD No. 289, and added that the three principles set out in the said case has been met in the present case. She insisted that, as the suit property does not belong to the 1st respondent nor secured the purported loan, it is crucial and necessary to grant the application. That if the same will not be granted, the applicant will suffer irretrievable loss, and it will defeat the very purpose of the main suit and render the main case nugatory. She added that, the applicant stands to lose more than the respondents if the injunction is not granted.

In conclusion, she cited Order 37 Rule 1 (a) and 2(1), and Section 68(e). She prayed to adopt the affidavit of the applicant as part of her submissions. She invited the court to allow the Application with costs.

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Responding to the above submission, the 2nd and 3rd respondents' counsel Mr. Mbogela vehemently opposed the Application which he said it is misconceived and has no merit. He prayed to adopt the 2nd and 3rd respondents' counter affidavit which was sworn by Henry Lazaro Chaula.

Mr. Mbogela submitted that, the applicant guaranteed the loan taken by the 1st respondent from the 2nd respondent. That, unfortunately, in the public notice of sale, instead of typing the name of 1st respondent as EMMASAI (T) GENERAL ENTERPRISES, it was written as EMMASAI TANZANIA ENTERPRISES LIMITED. That the applicant guaranteed the loan taken by the 1st respondent in the name of EMMASAI (T) GENERAL ENTERPRISES as per annexure ECOB – 1 to the counter affidavit.

Mr. Mbogela submitted further that the issue to be dealt by this court is whether the applicant has demonstrated the existence of the three criteria in the application at hand. He argued that the Application does not meet the three criteria for granting temporary injunction as they were stated in the land mark case of **Atilio vs. Mbowe (supra)**. He contended that, there is nowhere in the affidavit that the applicant has stated and explained that there is prima facie case or triable issue to be determined. That according to the Plaintiff in the main case, there is no triable issue because the applicant freely guaranteed the loan taken by the 1st respondent and has failed to pay the debt.

He stated that, the applicant has not stated in the affidavit how he will suffer irreparable loss in case the suit property is lost. That the applicant has just mentioned that he will suffer irreparable loss at paragraph 8 of

Atilio

the affidavit without explaining how he will suffer the loss. He pointed that if the reliefs sought in the Plaint is proved, the 2nd respondent is in the position to redress the applicant by way of damages. He cited the case of **Mariam Christopher vs. Equity Bank Tanzania Limited and Another**, Misc. Land Application No. 1070 of 2017, High Court of Tanzania at Dar es Salaam (unreported).

Mr. Mbogela contended that, on the balance of convenience, the applicant has not stated in his affidavit, how he will suffer greater hardship and mischief if the injunction is not granted. He submitted that, the Bank is the one to suffer than the applicant as the debt is not yet paid back.

He averred that this Court should decline to grant injunctive order against the 2nd respondent who is the creditor and is legally exercising the contractual rights with respect to loan recovery measures. To cement his point, he referred this Court to the case of **Agency Cargo International vs. Eurafrican Bank (T) Ltd**, High Court (Dar es Salaam), Civil Case No. 44 of 1998 (unreported) cited in **Lukolo Company Limited vs. Bank of Africa**, Misc. Civil Application No. 494 of 2020, High Court at Dar es Salaam (unreported). He concluded by praying for the dismissal of the application with costs.

It is trite law that temporary injunctions are a discretionary remedy but which ought to be used judicially, upon satisfaction of the three conditions which was set in the celebrated case of **Atilio vs. Mbowe (supra)**, and restated and elaborated further in the numerous authorities. The three conditions are that;

Atilio

1. There must be a serious issue to be tried on the facts alleged and a probability that the plaintiff will be entitled to the relief prayed;
2. 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.
3. That on the balance, there will be greater hardship and mischief that will be likely to be suffered by the applicant/plaintiff if temporary injunction is not granted than may be suffered by the respondent/defendant from the granting of it.

I feel necessary to point that, the applicant must establish as a whole, the three herein above conditions.

Starting with the first condition, the applicant's counsel has averred that the applicant is a lawful owner of suit property and the same has never been guaranteed to any loan for the 1st respondent from the 2nd respondent. That if the Application will not be granted, it will defeat the very purpose of the main suit and thus it will render the main suit nugatory.

The applicant has stated further in his affidavit that the main suit stands overwhelming chances of success as the house which is subject of sale by the respondents does not belong to the 1st respondent nor acted as security for a loan given to 1st respondent by 2nd respondent. In response, the 2nd and 3rd respondents has vehemently argued that the applicant has guaranteed 1st respondent the loan from the 2nd respondent and mortgaged the suit property as a security. *Adls.*

I understand that, it is not sufficient for the applicant to file a suit with claims but he must go further and show that he has a serious question as to the existence of a legal right which he claims in the suit. On that, I have gone through the affidavit and the Complaint in the main suit and I am satisfied that there is a prima facie case whereby the serious question to be tried is whether the suit property was mortgaged by the applicant for the 1st respondent to get loan from the 2nd respondent. I find that the applicant has satisfied the first condition.

On the second condition on the necessity of court's interference to protect the plaintiff from irreparable loss, Mr. Mbogela for the respondents has contended that, the applicant has not stated in his affidavit how he will suffer irreparable loss. However, at page 8 of the affidavit the applicant stated that he stands to suffer irreparable loss in that he will lose ownership of the residential house with his family hence creating chaos in finding relocation of the family members whereas he has no other residential property to settle. I am satisfied that the fact that the suit property is a residential where the applicant's family reside, the suffering which might be caused by the sale of the property as of now pending the determination of the main suit may cause the family to become homeless and that among other things can cause irreparable injury. Basing on that, I am satisfied that the second condition has been met by the applicant.

Coming to the third condition, the applicant has established in his affidavit that, if this Application is withheld, he stands to suffer a lot than the respondents upon which the applicant will lose ownership of the property which he is living in with his family and which he claims is not subject of

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mortgage. In my view, I agree with the applicant's submissions that he stands to suffer more if the 2nd and 3rd respondents will execute their intention of selling the suit property. The applicant is claiming ownership of suit property and denying to have entered a mortgage agreement with the 2nd respondent in respect of guaranteeing the 1st respondent to get a loan from the 2nd respondent. The applicant's claims are vehemently denied by the respondents that indeed, the applicant mortgaged the suit property.

Since this issue has not been determined and the matter is pending before the court, the applicant is at risk of losing the ownership of suit property if the temporary injunction is not granted. The suit property will be sold by way of auction to the bonafide purchaser and that will create another dispute on the suit property. Therefore, the balance of convenience lies on the maintenance of status quo for now by granting a temporary injunction pending the hearing and determination of the main case.

In the upshot, I allow this Application and hereby grant the temporary injunction on the suit property for six months from the date of the Ruling. Costs will follow the main suit. It is so ordered.

Dated at Dar es Salaam this 22nd day of February, 2022.



A handwritten signature in blue ink, appearing to read "A. Msafiri", written over a horizontal line.

A.MSAFIRI
JUDGE

