

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 252 OF 2022

ISLAM ALLY SALEH APPLICANT

VERSUS

CATS TANZANIA LIMITED 1ST RESPONDENT

INTERNATIONAL COMMERCIAL

BANK (TANZANIA) LTD 2ND RESPONDENT

RULING

Date of last Order: 23.06.2022

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A.Z. MGEYEKWA, J

This application was lodged under Certificate of Urgency on 23rd May, 2022. The Application was made under section 68 (e), Order XXXVII Rule 1 (a), and section 95 of the Civil Procedure Code, Cap.33 [R.E. 2019]. The application is brought made by way of Chamber Summons supported by

an affidavit deponed by Mr. Aaron Allan Lesindamu, learned Advocate for the Applicant. On their sides, the 2nd respondent resisted the application and has demonstrated his resistance by filing a counter-affidavit deponed by Stella Paul Hakili, learned counsel. The 1st respondent was summoned to appear in court by way of publication in Kiswahili tabloid – Mwananchi Newspaper dated 9th, June, 2022. I am alive to the fact that the 1st respondent was notified through the said publication to appear in court for hearing. Having regard to the entire circumstances of this case, I am of the considered view that the 1st respondent was duly being served but he opted not to show appearance, therefore, I proceed to determine the application *ex parte* against the respondent.

The application is borne from the fact that the applicant is seeking an order of temporary injunction to restrain the respondents or its agents or workmen from evicting the applicant from the disputed premise in Plot No. 214 Block 'C' located at Msasani Village area within Kinondoni in Dar es Salam pending the determination of the main application.

When the matter came up for hearing on 23rd June, 2022, Mr. Aaron Lensindamu, learned Advocate appeared for the applicant and the respondent enlisted the legal service of Mr. Richard Madibi, learned Advocate.

In his submission, Mr. Sindano submitted that the applicant in 2005 entered into an agreement with the 1st respondent to purchase the suit property to the tune of USD 450,000 and the agreed amount had to be paid in two installments.

He insisted that the applicant paid USD 150,000 to the 1st respondent and he handed over the key of the suit premises to the applicant. Mr. Singano went on to submit that the remaining USD 300,000 had to be paid as a final installment after the 1st respondent produce the original certificate.

Mr. Sindano further stated that the applicant came to learn that the applicant had mortgaged the suit property with Title No. 52127 to the 2nd respondent who is in the process to evict the Applicant from the suit premises. Hence, Mr. Sindano is requesting the court intervention to order the applicant to refund the purchasing price to a tune of USD 150,000. Advanced to the 1st respondent.

In response, Mr. Richard learned Advocate, urged for this court to adopt the counter affidavit and form part of his submission. He contended that the court in the famous case of **Atilio v Mbowe** (1969) HCD 284 has set three conditions in granting a temporary injunction. First, there must be

a triable issue. Second, the applicant must establish that he will suffer great loss, and third, the applicant must prove that the balance of convenience which is likely to be caused to the applicant by refusing the injunction will be greater than what is likely to be caused to the opposite party by granting it.

Mr. Richard contended that the applicant has failed to establish that the three conditions exist. He argued that the applicant also has failed to prove whether the suit property belongs to him because even the attached documents prove that, the suit property belongs to the 1st respondent. Insisting, Mr. Richard contended that there is no any supporting document to prove the applicant purchased the suit property and there is no proof that he paid USD 150,000 to the 1st respondent.

Mr. Richard further contended that reading paragraphs 1 to 13 of the applicant's affidavit, there is nowhere the applicant has stated the applicant has not stated if he will likely suffer loss if the temporary injunction is not granted. It was his view that the 2nd respondent is likely to suffer loss because the 1st respondent secured a loan from the 2nd respondent and later he defaulted to service the said loan. He stressed the 2nd respondent will be prejudiced if this court will grant this application. Fortifying his submission the learned counsel for the 2nd

respondent cited the case **American Cyanamid v Ethicon Ltd** [1975] 1 All ER 504.

On the strength of the above submission, the learned counsel for the 2nd respondent beckoned upon this court to dismiss the application with costs for lack of merit.

In his rejoinder, counsel for the applicant reiterated his submission in chief and further stated that there was an oral agreement between the 1st respondent and the applicant.

After a careful consideration of the submission from both parties, I am guided by the principles in granting the temporary injunction as were well established in the case of **Attilio v Mbowe** (1969) H.C.D 284. In the **First, prima facie case**, the court must satisfy that there is a bona fide dispute raised by the applicant and the court must be satisfied that there is bonafide dispute raised by the appellant, that there is a strong case for trial which needs investigation and a decision on merit and on the facts before the court and there is a probability of the applicant be entitled to the relief claimed by him. **Second, irreparable loss**, that the applicant must satisfy the court that he will suffer irreparable loss if the injunction, as prayed, is not granted and that there is another remedy open to him by which he can protect himself from the consequences of apprehended

injury. **Third**, the balance of convenience which is likely to be caused to the applicant by refusing the injunction will be greater than what is likely to be caused to the opposite party by granting it.

The Courts have tested the above principles in various cases such notable cases include; **Agency Cargo International v Eurafrican Bank (T)** (HC) DSM, Civil Case No. 44 of 1998 (unreported), **Barretto Haulliers (T) Ltd v Joseph E. Mwanyika & Another**, Misc. Civil Application No. 253 of 2016 and **Giella v Cassama Brown & Co. Ltd** (1973) to mention just a few. In the case of **Barretto Haulliers (T) Ltd** (supra) the Court listed three conditions in granting the temporary injunction as follows: -

- (i) There must be a 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 the injunction than will be suffered by the defendant from the granting of it.*

In determining the first principle that the applicant must establish that

there is a *prima facie* case or there is a serious question to be tried. After going through the affidavit, I have noted that there is a triable issue since the applicant is claiming that he paid the 1st respondent USD 150,000 but unfortunately, the 1st respondent did not hand over the suit landed property. The applicant throughout his affidavit has narrated the gist of the matter at hand, trying to convince this court that the 1st respondent has not fulfilled his promise since he did not hand over the suit premises to him instead he was served with a demand notice to vacate the suit premises. Therefore, in my view, the applicant has proved that there is a dispute which draws the attention of this court to determine it. Therefore, the first condition is met.

Getting to the second condition, the applicant must satisfy the Court that they will suffer irreparably injury if an injunction or court interference is important to protect the applicant. Without wasting the time of the court, the second and third conditions were not met. The applicant in his affidavit has not established the extent of loss that he is likely to suffer in case this court will not grant the instant application. Therefore, this condition is not met.

With respect to the third condition, a balance of convenience, which is likely to be caused to the applicant by refusing the injunction will be higher

than what is likely to be caused to the opposite party by granting it. I fully subscribe to the submission made by the learned counsel for the 1st respondent that the applicant has not stated at all how he will suffer greater hardship than the respondents. Therefore, he has failed to convince this court that in case this court will grant the application, he will suffer loss.

Under the said circumstances, I am hesitant to suggest that the applicant has established that he will suffer irreparable loss and that the balance of convenience is in favour of the applicants. The last two conditions were not met. I, therefore, hold that this is not a fit case for granting a temporary injunction.

Order accordingly.

DATED at Dar es Salaam this 23rd June, 2022.



A.Z. MGEYEKWA

JUDGE

23.06.2022

Ruling delivered on 23rd June, 2022 in the presence of Mr. Sindano, learned counsel for the applicant and Mr. Richard Madibi, learned counsel for the 1st respondent.



A.Z. MGEYEKWA

JUDGE

23.06.2022