

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 277 OF 2022**

**FATUMA HAMISI SULTANI.....APPLICANT**

**VERSUS**

**TCB BANK PLC.....1<sup>ST</sup> RESPONDENT**

**JUMANNE ABEID IFANDA.....2<sup>ND</sup> RESPONDENT**

**ESTHER ALPHONCE MAHENDE.....3<sup>RD</sup> RESPONDENT**

**ESTHER HARDWARE & GENERAL SUPPLIES.....4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

*Date of last order: 9/8/2022*

*Date of ruling: 31/8/2022*

**RULING**

**A. MSAFIRI, J.**

On the 1<sup>st</sup> day of June 2022, the applicant lodged an application in this Court by way of chamber summons under Section 2(3) of the Judicature and Application of Laws Act [CAP 358 R.E 2019] Sections 68 (e) and 95 of the Civil Procedure Code [CAP 33 R.E 2019], for the following

orders; *Alles*

- i. *That this Honourable Court be pleased to grant temporary injunction restraining the 1<sup>st</sup> respondent, his agents and/or workmen from evicting the applicant from the disputed landed property which is located at Plot No. 249 Block "A" Boko area within Kinondoni Municipality, Dar es Salaam with title deed CT No. 120028, LO No. 456012, LD No. 200886 pending institution, hearing and determination of the main suit.*
- ii. *This honorable court be pleased to grant any order as it may deem fit and just to grant and*
- iii. *Costs of this application be provided for.*

The application has been taken at the instance of the applicant and is supported by an affidavit affirmed by the applicant herself.

When the application was called on for hearing on 9/8/2022, Mr. Vedastus Majura learned advocate appeared for the applicant. The 1<sup>st</sup> respondent had the services of Messrs Epafra Mwego and Emmanuel Mwakyembe learned advocates whereas the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents appeared in person. For the 5<sup>th</sup> respondent, Mr. Mwego learned advocate held a brief for Mr. Elias Evelius, learned state attorney. *Aelle*

Mr. Majura having adopted the affidavit in support of the application, contended that the 1<sup>st</sup> respondent has already issued a 60 days' notice to the applicant with intention to dispose of the property in disputes. Mr. Majura contended further that there are serious triable issues which this Court has to determine. According to the learned advocate for the applicant, the mortgaged property is a matrimonial property and was mortgaged by the 2<sup>nd</sup> respondent without the applicant's consent.

Mr. Majura therefore contended that the Court should grant the prayer sought otherwise the applicant will suffer an irreparable loss which cannot be compensated by the respondents as the mortgaged property is a family house where the applicant lives with her children.

On reply Mr. Mwego forcefully opposed the application contending that it is not in dispute that the 3<sup>rd</sup> and 4<sup>th</sup> respondents were granted loan by the 1<sup>st</sup> respondent, the loan was secured by the disputed property and there was a default in repayment of the loan.

According to Mr. Mwego, the conditions stipulated in the land mark case of **Attilio v Mbowe** (1969) HCD No. 284 have to be cumulatively established before the Court can grant an application for temporary

injunction. Mr. Mwego submitted that those conditions are existence of prima facie case, irreparable injury to the applicant and balance of convenience.

On the existence of triable issue, Mr. Mwego stated that the issue of spouse consent is a legal issue but in the instant application no serious triable issues have been revealed.

On the second condition Mr. Mwego submitted that affidavit in support of the application does not demonstrate on how the applicant is likely to suffer more than the respondent. Mr. Mwego contended that it is the 1<sup>st</sup> respondent who will suffer more because the bank will not be able to realize its money hence it will run bankrupt.

On the aspect of irreparable loss likely to be suffered by the applicant, Mr. Mwego contended that no facts have been stated to prove that the loss is irreparable and cannot be compensated. He was of the view that landed properties are capable of being evaluated and therefore the bank is capable of compensating the applicant.

On his party, Mr. Mwakyembe added that the applicant has submitted on two conditions only, these are triable issue and the irreparable loss. The other condition on the balance of convenience has not been established.

The 2<sup>nd</sup> respondent conceded with the application contending that he did not seek the consent of the family when he sought the loan because he was unaware whether consent was needed.

The 3<sup>rd</sup> respondent who is also the proprietor of the 4<sup>th</sup> respondent contended that she took the loan for business but she fell sick hence she was unable to repay the loan as per the requirement. She prayed her counter affidavit be adopted as part of her submission.

On rejoinder, Mr. Majura essentially reiterated his submission in chief. He contended that in application at hand the Court has to determine whether there are triable issues.

Having gone through the submissions of the parties rival and in support to the present application the sole issue calling for my determination is whether the applicant has shown sufficient cause to justify her application.

In the present application, the applicant seeks an injunction restraining the respondents from evicting the applicant from the disputed property described above. As rightly submitted by Mr. Mwego learned advocate for the 1<sup>st</sup> respondent, before granting an injunction the conditions stipulated in the land mark case of **Atilio v Mbowe [supra]** have to be established. To add, the said conditions must be cumulatively established as per the decision of this Court in **Neem Salha Company Limited v Dar es Salaam Development Corporation (DDC) & another [supra]**.

In **Atilio v Mbowe** (supra) for temporary injunction to be granted the party must prove the following;

- i. There must be a serious question to be tried on the alleged facts and a probability that the plaintiff will be entitled to the relief 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.*
- iii. That on the balance 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 it.*

Going by the affidavit in support of the application on paragraph 14, the applicant has claimed that she will suffer psychologically and mentally disturbed as she and her family will be evicted from the suit house which they primarily depend for shelter.

The affidavit is silent as to whether there are any serious triable issues by the Court as well as how on the balance that there will be greater hardship and mischief suffered by the applicant from withholding of the injunction than will be suffered by the respondents from granting it.

Instead the applicant brought those grounds in the course of the submission. It follows therefore that the other two conditions surfaced for the first time in the course of the submissions. In applications in which evidence has to be proved by affidavit like the one at hand, the applicant is required to state all the facts on the affidavit and not on the submission. Submissions are not evidence and cannot be a substitute of affidavit rather an elaboration or arguments on evidence and law.

The applicant ought to have stated on the affidavit in support of the application such facts as the irreparable loss they are likely to suffer, the serious issues for determination by the Court as well as why the application should be granted on the balance of convenience.

Hence as the facts have been brought up in the course of submission and not in the affidavit, those statements remain mere and unproven assertions because no evidence has been given by affidavit to prove the allegations in the statement.

In the case of **The Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman, Bunju Village Government & 11 Others**, Civil Appeal No. 147 of 2006 (supra), the Court of appeal held:

*" . . Submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence.*

It is for the foregoing reasons that I hold that the application has not satisfied the conditions stated in the case of **Atilio v Mbowe** (supra) hence it lacks merits and it is hereby dismissed with costs.



*A. Msafiri*

**A. MSAFIRI,  
JUDGE  
31/8/2022**