

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 444 OF 2022**

*(Originating from Land Case No. 40 of 2022)*

**BHARAT RAMJI BHESANIA..... 1<sup>ST</sup> APPLICANT**

**RAMESH RAMJI BHESANIA.....2<sup>ND</sup> APPLICANT**

**BHESANIA GARAGE LIMITED..... 3<sup>RD</sup> APPLICANT**

**VERSUS**

**EXIM BANK (TANZANIA) LIMITED..... RESPONDENT**

**RULING**

*24.11.2022 & 15.03.2023*

**Masoud, J.**

This Application was brought under the provision of Order XXXVII Rule 1(a) and Sections 68 (e) and 95 of the Civil Procedure Code, Cap 33 R.E 2019 (herein after The C.P.C). The Applicants are seeking an order of temporary injunction restraining the Respondent, their agents, employees, servants or any person acting on his behalf from attaching and sale or to dispose of the Applicants landed properties with Certificate

of Occupancy C.T. No. 635 Land Office No. 54207, Plot No. 220 Block B 1B, Lugalo in Iringa Municipality owned by 2<sup>nd</sup> Plaintiff herein, and Certificate of Occupancy C.T. No. 4604 Land office No.127955 Plot No.58, Low density Industrial Area in Ipogolo Iringa Municipality pending the hearing of the main suit, Land Case No. 40 of 2022, Costs of this Application and any other reliefs the court may deem fit to grant. The application is supported by the 1<sup>st</sup> Applicant's affidavit dated 22/08/2022.

During hearing, both parties were represented. Whereas, the Applicants were represented by Mr. Joseph Mailu Msengezi, Advocate, the respondent was represented by Mr. Gabriel S. Mnyele, Advocate.

The application proceeded by way of filing written submissions. Both parties adhered to the submission filing schedule. Through his affidavit, the 1<sup>st</sup> Applicant introduced himself as the director of the 3<sup>rd</sup> Applicant. He added that the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants are the lawful owners of all pieces of land in dispute.

Mr. Mailu submitted that the gist of this application is the fact that the Applicants secured a loan from the respondent and mortgaged several properties that is, vehicles and landed properties including the Plots No.220, Block 1B and Plot No. 58 both of Iringa Municipality (supra). That due to business problems, the Applicants failed to service the said loans

properly. Thus, the Respondent filed Commercial Case No. 18 of 2015 which was heard ex parte and on 28/08/2018 the ex parte judgment was granted in favour of the Respondent.

Mr. Mailu submitted further that, after the delivery of the said ex parte judgment, the parties agreed on the mode of disposition of the Mortgaged assets out of the court decree, and that several properties were disposed of in the said manner after approvals by the respondent, and the proceeds of the said sales were deposited in the respondent's recovery account.

Advocate Mailu added that, despite the said agreement the respondent filed application for execution in respect of the Commercial Case No. 18 of 2015 seeking for the execution order for attachment and sale of the Applicant's properties including the disputed properties mentioned herein above, contrary to their disposition agreement (out of court). Henceforth, the applicants decided to file Land Case No. 40 of 2022 and the application at hand.

Mr. Mailu submitted that for the application of injunction to be granted three principles mentioned in the case of **Attilio vs. Mbowe [1969] HCD No.284** must be met. He went further mentioning the said principles and expounding on them in relation to the instant application as follow:

One, the presence of serious question to be tried in the suit and the that there is a probability that the plaintiff /applicant will succeed. As regard to this point, Mr. Mailu submitted that, paragraphs 3, 4, 5 and 6 of the Applicant's affidavit and Respondent's counter affidavit reveal that there was an agreement between the parties on how to dispose of the mortgaged assets outside the court decree.

It is the respondent's claim that the said agreement was limited to vehicles only, which claim is strongly disputed by the Applicants. Hence the filing of Land Case No.40 of 2022. Therefore, there is, it was argued, a serious question to be determined in the main suit in which the Plaintiffs/ Applicants have a great chance of winning.

Second, that the court's interference is needed to protect the applicant from suffering irreparable loss, likely to be caused by the respondent. Mr. Mailu submitted in relation to the foregoing condition that, by filing the execution in respect of the Commercial Case No. 18 of 2015, the Respondent intended to dispose of the disputed properties through attachment and sale.

The learned counsel added that the disputed properties are used as shelters for the 1<sup>st</sup> and the 2<sup>nd</sup> Applicant's families as evidenced in paragraph 9(a), (b) and (c) of the applicant's affidavit. Therefore, if the application at hand is not granted the Applicants and their families will

remain homeless and that the disputed properties, are the only properties having their historical backgrounds and their cultural values from their parents. Furthermore, if the sought order is not granted, the pending Land Case No. 40 of 2022 will be rendered nugatory.

To support his arguments, Mr. Mailu cited the case of **Paul Edward Shayo and Another vs. ECO Bank Tanzania Limited and Another Misc. Land Application No. 506 of 2022 (unreported)**, High Court Land Division, in which the court cited with approval the case of **Deusdedit Kisisiwe v. Protaz B. Bilauri, Civil Application No. 13 of 2001** (unreported).

Three, the balance of inconvenience principle, Mr. Mailu submitted that the applicant will suffer hardship compared to the respondent in case the application is denied. He added that the Applicant solely depends for their livelihood in the disputed properties, that if the application is not granted the Applicants will suffer more inconveniences than the Respondent, as the properties in dispute will be disposed of and the applicants rendered homeless and subjected to psychological torture which cannot be compensated in terms of money.

Mr Mailu added that granting the application at hand does not deprive the Respondent in any way in case he succeeded in the main suit. To support is his argument, Mr. Mailu cited the case of **John Pascal**

**Sakaya vs. Azania Bank Limited Misc. Commercial Case No. 62 of 2018, high court commercial division at DSM, (Unreported).**

He finalised his submission by praying the court to grant the application.

In reply, Mr. Mnyele, started by appreciating the work done by the applicant's advocate when submitting in support of the application.

Mr. Mnyele, however went further and submitted that the preconditions for filing the application under Order XXXVII, R. (1) of the Civil Procedure Code, cap. 33 R.E 2019 is the pendency of the main suit, which indeed exist, that is Land Case No. 40 of 2022. He added that under R. 1 of the cited Order (supra), an application for injunction can be maintained if the property in question must be in danger of being wasted, alienated or damaged.

However, that, since the property in dispute is about to be sold by way of execution, the rule cannot apply to stop the execution process by way of injunction. The applicant could have utilized the provision of Order XXI R.27 of the C.P.C to stay the execution at the Commercial Court pending determination of the main suit, Land Case No. 40 of 2022. Mr. Mnyele submitted further that the application does not meet the yard stick provided by the legal principles underlying the grant of temporary injunction.

Accordingly, the Applicants have not established an arguable/ prima facie case with any possibility of succeeding, it was argued by Mr Mnye. Strengthening the argument, it was pointed out that there was nothing attached to the affidavit or the plaint to show express agreement which was agreed between the parties to dispose of the landed properties in the manner the vehicles were disposed.

It was furthermore, contended that, so long as the applicants are indebted to the respondent and the decree is available, the applicant will not suffer any loss if the properties are auctioned, as they would be fulfilling their contractual obligation as borrowers, though under the force of decree.

Having gone through the parties' submissions, the main issue for determination is whether the application at hand is meritorious.

Granting or not granting of an application for temporary injunction is an exercise of discretion of the court. However, the discretion has to be judiciously exercised.

When replying, Mr. Mnye said that, the property in dispute is about to be sold by way of execution, the rule (that is R.1 of Order XXXVII of the C.P.C) cannot apply to stop the execution process by way of injunction. When re-joining Mr. Mailu said that, Mr. Mnye misdirected himself because the matter before this court, the Land Case No. 40 of

2022, is new with deferent cause of action from that which was before the commercial court. And that, the cause of action in the Land Case No. 40 of 2022 is breach of agreement. Thus, the only reliefs the parties are entitled pending the final determination of the main case is the application for injunction under Order XXXVII R.1 of the C.P.C.

I am in agreement with Mr. Mnyele's line of argument that, according to Order XXXVII R. 1 of the C.P.C, for the Application of temporary injunction to be granted the property in question must be in danger of being wasted, alienated or damaged, but if the property is likely to be sold by way of execution the rule cannot apply to stop the execution process. Rather, the applicant if at all was not satisfied with the findings of the commercial court which issued the decree, he could have appealed to the Court of Appeal and in the process, he could have applied the provision of Order XXI R.27 of the C.P.C to stay the execution proceedings before the commercial court pending determination of his appeal.

So long as there is an application for execution pending before the commercial court, application for injunction before this court is improper. As properly submitted by Mr. Mailu, the cause of action in Land Case No. 40 of 2022 is new therefore, cannot be used to stop execution proceedings of another different case.

In the upshot and having weighed the facts in totality, I find this



application lacking in merits. It is hereby dismissed with costs. It is ordered

Dated and delivered at Dar es Salaam this 29<sup>th</sup> day of March, 2023.



  
**B.S. Masoud**  
**JUDGE**