

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPLICATION NO. 209 OF 2023
(Arising from Land Case No.265 of 2022)

TASILO JOSEPH MAHUWI APPLICANT

VERSUS

OMARY OTHMAN DAUDI1ST RESPONDENT

NMB BANK PLC..... 2ND RESPONDENT

ADILI AUCTION MART LTD 3RD RESPONDENT

AGNES KYANDO 4TH RESPONDENT

RULING

Date of last Order: 03.05.2023

Date of Ruling: 09.05.2023

A.Z MGEYEKWA, J

The applicants' application is brought under a certificate of urgency. The same is made under Order XXXVII Rule 2 (1) and 95 of the Civil Procedure Code Cap.33 [R.E 2019]. The application was accompanied by an affidavit

sworn by Tasilo Joseph Mahuwi, the applicant's Managing Director. Opposing the application, the 1st respondent filed a counter affidavit sworn by Mr. Consolatha Mosha, Principal Officer of the 2nd respondent. The 1st respondent did not oppose the application.

When the matter was called for hearing on 3rd May 2023, the applicant enlisted the legal service of Ms. Sophi Serungi, learned counsel. The 2nd respondent had the legal service of Mr. Ally Hamza, learned counsel. The matter proceeded *ex parte* against the 3rd respondent who was duly being served to appear in court.

The application is borne from the fact that there is a pending Land Case No. 209 of 2023 before this court whereas the applicant in the instant application is praying for this Court to restrain the respondents from harassing the applicant and his family in respect of occupation of the disputed house and sale through auction the landed property situated on Plot No. 2005 Block 'A' with CT No. 83454 pending the hearing and determination of the main suit.

The learned counsel for the applicant started to kick the ball rolling. Ms. Sophia was very brief. She urged this Court to grant an injunctive order pending the determination of the main suit. Ms. Sophia contended that the 2nd and 3rd respondents wants to evict the applicant through the 4th respondent

whereas in March 2023, the 4th respondent called the applicant and informed him that the house is on sale. She went on to submit that they tried to reach the 4th respondent but she did not pick up the phone. The learned counsel for the applicant continued to submit that on 30th March 2023, the 4th respondent and 8 other people headed to the applicant's house trying to forcefully evict him from the suit-landed property for the main reason that the disputed house was on sale. Thus, the applicant decided to file the instant application for Temporary Injunction.

In conclusion, Ms. Sophia beckoned upon this Court to issue an injunctive order restraining the respondents from evicting the applicant until the determination of the main suit.

In his rebuttal submission, Mr. Ally forcefully opposed the application. He urged this Court to adopt the 2nd respondent's counter-affidavit sworn by Ms. Consolatha Mosha and annexures to form part of his submission. Mr. Ally stated that reading the affidavit specifically paragraph 1, the applicant shows clearly that he is aware that the current application arises from Land Case No. 262 of 2022. He urged this Court to take judicial notice under sections 58 and 59 of Evidence Act Cap.6, the applicant is aware that he mortgaged his

property situated on Plot No. 2005 Block 'A' CT 83454 for a long-term facility offered to the 1st respondent.

Mr. Ally went on to submit that the legal wife, Grace Mahuwi also consented to the said mortgage. The learned counsel for the 2nd respondent contended that it is not disputed by the applicant as reflected under paragraph 2 (a) of the 2nd respondent's WSD in the main suit. He went on to submit that another noncontested fact is that the 1st respondent herein defaulted the repayment of the said mortgage due to the said default the applicant herein was notified via notice. To support his submissions he refereed this Court to annexure NMB01 attached in our counter affidavit dated 22nd December, 2021. He also stated that it is not disputed that the mortgage is uncontested and there is a default in honouring the mortgage deed.

The learned counsel for the 2nd respondent went on to submit that they have defaulted to pay more than Tshs. 100,000,000/=, thus the current application is devoid of merit. He stated that the 2nd respondent has the power to sell the suit property in case of default. To aid his cause, he cited the case of **Giella v Cassman Brown & Co Ltd** [1973] EA 358 and 360, the 3 conditions are set therein the applicant must show a prima facie case with success since it is not disputed that the applicant mortgaged the disputed house thus there is

a long default by the 1st respondent and the applicant being the mortgagor failed to remedy the default, Thus, said, Mr. Ally was certain that the prima facie case does not exist.

On the second principle, Mr. Ally contended that it is the bank that will suffer irreparable loss not the applicant due to the reasons that the 1st respondent issued a loan to the tune of Tshs. 250,000,000/= the said loan is not paid in full. He argued that there is a balance of more than Tshs. 157,470,000/= and interest still accrues. He went on to submit that the 2nd respondent is running a bank business thus the applicant attempts to restrain the Bank to recover his money. He argued that in various decisions of this Court, the Court has denied granting an injunctive order to protect the banking business especially where there are no any sufficient reasons. Supporting his argumentation, he cited the case of **General Tyre East & another v HSBC Bank PLC**, Civil Application No. 35 of 2005. The bank will be restricted to enforce its contract.

On the balance of inconveniences, the counsel for the 1st respondent submitted the bank stands to suffer more since the applicant has his own money thus the bank will suffer more. In the case of **Lucy Annastanzia Mkopoka v Allan Peter Mkopoka & 3 others**, Misc. Land Application No.15

of 2015. In the current application, there is no any element of illegality or collusion.

In conclusion, the learned counsel for the 2nd respondent beckoned upon this Court to dismiss the application with costs.

In her rejoinder, Ms. Sophia came out forcefully. She contended that there is a lot of disturbance done by the 1st respondent and the Bank. She claimed that the borrower and the Bank entered to an agreement and the Bank issued loans without the knowledge of the applicant. Ms. Sophia went on to argue that the 1st respondent defaulted to repay the loan, astonishing the Bank wants to sell the properties of the guarantor instead of selling the properties of 1st respondent who took the loan. She stressed that in case this Court will not issue an injunctive order then the applicant will suffer irreparable loss. To support her submission she referred this Court to the case of **Atilio v Mbowe** [1969] EA.

She continued to argue that the applicant is praying for an injunctive order pending the determination of the main case for the court to certain itself who has the right over the suit property. She added that the 1st respondent wrote a letter to the Bank informing them that he is ready to service the loan thus in case the suit property is sold then it will be a loss to the applicant because the

borrower is ready to pay the loan. She urged this court to give the 1st respondent time to service the loan instead of selling the applicant's house. Ending, she urged this Court to grant the applicant's application.

Having heard the submissions of both learned counsels for the applicant and the respondents. In determining this matter, I will be guided by the principle governing a temporary injunction. The law is settled to the effect that temporary injunction serves as an equitable relief that is intended to insulate an applicant against possible irreparable loss or injury that may arise in the midst of the proceedings in the substantive claims. It is worth noting that the remedy of temporary injunction cannot be granted unless the applicant is able to demonstrate that a concluded right capable of being addressed by the order sought in the application exists.

The Courts have tested the Temporary Injunction principles in various cases such notable cases include; **Atilio v Mbowe** (1969) HCD 284. **Agency Cargo International v Eurafrican Bank (T)** (HC) DSM, Civil Case No. 44 of 1998 (unreported), and **Giella v Cassama Brown & Co. Ltd** (1973) to mention just a few. In **Atilio v Mbowe** (supra) the Court set out three principles include demonstration of existence of a prima facie case; likelihood of suffering an

irreparable loss; and that the balance of convenience should tilt in the applicant's favour.

Captivating stock of the applicant's depositions and his counsel submission, I hold the view that a prima facie case exists between the applicant, on one side, and the respondent, on the other. The applicant on paragraph 3 of his affidavit has established that there is a triable issue by alleging that the mortgaged property in dispute is subjected for sale the fact which is not opposed by the 2nd respondent. Again, the applicant has raised several issues, constituting his dissatisfaction in the suit that is pending in this Court. They include matters which attracts the attention of this Court. In my considered view, these issues raise a sound contest between the parties and this meets the first criterion in the grant of injunction.

On the second principle, the applicant who claims to be on the brink of suffering irreparable loss must not only establish that they will suffer irreparable loss but are duty-bound to demonstrate that, the kind of injury to be suffered cannot be atoned through monetary means. The applicant in his affidavit specifically in paragraph 6, has stated that he will suffer irreparable loss because the respondents will vacate his family from the suit property hence.

However, on the other hand, it is fact that the mortgagor mortgaged his property; Plot No. 2005 Block A with CT 83454 as a security to secure the said loan, and the 1st respondent is in default. There is no dispute that the Bank owes the applicant and 1st respondent an outstanding amount to the tune of Tshs.1, 054, 273, 739/=. The 1st respondent in paragraph 9 of his counter affidavit stated that the applicant is aware that his house was mortgaged. To support their claims they referred this Court to annexure NMB 01 collectively; Mortgage of a Certificate of Right of Occupancy and Notice of Default dated 22nd December 2021. The said documents were issued to the applicant and the 1st respondent informing them to service arrears and interest totaling Tshs. 178,868,454.17 and he was given 60 days to service the said loan.

From the record, it is vivid that the Bank took efforts to demand loan repayment of the outstanding balance from the applicant and 1st respondent but all efforts ended in vain. Therefore, I am in accord with Mr. Ally that the Bank will suffer more because the applicant owes it money and he is not making repayments.

Based on the above submissions, it is my considered view that in case this Court will grant injunction order, the Bank also stands to suffer more

irreparable loss compared to the applicant. It is worth noting that the Bank's business depends on repayment of the loan for its business to prosper, such that repayment of the loans must strictly adhere to protect the bank's business which contributes much to the individual and nation's development. In the case of **Zak Import & Export Company Limited v Crown Finance & Leasing Ltd**, Civil Case No. 27 of 2000 HC at DSM, the Court held that:

"The creditors must be protected from borrowers who are not committed to their obligations in paying the loaned money."

[Emphasis added].

Applying the above authority in the matter at hand, it is vivid that, the second condition is not established.

Regarding the third principle, on the balance of convenience. The applicant has not stated anything concerning the balance of convenience. As I have elaborated earlier, the bank stands to suffer more inconveniences because the applicant has not even tried to service the loan, and the claims that the applicant made an undertaking to pay the restructured loan as per the restricted terms cannot hold water because it was a long-standing unpaid loan. It is clear that the 1st respondent is required to service his loan, failure to do so will render the Bank unprofitable and might be a candidate for bankruptcy. See the case of **Mohamed Iqbal Haji & Others v Zedem**

Investments Limited, Misc. Land Application No.05 of 2020. Thus, it is my considered view that from the facts quantified in the affidavit, it is hard to gauge that the applicant had taken efforts to service the alleged loan.

Based on the above reasons, I am hesitant to suggest that the balance of convenience is in favour of the applicant. The law requires the three conditions of the temporary injunction must all be met, meeting one or two of the conditions will not be sufficient for the court exercising its discretion to grant an injunction. See the case of **Christopher P. Chale v Commercial Bank of Africa**, Misc. Civil Application No.635 of 2017 (unreported).

In the upshot, I find that the applicant has failed to adduce sufficient grounds to warrant this Court to invoke its discretionary powers of granting an injunction, therefore, I proceed to dismiss the instant application. Costs to follow the event.

Order accordingly.

DATED at Dar es Salaam this 9th May 2023.



A.Z.MGEYEKWA

JUDGE

09.05.2023

Ruling delivered on 9th May 2023 in the presence of the applicant.




A.Z.MGEYEKWA

JUDGE

09.05.2023