

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

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISCELLANEOUS LAND CASE APPLICATION NO. 230 OF 2023**

(Arising from Civil Case No. 105 of 2023)

**ALDO HANS POPPE (*Administrator Pendente Lite*  
*to the Estate of the Late Zacharia Hans Poppe*) .....1<sup>ST</sup> APPLICANT**

**ANGEL ZACHARIA POPPE (*Administrator Pendente Lite*  
*to the Estate of the Late Zacharia Hans Poppe*) .....2<sup>ND</sup> APPLICANT**

**ABEL ZACHARIA POPPE (*Administrator Pendente Lite*  
*To the Estate of the Late Zacharia Hans Poppe*).....3<sup>RD</sup> APPLICANT**

**VERSUS**

**BANK OF AFRICA TANZANIA LIMITED  
(BOA TANZANIA).....1<sup>ST</sup> RESPONDENT**

**BILO STAR DEBT COLLECTOR CO. LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

Date of last Order: 09.05.2023

Date of the Ruling: 17.05.2023

**A.Z. MGEYEKWA, J**

The applicants being lawful administrators of the estate of the late Zacharia Hans Poppe hereinafter the deceased filed this Application on

20<sup>th</sup> April, 2023 under a Certificate of Urgency praying for the following orders to wit: -

***“EXPARTE:***

- 1. The Honourable Court be pleased to Order that the requirement for service be waived while it Orders Maintenance of Status Ante on House No. 10, Block No. 1057, Block “L”, Mbezi Beach, Kinondoni District, Dar es salaam in the names of Zacharia Hans Poppe (deceased) pending service processes and hearing inter parties of this Application for Temporary Injunctive Orders for reasons that the auction advertised by the 2<sup>nd</sup> Respondent under the auspices of the 1<sup>st</sup> Respondent is slated for 19<sup>th</sup> April, 2023.*

***INTER PARTIES:***

- 1. This Honourable Court be pleased to Order that the 1<sup>st</sup> and 2<sup>nd</sup> respondents be temporarily restrained from auction or selling by private contract or public sale in any manner whatsoever or in any shape or form dispose of the land property described as Plot No. 10, Block 1057, Block “L”, Mbezi Beach, Kinondoni District, Dar es salaam in the names of Zacharia Hans Poppe (deceased) pending*

*hearing and final determination of Civil Case No.....(sic) of 2023 between the parties;*

*2. This Honourable Court be pleased to issue any other Orders consummate with the requirement of justice;*

*3. Costs be provided for”.*

The 1<sup>st</sup> and 2<sup>nd</sup> respondents both filed their counter affidavit on 28<sup>th</sup> April 2023 in conformity with the Court's Order dated 21<sup>st</sup> April 2023. The applicants herein did not file their reply to the counter affidavit as directed by this Court on 5<sup>th</sup> May, 2023 for reasons better known to them.

When the matter was called for hearing on 9<sup>th</sup> May, 2023 the applicant enjoyed the legal service of Mr. Omary Msemo, learned counsel and the respondent enlisted the legal service of Ms. Caster Lufungilo, learned counsel.

In respect to this Ruling, let me ponder that, I am not intending to reproduce the entire submissions as argued by the counsels for the parties, however, the same will be referred in the course of addressing and determination of this Application. This Court had ample time to scrutinize and conceptualize both counsels' *viva voce* submissions registered in this Court on 9<sup>th</sup> May 2023.

What is gathered therefrom as to the instantaneous Application is that, Mr. Omary Msemo the learned counsel for the applicants, maintained that,

there is a triable issue to be determined by this Court as the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not comply with the requisite of law of sixty days' notice and fourteen days' notice respectively to the applicants. To bolster his position, he cited the case of **Judith Athuman Shani v NMB & 2 Others**, Land Appeal No. 5 of 2021, (unreported).

Ms. Caster Lufungilo, contended that, the requirement of sixty days' notice was served to the applicants herein. To support his submission he referred this Court to Annexure BOA-6. He added that the applicants did not deny their signatures and also the fourteen days' notice was served to them as indicated in paragraph 4 (ix) of the 1<sup>st</sup> respondent's counter affidavit vide annexure BOA-9. Thus, she ended by insisting that, in the circumstances there was no triable issue.

It is trite law that under section 127 (1) and (2) of the Land Act, Cap.113 [R.E 2019], the issue of sixty days' notice from the mortgagee (1<sup>st</sup> respondent) to the mortgagor (lawful administrators of the deceased herein referred as applicants) is of paramount consideration before the 1<sup>st</sup> respondent to exercise her rights/ remedies under the mortgage deed. Going by the 1<sup>st</sup> respondent's counter affidavit, it is undeniable fact that, she issued the said notice to the applicants as averred under paragraph 4 (vi) and annexure BOA-6 dated 5<sup>th</sup> November, 2022. To ponder further, the counsel for the applicants did not refute such aversion through a reply

to the 1<sup>st</sup> respondent's counter affidavit rather he made his submission from the bar to disprove the said facts as an afterthought.

In the instant matter and as per the evidence on record, I have considered the fact that the 1<sup>st</sup> respondent issued the default notice to the applicants, hence the same was properly communicated pursuant to the law.

More so, according to section 12 (2) and (3) of the Auctioneers Act, Cap. 227 [R.E 2019], provides thus: -

*"12 (2) No sale by auction of any land shall take place until after at least fourteen days public notice thereof has been given at the principal town of the district in which the land is situated and also at the place of the intended sale.*

*"12 (3) The Notice shall be given not only by printed or written document but also by other methods intelligible to an educated person as may be prescribed and it shall be expressed in Kiswahili as well as English and shall such state the name and place of residence of the owners".*

*Emphasis supplied.*

Given such stance of the law, it follows therefore, under the auspices of the 1<sup>st</sup> respondent instructed the 2<sup>nd</sup> respondent to dispose of the mortgaged securities for recovering measures and the same was acted upon by the later *vide* issuance of fourteen days' notice in accordance to

the law and evidenced as per paragraph 7, 9 and annexure BILLO-3 to the 2<sup>nd</sup> respondent's counter affidavit which is in line with paragraph 4 (ix) together with annexure BOA-9 to the 1<sup>st</sup> respondent's counter affidavit. Thus, again, the notice to the public about the conducted auction was acted in conformity to the law. In the case of **Abdi Ally Salehe v Asac Care Unit Limited & 2 Others**, Civil Revision No. 3 of 2012, (CAT-DSM), (unreported) at page 8 of the Ruling, the Court had this to say: -

*"In deciding such applications, the court is to see only a prima facie case, which is one such that it should appear on the record that there is a bona fide contest between the parties and serious questions to be tried".*

Guided the above findings and the authority of the CAT, it is clear that the 1<sup>st</sup> condition on the triable issue is not established.

Regarding the 2<sup>nd</sup> condition hereof, counsel for the applicants asserted that the applicants will suffer irreparable loss in case the injunctive Order will not be issued since they will lose the suit landed property. To fortify his assertion, he referred this Court to the decision of **Lushoto Tea Company v NMB Bank PLC & Another**, Misc. Land Case Application No. 413 of 2019, (Unreported).

Counsel for the 1<sup>st</sup> respondent argued that, the applicants have not substantiated how the said loss is irreparable as the 1<sup>st</sup> respondent is only

exercising her rights arising from the contractual agreement. He insisted that their business will collapse if injunction is granted by this Court. To reinforce her argument, she cited the case of **Mohamed Iqbal Haji & Others v Zedem Investment Ltd & Others**, Misc. Application No. 5 of 2022, (unreported).

It is undisputed that, the applicants have not akin justified the loss they will suffer if this Application will be granted. The mere aversion that, the suit property constitutes *inter alia* the property that has been marked for distribution to the lawful heirs of the estate of the late Zacharia Hans Poppe as per paragraph 10.0 and annexure TAL-5 to the applicants' joint affidavit. In my considered view, the aforesaid stands no plausible reason to warrant this Court to grant the Application as the 1<sup>st</sup> respondent being a genuine creditor to the late Zacharia Hans Poppe *vide* their banking transactions and the same being acknowledged by the applicants themselves through paragraph 5.0 of their joint affidavit, I see no loss to be suffered by the applicants compare to the 1<sup>st</sup> respondent which is a lending institution to the public at large and be it as it may the same will be disposed of to bring the 1<sup>st</sup> respondent to its original position.

On the balance of convenience, the learned advocate for the applicants stated that, it is in favour of the applicants because their property is about to be disposed of and the respondent could have wait until the

determination of this suit since the property will be there and the value is appreciating hence, they can sale it in a higher price.

Resisting, the attorney for the 1<sup>st</sup> respondent submitted that, her client is a *bonafide* lender who has suffered inconvenience by the applicants' failure to repay the loan as such granting the Order of injunction will add sour to her and she is capable to remedy the applicants in case the matter will not be determined in her favour. To support her submissions, she referred this Court to the decision of **Fatuma Mohamed Salum & Another vs. Lugano Angetile Mwakyosi Jengela & Others**, Misc. Land Application No. 90 of 2015 (unreported).

It is worthy to note that, the applicants have not justified the balance of convenience, they did not state how they will suffer if the injunctive order is not granted. To that, I am not in accord with Ms. Lufungilo that the balance of convenience must always be in favour of the public, hence the 1<sup>st</sup> respondent. See the cases of **Alhaj Muhidin A. Ndolanga & Another v The Registrar of Sports and Sports Association & Others**, Misc. Civil Cause No. 54 of 2000, (unreported) and **Trustees of Anglican Church Diocese of Western Tanganyika vs. Bulimanyi Village Council & 2 Others**, Misc. Civil Application No. 01/ 2022 (unreported) at page 7.

I find refuge to the case of **Starcom Consumer Healthcare Ltd & Another v Diamond Trust Bank (DTB) & 3 Others**, Misc. Land



Application No. 08 of 2023, HC at Morogoro, (unreported.) My brother G.P. Malata, J observed and principled that: -

*"It is trite law that, interim or injunctive orders are only granted by the Court in the exercise of Court's discretion which, however, must be done judiciously. It has to act judiciously, in the sense that, there must be material facts/grounds/evidence satisfying the Court to exercise its discretionary supremacies. Short of that, the Court will have nowhere to rely upon".* Emphasis added.

Having weighed the different probabilities in this application, it appears that the applicants have failed to establish all three conditions for temporary injunction.

In sum, I find that the Application is devoid of merit and stands to be dismissed without costs. I

Order accordingly.

DATED at Dar es Salaam this 17<sup>th</sup> May 2023.



A.Z.MGEYEKWA

JUDGE

17.05.2023

Ruling delivered on 17<sup>th</sup> May 2023 via video conferencing whereas the Mr. Omary Msemu, learned counsel for the applicants and Ms. Caster Lufungilo, learned counsel for the respondents were remotely present.



A.Z.MGEYEKWA

JUDGE

17.05.2023