

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**(LAND DIVISION)**  
**AT DAR ES SALAAM**

**MISC. LAND CASE APPLICATION NO.137 OF 2023**

(Originating from Land Case No. 65 of 2023)

**MICHAEL KIWERA.....1<sup>ST</sup> APPLICANT**  
**DOMITILA MICHAEL KIWERA.....2<sup>ND</sup> APPLICANT**  
**VERSUS**

**AZANIA BANK LIMITED.....1<sup>ST</sup> RESPONDENT**  
**MAC AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

*Date of Last Order: 25.05.2023*

*Date of Ruling: 31.05.2023*

**T. N. MWENEGOHA, J.**

This is an application for Temporary Injunction, made under **Order XXXVII Rule 1(a) and (b), Sections 68(c) and (d) and 95 of the Civil Procedure Code, Cap 33 R. E. 2019**. The applicants have prayed among others for an interim order, restraining the respondents and any other person working under their instructions, from disposing by way of public auction, the mortgaged property located at Plot No. 1026/43 Kijitonyama Area, pending the determination of the main suit. The Application was supported by the joint affidavit of both applicants herein.

The same was heard by way of written submissions and exparte against the 2<sup>nd</sup> respondent. Advocate Yuda Thadei, appeared for the applicant. His arguments were centered in the case of **Atilio versus Mbowe**,

**(1969) HCD 284**, where it was emphasized that for injunction order to be given, the applicant must meet three conditions as follows.

First, there must be a prima facie case between the applicant and the respondents. He insisted that, there exists a serious question of law in need of interference by this Court. It involves the status of the mortgage where there are issues of interests and penalties involved in payment of the agreed loan. This is contrary to the loan agreement; hence the court need to resolve this issue through hearing of the main suit which is Land Case No. 65 of 2023.

Second, if the application is not granted, the applicants stand to suffer irreparable loss. That, the respondents are about to dispose the mortgaged property. If the same proceeds, the applicants are going to lose two properties at the same time, in the same transaction. That, the applicants have already sold another property to service the loan in question. Above all, the applicants have the monies to deposit to the bank for the purpose of repaying the loan.

Lastly, on balance of convenience and advantage, the applicants will suffer greater hardship than the respondents if the Application is denied.

In reply, Mbagati Nyarigo, learned Advocate for the 1<sup>st</sup> respondent insisted that, the applicants claim against the 1<sup>st</sup> respondent are vicious and frivolous. That, this Application does not fit in the case **Atilio versus Mbowe, (supra)**. That, the applicants' intentions of instituting the Land Case No. 65 of 2023 are clear, that is to deny the 1<sup>st</sup> respondent her right to recover the outstanding loan amount due, which constitutes a total of 283,634,025.83/=. That, the applicants in other words have no triable issues against the 1<sup>st</sup> respondent, both applicants have admitted to have

a loan agreement with the 1<sup>st</sup> respondent and the said loan has not been paid yet. Therefore, the applicants are obliged to repay the amount due to them, failure of which the 1<sup>st</sup> respondent has the right to take the required actions against them. By doing so, no irreparable harm will occur on part of the applicants. After all, the mortgaged property in question is not owned by them, rather the same belongs to one Mary Komba who is not a party to this application or the main suit.

On the last ground, it was argued by the counsel for the 1<sup>st</sup> respondent that, on balance of convenient, there will be greater hardships and mischief suffered by the 1<sup>st</sup> respondent if the Application is allowed, compared with the hardships to be experienced by the applicants if the same is denied. That, the respondent being a financial institution, is in need of the amount due for its operations.

Having gone through the submissions of the parties through their learned counsels, affidavit and counter affidavit for and against the Application, the question for determination is whether the Application has merits or not.

Both parties have relied their arguments in the case of **Atilio versus Mbowe (Supra)**, where three major conditions for injunction have been provided, as already stated herein earlier.

In my opinion, the applicants have satisfied the Court to be within the rules governing the grant of an injunctive relief. They have managed to prove the existence of a triable case between them and the respondents in particular, the 1<sup>st</sup> respondent, vide Land Case No. 65 of 2023 which is the foundation of this case and where they are disputing their loan agreement. Hence the 1<sup>st</sup> ground has been affirmatively answered.

Further and in consideration of the existence of this suit, I see it just and equitable to protect the interests of the parties including the applicants in the case at hand, with regard to the ownership of the disputed landed property. It is on this basis, the 2<sup>nd</sup> ground comes into play, that the applicant may suffer irreparable loss if the Application is denied. And on balance of convenient, it is obvious that the applicants are the one to suffer greater hardships than the respondents, if the Application is not allowed. They will lose a property which is likely to change hand from them to the 3<sup>rd</sup> party.

For the reasons I have given herein above, I find merits in the Application. The same is allowed. The respondents and any other person working under their instructions, are restrained from disposing by any means, the mortgaged property located at Plot No. 1026/43 Kijitonyama Area, pending the final determination of the main suit, Land Case No. 65 of 2023.

No order as to costs.



  
**T. N. MWENEGOHA**

**JUDGE**

**31/03/2023**