

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC LAND APPLICATION NO. 317 OF 2023**

(Originating from Land Case No. 131 of 2023 in the High Court Land Division)

VENANCE PETER KIMBORIAPPLICANT

VERSUS

NATIONAL BANK OF COMMERCE.....1ST RESPONDENT

MOSHIKAN AL ISSA T/A RAZU FASHION2ND RESPONDENT

SANTANA INVESTMENT LTD.....3RD RESPONDENT

ALFRED BONIPHACE LAZARO.....4TH RESPONDENT

NEEMA LALA BAYO.....5TH RESPONDENT

RULING

Date of last Order: 24/07/2022

Date of Ruling: 15/08/2023

K.D. MHINA, J.

The applicant has brought this application seeking for the following orders:-

*" 1. That this Honourable Court may be pleased
to issue temporary injunction restraining the
respondents, its assigns, their agent and/or
representatives acting under the authority or power
and/or command of the respondents from disposing
of properties on plot no. 2076 Block D Changanyikeni*

*Area, Kinondoni Municipality in Dar es Salaam
pending the hearing of the main suit to wit; the Land
Case No. 131 of 2023.*

*3. Any other order as this Honourable Court may
deem just to grant."*

The application was brought under the certificate of urgency by way of chamber summons made under Order. XXXVII Rule 1 (1) and (2) Order XLIII Rule 2 together with sections 68 (c) and (e) and 95 of the Civil Procedure Code [Cap 33 R.E. 2019] (the CPC). It is further supported by the affidavit of the applicant, Venance Peter Kimbori, which expounded the grounds for the application.

For clarity, I will quote what is contained from paragraphs 6 to 10 of the affidavit;

*"6. That once in a while, I was a guarantor of the 2nd
respondent in order for him to obtain a loan facility at a tune of
TZS. 50,000,000/= from the 1st respondent; National Bank of
Commerce Ltd.*

*7. That, I had deposited my certificate of title as security to the
aforesaid loan.*

8. That, the 2nd respondent defaulted to repay the above-mentioned loan.

9. That, in consideration of what is hereinabove stated the 1st respondent had engaged the 3^d respondent in auctioning of my property in order to recover the loan.

10. That, the auction done by the 3^d respondent under the instruction of the 1st respondent was done at the absence of my knowledge”.

In response the respondents countered the claims by filing their respective counter affidavits. They vehemently disputed the facts by stating as follows.

At paragraph 10 of the 1st respondent counter affidavit, it was deponed that the applicant was fully aware and knowledge of the public auction. Further the public auction followed the procedures including informing the chairperson of the locality where the auction took place and by advertising the auction in Uhuru Newspaper dated 26 March 2022.

In the 3rd respondent counter affidavit, in paragraphs 4 and 7, it was deponed that the auction was conducted and the plot with Title No. 84171

was sold on 11 August 2022. Further, the applicant had a knowledge of the auction after a 14 days' notice in Uhuru newspaper dated 26 March 2022.

On their side, the 4th and 5th respondents, in paragraph 6 of their joint counter affidavit stated that the 3rd respondent issued a notice of auction vide Uhuru newspaper dated 26 March 2022. Further, they were the highest bidder's and after paid the amount they were given a certificate of sale. After submitting the certificate of sale to the 1st respondent he was handed the title deed with no. 84171. They proceeded to apply to the Registrar of Title for the transfer of the property. The Registrar issued a 30 days' notice to the applicant informing him of his intention to transfer the property to them. After the expiration of 30 days the ownership was transferred and they were issued a title deed.

The 2nd respondent did neither file the counter affidavit nor enter appearance before this Court. Therefore, after all efforts to trace him proved futile, the application proceeded ex parte against him.

At the hearing, the applicant was represented by Ms. Loveness Ngowi, learned advocates while the 1st, 3rd 4th and 5th respondents had the services

of Mr. Yohanes Konda, learned advocate. The learned counsel for the parties argued the application by way of oral submissions.

Submitting in support of the application, Ms. Ngowi argued that the reason for the application is to maintain status quo of the suit property pending determination of the parties' rights in the main case. She argued that if the application would not be granted, the applicant will suffer irreparably damage because the suit property belonged to the applicant who guaranteed the 2nd respondent to take a loan from the 1st respondent.

She further submitted that the 2nd respondent informed the applicant that he fully serviced the loan, therefore he could take his title from the 1st respondent. But to his surprise he was informed by the 1st applicant that the loan was not fully repaid.

Later, the applicant was served with the notice to vacate from the premises and that it was already sold to the 4th and 5th respondents by the 3rd respondent.

She concluded by submitting that unless temporary injunction is granted, otherwise the pending Land Case No. 131 of 2023 will be nugatory.

In response, Mr. Konda argued that in applications of this nature, the applicant must meet the three conditions stated in the case of **Attilio v. Mbowe, 1969** (1969) HCD 69.

From above, argued that since there was no dispute that the applicant guaranteed the loan taken by the 2nd respondent from the 1st respondent and that the applicant failed to counter the facts raised in the counter affidavits, then there are no triable issues.

He further argued, that the applicant was aware of auction as the notice was advertised on 26 March 2022 in Uhuru Newspaper. On top of that the procedures were followed by even communicate to the Local authorities and the Municipal Council.

On irreparable loss Mr. Konda submitted that the counsel for the applicant did disclose how the applicant would suffer irreparably loss and did not say how the applicant would repay the loan if the application is granted.

He concluded by submitting that the 4th and 5th respondents saw the auction advert in the newspaper and after followed the procedure, they emerged as the highest bidders and successful purchased the plot. Later, they were issued by a title deed.

In a brief rejoinder Ms. Ngowi submitted that failure to file a reply to counter affidavit did not mean that the applicant agreed with what was contained in the counter affidavit.

She also stated that at paragraph 10 of the affidavit it was indicated that the auction was carried improperly and that was a trial issue which triggered the applicant to file the land case. And, the above illegality would occasion the applicant to suffer irreparably loss.

She concluded by stating that regarding the advert in the newspaper that not every person can read the newspapers. And in the affidavit, the applicant indicated that the auction was conducted in his absence.

Having passionately consider the affidavit, affidavits in reply and submissions from the parties the issue that this Court is invited to determine is whether the application for restraining order can be issued to the respondents.

But before going into the merits or demerits of the application I wish to raise one issue which I discovered in this application.

As it is trite that parties are bound by their pleadings. In **YARA Tanzania Limited vs Charles Aloyce Msemwa and 2 Others**; Commercial Case No. 5 of 2013, unreported (HC-Commercial Division), it was held that:

"It is a cardinal principle of the law of civil procedure founded upon prudence that parties are bound by their pleadings. That is, it is settled law that parties are bound by their pleadings and that no party is allowed to present a case contrary to its pleadings".

I raised this issue because Ms. Ngowi *"tried to smuggle"* new facts which were not pleaded in the affidavit when she submitted that the 2nd respondent informed the applicant that he fully serviced the loan, therefore he could take his title from the 1st respondent. But to his surprise he was informed by the 1st applicant that the loan was not fully repaid. That is not allowed and this Court will not consider such a statement introduced from the bar during hearing. This position is clearly stated by the Court of Appeal **in Rosemary Stella Chambe Jairo vs. David Kitundu Jairo**, Civil Reference No. 6 of 2018 [Tanzlii], where the Court discussed the statement from the bar it held that;

"The practice abhorred and discouraged from the Court".

Reverting back to the merits or demerits of the instant application, the entry point is section 68 (e) and Order XXXVII Rule (1) (a) of the CPC, whereby this court has powers to order, temporary injunction upon being satisfied that there is a pending suit and there is sufficient cause to make

such an order for the purposes of preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of the disputed property.

As to what constitutes a sufficient cause the cited case **Attilio v. Mbowe (Supra)**, provide an answer that there must exist three conditions which the applicant must meet. The conditions are:-

- (i) *There must be serious question to be tried on the facts alleged, 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, and*
- (iii) *That on the balance there will be greater hardship and mischief suffered by the plaintiff from the withholding of the injunction than will be suffered by the defendant from granting of it."*

Applying the above conditions in the present application, it is quite clear that the presence of a pending suit alone does not suffice the granting of a temporary injunction. There must be serious triable issues.

The circumstances of this matter;

One, where by according to the pleadings the auction was advertised in Newspaper and also communicated to the local and Municipal authorities.

Two, where by the 4th and 5th respondents after declared the highest bidders in the auction purchased the disputed plot and handed the mortgaged title deed by the 1st respondent.

Three, where the 4th and 5th respondents after handed the title deed they applied to the Registrar of Title for the transfer of the title from the applicant to their names and the Registrar issued a 30 days' notice to the applicant. After expiration of 30 days, the Registrar issued the Title in the names of the 4th and 5th respondents.

From the above circumstances and a mere looking of section 126 of the Land Act, Cap 113 of the Revised Edition, 2019 that:

"Where the mortgagor is in default, the mortgagee may exercise any of the following remedies –

(a) appoint a receiver of the income of the mortgaged land; (b) lease the mortgaged land or where the mortgaged land is o f a lease, sub-lease the land;

(c) enter into possession of the mortgaged land; and

*(d) **sell the mortgaged land**, but if such mortgaged land is held under customary right of occupancy, sale shall be made to any*

person or group of persons referred to in section 30 of the Village Land Act". [Emphasize supplied]

And the decision of the Court of Appeal **in Godebertha Rukanga vs. The CRDB and four others**, Civil Appeal No. 25 of 2017 (Tanzlii) where it was held that;

"The second issue is whether, as a result of the irregularity in the process of issuing a notice of auction, the appellant's prayer for nullification of the sale should have been granted. From the facts of the case as outlined above, the answer to this issued is in the negative. It is an undisputable fact that despite the short notice, the suit property was bought by the 4th respondent through the 3rd respondent. It was not disputed further that thereafter, under the power of sale, the 1st respondent caused the title of the suit property to be registered in the name of the 4th respondent. In the circumstances, being a bona fide purchaser for value, and because there was no evidence of fraud or misrepresentation by the mortgagee, the 4th respondent's right over the suit property is legally protected. That is in accordance with s. 135 (1) - (3) of the Land Act".

I am not persuaded by the applicant's affidavit and submission in granting the prayers sought in the chamber summons. The submission by Ms. Ngowi regarding the notice of auction in the newspaper, when she stated

that not every person is reading newspapers is of no merits because that is the recognized and lawful procedure.

Further, the circumstances where the title holder are the 4th and 5th respondents who purchased the suit property by way of auction and later transfer the ownership, the applicant did not disclose how he would suffer irreparable loss.

The same as in the circumstances where the applicant admitted that the suit property was sold after the 2nd respondent whom he guaranteed his loan defaulted to repay the loan, he did not disclose how he would suffer irreparably loss.

Therefore, a prima-facie case has not been established and looking at the balance of convenience there would be greater mischief and hardship on the part of the respondents especially the 4th and 5th respondents who are bona fide purchaser than on the applicant if injunction is granted.

On the basis of the foregoing reasons, I find that the application is devoid of merits and hereby refused grant it. Consequently, the application is dismissed with costs.

It is so ordered



A handwritten signature in blue ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

K. D. MHINA

JUDGE

15/08/2022