

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 663 OF 2023**

**(Arising from Land Case No. 336 of 2023)**

**ASIF MIRZA YUNUS ..... APPLICANT**

**VERSUS**

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

**RAHABU ERNEST RUBAGO..... 2<sup>ND</sup> RESPONDENT**

**RULING**

*23/10/2023 & 27/10/2023*

**A. MSAFIRI, J.**

The applicant have brought this Application under Order XXXVII Rules 1(a) and (b) of the Civil Procedure Code, Cap 33 R.E 2019, (herein the CPC) praying for the order of this Court to restrain the 1<sup>st</sup> respondent or her agents or anyone acting on her behalf or her authorization from selling or taking possession of the applicant's house on Plot No.127, Block 4, Kwembe Area, Dar es Salaam pending the hearing of the main suit

The Application has been taken at the instance of the applicant and is supported by the affidavit deposed by Asif Mirza Yunus, the applicant himself. The Application was contested by the 1<sup>st</sup> respondent through the

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counter affidavit deposed by Elizabeth Muro, a Principal Officer of the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent did not contest the Application hence she did not file any counter affidavit.

At the hearing which was oral, the applicant was represented by Messrs. Humphrey Mwakajinga, and Onesmo Stambuli, learned advocate, while the 1<sup>st</sup> respondent was represented by Mr. Emmanuel Mbuga, learned advocate, and on the 2<sup>nd</sup> respondent appeared Mr. Haji Mlosi, learned advocate who was holding brief of Mr. Peter Mbuli, learned advocate. Mr. Mlosi reminded the Court that the 2<sup>nd</sup> respondent was supporting the Application.

In submissions, Mr. Mwakajinga started by adopting the contents of the affidavit of the applicant. He stated that the applicant and 2<sup>nd</sup> respondent are husband and wife and in their marriage they have achieved a house on Plot No.127, Block 4, Kwembe Area, Dar es Salaam (herein the suit property). He said that the 2<sup>nd</sup> respondent took a loan from the 1<sup>st</sup> respondent and secure the loan with the suit property without knowledge or consent of the applicant. That, from 02/10/2023, the 1<sup>st</sup> applicant had intention of selling the suit property without any notice.

The counsel submitted further that the applicant has interest on the suit property which is the matrimonial property hence he prays for

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temporary injunction pending the hearing of main case so that he can be heard.

He referred the Court to the principles set in the case of **Attilio vs. Mbowe**(1969) HCD 284, which are; first, the presence of a serious question to be tried on the facts alleged. On this, the counsel stated that there is a main case No. 336 of 2023 which has serious questions to be determined. Second; that the applicant will suffer great loss if his right on the suit property will be taken over by sale. Third; that it is the applicant who stands to suffer if this Application will not be granted. He prayed for the Application to be granted.

In reply, Mr. Mbuga, advocate for the 1<sup>st</sup> defendant prayed to adopt the contents of the counter affidavit of the Principle Officer of the 1<sup>st</sup> defendant one Elizabeth Muro.

He submitted first on two issues; first that the suit property has already been sold by auction hence the Application is overtaken by events. He referred the Sale Report which was annexed to the counter affidavit as annexure BOA-Z. He cited the case of **Emmanuel Gitighan Gherabaster vs. CRDB Bank PLC and 2 others**, Misc. Application No. 625 of 2021 where this Court refused to grant an injunction where an event has already occurred.

  
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The counsel for the 1<sup>st</sup> applicant stated further that the applicant has stated that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were parties in Civil Case No. 248 of 2022. In the said case the said parties entered a Deed of Settlement on the suit property and on the default of the 2<sup>nd</sup> respondent, the 1<sup>st</sup> respondent opted to enforce what was agreed on the Deed of Settlement.

He argued that the applicant is seeking a temporary injunction against the Court Order. He cited the case of **Ila Yogesh & 2 others vs. DTB Tanzania LTD & 6 others**, Misc. Application No. 308 of 2023 where this Court ruled that no injunction can be entered against the judicial process.

He submitted further that the applicant has failed to meet the three conditions as provided in the case of **Attilio vs. Mbowe (supra)**. On the first condition, the counsel stated that the 1<sup>st</sup> respondent has acquired the statutory declaration of the 2<sup>nd</sup> respondent that she has no any spouse. Also the issue of spousal consent only entitles the applicant to seek for damages and not nullification of mortgage which has already been discharged by sale. Hence there is no serious issue to be determined by the Court.

On the second condition of irreparable loss, he argued that the applicant has only stated that the suit property is the family house where they reside. That he has not shown how they will suffer irreparable loss. *Atlg.*

He cited the case of **Therezia Kenan Makinda & 2 others vs. Azania Bank Ltd & another**, Misc. Application No. 12 of 2022 where this Court held that, one should state the irreparable loss.

On the third condition, the respondent stated that it tilts in favour of the 1<sup>st</sup> respondent as it will be the Bank which will suffer as it depends on the loan business as part of its growth and it stands to become bankrupt as a result of defaulters. He prayed for the dismissal of the Application with costs.

In rejoinder, Mr. Stambuli argued that the claims that the suit property has been sold are questionable since it is stated that the sale was done on 16/10/2023 but the Notice on a newspaper was put on 14/10/2023. Furthermore, the purported sale report of suit property was made on 30/9/2023 while the sale took place on 16/10/2023. That the variations shows that the respondent wants to deceive the Court and the claims that the property has already been sold is questionable.

He added that the question of seeking injunction against the judicial process has no merit as the applicant was not a party in the Civil Case No. 248 of 2022. He reiterated his submissions in chief and prayers.

Having heard and considered the submissions from the rival parties to this matter, I have also read the contents of the affidavit and counter

*Atts.*



affidavit along with the attached documents.

As was correctly put by the counsels for both rival parties, conditions for granting the temporary injunction were set out in the famous case of **Attilio vs. Mbowe (supra)**. These conditions are also reflected in many other cases after **Attilio vs. Mbowe's** case. The conditions are namely existence of serious question to be tried on the facts alleged, demonstration that the applicant stands to suffer irreparable loss if injunction is not granted, the loss incapable of being monetary compensated and the balance of convenience in favour of the party who will suffer greater inconvenience if injunction is or is not granted.

It is also trite law that the conditions are to be met cumulatively and meeting one or two conditions will not be sufficient for the purpose of the court exercising its discretion to grant an injunction. Therefore in the instant Application, the pertinent question to be determined is whether the facts disclosed in the Application for temporary injunction satisfy the conditions for granting the injunction which has been prayed for.

Starting with the first condition of prima facie case, it is a settled position of law that in the said condition, the applicant is required to show that there is serious question to be tried on the alleged facts and the reliefs sought by the applicant in the main suit must be the one that the

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court is capable of awarding.

Furthermore, in the same breath, the Court is required to look at the said reliefs sought by the applicant/ plaintiff in the main case and the claims made in order to see if they raise a serious question for determination of the Court.

In the affidavit, the applicant have stated to have interest in the suit property and claims it is a matrimonial property and being the husband of the 2<sup>nd</sup> respondent he has a right to be heard on the matter in order to save his interest. I have no qualm about the claimed interest on the suit property as the applicant has attached a copy of the certificate of marriage which is part of the affidavit. I believe that the issue whether the applicant is the lawful husband of the 2<sup>nd</sup> respondent or not or whether he has interest on the matter are issues not to be determined at this stage.

However, I have read the reliefs sought in the main case and they raise question as to whether this Court is able to award the reliefs sought. I say so because in the reliefs, the applicant/plaintiff prays as follows;

- a. Declaration that the ***intended sell of the plaintiff's house on Plot. No 127 Block 4, Kwembe Area, Dar es Salaam is unjust and unreasonable and be nullified. (emphasis mine).***
- b. Costs of the suit
- c. Any further relief(s) this court deems fit and just to grant. *Alle.*

Looking at the first relief which is the main one, the applicant/plaintiff is praying for nullification of the intended sell of the plaintiff's house. Also at paragraph 4 of the affidavit the applicant states that the 1<sup>st</sup> respondent wants to sell by public auction the suit house without issuing notice and the auction is intended to take place on 02/10/2023. In her counter affidavit, the 1<sup>st</sup> respondent averred that the suit plot has already been sold through public tender conducted on 16/10/2023. The 1<sup>st</sup> respondent attached the Report on Sale on her counter affidavit showing that the suit property was sold by tender on 16/10/2023 to one Pamela Enock Mhembano. There is another letter where the purchaser is informed to have won the tender of purchasing the suit property.

The counsel for the applicant have vehemently contested the claims in the counter affidavit by the 1<sup>st</sup> respondent that the suit property has been already sold. Unfortunately, the applicant did not file reply to the counter affidavit to deny those claims but have rather denied in submission in the Court.

Nevertheless I have considered the submissions by both counsels for the parties on whether the suit property is already sold or not. In his affidavit, the applicant is stating that the suit property is set to be sold on 02/10/2023 while the 1<sup>st</sup> respondent in her counter affidavit states that

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the suit property has been sold since 16/10/2023. The hearing of the Application was done on 23/10/2023 hence there is a probability that by that time, the suit property has already been sold. In the circumstances, I find that the Court cannot issue a temporary injunction to stop the sell which is likely to have already taken effect. The Court cannot stop the "intended sale" under uncertain circumstances.

This Court also finds that the applicant has failed to satisfy the Court on the second condition on the suffering of irreparable injuries. He states at paragraph 6 of the affidavit that he will suffer great loss to lose the suit house without being heard and that it is the house in which the whole family lives. Even in the submission, the counsel for the appellant did not explain on the purported injuries the applicant and his family will encounter if the disputed house will be disposed by way of sale. The applicant did not demonstrate on how the intended loss is incapable of being atoned by way of damages or compensation. The applicant has just stated generally that he will suffer irreparable loss and left it to the Court to make assumptions on how the loss is irreparable.

On the third condition on the balance of convenience, the applicant's affidavit is silent. But in the submissions by the counsel for the applicant, he averred that it is the applicant who stands to suffer the great loss if


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the Application will not be granted. Again it was not demonstrated how the applicant stands to suffer more than the respondent.

In the circumstances, it is my finding that although there is an issue of applicant's interest on the suit property which can be among the issues to be determined during the main case, the applicant has failed to meet the two conditions as per requirement hence the Court cannot exercise its discretion and grant the Application.

For the above reasons the Application is hereby dismissed with costs.

It is so ordered.



**A.MSAFIRI**

**JUDGE**

**27/10/2023**

