

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

MISC. LAND CASE APPLICATION NO. 635 OF 2023
(Originating from Land Case No. 255 of 2023)

HAPPINESS SIMON NDEKI.....APPLICANT

VERSUS

**INTERNATIONAL
COMMERCIAL BANK (T) LTD.....1ST RESPONDENT**

MBUZAX AUCTION MART AND COMPANY LTD..2ND RESPONDENT

N AND J INVESTMENT LIMITED.....3RD RESPONDENT

JOSEPH JAMES MGANA.....4TH RESPONDENT

R U L I N G

Date of Last Order: 05.10.2023
Date of Ruling: 26.10.2023

T. N. MWENEGOHA, J.

The Ruling emanates from an Application for Injunction, by the applicant abovenamed, made under **Order XXXVII Rule 1(a) and 2(1) and (4), read together with Sections 68(e) and Section 95 of the Civil Procedure Code, Cap 33 R. E. 2019**. She wants the respondents and any other person working under their instructions, to be restrained from evicting, stopping or otherwise, disturbing her, from the use of a house, located at Kawe Area, Kinondoni Municipality, with Certificate of Title No. 86341 Plot No. 998, a house located at Plot No. 542, Block K, Mbezi, within

Kinondoni Municipality. Together with a house which is located at Plot No. 195, Block 2, with Certificate of Title No. 86341, Mbwani-Mpiji area. All three properties are within the Dar es Salaam region. The Application was preferred, pending the determination of Land Case No. 255 of 2023. The same was supported by the affidavit of the applicant, Happiness Simon Ndeki. It proceeded by way of written submissions and Ex-parte against the 2nd respondent. Advocate Seleman Almasi, appeared for the applicant, Advocate Juventus Katikiro for the 1st respondent, the 3rd applicant was represented by the 4th respondent, the Director to the 3rd respondent, while the 4th defendant appeared in person.

In his submissions in support of the Application, Mr. Almasi relied on the case of **Atilio versus Mbowe, 1969, HCD 284**. He maintained that, the said case has been referred in a number of authorities, to name few, include the case of **Dominic Daniel & Another versus CRDB PLC & Another, Commercial Case No 39 of 2011, High Court of Tanzania, Commercial Division at Dar es Salaam(unreported)**. He argued that, the applicant has met all the conditions required for an order of Injunction to be issued in her favour. That, there is a serious question of law between her and the respondents. The same, is centred on the legality of the Mortgage Agreement, between the 1st and 4th respondents, as stated in the affidavit and the plaint. To beef up his position, he cited the case of **Hashim Ibrahim Lema versus Maxicom Africa & 2 Others, Misc. Land Application No. 457 of 2021, High Court of Tanzania, Land Division at Dar es Salaam, (unreported)**.

Mr. Almasi went on to argue that, the applicant stands to suffer irreparable loss if this Application is denied. That, at paragraphs 13-15 of the affidavit, the applicant has demonstrated how the properties in question being the

matrimonial properties, will be lost if Injunction is not given. That, the respondents have threatened to evict the applicant and her family. If the sale is left to proceed, the applicant and her family will lose a home and forced to relocate, to find another place to live.

Lastly, on balance of convenience and advantage, it was argued that the applicant will suffer greater hardship than the respondents if the Application is denied. That, apart from losing ownership, control and enjoyment of her matrimonial properties, she will face difficulties in finding another home for her family to live in and start a new life.

In reply, Mr. Katikiro for the 1st respondent opposed the instant Application based on the fact that, the auctions intended to be taken followed the default in repaying the loan by the 3rd respondent. Therefore, she is the one to blame and not the 1st respondent.

That, above all, the applicant has not fulfilled the three conditions given in **Atilio versus Mbowe** (supra), for her Application to succeed. That, the applicant has failed to show that, there exists a prima facie case, between her and the respondents. That, failure to meet this condition alone, makes the whole Application to be devoid of merits.

It was his argument that the rules are settled that, before allowing an Application for Injunction, all conditions must be met, as stated in **Christopher P. Chale versus Commercial Bank of Africa, Miscellaneous Civil Application, No. 635 of 2017, High Court of Tanzania at Dar es Salaam**. Further, that, the applicant will not suffer any harm if the Application is denied and on balance of convenience, the 1st respondent stands to suffer than the applicant.

As for the 3rd and 4th respondents, in their joint submissions, supported the Application and prayed for the Court to weigh the guidelines for injunction and grant the order accordingly.

Having gone through the submissions of the parties through their learned counsels, applicant and the 1st respondent, and those who appeared unrepresented by Advocates, (3rd and 4th respondents), the only question in need of an answer at this juncture, is whether the Application has merits or not.

As a general rule, governing Applications of this nature, the applicant must show that, she has met the conditions set for an Injunction to be given in her favour. That, there is triable issue existing between the parties in an Application in question and that if the Application is not granted, it is the applicant who stands a chance to suffer irreparable loss. Therefore, the Court's intervention is necessary to prevent it, because, if nothing is done, the said loss will lead to greater hardship on her part, compared to the sufferings that are likely to occur on the respondent, in case the order is not given. See **Atilio versus Mbowe** (supra).

As argued by the 1st respondent's counsel, the conditions listed above, must all be met by the applicant. Failure to meet one or more of the same renders the Application meritless resulting in its denial. See **Christopher P. Chale versus Commercial Bank of Africa** (supra).

In the present case, the applicant in my settled view, has demonstrated well the existence of a prima facie case against all four respondents above named. The instant Application originates from a pending suit, Land Case No. 255 of 2023, between the applicant and the respondents respectively. In the said case, the Court is expected to decide on the validity of the

Mortgage Agreement entered between the 1st respondent and the 4th respondent, in favour of the loan facility, advanced to the 3rd respondent by the 1st respondent. It is on the basis of the loan in question, which stand unpaid to date by the 3rd respondent, the lender is intending to auction the properties in dispute, to secure the amount due. The applicant being a wife of the 4th respondent and a partner in the acquisition of the suit properties, is worried that, the actions of the 1st respondent and his agents will lead to a loss of her matrimonial home and her matrimonial properties at large. She and her family will be forced to relocate to other places to find a new life. Her worry is well justified. If the Application is denied, it is obvious that she will lose a home and the properties she contributed in their acquisition. Thus, she is likely to suffer irreparable loss and hardships than the respondents. Therefore, I agree with the applicant, she deserves the order of this Court to be in her favour.

In the event, based on the afore given reasons, I find merits in the instant Application and allow it accordingly.

Hence fore, the respondents, and any other person working under their instructions, is restrained, from evicting, stopping or otherwise, disturbing her, from the use of a house, located at Kawe Area, Kinondoni Municipality, with Certificate of Title No. 86341 Plot No. 998, a house, located at Plot No. 542, Block K, Mbezi, within Kinondoni Municipality and a house which is located at Plot No. 195, Block 2, with Certificate of Title No. 86341, Mbweni-Mpiji area all in Dar es Salaam.

Order as to costs.




T. N. MWENEGOHA
JUDGE
26/10/2023