

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 688 OF 2023

(Originating from Land Case No. 351 of 2023)

PONEKA PATRICK MIHAYO Alias

PATRICK LUTANDULA MIHAYO 1ST APPLICANT

SAYUNI CONTRACTORS LIMITED 2ND APPLICANT

VERSUS

CRDB BANK PLC RESPONDENT

Date of last order: 30/11/2023

Date of ruling: 11/12/2023

RULING

I. ARUFANI, J.

The applicants lodged the present application in this court under Order XXXVII Rule 1 (b) and 2 (1) of the Civil Procedure Code [CAP 33 R.E 2019] (hereinafter referred as the CPC). The applicants are seeking for an order of temporary injunction to restrain the respondent, their employee, agents or any person acting on their behalf from disposing of the landed property on Plot No. 1318 Block 'D' Mtoni Kijichi Area, Temeke Municipality in Dar es Salaam Region held under Certificate of Title No. 125923 (hereinafter referred as the suit property) pending final determination of the main suit pending before this court.

The application is supported by an affidavit sworn by the first applicant who is also the second applicant's Managing Director and it was opposed by a counter affidavit sworn by Pascal Mihayo, Principal Officer of the respondent. When the matter came for hearing, the court ordered the counsel for the parties to argue the application by way of written submissions. While the applicants' submission was drawn and filed in the court by Mr. Erick Simon, learned advocate, the respondent's submission was drawn and filed in the court by Ms. Jamila Kassim Athuman, learned advocate.

The counsel for the applicants stated in his submission that, grant of a temporary injunction is an exercise of a judicial discretion. He stated there are certain conditions which are supposed to be established before granting or refusing to grant the order of temporary injunction. He argued the stated conditions were stipulated in the famous case of **Atilio V. Mbowe** (1969) HCD 284 where it was stated that, there must be a serious question to be tried and probability that the plaintiff will be entitled to the relief prayed, court's interference is necessary to protect the plaintiff from injury which may be irreparable and balance of inconvenience to the parties if the order of temporary injunction will be withheld or granted.

The counsel for the applicants argued in relation to the first condition that, it is not in dispute that there is land Case No. 351 of 2023 filed in the court by the applicants which is pending in the court. He argued the affidavit supporting the application shows the applicants are contending the auction intended to be conducted by the respondent is unlawful. He argued that, the intended auction is unlawful because the parties have not yet signed the term loan facility comprising the terms and conditions accepted in the consent settlement order executed by the parties.

He submitted that, the facts deposed at paragraph 15 of the affidavit and strongly disputed at paragraph 16 of the counter affidavit of the respondent shows there are issues calling for decision of the court. To support his argument, he referred the court to the case of **Abdi Ally Salehe V. Asac Care Unit Limited & Two Others**, Civil Revision No. 3 of 2012, CAT at DSM (unreported) where it was stated that, in determine application of this nature the court is required to see only a prima facie case on the face of the record of the matter that there is a bona fide contest between the parties and serious question to be tried.

He argued that, the current status of the suit property is now being used by the first applicant and his entire family for residential purposes.

He stated it is deposed at paragraph 11 of the affidavit of the applicant that the respondent's agent has issued a notice that, they will auction the suit property after expiry of 14 days. He submitted that, as the applicants are in occupation of the suit premises and they have filed the suit pending in the court to challenge legality of the intended auction of the suit premises, the current status be preserved by restraining the respondent's agent and whoever pretends to act under the instruction of the respondent till determination of the main suit.

He argued in relation to the second condition that, the applicants are likely to suffer irreparable injury before their legal rights are determined. He argued that, as averred at paragraph 11 and 14 of the affidavit supporting the application the first applicant stand to lose his property before their right in the main suit is determined. He argued that, as appearing in annexure 7 to the affidavit of the first applicant, it is obvious that the suit property is in danger of being auctioned.

He stated the fourteen days given in the notice of auction the suit property has already expired, hence the respondent may proceed to sell the suit property at any time unless is restrained by the order of the court. He submitted that the suit property is in danger of being auctioned before the legal rights of the parties are established and the entire family of the

first applicant who are using the suit property as their residential home will be rendered homeless. He submitted that, since the stated kind of loss cannot be atoned by way of damages, it is appropriate for an order of temporary injunction to be granted.

He argued in relation to the third condition of balance of convenience that, as deposed at paragraph 16 of the affidavit supporting the application, the applicant stand to suffer more if the order of temporary injunction will not be withheld. He submitted the respondent stand to suffer nothing if the order of temporary injunction will be granted. He stated that can be observed by looking in the counter affidavit of the respondent where it is not stated in any paragraph a kind of injury the respondent is likely to suffer in the event the temporary injunction is granted.

He argued the third condition precipitates both parties to indicate in their affidavit and counter affidavit the kind of injury is likely to suffer if temporary injunction is granted or refused for the purpose of enabling the court to balance the conveniences of granting or refusing to issue the order of temporary injunction. He stated the applicants have stated the required facts at paragraph 16 of their affidavit and insisted at paragraph 14 of their reply to the counter affidavit of the respondent while the

counter affidavit of the respondent is silent and the court has nothing for making comparison.

He submitted that applicants stand to suffer if injunction is withheld and the respondent is at liberty to recover the alleged sum of money with interest through auction of the suit property if the main suit will be determined in their favour. He based on the above stated submission to state the third condition for granting the order of temporary injunction has been established in favour of granting the same than withholding the same. At the end he prayed the application for temporary injunction be granted with costs.

In reply the counsel for the respondent prayed to adopt the respondent's counter affidavit as part of her submission. She stated that, as appearing in the affidavit, reply to the counter affidavit and the submissions of the applicants, the applicants have neither denied their debt nor their failure to repay the same. She stated that shows the suit and the conduct of the applicants amount to an abuse of court process calculated to delay and frustrated the process of recovery of the outstanding debt. She stated it is a common knowledge that a temporary injunction is an order granted by the court on its discretion. She stated it is the duty of the applicant to satisfy the court to exercise its discretion

by establishing three conditions for temporary injunction to be granted enunciated in the case of **Atilio V. Mbowe** (supra) cited in the submission of the applicants.

She stated in relation to the first condition of prima facie case with probability of success that, it is not disputed that there is Land Case No. 351 of 2023 pending in the court which is not yet determined by the court. She however stated that is not enough for the court to grant the order of temporary injunction. She stated the applicant is required to show there is a serious issue to be determined by the court. She referred the court to the case of **Nelson M. Matiku V. EFC Tanzania Microfinance Bank Limited**, Misc. Land Application No. 1023 of 2017, HC Land Division at DSM (unreported) where it was stated inter alia that, the fact that there is a case pending in court alone is not sufficient to show there is a serious question to be determined by the court.

She argued that, the contention by the applicant that the intended auction is unlawful because parties have not yet signed the term loan facility comprising terms and conditions acceptable by the parties does not hold water. She stated that is because the terms and conditions for payment of the outstanding loan were stipulated in the consent settlement

order which was executed by the parties and adopted by the court annexed in the counter affidavit of the respondent as annexure CRDB-1.

She argued that, the second applicant failed to repay the outstanding balance of the loan despite being aware of the terms of payment and the status of the loan as she was informed by the respondent through the letter attached to the counter affidavit as annexure CRDB-2. She stated that, the fact that there is no paragraph in the affidavit of the first applicant evidencing repayment of the outstanding loan despite being reminded by the respondent proves the applicant have never made any effort of repaying the outstanding balance of the loan. She submitted that the assertion in the affidavit of the applicants serves as an admission of default in repayment of the outstanding loan, and looking at the facts of the application shows this is an abuse of the court process and pray the court to dismiss the application.

As for the second condition of irreparable loss to be suffered by the applicants the counsel for the respondent submitted that, until 12th October, 2021 the outstanding debt was TZS. 206,765,203 with an interest of 15% per annum. She stated that shows it is the respondent who stands to suffer irreparable loss and not the first applicant if measures to recover the stated debt is not taken. She stated that is

because the respondent's main activity is to lend money to individuals and companies. She submitted that, the attempt by the applicants to restrain the respondent to recover the outstanding debt will definitely lead to collapse of the respondent's business.

She went on arguing that, it is an established principle that, parties must not only establish that they will suffer irreparable loss but are bound to demonstrate kind of injury to be suffered cannot be atoned through monetary means. To support her argument, she cited in her submission the case of **Tasilo Joseph Mahuwi V. Omary Othman Daudi & Three Others**, Misc. Land Application No. 209 of 2023, HC Land Division at DSM (unreported). She submitted that the record shows the applicants have no intention of repaying the outstanding balance of the loan and they are trying to seek for court's intervention while knowing that they have deliberately defaulted to repay the loan.

She submitted the stated act prejudiced the right of the respondent and if the court will grant the prayer of temporary injunction, it is the respondent that will suffer irreparably. She argued if we will measure the ability of the parties to remedy the situation if the temporary injunction is not granted and the respondent disposed of the mortgaged property, definitely the respondent is in a better place financially to remedy the

injury to be suffered by the applicants. She cited in her submission the case of **Zak Import & Export Company Limited V. Crown Finance & Leasing Limited**, Civil Case No. 27 of 2000 HC at DSM (unreported) where it was stated that, the creditors should be protected from borrowers who are not committed to their obligations in paying the loaned money.

She argued in relation to the third condition of balance of convenience that, the applicants have failed to establish how they will suffer more compared to the respondent. She stated that, the contention by the counsel for the applicants that the suit property is a residential home does not hold water because even if it is a residential home but it was mortgaged to secure the loan. She submitted the respondent will suffer more if the prayer will be granted compared to the applicant if the prayer will not be granted because the debt has been a long outstanding one and the applicants have never made any effort to repay the same.

She submitted that the money borrowed by the applicant is not the money of the respondent but the money deposited by the bank's clients whom they are expecting to withdraw them at any time. She stated that, if the borrowed money will not be paid back in time, the bank will lack funds, and that will lead to the death of the bank as its survival depends on the money borrowed. To support her submission, she referred the

court to the case of **Benny Joseph Mdesa & Another V. National Microfinance Bank PLC (NMB Bank) & Three Others**, Misc. Land Application No. 08 of 2021, HC at DSM (unreported) where it was stated inter alia that banks need to be protected from defaulting borrowers.

She went on arguing that, the balance of convenience shows the respondent will suffer more compared with the applicants. She submitted further that, as stated in the case of **Nelson M. Matiku** (supra), for the prayer of temporary injunction to be granted the applicant must meet all the three conditions established in the case of **Atilio V. Mbowe** (supra) and failure of which the order of temporary injunction will not be granted. She based on the above submissions to pray the court to dismiss the application with costs.

In his extensive rejoinder the counsel for the applicants stated the applicants have never admitted the alleged outstanding debt of TZS 206,765,203 and the interest of 15% per annum. He stated one of the bases of the main suit is the legality of the facility restructured by the respondent which is stated is unjustified and it cannot be said it is not disputed. She stated it also not true as argued by the counsel for the respondent that the applicants have not paid anything towards clearance of the debt. He stated immediately after signing the consent settlement

order the first applicants' Plot No. 752 Block 47 Kijitonyama Area, Kinondoni Municipality was sold and TZS 160,000,000/= was deposited into the respondent's account to offset the loan amount.

He submitted that, although they understand the main activity of the respondent is to lend money to individuals and companies but that fact cannot legalize the intended sale of the suit property to realize the claimed sum of TZS 206,765,203/= before being properly justified. He referred the court to the case of **Makungu Investment V. Ptrosol (T) Limited**, Civil Appeal No. 23 of 2013, CAT at Arusha (unreported) where what is a triable issue in a case was defined. He also referred the court to the case of **Ramadhani Ally & Two Others V. Shaban Ally**, Civil Appeal No. 3 of 2008 cited in the case of **Chai Bora Limited V. Alvic Builders (T) Limited & Another**, Misc. Civil Application No. 133 of 2021 (unreported) where what constitute monetary compensation in substitute of a physical house was considered.

The counsel for the applicant continued to cite other cases in his rejoinder like the case of **Esther Joseph Ogutu V. Equity Bank & Another**, Misc. Land Application No. 523 of 2021, HC Land Division at DSM (unreported) where the issue of who will be more inconvenienced if

the order of temporary injunction is granted or withheld was considered.

At the end he prayed the application be granted.

I have given keen consideration the submissions from the counsel for the parties and read carefully the chamber summons together with what is deposed in the affidavit, counter affidavit and the reply to the counter affidavit filed in the present application. The court has found the main issue to determine in this application is whether the applicant is entitled to be granted the order of temporary injunction is seeking from the court. The court has found that, as rightly argued by counsel for the parties the conditions governing grant of order of temporary injunction in our jurisdiction were laid in the famous case of **Atilio V. Mbowe** (supra) to be as quoted hereunder: -

- (i) *There must be a serious question to be tried on the facts alleged, and the probability that the plaintiff will be entitled to the relief prayed.*
- (ii) *The applicant stands to suffer irreparable loss requiring the courts intervention before the applicant's legal right is established.*
- (iii) *On the balance of convenience, there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendant from granting of it.*

Starting with the first condition of existence of triable issue or a prima facie case the court has found it is required to be satisfied there is a triable issue or in other words the applicant has a cause of action against the respondent with a probability of success. The court has found that, as stated in the case of **Surya Kant D. Ramji V. Saving and Finance Ltd & 3 Others**, Civil Case No. 30 of 2000, HC Commercial Division at Dar es Salaam (unreported), in determine there is a prima facie case or serious issue for determination in the main suit the court is required to use the facts as disclosed in the plaint and in the affidavit supporting the application.

While being guided by the position of the law stated hereinabove the court has found the counsel for the applicant submitted there is a prima facie case in the suit pending in the court. He contended that the auction intended to be carried out by the respondent's agent of selling the suit property which is being challenged in the main suit is unlawful because the parties have not yet signed the term loan facility agreement comprising the terms and conditions acceptable by the parties as agreed in the consent settlement order annexed in the affidavit of the applicant as annexure A1.

The court has found the above submission of the counsel for the applicant can be seeing at paragraph 6 of the affidavit of the first applicant

where it is deposed it was the applicants' expectation that, after signing the consent settlement order adopted by the court, the second applicant and the respondent would have sign a loan facility agreement to restructure the outstanding loan on terms and conditions which were to be agreed by the applicants and the respondent. It is further stated at paragraph 7 of the affidavit of the applicant that, the respondent did not prepare the stated loan facility agreement for being signed by the parties.

It is deposed further at paragraphs 8, 9 and 11 of the affidavit of the applicant that, despite several reminders made to the respondent by the first applicant but the loan facility agreement carrying out the terms and conditions of the term loan stated would have been given to the second applicant was not prepared. He stated to the contrary on 6th October, 2023 the applicants received a notice issued by Suma JKT Auction Mart Co. Ltd acting as agent of the respondent notifying them the suit property would have been auctioned after expiration of 14 days. As deposed at paragraph 12 of the affidavit supporting the application the stated notice moved the applicants to institute the suit pending this court to challenge the intention of the respondent to auction the suit property.

The court has found what is deposed at paragraphs 6 to 9 of the affidavit of the applicant is vehemently disputed at paragraphs 5 to 7 of

the counter affidavit of the respondent. The court has found what is deposed in the above paragraphs of the affidavit of the applicant and the paragraphs of the counter affidavit of the respondent is almost similar to what is averred at paragraphs 10, 11, 12, 13 and 14 of the plaint and disputed at paragraphs 4, 5 and 6 of the written statement of defence of the respondent filed in the main suit.

The court has found the counsel for the respondent argued the applicant suit is an abuse of the court process because the terms and conditions of the term loan facility are well stipulated in the consent settlement order executed by the parties. The court has found it is true that the consent settlement order contains the terms and conditions on how the money converted into the term loan by the respondent should have been paid by the applicant, the interest to be charged plus the duration of paying the same. However, paragraph 4 of the consent settlement order states other terms and conditions of the stated term loan facility should have been accepted by the parties.

That being the position of the matter the court has found that, as stated in the case of **Makungu Investment Co. Ltd** (supra) cited in the rejoinder submission of the counsel for the applicant there is a triable issue in the suit pending in the court because the allegation by the

applicants that the intended auction of the suit property by the respondent through his agent is unlawful on the ground that there is no agreement signed by the parties stating the terms and conditions of the term loan facility converted to the second applicant by the respondent which was signed by the parties is vehemently disputed by the respondent. To the view of this court the stated issue needs to be determined by the court in the trial of the main suit.

That being the position of the matter the court has found the first condition for granting an order of temporary injunction which is existence of triable issue has been established in the application at hand. The court has come to the stated finding after seeing the position of the law as stated in the cases of **Abdi Ally Salehe** (supra) and **Surya Kant D. Ramji** (supra), it is not conclusive evidence which is needed to establish there is a triable issue but rather the facts as disclosed in the plaint and in the affidavit. In the premises the court has found the applicants have managed to establish there is a triable issue in the main suit which in the absence of some important answers the applicants will be entitled to the reliefs sought in the main suit.

Coming to the second condition for granting the order of temporary injunction which is irreparable injury to be suffered if the order will not be

granted and the suit property auctioned before the applicants' suit is determined, the court has found it was stated in the case of **T. A. Kaare V. General Manager Mara Cooperative Union Ltd**, [1987] TLR 17 that, irreparable loss does not mean there must be no possibility of physical injury but merely that the injury would be material, for example one that could not be adequately remedied by damages. The court has found the counsel for the applicants submitted the applicants will suffer irreparable injury which cannot be atoned by way of monetary compensation because the suit property intended to be auction is being used by the first applicant and his family as their residential home.

On her side the counsel for the respondent stated the applicants have not shown their intention to repay the outstanding debt which is TZS 206,765,203 and stated if the order of temporary injunction is granted the respondent is the one stand to suffer irreparable injury and not the applicants. The court has considered the stated submission from the counsel for the parties and find what the court is required to look here is whether the applicants have managed to establish they will suffer irreparable injury if the order of temporary injunction will not be granted and the suit property is auctioned before the suit pending in the court is determined.

The court has found that, although it is true that the business of the respondent is to lend money to the individuals and companies and if the money lent to their customers is not repaid, they will fail to continue with business but to the view of this court granting the order of temporary injunction does not mean it is the end of repaying an outstanding debt. To the view of this court and as provided under Order XXXVII Rule 1 (b) of the Civil Procedure Code upon which the application is made the purpose of temporary injunction is to restrain disposition of the suit property until disposal of the suit pending in the court. It is not a decision that the outstanding debt should not be paid if it will be adjudged in the suit pending determination of the court is supposed to paid.

Therefore, the argument that the applicants have not shown their intention to repay the outstanding debt cannot be a ground of refusing to grant the order of temporary injunction because the issue as to whether the applicants have failed to repay the outstanding debt or they have no intention of repaying the same and there is a need of compelling them to repay or allow the respondent to exercise their right of recovering the outstanding debt is an issue to be determined in the trial of the main suit and not in this application for the order of temporary injunction.

The court has found the issue as to whether auction of residential house and rendered a family homeless is an irreparable which cannot be atoned by monetary compensation was considered in the case of **Nelson M. Matiku** (supra) and stated it suffice to convince the court the applicant will suffer irreparable loss if the order of temporary injunction is not granted and the residential house is auctioned before determination of the rights of the parties. The similar view was taken in the case of **Agnes Kosia & Another V. The Board of Trustees of NSSF & Another**, Misc. Land Case Application No. 590 of 2016 where it was stated that, if the applicants would have been evicted from their residential houses before their rights in their suit is determined it would have led them to live difficult life for lack of shelter which is one of the basic needs of life.

The court has considered the argument by the counsel for the respondent that the respondent stand in a better position financially to remedy the injury which will be suffered by the applicants if the suit property will be auctioned and found they are entitled to the reliefs they are seeking in the main suit but find the unpleasant life the first applicant and his family will live if the mortgaged house will be auctioned before determination of the rights of the parties in the suit cannot be atoned by monetary compensation. It is because of the above stated reasons the

court has found the applicants have managed to establish the second condition for granting an order of temporary injunction.

Coming to the third condition of balance of convenience the court has found that, although the counsel for the respondent submitted the applicants have not shown how they will suffer more injury than the respondent but the court has found as stated in the second condition of irreparable injury to be suffered, the applicants will suffer more if the order of temporary injunction will not be granted and the suit property will be auctioned before determination of the main suit. The court has considered the argument by the counsel for the respondent that the applicants' argument that the suit property is a residential house has no merit because it was mortgaged as a security for the term loan facility. The court has been of the view that the stated argument has not established the applicants will not be more inconvenienced if the suit property will be sold before the rights of the parties in the main suit are determined.

The court has come to the above stated finding after seeing that, even if it is true that the house which is a residential house was mortgaged as a security for the loan but auction of the same must observe the required rights and obligations of all parties in the term loan facility.

Although the court is in total agreement with the position of the law stated in the case of **Benny Joseph Mdesa & Another** (supra) that banks should be protected from defaulting borrowers but the stated protection is required to be also accorded to the borrowers who their default to repay the term loan facility was not caused by their own fault. Where there is a dispute about an allegation of defaulting to repay the loan, the court is required to determine the same before allowing or disallowing the mortgaged property to be disposed of. The court has found that, the applicant will be more inconvenienced if the order of temporary injunction will not be granted than the inconvenience the respondent will suffer if the order will be granted.

The court has come to the stated finding after seeing that, as stated hereinabove the injury to be suffered by the first applicant and his family if the suit property will be auction cannot be atoned by way of monetary compensation while as rightly stated by the counsel for the applicants if the order is granted the respondent will recover the outstanding debt plus interest if the suit pending in the court will be determined in favour of the respondent. In the premises the court has found all the three conditions for granting an order of temporary injunction stipulated in the case of *Atilio V. Mbowe* have been established conjunctively in the present

application to the extent of moving the court to exercise its discretion to grant the application of the applicant.

Consequently, the application of the applicant is hereby granted. The respondent and his employees, agents or any person acting on their behalf are restrained from disposing of the suit property on Plot No. 1318 Block 'D' Mtoni Kijichi Area, Temeke Municipality, Dar es Salaam with certificate of title number 125923 pending final determination of the main suit pending before this court and each party to bear his own costs.

Dated at Dar es Salaam this 11th day of December, 2023.



I. Arufani
JUDGE
11/12/2023

Court:

Ruling delivered today 11th day of December, 2023 in the presence of Mr. Petro Fredrick, learned advocate for the applicants and in the presence of Ms. Haika Mrango, learned advocate for the respondent. Right of appeal to the Court of Appeal is fully explained.



I. Arufani
JUDGE
11/12/2023