

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

**MISC. LAND APPLICATION NO. 115 OF 2022**

*(Arising from Land Case No. 55 of 2022 High Court Land Division)*

**JACKSONI W. ELIPHASI ..... 1<sup>ST</sup> APPLICANT**

**FRANK MUSARI ..... 2<sup>ND</sup> APPLICANT**

**MUNSA TRADING ENTERPRISES LTD ..... 3<sup>RD</sup> APPLICANT**

**VERSUS**

**RAHIM SHABAN ..... 1<sup>ST</sup> RESPONDENT**

**JOYCE MALAI ..... 2<sup>ND</sup> RESPONDENT**

**VICTOR MATONDANE ..... 3<sup>RD</sup> RESPONDENT**

**NAOMI AMBWENE ..... 4<sup>TH</sup> RESPONDENT**

**ECO BANK TANZANIA LIMITED ..... 5<sup>TH</sup> RESPONDENT**

**LONG XING INTERNATIONAL LIMITED ..... 6<sup>TH</sup> RESPONDENT**

**STEAM GENERATION RECOVERY LIMITED ..... 7<sup>TH</sup> RESPONDENT**

*Date of last Order: 13/06/2023*

*Date of Ruling: 13/07/2023*

**RULING**

**I. ARUFANI, J**

This ruling is for the application filed in this court by the applicants seeking for an order of temporary injunction to restrain the respondents or their agents or anybody acting on their behalf from disposing of the suit premises described as Plot No. 63, Block E Kariakoo area, Dar es Salaam held under CT No. 38634 pending hearing and determination of the Land case No. 55 of 2022 pending in this court. The application is made under Order XXXVII Rule 1 (a) and Section 68 (c) of the Civil

Procedure Code, Cap 33 [R.E 2019].

The application is supported by an affidavit sworn by Mr. Frank Musari, the second applicant in the present application and it is opposed by a Joint counter affidavit sworn by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 7<sup>th</sup> respondents sworn on behalf of the mentioned respondents by Hope Liana, the Head and Company Secretary of the 5<sup>th</sup> respondent. While the applicant was represented in the matter by Mr. Edward Chuwa learned advocate, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 7<sup>th</sup> respondents were represented by Mr. John Laswai learned advocate and the matter proceeded ex parte against the 1<sup>st</sup> and the 6<sup>th</sup> respondents. By consent of the counsel for the parties the application was argued by way of written submissions

The counsel for the applicant stated in his submission that, the principle of granting temporary injunction is summarized in the famous case of **Attilio V. Mbowe** which states for the order of temporary injunction to be granted the applicant is required to show there is a triable issue in the main suit, the applicant will suffer irreparable loss if the order is not granted and balance of inconvenience as to who between the applicant and the respondents will suffer more than the other if the order of temporary injunction will be granted or withheld.

The counsel for the applicants submitted that there is a prima facie case or triable issues worth to be considered by the court in the main suit.

He argued that, it is not in dispute that the third applicant is the registered owner of the land in dispute and the first and second applicants are directors of the third applicant and were together with one Reginald Frank Musari who is now a deceased.

He argued that, the stated Directors of the third applicants have never consented or mortgaged the land in dispute in favour of the 5<sup>th</sup> respondent for the loan advanced to the 6<sup>th</sup> respondent. He stated the late Reginald Frank Musari could have not executed any deed as he was drug addict but his signature was forged to show he signed a memorandum of acceptance of the alleged mortgage on 12<sup>th</sup> February, 2016.

He went on arguing that, the first respondent who is a lawyer represented himself as the director of the sixth respondent while committing fraud by forging the signature of the deceased and he personally drew cheques for himself out of loan advanced to the sixth respondent. He stated the legal mortgage was forged and on 12<sup>th</sup> February 2016 the fifth respondent issued an offer letter referring to the loan given to the sixth respondent while the memorandum of understanding was executed on December, 2015. He argued that, on 12<sup>th</sup> February, 2016 the 5<sup>th</sup> respondent issued an offer letter referring to the loans given to the 6<sup>th</sup> respondent in 2014 which is prior to the execution

of the purported mortgage dated 24<sup>th</sup> January, 2016. He submitted all the stated crucial points are denied by the fifth respondent and that shows there are triable issues in the main suit which need to be tried by the court.

He argued in relation to the second principle for granting an order of temporary injunction that, the value of the suit premises is more than two billion shillings but the fifth respondent has not disclosed the value of the mortgaged land. He stated if the injunction is not granted and the suit premises is disposed of the applicant will suffer irreparable loss. He argued that, the first respondent has neither counter the applicants' affidavit nor filed her defence in the matter and the second, third, fourth, sixth and seventh respondents have not filed their respective counter affidavit because the alleged joint counter affidavit was sworn by the principal officer of the fifth respondent who had no capacity to swear an affidavit on behalf of the other respondents.

He submitted that the fact of irreparable loss is not disputed and it is not shown how the loss the applicant will suffer can be compensated by the respondents if the injunction will be withheld. To support his submission, he referred the court the case of **Registered Trustee of St. Anita Greenland's Schools (T) & 6 Others V. Azania Bank Limited**, Civil Application No.168/16 of 2020 (unreported) where the Court of

Appeal of Tanzania held that, failure to file affidavit of some of the applicants in the matter renders the application incompetent.

He argued in relation to the principle of balance of convenient that, the applicant stands to suffer more than the respondent if the order of temporary injunction will not be granted. He submitted the fifth respondent will not be inconvenienced as she has recourse to the loan agreement against the sixth respondent as she can sue her on breach of contract. He argued that, the applicants' suit premises intended to be sold is a commercial premises therefore they will not only lose the building but also their business and source of livelihood and the goodwill which cannot be compensated by way of monetary terms.

In his reply the counsel for the second, third, fourth, sixth and seventh respondents argued it is not true that they have not filed their counter affidavit in the matter. He argued it is on record that they have filed their joint counter affidavit alongside with the fifth respondent on 6<sup>th</sup> April, 2022. He cited in his submission the case of **Atilio V. Mbowe**, (1969) HCD No. 284 where it was held that, for the order of temporary injunction to be issued the applicant must show he has a prima facie case with the probability of success, he is likely to suffer irreparable injury and when the court is in doubt, it will decide the application on balance of convenience.

He argued in relation to the issue of existence of prima facie case in the main suit that, the applicants' application and submission are too remote on the test of prima facie case. He submitted the applicants have not shown any prima facie case with the probability of success in the main suit. He argued that, the application for temporary injunction to stop the fifth respondent from exercising her lawful powers of recovering the loan extended to the sixth respondent which was secured by the suit premises is an abuse of the court process.

He added that the applicants and especially the third applicant are making forum shopping by using this court of justice as refuge to escape from contractual obligation created between the third applicant and the sixth respondent in the collateral agreement dated 7<sup>th</sup> December 2015. He stated the applicants are seeking in the main suit for a declaration that the first to sixth respondents conspired and fraudulently forged the cooperate guarantee agreement and forged the signature of the second applicant on the resolution of the board of the third applicant which caused the mortgage deed to be null and void.

He stated the applicants have not given full description of the mortgaged property they want to be declared by the court it is invalid. He added that, the allegation of fraud made by the applicants has nothing to do with the fifth respondent's bank and therefore any claim against the

bank in connection with what transpired between the third applicant and sixth respondent must fail, hence there are no chances of success in the main suit.

Counsel for the respondents submitted that, it is not the first time the suit involving the suit premises to be filed in the court. He stated the third applicant filed in the court Land Case No. 426 of 2017 against the fifth and sixth respondents alleging the mentioned respondents were withholding the certificate of title of the suit property unlawfully which was determined against the third applicant. He stated the suit pending in the court was lodged in the court after the fifth respondent initiated the measures of recovering the unpaid loan issued to the 6<sup>th</sup> defendant by the 5<sup>th</sup> respondent plus its interest as provided under the Land Act.

He argued that, under the stated circumstances the present application is an afterthought as the above analysis shows the applicants' claims were raised to circumvent the fifth respondent's lawful measures of recovering her unpaid loan and its interest by disposing of the suit premises pledged as a collateral for the loan advanced to the sixth respondent by the fifth respondent. He argued that, the applicants have not established that they will suffer irreparable loss which in the event they succeed in the frivolous claims of conspiracy, forgery and frauds it cannot be atoned by the award of damages.

He argued in relation to the condition of balance of convenience that, the fifth respondent is the one to suffer more tremendously than the applicants if the injunction will be granted in favor of the suit premises as the bank loan and interest will be at risk if the property will be released as the whereabouts of the first and sixth respondents is unknown. He argued further that, grant of injunction to stop the fifth respondent from disposing of the suit property which was lawful mortgaged for the loan disbursed to the sixth respondent will make the fifth respondent to suffer as there is no likelihood of recovering the stated loan plus interest.

To support his submission, he cited in his submission the case of **Cosmos Properties Limited V. Exim Bank Tanzania Limited**, Misc. Civil Application No. 584 of 2021 HC at DSM (unreported) where it was stated that, in determine whether the applicant has established prima facie case with highest chance of success the main case must be not frivolous or vexatious and there is a serious issue to be tried at the trial. It was stated further in the same case that, if the risk of doing injustice is going to make the respondent suffer then the balance of inconvenience is favorable to the respondent.

He also cited in his submission the case of **General Tyre Africa Ltd V. HSBC Bank RPC**, [2006] TLR 60 where it was stated that, banks or lenders and their customers or borrowers must fulfill and enforce their



respective contractual obligations under various lending/security agreements entered into by the parties. He further more cited in his submission the case of the **Private Agricultural Sector Support Trust & Another V. Kilimanjaro Cooperative Bank Ltd**, Consolidated Civil Appeals No. 171 & 172 of 2019 CAT at Moshi (unreported) where it was stated if you borrow money, you must ultimately pay it back and there is no shortcut. At the end he prayed the court to desist to interfere with the contractual relationship between the third applicant and the sixth respondent.

In his rejoinder the counsel for the applicants stated that, the counsel for the respondent has submitted that this is an application for the court to grant an order of injunction against the fifth respondent to stop her from enforcing her rights and disposing of the suit premises. He submitted the submission by the counsel for the respondents is misleading as the alleged right is the subject of the pending suit. He submitted that, to argue it is a respondents' right to dispose of the suit premises is to admit there are triable issues to be determined and therefore an order of temporary injunction has to be issued pending hearing of the main suit.

He went on submitting on the issue of the absence of the counter affidavit of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 7<sup>th</sup> filed in the matter by stating that, as the counsel for the respondents submitted it is the 5<sup>th</sup> respondent who is

targeted in the application because is the one who instructed the 7<sup>th</sup> respondent, that shows they were admitting that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 7<sup>th</sup> respondents were not required to file their counter affidavit in the matter at hand.

He submitted that the respondents have not responded to their submission that there is illegality on the mortgage deed entered between the 3<sup>rd</sup> applicant and the 5<sup>th</sup> respondent as pleaded under para 20 of the plaint and para 14 of the applicants' affidavit. As for the issue of existence of Land Case No. 426 of 2017 he argued the applicants raised the same concern in the main suit as a point of preliminary objection and it was determined by the court hence it cannot be raised or discussed in the present application.

Coming to the issue of irrepealable loss to be suffered by the applicant if the order of temporary injunction will not be granted and the balance of convenience the counsel for the respondent replied that, it is the applicant who will suffer more than the respondents as if the suit premises will be disposed of before the suit pending in the court is determined. He submitted that is because the value of the property will be used to cover unsecured loan of the 6<sup>th</sup> respondent which the 5<sup>th</sup> respondent admit that she is untraceable although she is their bank customer. Finally, the counsel for the applicants prayed the application be

granted with costs.

Having carefully considered the rival submissions filed in the court by the counsel for the parties and after going through the documents filed in this application and in the main suit the court has found the issue to determine in this application is whether the order of temporary injunction sought from this court by the applicants should be granted. Before going to the merit of the application the court has found proper to start with the concern raised in the submission of the counsel for the applicant that the first, second, third, fourth, sixth and seventh respondents have not filed their counter affidavit in the matter to counter the application of the applicants.

The counsel for the applicants argued that, as Hope Liana has deposed is the Principal Officer of the fifth respondent, she has no capacity to swear an affidavit for the second, third, fourth, sixth and seventh respondents and filed the same in the court. The court has considered the stated argument and after going through the counter affidavit sworn by Hope Liana it has found the stated deponent stated categorically in the said counter affidavit that she was swearing the stated counter affidavit on behalf of the second, third, fourth, fifth and seventh respondents.

The deponent of the stated counter affidavit deposed at paragraph

1 of the counter affidavit sworn by her that, she was swearing the stated counter affidavit on behalf of the mentioned respondents basing on her capacity and knowledge of the facts of the application as well as her full involvement in the matter between the fifth respondent and the applicants together with the mentioned respondents who authorized her to swear the stated counter affidavit on their behalf. That means it is only the first and sixth respondents who did not file in the court their counter affidavit and as stated at the outset of this ruling the court ordered hearing of the application to proceed ex parte against them. That being the position of the matter the court has failed to see any merit in the concern raised by the counsel for the applicants and it is hereby dismissed in its entirety for being devoid of merit.

Back to the merit of the application the court has found that, as rightly argued by the counsel for the parties the conditions governing determination of an application for an order of temporary injunction in our jurisdiction were laid down in the famous case of **Atitlio V. Mbowe** cited by the counsel for the parties. The conditions laid in the above cited case are as follows: -

- (1) "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.*
- (2) 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*

*(3) That on the balance of convenience 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 the granting of it."*

Starting with the first condition of serious question to be tried which sometimes is referred as a prima facie case, the court has found the position of the law 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) the court is required to look into the facts deposed in an affidavit supporting the application and the facts averred in the plaint to see whether there is a serious or triable issue need determination of the court.

The court has also found it was stated in the case of the **CPC International Inc V. Zainabu Grain Millers Ltd**, Civil Appeal No. 49 of 1999, (unreported) the court is not required to go into detail of the case to see the applicants will win his case and or obtain a decree at this stage of the case. To the view of this court to do so it will amount to prejudge the applicants' case prematurely as the parties have not adduced their evidence in the case to prove or disprove the allegations and reliefs they are seeking from the court. What the court is required to be satisfied

is that the applicant's case has a probability chance of success and it is not frivolous or vexatious case.

While being guided by the position of the law stated in the above cited cases the court has gone through the affidavit supporting the application together with the facts averred in the plaint and find there is an allegation at paragraph 11 of the affidavit that the 6<sup>th</sup> respondent breached the terms of the memorandum of understanding. The court has also found that as rightly argued by the counsel for the applicants there are several allegations of fraud and forgery alleged were committed by the 1<sup>st</sup> to 6<sup>th</sup> respondents at paragraphs 12 to 22 of the affidavit supporting the application and averment at paragraph 8 of the plaint.

It is deposed and averred in the mentioned paragraphs that, the 1<sup>st</sup> to 6<sup>th</sup> respondents fraudulently prepared and forged various documents which includes mortgaged deed, memorandum of acceptance of the guarantor, board resolution and seal of the 3<sup>rd</sup> applicant. It is also alleged the signatures of the 1<sup>st</sup> and 2<sup>nd</sup> applicants together with the signature of Regnald Musari (now a deceased) who was one of the 3<sup>rd</sup> applicant's Director and seriously sick were forged to show the 3<sup>rd</sup> applicant guaranteed repayment of the loans issued to the 6<sup>th</sup> respondent by the 5<sup>th</sup> respondent. The stated deposition and allegations are strongly disputed by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> respondents at paragraphs 14 to

22 of the counter affidavit filed in the court to oppose the application of the applicants.

The court has found that, although the counsel for the mentioned respondents gave a detailed submission as analyzed hereinabove purporting to show the stated allegations are baseless and an afterthought but the court has found they are serious allegations establishing the requirement of being determined by the court and if they will be substantiated the applicants might be entitled to the reliefs are seeking in the main suit.

The court has considered the argument by the counsel for the respondent that there has been Land Case No. 426 of 2017 which was filed in the court by the 3<sup>rd</sup> applicant against the 5<sup>th</sup> and 6<sup>th</sup> respondents but found as rightly argued by the counsel for the applicants the issue of existence of the mentioned case was considered and determined by the court in the preliminary objection raised in the main suit by the counsel for the respondents. Therefore, the similar point cannot be redetermined by the court in the present application. It is because of the above stated reasons the court has found there are serious issue of forgery and fraud alleged in the applicants' application and in the main suit which established the applicants have a prima facie case against the respondents in the suit filed in the court by the applicants.

Coming to the second condition of irreparable loss the court has found that the court is required to consider whether there is a need to protect either of the parties from species of injuries known as irreparable injury before the right of the parties can be established. The court has found it was stated in the book of **Sohoni's Law of Injunction**, Second Edition, 2003 at page 93 that: -

*"As the injunction is granted during pendency of the suit, the court will interfere to protect the plaintiff from injuries which are irreparable. The expression "irreparable injury" means that, it must be material one which cannot be adequately compensated for in damages."*

Under the guidance of the position of the law stated in the above quoted excerpt the court has found it is not disputed that the 5<sup>th</sup> respondent has initiated the process of disposing of the suit property to recover the loan facility issued to the 6<sup>th</sup> respondent by the 5<sup>th</sup> respondent basing on ground that suit property was pledged as a collateral for the stated loan which the 6<sup>th</sup> respondent has defaulted to repay. The court has found that, if the stated suit will be disposed of before determination of the main case the applicant will suffer irreparable loss.

The court has come to the stated finding after seeing it has been submitted by the counsel for the applicants that the suit property intended to be disposed of is a commercial premises which its value is more than



two billion and the respondents have not disclosed the value of the suit property in the purported mortgage, something which may cause the suit property to be sold at a throw way price. The court has also found the counsel for the applicants have stated the suit property is a commercial building which the applicants are deposing it was fraudulently mortgaged to secure the loan disbursed to the sixth respondent by the fifth respondent.

It is the view of this court that, as rightly argued by the counsel for the applicants if the suit property will be sold before determination of the main suit pending in the court the applicants will not only lose the said building but also it has not been stated how the applicant will be compensated if the main suit will be determined in their favor. The court has considered the argument by the counsel for the respondents that the fifth respondent is the one stand to suffer more irreparable loss compared by the applicants if the order of temporary injunction will be issued but failed to side with his argument.

The court has come to the stated finding after seeing that, as rightly argued by the counsel for the applicants, the counsel for the respondents has not stated how the applicants will be compensated if the suit premises will be disposed of and the main suit will be determined in their favor. To the contrary the court has found the fifth respondent will not suffer

irreparable loss because as stated in the case of **Abualy Alibhai Azizi V. Bhatia Brothers Ltd**, [2000] TLR 288 the object of an order of temporary injunction is only to preserve the pre-dispute state until the end of the trial of the dispute or until the future order and not otherwise. It is because of the above stated reasons the court has found the second condition for granting the order of temporary injunction has been established in the present application.

With regards to the third condition of balance of convenience the court has found that, the question to determine here is who is going to suffer greater hardship and mischief if the order of temporary injunction is not granted. The court has found that as alluded in the second condition for granting the order of temporary injunction if the order will not be granted the applicants will be more inconvenienced than the respondents as they will not only loss the building but also goodwill from the people who doing business with them before their dispute is determined by the court.

The court has considered the submission by the counsel for the respondents that the fifth respondent will be more inconvenienced as whereabouts of the fourth and sixth respondents is not known but find the stated argument cannot be used as a ground of refusing to grant the order the applicants are seeking from the court for the purpose of

preserving the state of the suit property pending hearing and determination of the dispute between the parties.

The court has considered the facts, circumstances and the position of the law stated in the cases of **Cosmas Properties Limited, General Tyre Africa Ltd** and **Private Agriculture Sector Trust & Another** cited in the submission of the counsel for the respondents but find the stated cases are distinguishable to the present application. The court has found come to the stated finding after seeing they were not dealing with the circumstances where it is alleged the suit property was fraudulently mortgaged as it is in the present application.

In the premises the court has found all the three conditions for granting an order of temporary injunction laid in the case of **Atilio V. Mbowe** (supra) have been established in the present application. Consequently, the application for the order of temporary injunction sought from this court by the applicant is hereby granted without costs. It is so ordered.

Dated at Dar es Salaam this 13<sup>th</sup> day of July, 2023.



I. Arufani

**Judge**

13/07/2023

**Court:**

Ruling delivered today 13<sup>th</sup> day of July, 2023 in the presence of Mr. Edward Peter Chuwa, learned advocate for the applicants, in the presence of Mr. Mazoea Africa, learned advocate for the second, third, fourth, fifth and seventh respondents and in the absence of the first and sixth respondents. Right of appeal to the Court of Appeal is fully explained.



*I. Arufani*  
I. Arufani  
**Judge**  
13/07/2023