IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 315 OF 2023

RICHARD KARUMUNA RWEYONGEZA ..... APPLICANT

VERSUS

AFRICAN BANKING CORPORATION (T) LIMITED ..... 1ST RESPONDENT

NUTMEG AUCTIONEERS & PROPERTY

MANAGERS CO. LIMITED ..... 2nd RESPONDENT

INTER 33/34 LIMITED ..... INTERESTED PARTY CUM 3RD RESPONDENT

Date of last order: 21/09/2023.

Date of Ruling: 09/11/2023.

RULING

I. ARUFANI, J.

This application for temporary injunction was lodge before this court by the applicant under section 68 (e) and order XXXVII Rule 1 (a) 2 (1), 4 and 6 of the Civil Procedure Code Cap 33 [R.E 2019] praying for the following inter partes orders: -

1. *That, the honourable court be pleased to issue a temporary injunctive and preservative orders against the 1st and 2nd respondents, their agents, workmen, assignees, servants or any other person deriving title or instructions from them from*

proceeding selling and evicting or alienating the applicant in her property being Farm number 2019 situated at Disunyara area, Mlandizi Kibaha with CT number 53398, measuring 89.834 Hectares pending hearing and final determination of the main suit pending in this court between the parties.

2. *That, the honourable court be pleased to order the costs of this Application abide the outcome of the suit.*
3. *That the honourable court be pleased to issue any other order or direction as the court shall deem fit to grant in the interest of justice.*

The instant application is supported by an affidavit sworn by the applicant and it is opposed by counter affidavits sworn by Ms. Lilian Musingi, Company Secretary and Mr. Phidel David Katundu, Managing Director of the first and second respondents respectively.

In this application the applicant was represented by Mr. Edward Chuwa learned advocate who was assisted by Mr. Mpaya Kamara and Ms. Anna Lugendo, learned advocates and while the first and second respondents enjoyed the service of Mr. Luka Elingaya who was assisted by Mr. Alex Miyanga, Ms. Saudia Kabora and Mr. Thomas Sipemba learned advocates, the hearing of the application proceeded ex parte against the third

respondent after dully being served and failed to appear in the court. This application was ordered to be argued by way of written submissions.

In support of the application, the counsel for the applicant prayed to adopt the affidavit of the applicant to form part of his submission. He stated the principles upon which the court is required to rely upon in determine whether to grant an order of temporary injunction or not are well settled. He submitted the stated principles were laid in the case of **Attilio V. Mbowe,** (1969) HCD No. 284 and followed by this court in the case of **Kibo Match Group Limited V. H. S. Impex Ltd**, [2001] TLR 152. The stated principles are (1) triable issues in the main suit (2) irreparable loss the applicant will suffer if the order is not granted and (3) balance of convenience the applicant will suffer if the order is not granted compared with the respondent if the order is withheld.

He argued that, the pleadings filed in the main suit and in the instant application discloses the triable issues requiring determination of the court. He stated paragraph 3 of the affidavit of the applicant shows that, the Mortgage between the applicant and the first respondent in respect of farm No. 2019 was mistakenly entered into thus it is inoperative, null and void.

He added that according to the plaint and written statement of defence filed in the main suit it is alleged that, the third respondent made a resolution to borrow USD 150,000 only from the first respondent and she was never authorized to borrow USD 400,000 or above USD 150,000/=. Nevertheless, the first respondent offered credit facility of USD 400,000 to the third respondent and the applicant was made to believe that the loan agreement was only USD 150,000 and he accordingly signed the bank guarantee in which it was clearly stated the loan amount is USD 150,000 as per annexure B to the written Statement of defence.

He further submitted that, the third respondent signed a deed of set off of her money in favor of first respondent to the tune of USD 150,000 by knowing the loan is USD 150,000 and he deposited cash cover of the same amount as evidenced by annexure B to the written statement of defence. He added that, the applicant executed mortgage deed of only USD 150,000.

He further argued that the first respondent in consent settlement deed fraudulently submitted that the mortgage was for the loan of USD 400,000 and withheld vital information that the first respondent had a right to set off on the third respondent account in which the third respondent deposited cash cover of USD 150,000. He argued that, the first respondent should not

benefit twice as having set off of USD 150,000 and recover from the applicant. He submitted these are issues need to be determined by the court in the main suit.

He referred the court to the case of **Mohamed Enterprises (T) Limited V. Masoud Mohamed Naser,** Civil Application No. 33 of 2012 CAT at DSM (unreported) where the Court of Appeal quoted the position of the law stated by **Mulla** in the **Code of Civil Procedure of India**, 16th Ed. Vol. 1 pp 299, 653 and 1066 where it was stated that, the only remedy for a person who wishes to challenge a compromise decree on the ground of fraud is to file a suit for setting aside the said decree.

He went on arguing that, the triable issues to be determine in this application is whether the first and second respondents were justified to resort to the right over the mortgage deed and exercised the right of sale where there is a judgment of the court capable of being executed and whether in view of Land case No. 98 of 2017 the 1st respondent had power to appoint the second respondent to sell the suit premises.

As for the issue of irreparable loss on the side of the applicant he argued that, paragraph 2 of the affidavit of the applicant states the value of

the suit property is TZS 13,032,900,000.00 but the respondents have conducted valuation of suit land secretly with the aim of accomplishing fraudulent move to sell the land at a throw away price below the value and the said valuation was done contrary to section 125 of the Land Act which abolished foreclosure. He submitted the applicant will suffer irreparable loss as his land will be foreclosed contrary to law and there is no way this illegality can be compensated in monetary terms.

To support his submission, he cited the case of **Kibo Match Group Limited** (supra) where the court referred the position of the law stated in the case of **Colgate Palmolive Company V. Zacharia Provision Store & Others** Com. Case No. 1 of 1997, HC Com. Division (Unreported) where when the court was considering the issue of irreparable loss to be suffered it held that, quantification of damage is not always a conclusive factor. Matters such as loss of goodwill, confusion and deception resulting from apparent similarity of the goods involved, are equally important.

As for the issue of balance of convenience the counsel for the applicant submitted that, from what he has stated in the preceding principles it is the applicant who will suffer more than the respondents if the injunction is not granted because the first respondent has recourse to the cash cover of USD

150,000/=, she can resort to debenture created by third respondent and the guarantee of Mr. Nikolaus Drizos and she can file a suit in the court against the third respondent. He submitted the first respondent will not suffer or be inconvenienced. He added that, the said options are available to the first respondent while the applicant does not have any of them. He concluded his submission by praying the application be granted by the court with cost.

In response to the applicant's submission, the counsel for the first and second respondents prayed to adopt the content of the counter affidavits of the first and second respondents and argued that, the court has established in number of cases pre-conditions to be met for granting or refusing an order of temporary injunction. To support his submission, he referred the court to the case of **Christopher P. Chale V. Commercial Bank of Africa,** Miscellaneous Civil Application No. 635 of 2017 (Unreported) whereby the court referred the principles laid in the case of **Atilio V. Mbowe** (1969) HCD No. 284. He added that, the court held in the Case of **Christopher P. Chale** (supra) that, all the conditions set out in the case of **Atilio V. Mbowe** (supra) must be met to move the court to grant an order of temporary injunction.

He stated that, on 24th May, 2019 the first respondent entered into settlement agreement which resulted into settlement order and decree of the court and it was agreed that the applicant will undertake to pay the first respondent USD 200,000 for the settlement of outstanding loan. He stated it was further agreed that, the stated amount of money would have been paid in equal instalment of first USD 100,000 to be paid on 31st august, 2019 and the last instalment of USD 100,000 to be paid on 31st December, 2019 but the applicant defaulted to pay as agreed. He added that, it was agreed at paragraph 4 of the consent settlement order and paragraph 3 of the decree that, failure by the applicant to pay any installment, the first respondent shall be entitled to proceed with execution.

He submitted that, when the first respondent decided to enforce the consent settlement order to recover the outstanding loan amount, the applicant rushed to this court to seek for injunctive order against the first respondent. He stated that, granting injunction to a person like the applicant is to allow court to be used as a bush to hide for loan defaulters. To support his submission, he cited in his submission the case of **Hydrox Industrial Service Ltd & Another V. CRDB Ltd & Two others,** Civil case no. 194 of 1999 (Unreported).

He submitted further that, the settlement order and decree entered between the parties did not relinquish the right of the first respondent over the facility letter or mortgage deed and does not state the execution shall be by way of court proceedings but was agreed the applicant shall pay the first respondent USD 200,000 and upon default the first respondent shall proceed with execution. He added that, the applicant is bound by the terms of the consent settlement order and decree and cannot ask this court to introduce new term. To support his argument, he referred the court to the case of **Harold Sekiete Levira & Another V. African Banking Corporation Tanzania Limited & Another,** Civil Appeal No. 46 of 2022.

He contended that, the allegations that the mortgage deed was mistakenly entered, non-operative and void, that the third respondent was not authorized to borrow USD 400,000 and the applicant was made to understand the loan agreement was for USD 150,000 only are blatant lies showing the intention of the applicant to avoid repayment of the loan. He added that, the consent settlement order estopped the applicant from raising this allegation again and if were true why he did enter into the consent settlement agreement.

He argued in relation to the second condition which relates to the irreparable loss the applicant will suffer that, the applicant's claims do not prove irreparable loss for a person who intentionally defaulted to repay the loan. He stated the first respondent conducted valuation of the suit property which was registered by Chief Government Valuer. He said the valuation report shows the current value of the suit property and is evidenced by annexure Banc ABC 9. He submitted the applicant failed to advance any evidence to show the value of the suit property is different and his allegation of foreclosure has not been pleaded either in the applicant's affidavit or in the applicant's reply to the counter affidavit.

He argued further that, the first respondent is engaged in Banking business including issuing loans, from August 2014 when the applicant and the third respondent defaulted to repay the loan and up to now more than 9 years has passed. He submitted that the first respondent is suffering irreparable loss and if she is restrained further from recovering the outstanding amount, she will suffer more loss. To support his submission, he cited the case of **Agency Cargo International V. Eurafrican Bank (T) Ltd,** HC (DSM) Civil Case No. 44 of 1998. He stated that, the first

respondent stands to suffer more loss if injunction is granted and the applicant claims can be compensated in monetary terms.

With regards to the third condition of balance of convenience, he submitted that the applicant did not prove he will suffer more hardship and mischief than the first respondent. He argued that, when the applicant mortgaged the landed property and executed personal guarantee to secure the loan, he was well aware that upon default on loan repayment the first respondent will have legal right to sale the disputed land to recover the loan amount. He added that the court has held in number of cases that, the court will not grant injunction on the basis of convenience of the applicant. To support this assertion, he cited the case of **Charles D. Msumari and 83 others V. The Director of Tanzania Harbors Authority**, Civil Appeal No. 18 of 1997.

He further stated that, the applicant has failed to establish and prove the pre-conditions for grant of injunction. He stated as the applicant is not willing to repay the loan and there is decree of the court he is not entitled to an injunctive order. He added that the loan must be repaid and there is no shortcut. To support his argument, he referred the court to the case of **The Private Agricultural Sector Support Trust & Another V.**

Kilimanjaro Cooperative Bank Ltd, Consolidated Civil Appeal No. 171 and 172 of 2019 CAT at Arusha (Unreported). He finalized his submission by stating that, the applicant is required to repay the loan amount and prayed the application be dismissed with costs for lack of merit.

In his rejoinder the counsel for the applicant reiterated what he has stated in his submission in chief and added that, the claims by the respondents that the applicant is one of the directors of the third respondent and he executed the Board Resolution to authorize the third defendant to borrow additional loan amount of USD 70,000 from the first respondent is false. He stated annexure ABC 4 is not a Board Resolution but a mere letter. He said the Board Resolution must be a resolution made by a proper meeting of the Company Members or Board of the Directors. The applicant finalized his rejoinder by praying the application be granted with cost.

Having considered the submissions from the counsel for the parties the court has found the issue to determine in this application is whether the laid down conditions for granting an order of temporary injunction has been met by the applicant. As rightly argued by counsel for the parties, the conditions upon which an application for temporary injunction can be granted or

refused are well settled in our jurisdiction. The stated conditions were laid in the case of **Attilio V. Mbowe** (supra) to be as follows: -

(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 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.*

On the first principal of prima facie case, the applicant's duty is to show there is prima facie case with probability of success. The court has found as stated in the case of **Colgate Palmolive Company** (supra) it is not required to determine the merit of the case at this stage of the case, rather it is required to be satisfied the claim is not frivolous or vexatious and there is a serious triable issue. While being guided by the stated position of the law the court has found in order to be able to determine the first condition it is required to examine what is stated in the application before the court and what is pleaded in the pleadings filed in the main suit.

The court has carefully examined the applicant's affidavit and what is stated in the submission filed in the instant application and it has gone through the pleadings of the case pending in the court and what is stated in the counter affidavit and in the written statement of defense of the defendants. The court has found the applicant is challenging the procedure adopted by the first and second applicants in execution of the consent decree entered by the court. The applicant is deposing the adopted procedure is arbitrary, fraudulently, circumventing the due process of execution proceedings and is defeating the terms of their consent judgment. He is also deposing the mortgage created over the suit property was void and non-operative and sale of the suit property is illegal.

The court has found on the other hand, the first and second respondents countered the applicant's claims by stating that, the sale of the suit property was not done fraudulently to defeat the terms of the consent judgment. He stated the sale of the suit property was lawfully done to recover the outstanding amount of the loan. He added that the terms of the consent settlement order and the decree does not relinquish the first respondent's rights over the mortgage deed or facility letter.

That being the position of the matter the court has found as the applicant is alleging what has been stated hereinabove and the stated allegations are vehemently disputed by the defendants, there are serious issues which need to be determine by the court after receiving evidence from the parties. The court has found among the issue need to be determined by the court in the main suit is whether the respondents can execute the consent decree of the court without the court sanction via execution proceedings as ordered in the consent settlement order. Another crucial issue requires determination of the court is whether the consent settlement order was fraudulently procured by the first respondent.

Although the counsel for the respondents submitted there is no triable issue in the suit filed in the court by the applicant and stated the applicant is using the court as a bush to hide while is a defaulter of repaying the loan but the court has found there are triable issues in the matter as stated hereinabove which cannot be determined by the court at this stage of the matter before going to the trial of the main case where the court will receive evidence from the parties to determine the stated issues. The above finding of the court can be bolstered by what was stated in the case of **CPC International Inc V. Zainabu Grain Millers Ltd**, Civil Appeal No. 49 of

1999, (unreported) that, it will be premature to dwell in determining the applicant will win the main suit or will obtain a decree at this stage as the parties have not adduced any evidence to prove or disprove the reliefs the applicant is seeking from the court. The similar position of the law can be seeing in the case of **American Cyanamid Co. V. Ethicon Ltd**, (1975) 1 All ER 504 where it was stated as follows: -

> *"It is not part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration. These are matters to be dealt at trial".*

The court has found the argument by the counsel for the respondents that the settlement order did not relinquish the right of the first respondent over the facility letter and the applicant is bound by the consent settlement order are matters to be determined in the main suit and not in this application. The court has found there is nowhere indicated the applicant is praying the court to introduce new terms in the consent settlement order issued by the court which was prohibited by the case of **Harold Sekiete Levira & Another** (supra) but is seeking for interpretation of the terms stated in the said consent settlement order.

In the light of what has been stated hereinabove and the position of the law stated in the excerpts quoted from the cases cited hereinabove, the court has found the issues disclosed in the affidavit of the applicant and in the suit filed in the court by the applicant have managed to satisfy the court the first condition for granting an order of temporary injunction which is establishment of existence of a prima facie case or triable issue in a case has been established in the applicant's application to the standard required by the law.

Coming to the second condition, the same requires the applicant to establish he will suffer irreparable loss if the order of temporary injunction will not be granted. The court has found that, as stated in the case of **Eliezer Liwali V. Bay View Properties Limited**, Misc. Com. Application No. 110 of 2021, HC Com. Division at DSM (unreported), in determine whether the applicant will suffer irreparable loss the court is required to consider varieties of reasons including the reason to prevent the relief sought from being rendered nugatory and even need to maintain the status quo.

The court has found it was also stated in the case of **T. A. Kaare V. General Manager Mara Cooperative Union,** [1987] TLR 17 that, the court is required to consider whether there is a need to protect either of the

parties from the species of injuries known as irreparable injury before right of the parties is determined. It is also stated in the book titled **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 by way of damages.* ***The injury need not be actual but may be apprehended."*** [Emphasis added].

Under the guidance of the position of the law stated in the above cited authorities the court has found the counsel for the applicant has argued that, if the order of temporary injunction the applicant is seeking from the court will not be granted the applicant will suffer irreparable loss because she will lose the suit property. The court has found the applicant has deposed at paragraph 2 of his affidavit that the value of the suit property is about Tshs. 13,032,900,000/=. The counsel for the applicant submitted that the applicant will suffer irreparable loss if the suit property will be sold as the respondents are about to sell the suit property at a throw away price under valuation report which was done secretly for the purpose of foreclosure which is contrary to Section 125 of the Land Act Cap 113.

The counsel for the applicant submitted further that, the suit property is in a prime area and he has occupied the same for a long time therefore if it is sold by the respondents, he will suffer irreparable loss without possibility of recovering the same. He stated that, sale of the landed property under the current circumstance will cause mental anguish and psychological bothering to the applicant which might cost his life.

The court has found the counsel for the respondents has argued the applicant has not adduced any proof in his affidavit to establish that he will suffer irreparable loss. The court has found the applicant has stated at paragraph 12 of his affidavit that, if the suit property will be sold before hearing and determination of the suit pending in the court he will be subjected into mental anguish and psychological botheration which may cost his life. Therefore, it is not true that the applicant has not adduced evidence to show he will suffer irreparable loss if the suit property will be sold before hearing and determination of the suit pending in the court.

The court has also found that, although the applicant has not stated the amount of damage he will suffer if the suit property will be sold before hearing and determination of the suit pending in the court, but as stated in the case of **Colgate Palmolive Company** (supra) quantification of damage

is not a conclusive factor in determine irreparable loss to be suffered. Other factors such as goodwill, confusion and deception resulting from apparent similarities of the goods involved are equally important factors to be taken into consideration.

Since the position of the law as stated in the case of **Eliezer Liwali** (supra) is very clear that in determine whether the applicant will suffer irreparable loss the court is required to consider varieties of reasons including the reason to prevent the relief sought from being rendered nugatory and even need to maintain the status quo the court has found the applicant has managed to establish the second condition for the order of temporary injunction to be granted in the matter which is irreparable loss to be suffered if the order of temporary injunction sought is not granted.

As for the third condition for granting an order of temporary injunction which is balance of convenience the court has found that, as stated in the book titled **Solonis Law of Injunction** (supra) the court is required to balance and weigh the mischief or inconvenience to be suffered by the parties if the order of temporary injunction sought by the applicant will be issued or withheld. The court has found the counsel for the applicant has argued that, if the order of temporary injunction the applicant is seeking

from this court will be withheld and the suit property is sold the applicant will be more inconvenienced as he will have no any other recourse of recovering the same.

He submitted that the first respondent has recourse to the cash deposit of USD 150,000 deposited to the first respondent by the third respondent and the first respondent can resort to the debenture created by the third respondent in their favour and the guarantee of Mr. Nikolaus Brizos. He stated the first respondent can also institute a case in the court against the third respondent. The court has considered the submission of the counsel for the respondents that the first respondent is doing banking business and if the order is granted the first respondent will be more inconvenienced as the debt has lasted for nine years.

After seeing the recourse stated by the counsel for the applicant which the first respondent can resort if the order is granted, the court has failed to accept his submission that if the order of temporary injunction is granted the first respondent will be more inconvenienced than the applicant if the order is withheld. The court has come to the stated finding after seeing the respondent has not stated the applicant has any other recourse if the suit property will be sold while the first respondent has the above stated

recourses. The above finding moved the court to find the applicant has managed to establish the third condition for being granting an order of temporary injunction that he will be more inconvenienced if the order of temporary injunction is withheld than the inconvenience which the first respondent will suffer if the order is granted.

In the premises, the court has found all the three conditions for an order of temporary injunction to be granted laid in the case of **Attilio V. Mbowe** (supra) have been established in the present application. Consequently, the order of temporary injunction the applicant is seeking from this court is hereby granted. The first and second respondents, their agents, workmen, assignees, servants or any other person deriving title or instructions from them are hereby restrained from proceeding with sale and evicting or alienating the applicant the suit property being Farm No. 2019 situated at Disunyara area, Mlandizi Kibaha with CT No. 53398 measuring 89.834 pending hearing and final determination of the main suit between the parties. Each party to bear his own costs. It is so ordered.

Dated at Dar es Salaam this 9th day of November, 2023

I. Arufani
Judge
09/11/2023

Court:

Ruling delivered today 23rd day of November, 2023 in the presence of Ms. Anna Lugendo, learned advocate for the applicant and in the presence of Mr. Alex Mianga and Mr. Luka Elingaya, learned advocates for the first and second respondents. The ruling has been delivered in the absence of the respondent. Right of appeal to the Court of Appeal is fully explained.

I. Arufani
Judge
09/11/2023