

**IN THE HIGH COURT OF TANZANIA**  
**(LAND DIVISION)**  
**AT DAR ES SALAAM**  
**MISC. LAND APPLICATION NO. 758 OF 2022**  
*(Arising from Land Case No. 258 of 2022)*

**JAPHET MATIKO ..... APPLICANT**

**VERSUS**

**NCBA BANK ..... 1<sup>ST</sup> RESPONDENT**

**BENS AGROSTAR CO. LTD ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

*Date of last Order: 17.01.2023*

*Date of Ruling: 07.02.2023*

**A.Z MGEYEKWA, J**

The applicants' application is brought under a certificate of urgency. The same is made under Order XXXII Rule (1) (a), sections 68 (e) and 95 of Civil Procedure Code Cap.33 [R.E 2019]. The application was accompanied by an

affidavit sworn by Japhet Matiko, the applicant. Opposing the application, the 1<sup>st</sup> respondent filed a counter affidavit sworn by Ms. Lilian Mndeme, Principal Officer of the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent's counsel also opposed the application by filing a counter affidavit deposed by Ms. Neema Macha, learned counsel for the 2<sup>nd</sup> respondent.

When the matter was called for hearing on 20<sup>th</sup> December, 2022, the applicant enlisted the legal service of Mr. Godfrey Hossa, learned counsel also holding brief for Mr. Peter Nyange, learned counsel for the 2<sup>nd</sup> respondent. The 1<sup>st</sup> respondent had the legal service of Mr. Ramadhani Maleta, learned counsel holding brief for Mr. Mbamba, learned counsel.

The application is borne from the fact that there is a pending Land Case No. 258 of 2022 before this court whereas the applicants are praying for an injunctive order to restrain the respondents, their servants, agents, and any person from disposing the disputed landed property with Title No. 186307/85 Plot No. 204 & 206 Block 'B' Mikocheni Area, Kinondoni District within Dar es Salaam pending hearing and determination of the main suit.

The learned counsel for the applicant started to kick the ball rolling. Mr. Hossa submitted that the 1<sup>st</sup> respondent has already engaged an auctioneer

one Nampula Auction Mart and Company Ltd to initiate the process of disposing the landed property Title No. 18630785 Plot No. 204 & 206 Block 'B' Mikocheni Area owned by the applicant in this case. The learned counsel for the applicant went on to submit that the auctioneer served the 2nd respondent with a 14 days' Notice, however, the same expired on 10<sup>th</sup> October, 2022.

The learned counsel for the applicant went on to argue that the applicant's intention is not to delay the administration of justice or to delay the Bank to dispose of the mortgaged landed property but to rescue the landed and mortgaged property from being disposed. He added that the grant of an interim order is crucial because there are important issues to be determined in the pending suit. Fortifying his position, he cited the case of **Atilio v Mbowe** [1969] HCD 284.

Mr. Hossa insisted that there is Land Case No. 258 of 2022 pending before this Court and there are serious triable issues to be determined by this Court. He went on to submit that the 1<sup>st</sup> respondent failed to issue a prior notice to the applicant informing him that the 2<sup>nd</sup> respondent defaulted to pay the loan. He added that the relationship between the applicant and 2<sup>nd</sup>

respondent ended after the expiration of the agreed three years of using the suit landed property and the 2<sup>nd</sup> respondent was supposed to release the title to the applicant and replace it with another title.

Regarding the second principle, irreparable loss Mr. Hossa contended that if this Court will not grant the applicant a temporary injunction then he will suffer irreparable loss since the landed property is the matrimonial property and the applicant did not secure the loan.

Concerning the third principle, on the balance of the convenience between the parties, the learned counsel for the applicant submitted that the applicant will suffer much compared to the 1<sup>st</sup> and 2<sup>nd</sup> respondents since it is a matrimonial asset and the applicant and his family resides in the said house. He stated that in case the injunctive order is not granted then the applicant's family will have nowhere to go. To bolster his submission, Mr. Hossa cited the cases of **Esther Joseph Oguty v Comrade Auction Mart Company Ltd**, Misc. Land Application No. 523 of 2021 and **Chai Bora Ltd v Alvic Builders (T) Ltd & Another**, Civil Application No.133 of 2021.

The learned counsel for the applicant continued to submit that the 1<sup>st</sup> respondent threatened the applicant by engaging an agent called Nampula

Auction Mart & Company Ltd to auction the suit landed property while there is no any contract related to the landed property between the applicant and the 2<sup>nd</sup> respondent.

In conclusion, the learned counsel for the applicant beckoned upon this Court to grant the applicant's application.

Responding, the learned counsel for the 2<sup>nd</sup> respondent confutation was strenuous. He contended that this Court dismissed Misc. Land Application No. 637 of 2022 was filed by Richard Kimwaga Stika on the same facts, same loan, and same transaction. He added that the difference in the instant application from the one dismissed is the Plot number and the names of the applicants. He went on to submit that the loan was secured by two plots; Plot No. 993 Kunduchi area, Dar es Salaam belonging to Richard Kimwaga Stika, and Plot No. 204 and 206, Block B No. 186307/86 Mkocheni Area, Dar es salaam belonging to Japhet Matiko.

Mr. Mbamba contended that both properties secured the same loan on the same transaction, facts, and grounds being similar to those involving the former application. He added that this Court cannot make a different decision to the one made in Misc. Land Application No. 637 of 2022.

The learned counsel for the 1<sup>st</sup> respondent continued to submit that the conditions for issuance of injunction were promulgated in a myriad of cases, such as the case of **Abdi Ally Salehe v Asac Care Unit Ltd & others**, Civil Revision No. 3 of 2012 (unreported). Mr. Mbamba also cited the case of **Atilio Mbowe** (supra).

Regarding the principles of temporary injunction, Mr. Mbamba contended that in a prima facie case, the applicant must show the existence of a genuine claim of the contest. The counsel for the 1<sup>st</sup> respondent argued that the applicant in his affidavit admits to have guaranteed the loan. He also admits that the loan was not repaid. To support his submission he referred this Court to paragraphs 4, 5, and 7 of the applicant's affidavit. He added that the applicant in his Complaint admitted liability. To buttress his submission, he referred this Court to paragraphs 6, 8, 9, and 10 of the applicant's affidavit.

Mr. Mbamba contended that in the case of **Abdi Ally Salehe** (supra), the Court listed other factors such as delay in filing the application, acquiescence, and lack of clean hands which need to be considered before granting an injunctive order. Mr. Mbamba continued to argue that the applicant has failed

to prove the existence of a prima facie case hence the remaining two conditions for issuance of injunction; balance of convenience and irreparable injury cannot by themselves be taken into account.

On the strength of the above submission, the learned counsel for the 1<sup>st</sup> respondent urged this court to dismiss the application with costs.

The 2<sup>nd</sup> respondent in his written submission had no objection to the application.

Having heard the submissions of both learned counsels for the applicant and the respondents. In determining this matter, I will be guided by the principle governing a temporary injunction. The Courts have tested the above principles in various cases such notable cases include; **Atilio v Mbowe** (1969) HCD 284. **Agency Cargo International v Eurafrican Bank (T)** (HC) DSM, Civil Case No. 44 of 1998 (unreported), and **Giella v Cassama Brown & Co. Ltd** (1973) to mention just a few.

On the first condition, prima facie case, the applicants in paragraphs of the affidavit alleged that there is a triable issue based on Power of Attorney which was granted by the applicants to the 1<sup>st</sup> respondent, the Director of the 1<sup>st</sup> respondent to act on their behalf to attend several formalities of the

Government Department and sign the documents, however, it is alleged that the 1<sup>st</sup> and 2<sup>nd</sup> respondent used the said Power of Attorney to secure a mortgage with the Bank. The learned counsel for the applicant claimed that the said Power of Attorney was used in obtaining loan facilities for the 3<sup>rd</sup> respondent and they enhanced the loan without the consent of the applicant. In my view, I find that there is a dispute which attracts the attention of this Court. Thus, the first condition is established.

On the second principle, the applicants who claim to be on the brink of suffering irreparable loss must not only establish that they will suffer irreparable loss but are duty-bound to demonstrate that, the kind of injury to be suffered cannot be atoned through monetary means. It is noteworthy that the balance of convenience should be parallel and tilt in the favour of the applicants. The applicant in his affidavit specifically in paragraphs 6, 7 and 8 has explained in length that in case this court will not grant the temporary injunction then he and his family will suffer irreparable loss.

There is no dispute that in case the Bank will sale his landed property, the applicant will suffer irreparable loss since the Certificate of Title is in his name, and he alleged that the suit landed property is a matrimonial house.



I have also consider the fact that in case the Bank will auction the applicant's property then the loss will not be compared to compensation. I believe money substitute is not the same as a physical house. In the case of **Deusdedit Kisisiwe v Protaz B. Bilauri**, Civil Application No. 13 of 2001 (unreported) the Court of Appeal of Tanzania held that:-

*"The attachment and sale of immovable property will invariably, cause irreparable injury. Admittedly, compensation could be ordered should the appeal succeed but money substitute is not the same as the physical house. That difference between the physical house and the money equivalent, in my opinion, constitutes irreparable injury."*

Applying the above authority in the matter at hand, it is vivid that, the second condition is established.

Regarding the third principle, on the balance of convenience. The facts in the application at hand show that there is no dispute that the applicant in 2018 entered into an agreement with the 2<sup>nd</sup> respondent whereas the applicant was a guarantor, guarantying of a Right of Occupancy under CT No. 186207/85 and the memorandum of understanding was of three years from 16<sup>th</sup> March 2018 to 16<sup>th</sup> March 2021. The applicant mortgaged his

landed property as collateral in favour of NCBA in respect of the borrower to secure loan facilities to the tune of Tshs. 400,000,000/=. However, the 2<sup>nd</sup> respondent defaulted to service his loan as a result the Bank had no other option than to auction the suit-landed property.

I have read the applicant's affidavit and noted that the applicant did not show if he will suffer a greater loss compared to the 1<sup>st</sup> respondent. The applicant complained that he will suffer irreparable loss because the suit property is a matrimonial house without proving that he will suffer greater loss compared to the 1<sup>st</sup> respondent. Thus, it is my considered view that from the facts quantified in the affidavit, it is hard to gauge that the applicant has managed to present strong evidence to prove that he will suffer more compared to the 1<sup>st</sup> respondent.

Consequently, I have found that if the injunction order will be granted, the Bank stands to suffer a lot of inconvenience compared to the applicant. I am saying so because the outstanding loan balance is part of the Banks capital. It worth noting that the Bank's business depends on repayment of the loan for its business to prosper, such that repayment of the loans must be strictly adhered so as to protect the bank's business which contribute much to the

individual and nation's development. In the case of **Zak Import & Export Company Limited v Crown Finance & Leasing Ltd**, Civil Case No. 27 of 2000 HC at DSM, the Court held that:

*"The creditors must be protected from borrowers who are not committed to their obligations in paying the loaned money."*

*[Emphasis added].*

Guided by the above findings, it is clear that the 2<sup>nd</sup> respondent is required to service his loan, failure to do so will render the Bank unprofitable and might be a candidate for bankruptcy. See the case of **Mohamed Iqbal Haji & Others v Zedem Investments Limited**, Misc. Land Application No.05 of 2020.

Based on the above reasons, I am hesitant to suggest that the balance of convenience is in favour of the applicant. The law requires the three conditions of temporary injunction must all be met, meeting one or two of the conditions will not be sufficient for the purpose of the court exercising its discretion to grant an injunction. See the case of **Christopher P. Chale v Commercial Bank of Africa**, Misc. Civil Application No.635 of 2017 (unreported).

In the upshot, I find that the applicant has failed to adduce adduced sufficient grounds to warrant this Court to invoke its discretionary powers of granting injunction, therefore I proceed to dismiss the instant application without costs.

Order accordingly.

DATED at Dar es Salaam this 7<sup>th</sup> February, 2023.



  
A.Z.MGEYEKWA

**JUDGE**

07.02.2023

Ruling delivered on 7<sup>th</sup> February, 2023 in the presence of Mr. Godfrey Hossa, counsel for the applicant also holding brief for Mr. Samson Mbamba, counsel for the 1<sup>st</sup> respondent and Peter Nyangi, counsel for the 2<sup>nd</sup> respondent.



  
A.Z.MGEYEKWA

**JUDGE**

07.02.2023