

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

MISC. LAND APPLICATION NO. 10 OF 2023

(Arising from the Land Case No. 3 of 2023)

ALIPO BERNARD CHIKOKO 1ST APPLICANT
MOSES GODFREY MWAKALONGE 2ND APPLICANT
HONESTI FELISIAN BAIMU 3RD APPLICANT
FRANK JORAM ALUTE 4TH APPLICANT
DORIS ANSIBERT MUTALEMWA 5TH APPLICANT
ROZALIA ZENO 6TH APPLICANT
DIANA RICHARD AMANI 7TH APPLICANT
BEATRICE MHINA 8TH APPLICANT
PROJEST MASSAWE 9TH APPLICANT
EMMANUEL VITALS 10TH APPLICANT
FATMA RAMADHAN 11TH APPLICANT

VERSUS

AKIBA COMMERCIAL BANK PLC RESPONDENT

RULING

Date of last Order: 08.02.2023

Date of Ruling: 09.02.2023

A.Z. MGEYEKWA, J

The applicants' Application is brought under section 2 (2) of the Judicature and Application of Laws Act, Cap. 358 [R.E 2019], sections 68 (c) & 95 of the Civil Procedure Code, Cap. 33 [R.E 2019], The Application is premised on the grounds appearing on the Chamber Summons together with the supporting affidavit of Mr. Robert Kadaso Mageni, learned counsel for the applicant sworn on 5th January, 2023 which he averred that the applicants entered into a staff housing loan, they were retrenched from employment. They filed a labour matter at the High Court - Labour Division but they lost their case. Aggrieved by the decision of the High Court - Labour Division they decided to appeal to Court of Appeal of Tanzania. They claim that the respondent has threatened to sell and auction their properties, hence they filed the instant Application for Temporary Injunction.

The Application is contested. The respondent filed the counter affidavit of Charles Kamoto, Head of Credit Management for the respondent sworn on 31st January, 2023 in which she averred that the applicants' claims to the main suit are a mere afterthought, they want to frustrate the respondents' efforts in recovering of the loan housing facilities issued to the applicants.

When the matter was called for hearing on 8th December, 2022, the applicant enlisted the legal service of Mr. Robert Mageni, learned counsel, the respondent had the legal service of Ms. Catherine Tibasana, learned counsel.

The Application is borne from the fact that there is a pending Land Case No. 3 of

2023 before this court whereas the applicant is praying for an injunctive order to restrain the respondent and its agents, and servants from ordering the sale or auctioning of the applicants' house until the determination of the main suit interparties.

The learned counsel for the applicant started to kick the ball rolling. Mr. Mageni submitted that in the Application for Temporary Injunction, the principles have been outlined in a famous case of **Atilio v Mbowe** (1969) HCD 286 and **Salimu Mbaruku Mohamedi T/A Maarifa English Medium Pre & Primary School v Registered Trustees of Islamic Culture School**, Misc, Land Application No. 633 of 2021.

Submitting on the first principle; whether there is an arguable case, the learned counsel submitted that in paragraphs 9 & 10 of his affidavit, he has stated that there is a pending Land Case No. 3 of 2023 relating to the staff loan contract. The counsel went on to submit that the applicants lodged a Civil Appeal No. 289 of 2021 at the Court of the Appeal of Tanzania including the same parties and the dispute is related to the contract. Therefore, in his view, the applicants have established a *prima facie* case

As to the second principle of irreparable loss, the learned counsel for the applicant contended that in case this Court will not grant an injunctive order then the applicants will suffer irreparable loss since the loans were related to their dwelling houses and parties are residing in the said houses. He added that the applicants

will be homeless and their children will be forced to drop from their schools. To support his submission he referred this Court to paragraphs 7 and 8 of his affidavit. He went on to submit that the Suma JKT and Akiba Commercial Bank threatens the applicants to dispose of the said suit properties.

Concerning the third principle, the balance of convenience between the parties, Mr. Mageni submitted that the applicants will suffer more compared to the respondent since the respondent has the applicants' Certificate of Titles and other documents, thus, he can wait until the determination of the main suit.

In conclusion, the learned counsel for the applicants urged this Court to grant the applicants' Application pending the determination of the main suit.

In response thereto, the learned counsel for the respondent's confutation was strenuous. Ms. Catherine adopted his counter affidavit to form part of her submission she contended that the applicants are supposed to establish the three principles stipulated in the famous case of **Atilio v Mbove** (supra).

Starting with the first principle of *prima facie* case, Ms. Catherine contended that the counsel for the applicants cited the case of Civil Appeal No. 289 of 2021 which is pending before the Court of Appeal. But the respondent in paragraph 12 of the counter affidavit has stated that the Application for an injunction has nothing to do with Civil Appeal No. 289 of 2021 since the appeal is against the decision of labour

revision. She added that the said appeal does not concern with the recovery measures taken by the respondent. She valiantly argued that the applicants' main suit is an afterthought and the applicants want to frustrate the efforts of the respondents to recover the outstanding loan by selling the suit properties.

Arguing on the second principle; irreparable loss, the applicant's counsel contended that there is no irreparable loss on the party of the applicants because in their affidavit the applicants have failed to state the kind of loss they will suffer and there is no any proof of their allegations.

Regarding the third principle balance of inconveniences, Ms. Catherine argued that it is the respondent who is suffering and in case this Court will grant the injunctive order, the respondent will suffer more compared to the applicants. To support her submission, she cited the cases of **Christopher P. Chale v Commercial Bank of Africa**, Misc. Civil Application No 653 of 2017, **Agency Cargo International v Eurafrikan Bank (T) Ltd**, Civil Case No. 44 of 1998, and **Eva Nicolao Moshi v Lucy Moses Shayo**, Misc Land Application No. 109 of 2021. The learned counsel for the respondent continued to submit that the Bank must recover its loan to avoid bankruptcy.

On the strength of the above submission, the learned counsel for the respondent urged this court to dismiss the Application with costs.

In his rejoinder, the applicants' counsel reiterated his submission in chief. Stressing on the point of a Civil Appeal pending before the Court of Appeal, he stated that they have cited the said case to substantiate their submission. Mr. Mageni insisted that the applicants will suffer more losses compared to the respondent since the respondent has advanced a loan to the applicants to construct dwelling houses. He added that the right to life is paramount. Ending Mr. Mageni urged this Court to grant the applicants' Application.

In deciding whether to grant the temporary injunction sought after by the applicants, I wish to refer to and rely on the precedent set out in the case of **Barretto Hauliers (T) Ltd v Joseph E. Mwanyika & Another**, Misc Civil Application No. 253 of 2016, in which the conditions for the grant of an interlocutory injunction were settled as follows:

- (i) There must be a serious question to be tried on the facts alleged, and a probability that the plaintiff will be entitled to the reliefs prayed;*
- (ii) 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*
- (Hi) That on the balance, there will be greater hardship and mischief suffered by the plaintiff from the withholding of the injunction that will be suffered by the defendant from the granting of it.*

In determining whether the applicants made out a *prima facie* case with a probability of success? In the case of **MRAO v First American Bank of Kenya Limited & 2**

Others (2003) KLR 125, a *prima facie* case was described as follows:-

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

Looking at the facts of the case, the applicants have demonstrated their interest in the suit properties. The applicants claimed that they were employed by the respondent, hence, retrenched from employment. In paragraph 7 of the learned counsel’s affidavit, Mr. Mageni, claimed that the respondent threaten the applicants to auction their suit mortgaged properties in order to recover the staff housing loans which were deducted from the applicants’ salaries. Again, in paragraph 9 of the applicant’s counsel affidavit, Mr. Mageni, stated that the respondent’s action contravenes the staff housing loans contract which requires deduction. Reading the applicants’ counsel affidavit, I have noted that the circumstances of the matter at hand need to be determined based on its circumstances whereas, I have noted that there is no arguable ground before this court since the matter originated from a labour dispute and the issue of staff loans housing contract was determined by the labour court.

Moreover, reading the applicants’ counsel affidavit specifically paragraph 10, the learned counsel urged this Court to treat the matter as of urgency for the reason

that the applicants are frustrated during this period of appeal to the Court of Appeal, these phrasings clearly show that the applicants are turning this Court as their concealing shade knowing that they have lodged a case before the Court of Appeal of Tanzania against the decision of the High Court - Labour Division. The applicants were required to exhaust proper remedies, instead of applying for a temporary injunction. Consequently, I find that the applicants have failed to establish a *prima facie* case. In the absence of a serious triable issue, an injunction cannot be issued. Based on the above findings, it is clear that the first principle is not established, the applicants failed to satisfy the court on the three requisite conditions set out in the case of **Atilio Mbowe** (supra) and **Barretto Haulliers (T) Ltd** (supra). It is trite law that all three conditions must be met, in case one condition is not met then it is insufficient for the purpose of the court exercising its discretion to grant an injunctive order. See the case of **Christopher P. Chale v Commercial Bank of Africa**, Misc. Civil Application No.635 of 2017 (unreported). Hon Mwandambo, J (as he then was) held that:-

"it is also the law that the conditions set out must all be met and so meeting one or two of the conditions will not be sufficient for the purpose of the court exercising its discretion to grant an injunction."

Arising from the above reasons, I find that the applicants have not reached the threshold for the grant of a temporary injunction. I, therefore, dismiss this

Application. Costs shall be in the cause.

Order accordingly.

DATED at Dar es Salaam this 9th February, 2023.



A.Z.MGEYEKWA *h*iSS® | a **JUDGE**

09.02.2023

Ruling delivered on 9th February, 2023 via video conferencing whereas Mr.

Robert Mageni, learned counsel for the applicants was remotely present.



A.Z.MG EYEKWA

JUDGE

09.02.2023