

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 02 OF 2023**

**(originating from Land Case No. 01 of 2023**

**ERIC TALEMWA LUGELEKA ..... APPLICANT**

**VERSUS**

**ECO BANK TANZANIA LIMITED ..... 1<sup>st</sup> RESPONDENT**

**STEAM GENERATION RECOVERIES ..... 2<sup>ND</sup> RESPONDENT**

**NOELAH DAMAS LUGONGO ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

*Date of last Order: 10.02.2023*

*Date of Ruling: 15.02.2023*

**A.Z MGEYEKWA, J**

The applicant's application is brought under Order XXXVII Rule 1 (a), sections 68 (e), and section 95 of Civil Procedure Code Cap.33 [R.E 2019]

The application was accompanied by an affidavit sworn by Eric Talemwa

Lugeleka, the applicant. Opposing the application, respondents filed a joint counter-affidavit deposed by Hope Liana, Principal Officer of the 1st respondent authorized to swear on behalf of all respondents.

The application is borne from the fact that the applicant is pleading this court to issue interim orders restraining the respondents from evicting the applicant from his matrimonial house located at Plot No. 2058, Block 'H' with CT No. 110584, Mbezi Beach, Kinondoni Municipality within Dar es Salaam City.

When the application was called for hearing on 25<sup>th</sup> January, 2023 the applicant had the legal service of Mr. Nehemiah Nkoka, learned counsel, and respondents had the legal service of Ms. Hellan Ignas and Reginald Martin, learned counsels.

In his oral submission, the learned counsel for the applicant urged this court to adopt the applicant's affidavit and form part of his submission. Mr. Nehemiah submitted that the applicant's application is to move this Court to grant an injunctive order. Mr. Nehemiah submitted that it is trite law that for the court to issue an injunctive order, the applicant must meet the three conditions; the applicant must establish a *prima facie* case, the applicant

must show that he/she will suffer irreparable loss which cannot be compensated and balance of inconvenience. He stated that the said conditions were propounded in the case of **Atilio V Mbowe** [1969] HCD 284.

Arguing on the first principle, whether there is a *prima facie* case, Mr. Nehemiah stated that there is no dispute that the applicant has lodged a Land case No. 1 of 2023 before this Court pending the determination of the main case. Mr. Nehemia submitted that the applicant is alleging that there was an agreement between him and the 1<sup>st</sup> respondent to repay the loan. He went on to submit that the applicant wants to redeem his property after noting that it was mortgaged and in doing so the applicant deposited money. To bolster his submission he referred this Court to paragraphs 6, 7, and 13 of the applicant's affidavit and the 1<sup>st</sup> Respondent's counter affidavit specifically paragraphs 7 and 8. He also referred this Court to annexure ECO4 dated 21<sup>st</sup> February, 2022.

The learned counsel for the applicant went on to submit that the applicant has established a *prima facie* case in paragraph 11 of his affidavit and the 1<sup>st</sup> and 2<sup>nd</sup> respondents agree that the applicant was served with a Notice to vacate the matrimonial premises. He claimed that the said suit premises

were sold to the 3<sup>rd</sup> respondent employee who was not allowed to participate in the said auction. He insisted that there is a need for this Court to determine the rights of the parties.

On the second principle, the learned counsel for the applicant submitted that the applicant in his affidavit has proved that he stands to suffer more hardship. To buttress his contention he referred this court to paragraph 5 of the applicant's affidavit where the applicant is claiming the applicant is residing in the suit premises. he went on to submit that in case this Court will not grant the application, then the applicant and his family will be homeless and suffer humiliation and physical torture.

As to the third condition, Mr. Nehemiah argued that on the balance of convenience, the applicant stands to suffer more if the injunction is refused because he has spent money in redeeming the suit premises and they render homeless. He went on to submit that the respondents will not suffer any loss because they are not in possession of the suit premises. To support his submissions he cited the case of **Esther Joseph Ogutu v Equity Bank and Another**, Misc. Land Application No. 523 of 2021.

On the strength of the above submission, the learned counsel for the applicant beckoned upon this court to grant the application.

Responding, the learned counsel for the respondents' confutation was strenuous. He prayed this court to adopt the contents of the respondents' counter-affidavits to form part of his submission. He contended that the applicant was required to move this court to grant the temporary injunction based on the three conditions. To bolster his submission, he referred this court to the case of **Atilio** (supra).

On the first condition, whether there is a triable issue, Mr. Martin strongly disputed the submission made by the applicant's counsel. He stated that there is no any agreement between the 1<sup>st</sup> respondent and the applicant and there was no any agreement to settle the claimed amount. He referred this Court to the applicant's pleadings. He added that there is no any letter, email, or any sort of correspondence showing the alleged agreement. He lamented that the learned counsel for the applicant in his submission relied on the counter affidavit instead of basing on his own affidavit. Mr. Martin argued that there is no proof that the debts were cleared to justify the applicant's allegations.

On the second condition, Mr. Martin disputed the submission made by the counsel for the applicant by the mere fact that the applicant still resides in

the suit property thus, in his view the same does not justify that he will suffer irreparable loss. He stressed that the property is no longer in the name of the applicant. To bolster his submission he referred this Court to paragraph 3 of his affidavit; the property has been auctioned and what is remained is for the applicant to vacate the premises. He contended that since he did not challenge the eviction, it shows that he will not suffer irreparable loss.

On the last condition, the learned counsel for the respondents submitted that on the balance of inconvenience, it is a well-known principle that Banks have to receive the loans advanced to the borrowers. Fortifying his submission he cited the cases of **Rosemary Malinzi v Cargo Star Ltd & 3 Others**, Misc. Land Application No. 679 of 2020 and **Christopher Chale V Commercial Bank of Africa**, Civil Application No. 635 of 2017. It was his submission that in case this Court will grant the applicant's application then the Bank will not only be bankrupt but the bonafide purchasers will incur an irreparable loss.

On the strength of the above submission, Mr. Martin insisted that the applicant has failed to meet the condition set in Temporary Injunction. He urged this Court to dismiss the application with costs.

In his rejoinder, the counsel for the applicant reiterated his submission in chief. He stated they did not submit a lot on the affidavit because the same is adopted by this Court. The applicant's counsel submitted that there was an oral agreement. To support his submission he referred this Court to paragraphs 4 and 5 of the affidavit. Mr. Nehemiah contended that it is true that the applicant stands to suffer since his property was flatulently transferred. He distinguished the cited two authorities cited by the counsel for the respondent as the same is irrelevant to the case at hand because the applicant has already paid Tshs. 150,000,000 to the 1<sup>st</sup> respondent.

Ending, Mr. Nehemiah urged this Court to grant the application in order to protect the rights of the parties, and in his view, the respondent will not be prejudiced anyhow if this Court will grant an injunctive order.

Having heard the submissions of both learned counsels for the applicant and the respondents for and against the application. In determining this application, I will be guided by the three principles governing a temporary injunction; *the existence of a prima facie case*, meaning thereby that there is a serious case to be tried, in the case, and on the facts, there is a probability of being entitled to relief. The irreparable injury likely to be suffered, i.e. the

Courts interference, is necessary to protect him from the injury which is irreparably, and the balance of convenience, i.e. the comparative mischief or inconvenience likely to be caused by withholding injunction will be greater than by granting it.

The Courts have tested the above principles in various cases such notable cases include; **Atilio v Mbowe** (1969) HCD 284, **Tanzania Cotton Marketing Board Cogecat Cotton (COSA)** [1997] TLR 63 and **State of Assam v M/S M.S Associates Air** [1994] GAU 105 and **Agency Cargo International v Eurafrican Bank (T)** (HC) DSM, Civil Case No. 44 of 1998 (unreported).

Relating the facts before me and the said principle I should take note that at this point I do not have the full evidence before me. The standard of proof required would be somehow below that which is generally required upon full trial. For example, whether the applicant is a lawful owner of the suit landed property and whether the applicant started to pay the outstanding amount.

On the first condition, the applicant in paragraphs 2 and 3 of his affidavit alleged that the mortgaged suit premises is the matrimonial property and the Directors of UNICREDICT MICROFINANCE LIMITED (Paul Edward



Shayo and Lusekelo Mbwele) fraudulently transferred the suit property to their names without the applicant's knowledge. In my considered view, there is a triable issue to be determined by this Court as to whether the applicants were fraudulently caused to sign the said document. Therefore, in my view as long as there is a dispute then this first condition is established.

On the second principle, the applicant who claims 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. The applicant in paragraphs 6 and 7 stated that he started to repay the debt. The applicant claimed that he paid the 2<sup>nd</sup> respondent Tshs. 10,000,000/= as auctioneer's costs then he paid Tshs. 3,000,000/= and again he paid Tshs. 7,000,000/=.

In total the applicant deposited Tshs. 150,000,000/= to the 1<sup>st</sup> respondent in consideration of the repayment agreement between them. To support his submission he attached a payment slip and a copy of the email. In my considered view, I find that the applicant has proved that he paid part of the debt and in case the Bank will auction their property then the applicant will incur more loss compared to the defendants and the loss incurred 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.

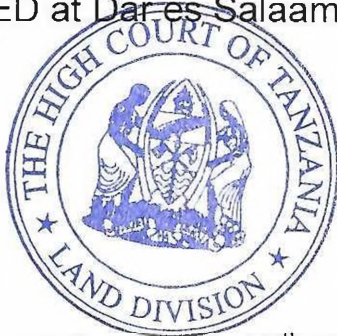
Concerning the third principle, on the balance of convenience. The facts in the application at hand show that the applicant will suffer compared to the defendants since he has repaid part of the debt and the money used to pay the debt was part of his business capital. In my considered view that in case the Bank will win the case they will be able to recover their debts with interest. Therefore, I fully subscribe to the applicant's learned counsel that the applicants will suffer more hardship compared to the respondent.

Having weighed the different probabilities in this application, it appears that the applicant has met all three conditions for temporary injunction.

In sum, I grant the application for temporary injunction pending the determination of the main case on merit. No order as to costs.

Order accordingly.

DATED at Dar es Salaam this 15<sup>th</sup> February, 2023.



  
A.Z.MGEYEKWA

**JUDGE**

15.02.2023

Ruling delivered on 15<sup>th</sup> February, 2023 in the presence of Ms. Hellan Ignas, counsel for the respondent.



  
A.Z.MGEYEKWA

**JUDGE**

15.02.2023