

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND CASE APPLICATION NO. 457 OF 2022**

BETWEEN

ABBAS AWES OMAR..... APPLICANT

VERSUS

**DEZO CIVIL CONTRACTORS CO. LTD..... RESPONDENT
DIAMOND TRUST BANK TANZANIA LTD.....RESPONDENT**

RULING

Date of last Order: 16/2/2023

Date of Ruling: 24/02/2023

A. MSAFIRI, J.

The applicant has brought this application under Order XXXVII Rules 1 (a) and 4 of the Civil Procedure Code Cap. 33 R.E 2019.

The applicant's main prayer is for an injunction order to restrain the respondents from selling or disposing of his house apartments on 1st, 3rd and 4th floors on Plot No. 31 Block 61 Kariakoo Area, Dar es Salaam pending the determination of the main suit. *Alle*

The application is supported by the affidavit of the applicant himself and is strongly resisted by the 2nd respondent through a counter affidavit deponed by Joyceline Kaika, a Principal Officer of the 2nd respondent. The 1st respondent is not objecting the application so they didn't file a counter affidavit.

The applicant was represented by Mr. Juma Nassoro, learned advocate, while Mr. Geoffrey Lugomo, learned advocate appeared for the 1st respondent and Mr. Kefas Mayenje appeared for the 2nd respondent.

The hearing of the applicant was oral. Having heard the submissions from contesting parties, I have gathered that there is no dispute between the contesting parties that the suit property was mortgaged by the 1st respondent to the 2nd respondent, originally with the consent of the applicant who is the owner of the said suit property.

Also, the counsels for the contesting parties also agrees that, it is trite law that in every application for temporary injunction, the court's power to grant injunction is predicated upon the applicant meeting the three conditions set out in the landmark case of **Atilio vs. Mbowe**, HCD (1969) *Atle.*

and this principle has been reiterated in numerous cases both by the Court of Appeal and this Court.

The pertinent question is whether the applicant has managed to meet the said three necessary conditions.

Mr. Nassoro, submitting in support of the application averred that all three conditions have been met by the applicant. Meanwhile, the counsel for the 2nd respondent, Mr. Mayenje contended that the applicant has failed to meet the three conditions so the application should not be granted.

The first condition is that; on the facts alleged, there must be a serious question to be tried by the court or a prima facie case.


In his affidavit, the applicant stated that, he consented to guarantee the 2nd respondent's loan to the 1st respondent worth TZS 600 million and thereby the applicant pledges the suit property to secure the said credit facility.

Mr. Nassoro submitted that there was a dispute that the loan which was consented by the applicant was renewed several times by the respondents without consent of the applicant as guarantor. *Alle.*

As per paragraph 8 of the affidavit, it is claimed by the applicant that since 2016, the 2nd respondent has been renewing the loan by enhancing credit facility to the 1st respondent. And that the enhanced loan has not been fully repaid, and now the 2nd respondent intends to dispose the applicant's suit property by auction. The applicant maintains that as the guarantor, he was unaware of the renewal/enhancement of the loan.

Mr. Nassoro submitted that the issue whether the applicant consented to the loan enhancement or not, is the one serious triable issue which has to be determined during the main case.

Mr. Mayenje, contended that there is no any triable issue which establishes prima facie case between the contesting parties. He submitted that as per paragraph 2 (ii) of the counter affidavit of the 2nd respondent, with attached annexure (credit facility letter), the renewed loan was consented by the applicant himself. That the applicant who was among the guarantors, consented for the renewal when he signed a credit facility in 2016 and 2017.

According to Mr. Mayenje, the applicant knew/was aware of renewal and enhancement of the loan. 

Looking at the reliefs prayed by the applicant (plaintiff) in his plaint in the main suit, the major one is a declaratory order that the renewal and mortgage of the plaintiff's suit property for enhancing overdraft facility from 2016 onward, by the 2nd defendant (2nd respondent) to the 1st defendant (1st respondent) is illegal, null and void.

In the case of **Abla Estate Developers & Agency vs KCB Bank Tanzania Ltd**, Misc. Land Application No. 604 of 2017, High Court Land Division, Dar es Salaam (Unreported), this Court observed thus;

"In the requirement to show prima facie case or serious issue, it is now settled that a prima facie case does not necessarily mean that the plaintiff /applicant will win the case or obtain a decree against the defendant. It means that he/she has a cause of action and the suit against the defendant is not frivolous or vexatious".

Guided by that principle, it is my view that there is a bona fide contest between the parties. The applicant is contending that he never consented for renewal or enhancement of overdraft facility by the 2nd respondent to the 1st respondent, and that, he was unaware of the said enhancement. The 2nd *Allo.*

respondent also contends that the applicant was aware and actually he consented the renewal of the loan (credit enhancement). This is a triable issue to be determined by the trial court in the main case. I find that the applicant has met the first condition.

The second condition is where the applicant has to establish that he stands to suffer irreparable loss, not capable of being atoned for by way of damages.

In his affidavit, the applicant deponed that unless the 2nd respondent and its employees or agents are restrained from disposing or auctioning the suit property, he will suffer irreparable loss.

In his submission before the Court, the counsel for the applicant averred that if the injunction order is not granted, the property will be sold and the applicant will have lost his valuable property. He argued further that losing ownership of property cannot be compensated.

Mr. Mayenje for the 2nd respondent argued that it is the 2nd respondent, the Bank which is the one who is suffering. He stated further that, the life blood of a bank is lending business and the loan should be repaid timely so as the bank business to thrive. He pointed that, since the applicant

Atle

consented to the loan and enhancement, there is no irreparable loss. To cement his arguments, he cited the case of **General Tyre E.A. Ltd vs. H.C.B.C Bank plc** [2006] TLR 60.

In the case of **Abdi Ally Salehe vs. Assac Care Unit Limited & 2 others**, Civil Revision No. 3 of 2012, CAT at Dar es Salaam, the Court of Appeal determining on the three conditions mandatory in granting an injunction, it observed as follows;

".....the applicant is expected to show that, unless the court intervenes by way of injunction, his position will in some way be changed for the worse, that he will suffer damage as a consequence or omission, provided that the threatened damage is serious, not trivial or minor, illusory, insignificant or technical only."

Basing on that principle, I am of the view that the applicant is at the risk of losing the ownership of the suit premises before the issue on whether he consented for loan renewal/enhancement or not has yet to be determined by the Court. I am in agreement that if the 2nd respondent will dispose the *Ally-*

suit property by auction as he intends, the applicant will lose ownership of the property which cannot be compensated or restored.

Basing on the principle set in the cited case of **Ally Salehe (supra)**, this is a serious damage and not a trivial one. I also find that the second condition has been met.

On the third condition on the question of balance of convenience, it means that the Court have to decide whether the applicant/plaintiff will suffer greater injury if the injunction is refused than the respondent (defendant) will suffer if it is granted.

Arguing on the third condition, Mr. Nassoro for the applicant argued that, the order for injunction has to be issued to pave way for determination of suit, otherwise the applicant will be inconvenienced as his property will be auctioned. He argued further that, the respondents will lose nothing as at the end of the trial if the applicant lose, the 2nd respondent will lose nothing as it will proceed to dispose of the suit property.

Mr. Mayenje for the 2nd respondents argued vehemently that this application is creating inconveniences to the Bank from exercising its rights. *Alle*

That the applicant has consented and guaranteed collateral of his property to a loan.

He referred this Court to the case of **Lukolo Company Limited vs. Bank of Africa**, Misc. Civil Application No. 494 of 2020, HC Dar es Salaam at page 4.

Having heard and considered the submissions by parties and the evidence in the pleadings, I am of the view that the applicant has managed to establish that he will suffer greater injury if the injunction is refused.

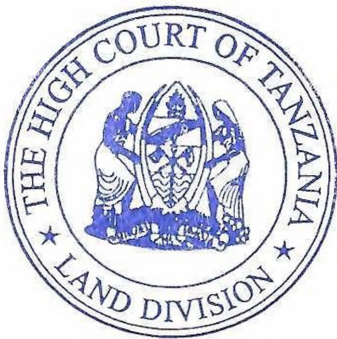
As I have found earlier, the applicant is at risk of losing the ownership of his property before the determination of the main case if this application is not granted. The suffering of the Bank is minimal as compared to the applicant. The Bank's business may rely on other banking business pending the determination of the main suit where, if the Bank succeed, then it may proceed to dispose the suit property.


Meanwhile, if the application is refused, then the suit property will be sold by auction and it will be difficult for the applicant to regain the ownership when the same will be in the hands of third party bonafide purchaser even *Atle*.

if the applicant might succeed in the main case. I find that the applicant has met the third condition.

In the upshot, the application is hereby granted. An order for temporary injunction is hereby entered against the respondents as prayed pending the hearing and determination of the main suit. Costs in the main cause.

It is so ordered.




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A. MSAFIRI
JUDGE
24/02/2023