

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

MISC. LAND APPLICATION NO. 468 OF 2023

(Arising from Land Case No. 242 of 2023)

SOBAI ASANJA LIMITED.....APPLICANT (PURCHASER)

VERSUS

I & M BANK (T) LIMITED.....1ST RESPONDENT (LENDER)

DR.ONESMO MICHAEL KYAUKE.....2ND RESPONDENT

JANGID PLAZA LIMITED.....3RD RESPONDENT (DEVELOPER)

RULING

13/03/2024 & 23/04/2024

GWAE, J

The applicant, Sobai Asanja Limited through his chambers summons is praying for the following reliefs;-

1. An order granting temporary injunction against the 1st and 2nd respondent, agent, servants and or workmen from selling twenty nine (29) mortgaged properties/Apartments of the applicant situated at Upanga, Jangid Plaza, Amani Gomvu and Jangwani Msimbazi in Dar es salaam Region
2. Temporary injunction restraining the 2nd respondent from enforcing the invitation for submission of bids to purchase

properties by 31st day of July 2023 pending hearing and determination of the debt suit

3. Any other order (s) or / and relief (s) the Court may deem fit and just to grant

In moving the court, the applicant has brought this application under Order XXXVII Rule (1) and (a), section 68 & 95 of the Civil Procedure Code, Cap 33, Revised Edition, 2018 together with any other enabling provisions of the laws. The Application is supported by an Affidavit affirmed by the Applicant's Director one Kuljinder Singh Mann.

In her affidavit, the applicant states that, the 1st respondent involved in the facilitation of purchase of the mortgaged apartments pursuant to their agreement dated 20th August 2015. However, it came to the knowledge of the applicant that, the 1st respondent proceeded with the purchase under the 1st respondent terms not known to her followed by the appointment of the 2nd respondent as receiver and who had advertised an invitation for submission of bids to purchase to the public for the purpose of selling the said 29 Apartments. The applicant further states that the 1st respondent has already issued 14 days' demand notice For payment of USD. 5, 398, 811.68 in terms of section 126 (a) and 27 (1) (2) of the Land Act, Cap 113, Revised

Edition, 2019 for the money advanced to the 3rd respondent through the facility agreement between the applicant and respondent.

Resisting the application, the 1st and 2nd respondent through their joint counter affidavit stated that they were not privy to the property Agreement, which was between the applicant and 3rd respondent. Thus, according to the 1st and 2nd respondent the applicant had no cause of action against them and that the 1st respondent is recovering credit facilities advanced to the applicant.

Admittedly, the 1st respondent stated that the applicant was given credit facilities and that the applicant had defaulted in repaying the credit facilities making an outstanding balance at USD. 6,221,562.10 and Tshs. 26,818,397.31. The 1st and 2nd respondent further stated that there is no case pending since the 3rd respondent's Misc. Application No. 507 of 2020 against the applicant, 1st respondent and Equity Bank for winding was struck out on 13th June 2023.

In his part, the 3rd respondent stated that the applicant was duty bound to pay him (3rd respondent) a total of USD/ 2,469,567.00 but she only paid USD.2,146,956.00. Hence, she is indebted to the tune of USD. 322,

611. 00. The 3rd respondent and his co-respondents stated that, the winding up proceedings are not connected with the appointment of the receiver, the 2nd respondent. The 3rd respondent went on stating that, the applicant has not demonstrated the loss that, he is likely to suffer if this application is dismissed.

Hearing of this application proceeded orally. Mr. Leonard Joseph, the learned advocate represented the applicant whilst Mr. Tazan accompanied by Ms. Rita Chichoma represented the 1st and 2nd respondent as well as Mr. Rico Adot, the learned counsel who represented the 3rd respondent who enjoyed the legal services of

In support of the application, the applicant's learned counsel started by adopting the applicant's affirmed affidavit. His line of arguments was based on the essential elements for granting interim application. He urged this court to refer to the famous cases of **Attilio vs. Mbowe** (1969) HCD 284 **Fast African Industry LTD vs. Ford** (1972) EA 420 and **Yer vs. Cosman Brown and Co. Ltd** (1973) EZ 358. The applicant's advocate restated the principles being;

1. That, the applicant has to demonstrate that there is a prima facie case.

2. That the applicant has to show that he shall suffer irreparable loss, hence court's interference is necessary
3. On balance of convenience, the applicant shall suffer more hardship or loss if injunction is not granted than the respondent if the injunction is not granted

According to the applicant's counsel, the applicant has met all three principles as per paragraph 7, 8,9,10 11 and 12 of the affidavit justifying this court to issue the orders sought. He emphasized that since the 1st respondent has appointed the receiver (2nd respondent). Therefore a prima facie case due to the established intention of the 1st respondent, loss that will be suffered if the landed properties are sold and that the applicant will suffer more irreparable loss if this application is refused. He supported his argument by citing in **Abdi Ally Salehe vs. ASAC Care Unit Limited**, Civil Revision No. 3 of 2012 (unreported), in, which the Court of Appeal held;

"In deciding the application in interim injunction the Court has to see only prima facie case and not to record finding the main controversy involved in the main suit prejudicing finding in the main suit.

On the other hand, Mr. Tazan responded to the submissions by the applicant's counsel by stating that, the applicant has failed to meet all three principles articulated in the authorities. According to his opinion, all principles

must be accumulatively established for the purpose of granting the application for temporary injunction. Bolstering his argument, Mr. Tazan cited the case of **National Furnisheers Ltd and Kawe Appointment vs. Exim Bank Ltd.** Misc. Land Application No. 102 of 2016 (unreported) at page 23.

The 1st and 2nd respondent's counsel went on submitting that the applicant has not established a prima facie case, against the 1st respondent relating property agreement. He added that nowhere there are complaints about the mortgaged properties and no proof pertaining repayment of credit facilities. Mr. Tazan also argued that the alleged loss has not been quantified and that the applicant cannot not suffer irreparable loss if the land properties are sold since he may be compensated and the fact that the 1st respondent may be wound up by BOT if loan recovery measures are not immediately taken. It was therefore his view that, in the balance of convenience, it is the 1st respondent who will suffer more irreparable loss than the applicant. He referred the court to **PIL Trade and Service Enterprises Ltd vs. TIB and another**, Misc. Land Application No. 17 of 2019

In his rejoinder, Mr. Leonard stated that, appointment of the receiver is challenged at paragraph 5 of the applicant's affidavit and added that the judicial authorities cited by the respondents' counsel are persuasive. The learned counsel for the applicant also re-joined by stating that, there is no legal requirement of proving the three principles cumulatively and that the applicant is questioning if the 1st applicant had released the facility that he applied. He finally stated that the applicant primary objective is the property and money.

Bearing in mind the parties' affidavits and the oral submissions by the parties' advocates during hearing of the application, the issues for the court's determination are;-

1. Whether in succeeding in an application for temporary injunction the applicant has to prove all three essential elements
2. Whether the applicant has demonstrated or met three established principles in granting an application for temporary injunction

In the first issue, it has been serious rival submission by the parties' advocates on whether there is a legal requirement to demonstrate all the three principles or in other words whether failure to establish or demonstrate

one of the elements for the temporary injunctive order to the satisfaction of the Court. It is the version of the applicant's counsel that it is not necessary whereas Mr. Tazan is of the view that all the three elements must be demonstrated accumulatively. In my view, it is the requirement of the law to show presence of all elements for example applicant may have a prima facie case in the main case but not necessarily, that he will suffer more irreparable loss than the respondent may suffer, if his application for temporary application is dismissed.

Furthermore, a person may suffer an irreparable loss is an application for an injunctive order is not issued yet he may not be entitled to grant of such application since he may not have any matter pending for hearing and determination. Hence, the applicant seeking an order of the court granting an application for interim order is required to demonstrate all three principles enunciated in the case of **Atilio** (supra). I subscribe my holding in **Tanzania Breweries Ltd. vs. Kibo Breweries Ltd and another** [1999] EA 341, in which it was held;

“Three conditions must be satisfied before a temporary injunction can be issued; firstly, that there must be a serious question to be tried on the facts alleged and a probability that the Plaintiff will be entitled to the relief prayed; second,

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; third, that on a balance of convenience, there will be greater hardship and mischief suffered by the Plaintiff from the withholding of the injunction than will be suffered by the Defendant from the granting of it

The Court (**Kalegeya, J** as he then was) went stating that

This is so because in order to succeed in securing an order for temporary injunction an Applicant has to establish in whole the three requisites as laid down in Attilio and Giella cases (supra). The Applicant has failed to establish just the first. The consequences are clear. The application for temporary injunction is dismissed."

Being persuaded by the above holding and foregoing reasons, I thus find that, the applicant is required to show all three essential elements as rightly argued by the 1st and 2nd respondents' counsel

Coming to the 2nd issue, in granting the applications of this nature, the Court has discretion, which should be judicially exercised by the Court after it have been satisfied that, the requisite principles have been shown by the applicant. Looking at the applicant's affidavit and his plaint vide Land Case No. 242 of 2023. The applicant is found challenging the intended sale of the

Apartments and the process of appointing the 2nd respondent unlike the contention by Mr. Tazan. (See paragraph 5 of the applicant's affidavit and the plaintiff's prayer in (b)). It is the application and the applicant's main suit that, are to be looked into in a nutshell in order to be safer in determining an application for temporary injunction. This position was emphasized by the Court of Uganda at Kampala in **Giella vs. Cassman Brown & Co Ltd** [1973] 1 EA 358 in which it was held;

"In holding that the undertaking was not unreasonable: this was the question to be decided in the suit and all that the judge had to decide at that stage was, whether the suit had a reasonable probability of success....."

Examining the affirmed affidavit of the applicant and the suit, I am satisfied that there is a prima facie case established by the applicant as opposed to the respondents' stand.

Now to the 2nd element on, whether the the court's interference in this application is necessary to prevent the injury likely to be caused by the respondents through the alleged sale. The alleged sale supported by a copy of the invitation for submission of bids to purchase properties mentioned therein, the same are also listed in the chamber summons (See AL2). In my

firm view, the threatening acts of the 1st and 2nd respondents to sale the landed properties requires intervention of the Court pending the hearing and determination of the applicant's main case.

As to the 3^d principle on the balance of convenience, the counsel for the applicant has argued that his client will suffer will suffer more hardships and damages than the respondents if the interim injunction is withheld. On the other hand, the respondents' counsel are found contending that the BOT will cause winding up to the 1st respondent if this application is granted that the 1st respondent can and is capable and that the 1st respondent can meet any payment for damages.

I am alive of the principle with effect that, if the anticipated injury is remedied by way of compensation and the respondent is financially capable to pay compensation should the public sale proceed as intended by the 1st respondent. (See **PIL Trade and Service Enterprises Ltd vs. TIB and another**, Misc. Land Application No. 17 of 2019 cited by the learned counsel for the 1st and 2nd respondent and **Giella vs. Cassman Brown** (supra) where in the case it was held;

"The second question, which the judge did not consider, is whether any loss which the company might sustain could not

be compensated by an award of damages. We do not know the scale of the company's operations or that of the firm, which the appellant has joined".

In the instant application while the 1st respondent has pleaded that she can be able to pay, it is also on the other hand, the court's finding that, the same remains mere assertions since it has not been proven that, the 1st respondent is capable to pay compensation for the loss sustained. More so, considering the nature of the landed properties involved in this particular application and the fact that the applicant is currently in possession and other tenants therein, I feel constrained, to unhesitatingly hold that, the applicant will suffer greater hardships and mischiefs if this application is not granted pending hearing and determination of the main suit.

In the foregoing deliberations, I hereby grant the sought temporary injunction restraining the 1st and 2nd respondent or agent, servants and workmen from selling twenty nine (29) mortgaged properties/Apartments of the applicant situated at Upanga, Jangid Plaza, Amani Gomvu and Jangwani Msimbazi area in Dar es salaam Region is issued. I further issue an order temporarily restraining the 2nd respondent from enforcing the invitation for submission of bids to purchase properties by 31st day of July 2023 pending

hearing and determination of the main suit. Costs of this application shall be in the course.

It is ordered.

DATED at DAR ES SALAAM this 23rd April 2024




M. R. GWAE

JUDGE