

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. APPLICATION NO. 2015 OF 2023
(Arising from Land Case No. 26016 of 2023)**

**RAHIM SEIF MWERA (Administratrix of the estates of
The late SEIFU SAIDI MWERA..... APPLICANT**

VERSUS

**TWIGA BANCORP LIMITED
(TANZANIA COMMERCIAL BANK PLC)..... 1ST RESPONDENT
SWEYA GROUP COMPANY LIMITED 2ND RESPONDENT
THE ATTORNEY GENERAL.....3RD RESPONDENT
THE COMMISSIONER FOR LANDS.....4TH RESPONDENT**

21/3/2024 & 24/4/2024

RULING

A. MSAFIRI, J

This is an application for temporary injunction brought under Order XXXVII Rule 1(a), Sections 68 (e) and 95 of the Civil Procedure Code, Cap 33 R.E 2019, (herein the CPC). The applicant Rahim Seif Mwera as the administratrix of the estates of the late Seifu Saidi Mwera, is praying for the order of this Court to temporarily restrain the respondents from disposing a suit property located at Plot No. 46 Block Q, situated at Temeke area, Mkuranga Street, Temeke District within Dar es Salaam.



The application is supported by the affidavit of the applicant herself. The 1st, 3rd and 4th respondents have also filed their joint counter affidavit contesting the application. The same was deposed by Lawrence Sebastian Munisi, the Principle Officer of the 1st, 3rd and 4th respondents. The 2nd respondent has never filed counter affidavit, it was served to appear in court but failed to appear or file its counter affidavit hence the application was heard in its absence.

On 29/02/2024, the court ordered the hearing to proceed by way of written submissions and set the schedule order. In presence of the advocates for both parties, who are Ms. Renatha Byabato, advocate for the applicant and Mr Emmanuel Mwakyembe, State Attorney for the 1st, 3rd and 4th respondents, the court issued a schedule order whereby the applicant was to file her submissions in chief by 08/3/2023, the reply submission by the respondents were to be filed by 14/3/2024 and rejoinder if any by the applicant was to be filed by 19/3/2024.

Furthermore, following Mr Mwakyembe's prayers, the court granted leave for the 1st, 3rd and 4th respondents to file their counter affidavit out of time i.e. by 01/3/2024. Indeed, the said respondents filed their counter *All.*

affidavit but until todate, they have not filed their reply submissions and as a result the applicant could not file her rejoinder (if any).

On 21/3/2024 the application came for mention for purpose of seeing whether the submissions have been properly filed and fixing of Ruling date but the respondents and their counsel Mr Mwakyembe were absent in court without notice. In the circumstances, the court had no option but to set the date for Ruling based on one side hearing that is the applicant.

It is trite law that failure to file written submission within the prescribed time by the court is tantamount to non-appearing to prosecute or defend one's case. Therefore the court moved on to decide the matter basing on the contents of the affidavit and the written submissions by the applicant. The court however have also taken into account that the 1st,3rd and 4th respondents have filed their counter affidavit hence while determining this application, the contents of the counter affidavit have been taken aboard.

Having read the submissions from the parties and read the contents of the affidavit and counter affidavit thereto, the issue for determination is whether this application is meritorious.

It is a principle of law that the Court's power to grant injunction is predicated upon the applicant meeting cumulatively, the three conditions set

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out in the celebrated case of **Atilio vs. Mbowe (1969) HCD No.284**. The three conditions are briefly that first; there must be a prima facie case/serious questions to be tried, second, the court interference is of necessity to prevent irreparable injury befalling the applicant and third, the balance of convenience.

I will start the determination of the application by analyzing on whether the first condition was met.

In her affidavit, the applicant stated that she is an administratrix of the estate of the late Seifu Saidi Mwera, who is her father. That among the properties owned by her father during his life time is the suit property. That without any justification, the 1st respondent and the 2nd respondent entered a loan agreement whereas the 1st respondent extended a loan of TZS 60,000,000/= to the 2nd respondent and mortgaged the suit property to secure the said loan. That the loan agreement shows that it was attested by one Seifu Saidi Mwera on 04/5/2016 and he was referred as a guarantor. The applicant stated in her affidavit that by that time, Sefu Saidi Mwera has already died since 05/11/2001.

She submitted that the 1st respondent have been unlawfully retaining the title of ownership of suit property and when the applicant conducted a search

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at the Land Registry, it came to her knowledge that the suit property is registered under encumbrances created by the 1st respondent as it was used to secure a loan facility.

It was stated further in the affidavit that the applicant challenges the purported mortgage of the suit property without the knowledge of the lawful owner of the suit property. That the act of mortgaging the suit property is a threat to all the heirs as there is likelihood of the respondents to dispose of the suit property at any time since the 2nd respondent who acted as the owner of the land during issuance of the loan, his where about is unknown.

In this, I find that the first condition has been met whereby the applicant claims that the late Seifu Mwera could not have signed as a guarantor to mortgage the suit property on 05/5/2026 while he died on 06/11/2001. She has attached a photocopy of the purported death certificate which shows that Seifu Mwera died on the said date. The applicant has also attached a photocopy of letters of administration which shows that she was appointed the administrator of the estate of the late Seifu Said Mwera on 20/3/2014.

In their counter affidavit, the 1st, 3rd, and 4th respondents have vehemently denied the applicant's claims and insisted that one Seifu Said Mwera signed as a guarantor to the mortgage. *Alle*

I find this to be serious triable issue to be determined by the court.

On the second and third conditions, the applicant averred that she will suffer irreparable loss as she will be prejudiced and affected by ongoing disposition. That, it is clear that on mortgagor's failure to pay part or full loan, the mortgagee have rights to dispose of the suit property and the applicant will suffer irreparable injuries which cannot be compensated by the monetary value.

I also find that according to the circumstances of the matter, the applicant stands to suffer irreparably before her rights to the suit property has been determined by the court. Also the applicant stands to suffer more than the respondents since the Title of ownership is in the hands of the respondents and they are likely not to be prejudiced if this application will be granted.

Since the applicant has managed to establish the mandatory conditions for the grant of temporary injunction, the application is granted.

Costs shall be in the cause.

It is so ordered.

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A. Msafiri

**A. MSAFIRI
JUDGE**

24/4/2024