

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 724 OF 2023

(Arising from Land Case No. 333 of 2023)

**FIRDOS APARTMENT LIMITED 1ST APPLICANT
HITAJI COMPANY LIMITED 2ND APPLICANT**

VERSUS

**COSMOS PROPERTIES..... 1ST RESPONDENT
AZANIA BANK LIMITED 2ND RESPONDENT
TAHER KUTBUDDIN TAIBALI 3RD RESPONDENT
MRS SALIMA TAHER TAIBALI 4TH RESPONDENT
SEBASTIAN KITENGULE GANYAKA 5TH RESPONDENT
LEAH MADATA MKABULO 6TH RESPONDENT
WILLIAM MUHEMU 7TH RESPONDENT
MARK AUCTIONEERS & COURT BROKERS
COMPANT LIMITED 8TH RESPONDENT
THE ATTORNEY GENERAL 9TH RESPONDENT**

RULING

22/3/2024&03/06/2024

GWAE, J

This is an application for temporary injunction made under Order XXXVIII Rule 1&2 and Section 68 (e) and Section 95 of the Civil Procedure Code, Cap 33, Revised Edition, 2019, seeking the following orders:-

- 1. That, this honorable court may be pleased to issue a temporary injunctive order restraining the respondents or their agents or anyone acting on their behalf from evicting the applicants from apartment number 1405 now comprised under CT 38083/29 on the 14th floor, apartment number 1803 under CT 38083/83 on 18th floor, and apartment number 1403 under CT 38083/27 on the 14th floor together with their respective parking slots at the Uhuru Heights Building on Plot No. 63/27, UWT Street, Upanga area, Dar es Salaam and from disposing of them selling or otherwise or from transferring them pending hearing and determination of the main suit.*
- 2. Costs of this application be provided for.*
- 3. Any other Orders(s) the court may deem fit to grant.*

The application was supported by a joint affidavit affirmed by Gulam Mustafa Ashfaq Lakhu and Zheng Haibo, the Principal Officers of the applicant and it was resisted through the joint counter affidavit sworn by one Charles James Mugila, the 2nd Respondent's Principal Officer duly authorised to act on behalf of the 2nd and 9th respondents. The rest of the respondents did not file their counter affidavits despite of being duly served. The court proceeded with the matter in their absence and being considered as not opposing the application as was correctly underscored by the Court of Appeal

in the case of National **Insurance Corporation (T) Ltd vs. Shengena Limited**, Civil Application No. of 2015 (unreported) where it was stated

"Before proceeding with the hearing on the merits of the application, we asked Mr. Emanuel to comment on the respondent's failure to file both the reply affidavit and reply submission in opposition of the application and whether or not he was not resisting the application. He was point blank that, he was not resisting the application. That concession to the application narrowed down our responsibility."

Hearing of the application was conducted by way of written submission. Only the applicants filed their submissions and were duly represented by Mr. Edward Chuwa, learned advocate. The matter proceeded *ex-parte* against the respondents.

In support of the application, the applicants' counsel referred to the case of **Atilio vs. Mbowe** (1969) HCD n. 284, which established three principles governing an application for temporary injunction; these being;

- 1. Demonstration of the existence of a prima facie case,*
- 2. The likelihood of suffering an irreparable loss and*
- 3. That the balance of convenience should tilt in the applicant's favour.*

On the triable issue, Mr. Chuwa submitted that, there are triable issues, which are to be determined in Land Case No. 33 of 2023 which is pending

before this court. He referred to paragraph 2 to 13 of the joint affidavit, which, according to him, constitute a triable issue as to who is the lawful owner of the properties in dispute. He went on arguing that, there are questions on the legality of the mortgage, the legality of the sale between the applicants and the 1st respondent on one hand and between the 2nd respondent and the 3rd, 4th, 6th and 7th respondents on the other.

Regarding the element of irreparable loss, Mr. Chuwa submitted that, the applicants stand to suffer irreparable loss should the injunctive order not be issued. He stated that, the applicants are in occupation of the suit premises because the premises are being occupied by their officers with their families. Thus, if the order sought is not granted the applicants' officers together with their families will be rendered homeless resulting to a series of unnecessary law suits for breach of contract on the part of the applicants and their respective officers taking into account that the applicants are contractually bound to provide housing and accommodation to them. He referred to the case of **Kibo Match Group Limited vs H.S Impex Ltd** (Supra) to bolster his argument.

On the element of the balance of convenience, Mr. Chuwa submitted that, the applicants stand to be inconvenienced more than the respondents

will, particularly the 2nd and the 9th respondents who have countered the application as the rest of the respondents did not file their counter affidavits to contest the application. He referred to the decision of this court in **Mtakuja Kondo and 3 Others vs. Wendo Maliki and 2 Others**, Miscellaneous Land Application No. 241 of 2016, to support his argument.

Mr. Chuwa further referred to annexure ABL-1 which is the offer letter attached to the counter affidavit and stated that, the 2nd respondent has recourse to other securities apart from the alleged mortgage, unlike the applicants whose officers' families will lose their homes. He further stated that, the 2nd and 9th respondents can claim by way of suit or otherwise from Directors who have executed Guarantees, guaranteeing the repayment of the loan. Also, they can realize the assets of the sister company of the 1st respondent, Cosmos Developers Ltd who have issued a debentures and corporate guarantee and realize the loan balance, if any, because following the debenture, they have an automatic legal right over the assets of the said Cosmos Developers Ltd.

I have carefully considered the affidavit in support of the application, submissions by the counsel for the applicants and the counter affidavit by the 2nd and 9th respondents, the issue for determination is whether the

application has merit. In determining the merit of this application, the court will be guided by Order XXXVIII Rule 1 (a) and (b) of the Civil Procedure Code, Cap 33 R.E 2029, which provides that:-

1. *Where in any suit it is proved by affidavit or otherwise—*

*(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit or suffering loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree;
or*

(b) that the defendant threatens, or intends to remove or dispose of his property with a view to defraud his creditors, the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of the property as the court thinks fit, until the disposal of the suit or until further orders:

Provided that, an order granting a temporary injunction shall not be made against the Government, but the court may in lieu thereof make an order declaratory of the rights of the parties."

Further to the above cited provision of the law, the case of **Atilio vs Mbowe** (Supra) established the following three principles which are the guideline in determining the application for temporary injunction:-

- 1. Demonstration of the existence of a prima facie case*
- 2. The likelihood of suffering an irreparable loss*
- 3. That the balance of convenience should tilt in the applicant's favour.*

Starting with the first principle, it is undisputed fact that the applicants have filed Land Case No. 333 of 2023 against the respondents in respect of the suit properties which is pending before this court. The applicants have managed to prove that there is a triable issue as to who is the lawful owner of the suit properties, the legality of the mortgage and the legality of the sale of the suit premises between the applicants and the first respondent and between the second respondent and the third, fourth, fifth, sixth and seventh respondents which needs the court's determination.

Regarding the second principle, in the case of **T.A Kaare vs General Manager Mara Corporative Union** (1987) TLR 17, the court is required to consider whether there is a need to protect either of the parties from the species of injuries known as irreparable injury before right of the parties is determined. Further, in the book of **Sohoni's Law of Injunction**, Second Edition, 2003, at page 93, it was stated that:-

"As the injunction is granted during the pendency of the suit, the court will interfere to protect the plaintiff from injuries which are irreparable. The expression "irreparable injury" means that, it must be material on which cannot be adequately compensated for in damages. The injury need not be actual but may be apprehended."

The applicants deponed at paragraph 25 of the affidavit that they are still in occupation of the suit premises occupied by their respective officers with their families and thus, if the order sought is not granted, the applicants' officers and their families will be rendered homeless. The 2nd and 9th respondents on the other hand deposed that, should this court issue an order for injunction, the 2nd respondent will suffer greater hardships as the applicants who have already been evicted from the suit premises will repossess the properties against the bonafide purchasers.

In determining this point, the court have keenly made an inquiry as to who between the applicants and the 2nd respondents will suffer the greater hardship should the injunction order is granted. The answer is the applicants on the reason that, the applicants have successfully proved under paragraph 11 of the affidavit that eviction notice has been issued to them but they are still in occupation of the suit premises. The 2nd and 9th respondents deponed

that the applicants have already been evicted but no proof have been tendered to that effect, in favour of the 5th and 6th respondent. In the circumstances, I find the applicants are more likely to suffer irreparable loss as their respective officers and their families will be rendered homeless.

On the last principle of convenience, I agree with the counsel for the applicants that, the applicants stand to be more inconvenienced than the respondents would. This is due to the reason that, it is only the 2nd respondents who have contested the application, the rest of the respondents did not oppose the application by filing the counter affidavit.

Similarly, the suit premises are not only the securities for the alleged loan facilities. According to annexure ABL-1, Offer Letter to the alleged loan, the first respondent secured the loan with other landed properties, debenture charge, personal guarantee and corporate guarantee of Cosmos Developers and Directors of the company, which the second respondent can use the same in the loan recovery.

Before I sum up, I have noted at paragraph 16 of the counter affidavit that, the 9th respondent has conducted eviction and evicted whoever was in possession of some of the suit properties. According to Annexure ABL-8, the property situated on Plot No. 63/27, apartment 'C', 1403, 14th floor, CT No. **38083/27**, along Bibi

Titi road, Upanga area (Uhuru Height) within Ilala Municipality, Dar es Salaam was handled over to SEBASTIAN GANYAKA, the 5th respondent and a property situated on Plot No. 63/27, apartment 'E' (1405), 14th floor, CT No. **38083/29**, along Bibi Titi road, Upanga area (Uhuru Height) within Ilala Municipality, Dar es Salaam, was handled over to LEAH MADATA MKUBULO, the 5th respondent. Since the eviction to the said apartments have been carried out. Thus, nothing to restrain the respondents from evicting the applicants or their agents from therein. I endorse the case of **Mtakuja Kondo & 3 Others vs. Wendo Maliki**, (Civil Application No. 74 of 2013), [2013] TZCA 354 (29 July 2013) it was held;

"..it is on record that the suit premises have already been sold so it will not serve any useful purpose to grant an order for stay of execution. The application has been overtaken by events. The learned advocate for the respondent pointed out correctly that the remedy for the applicants lies elsewhere but not in filing this application for stay of execution."

In our instant application, it is evidently clear that the said apartments have been handled over to the 5th and 6th respondents, I find the grant of temporary injunction cannot serve the applied purpose because it has been overtaken by event. More so, grant of the injunctive orders in respect of the apartments so handed over will cause more inconvenience to the 5th and 6th respondents than the applicants.

In the eventuality, I find the applicants have partly successfully met the condition for granting an order for temporary injunction as laid down in the case of **Atilio vs. Mbowe** (Supra). Therefore, the respondents herein and any other person acting on their behalf are restrained from evicting the applicants or their agents/employees from apartment number 1803 under **CT 38083/83 on 18th floor**, with its respective parking slots at the Uhuru Heights Building on Plot No. 63/27, UWT Street, Upanga area, Dar es Salaam pending hearing and determination of the Land Case No. 333 of 2023. Costs of this application shall abide to the outcome of the Main Case (Land Case No. 333 of 2023).

It is so ordered

DATED at **DAR ES SALAAM** this 3rd day of June, 2024.




M. R. GWAE
JUDGE