

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 771 OF 2023**

**(Arising from Land Case No. 393 of 2023)**

**SALEHE HASSAN MSAHALA..... APPLICANT**

**VERSUS**

**SALEHE MSAHARA CONSTRUCTORS LIMITED..... 1<sup>ST</sup> RESPONDENT**

**DCB COMMERCIAL BANK PLC..... 2<sup>ND</sup> RESPONDENT**

**MARK AUCTIONEERS AND COURT**

**BROKERS COMPANY LIMITED.....3<sup>RD</sup> RESPONDENT**

**RULING**

*17/11/2023 & 21/02/2024*

**A. MSAFIRI, J.**

The applicant have brought this Application under Section 68 (c),(e) and Section 95, Order XXXVII Rules 1(a) and (b) and (2), all of the Civil Procedure Code, Cap 33 R.E 2019, (herein the CPC). He is praying for the order of this Court to temporarily restrain the respondents from disposing of the applicant's property namely Plot No. 2255 Block A, Plot No. TMK/YBV/BMW26/18, Plot No. TMK/YBV/BMW29/33, Plot No. TMK/YBV/BMW30/60 and Plot No. TMK/YBV/BMW/39/70 at Barabara ya Mwinyi within Temeke Municipality pending the determination of the main suit on merits.

*Alle*

The Application was supported by the affidavit of Hussein Hitu, an advocate of the applicant. It was contested by the 2<sup>nd</sup> respondent through a counter affidavit deposed by Abdallah Myoba, a Recovery Manager of the 2<sup>nd</sup> respondent. The 1<sup>st</sup> respondent filed a counter affidavit which was deposed by one Tatu Salehe Msahala, one of the Directors of the 1<sup>st</sup> respondent. The same was in support of the Application while the 3<sup>rd</sup> respondent neither entered appearance nor filed the counter affidavit despite being duly served and received the summons.

At the hearing which was oral, the applicant was represented by Mr. Hussein Hitu, learned advocate, while the 1<sup>st</sup> respondent was represented by Mr. Twahir Burhan, learned advocate and the 2<sup>nd</sup> respondent was in representation of Mr. Alexander Mzikila, learned advocate. The hearing was heard ex-parte against the 3<sup>rd</sup> respondent.

In submissions, Mr. Hitu prayed to adopt the contents of the affidavit in support of the application. He said that it is the discretion of this court to grant the sought order of temporary injunction. That in exercising this discretion, the court has to observe three principles as it was set in the famous case **of Atilio vs. Mbowe**(1969)HCD. The stated three principles are first, presence of a prima facie case, second; proof of irreparable loss and third; balance of convenience.


Mr Hitu submitted that the applicant have managed to satisfy all three conditions. On the first condition, Mr Hitu submitted that there is a serious issue

in the main case to be determined i.e. the Land Case No. 393 of 2023. That the issue is that there is a breach of contract/ agreement which was entered between the applicant, 1<sup>st</sup> respondent, 2<sup>nd</sup> respondent and the Registered Trustees of NSSF. That the applicant believes that the contract is valid until now as it was never terminated hence the act of 2<sup>nd</sup> and 3<sup>rd</sup> respondents intention of selling the collaterals is illegal.

On the 2<sup>nd</sup> condition, the counsel for the appellant submitted that there will be no award to compare with the loss which the applicant will incur if the court will not intervene before the parties' legal rights have been established in the main case.

On the 3<sup>rd</sup> condition, the counsel for the applicant averred that the applicant will suffer more if the temporary injunction will not be granted. This is for the reason that applicant sustain his life necessities and his family's from the houses which are set as collaterals and that some of his family lives in those houses.

In conclusion, the counsel referred this case to the cases of **Jonathan Omary Mbwambo vs Saidi Shaban Mtonga & others**, Application No. 774 of 2016 and **Asteria Augustine & others vs NMB PLC & others**, Civil Application No. 148 of 2020. He prayed for the Application to be granted.

As said earlier, the 1<sup>st</sup> respondent through the counsel Mr Burhan did not contest the Application. 

Mr. Mzikila, counsel for the 2<sup>nd</sup> respondent started his submission by praying to adopt the contents of the counter affidavit of the 2<sup>nd</sup> respondent which contest the Application.

He said that he is in agreement with the counsel for the applicant on the requirement of the applicant to meet the three conditions set in the case of **Attilio Mbowe(supra)**. He pointed that all three conditions must be revealed in the applicant's affidavit but in this Application, the said conditions are not reflected.

The counsel for the 2<sup>nd</sup> respondent stated further that, on the breach of contract between the applicant, 2<sup>nd</sup> respondent and NSSF, the said NSSF is not part of this Application hence she cannot prove on the period of the claimed contract and whether the contract is still valid.

On the 2<sup>nd</sup> condition of likelihood of the applicant to suffer irreparable loss, Mr Mzikila submitted that the 2<sup>nd</sup> respondent is a financial institution which is in position of atoning the applicant by way of damages.

On balance of convenience, Mr Mzikila argued that the collateral houses are five but the counsel for the applicant did not state in which house the applicant lives with his family. He argued that the applicant is also the owner of the 1<sup>st</sup> respondent so he has other means of income. To cement his point, he referred this court to the case of **Cosmos Properties vs. Exim Bank Ltd**, Misc. Application No. 584 of 2021 (Unreported).



Mr. Mzikila told the court that if it will see it fit to grant this Application then the injunction order should not include a piece of land on Plot No. TMK/YBV/BMW29/33 for the reason that the property has already been sold since 15/11/2023 and by that time, this Application has not yet been instituted. He prayed for the Application to be dismissed with costs.

In rejoinder, the counsel for the applicant mostly reiterated his submission in chief. On Plot. No TMK/YBV/BMW29/33, the counsel stated that he has no information of sale of any houses among the five houses set as collaterals. That the 2<sup>nd</sup> respondent could have proved his claims by attaching the proof in his counter affidavit but there is no such proof. He reiterated his prayers.

The Court's powers to grant temporary injunction is governed by the provisions of Order XXXVII Rules 1 and 2, and Section 68(e) of the CPC. These powers have been interpreted and elaborated so succinctly in a number of decisions including the famous case of **Attilio vs Mbowe** (supra). In the said case, conditions for granting the temporary injunction were set. These conditions are also reflected in many other cases after **Attilio vs. Mbowe's** case. The conditions are namely existence of serious question to be tried on the facts alleged, demonstration that the applicant stands to suffer irreparable loss if injunction is not granted, the loss incapable of being monetary compensated and the balance of convenience in favour of the party who will suffer greater inconvenience if injunction is or is not granted.

*Attilio*

Temporary injunctions are a discretionary remedy but which ought to be used judicially. Courts cannot grant them even when it is convenient to do so if the applicable conditions enumerated above has not been fully satisfied. It is also trite law that the three conditions must be met cumulatively and so, meeting on or two of them will not be sufficient for the purpose of granting the sought order of injunction.

Having carefully considered the rival submissions by the parties along with the contents of pleadings i.e. affidavit, counter affidavit and reply to the counter affidavit, the major issue for determination is whether the applicant has managed to fulfil or meet the three mandatory conditions cumulatively so that to warrant this Court to grant the interim injunction as prayed.

On the first condition of establishment of a prima facie case, the counsel for the applicant claimed that there is a breach of contract/ agreement which was entered between the applicant, 1<sup>st</sup> respondent, 2<sup>nd</sup> respondent and the Registered Trustees of NSSF. That the applicant believes that the contract is valid until now as it was never terminated hence the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' intention of selling the collaterals is illegal.

In the affidavit in support of Application this claim of the breach of contract which still exist between the 1<sup>st</sup>, 2<sup>nd</sup> respondents and Registered Trustees of NSSF is reflected at page 2 of the affidavit, where the applicant stated that he was shocked to see a newspaper which was advertising auctioning of the assets

belonging to him. That he questioned the 1<sup>st</sup> respondent who "narrated stories" that the project which was depended on finalizing the loan is still on progress. That the 1<sup>st</sup> respondent showed the applicant a copy of the debt acknowledgement, refinancing and commitment to repay agreement dated on 30<sup>th</sup> April 2018 which are still bound to the parties thereto. The said agreement was attached with the affidavit.

I have read the agreement which is titled "DEBT ACKNOWLEDGEMNT, REFINANCING AND COMMITMENT TO REPAY AGREEMENT". This agreement shows that the 1<sup>st</sup> respondent has already defaulted in loan repayment hence this was an agreement where it was committing on repayment. The counsel for the applicant stated that there was breach of this contract because the 2<sup>nd</sup> and 3<sup>rd</sup> defendants intends to auction the collaterals while the agreement is still valid and binding between the parties. Having read the agreement I agree that there are issues which has to be determined by this Court in the main case. Those issues might arise from clause 4 and 5 of the agreement in dispute that the borrower (now 1<sup>st</sup> respondent), undertakes to complete the remaining works within six weeks from the date of disbursement by the bank (now the 2<sup>nd</sup> respondent) of the specified money into the account of the borrower. I find this to be a matter of evidence on whether the borrower completed the agreed works within the specified time or the project still continue up to date as per the applicant's submissions in court.

*Alle*

The 2<sup>nd</sup> respondent did not challenge the existence of purported agreement between the said parties. Even in his submission in Court, the counsel for the 2<sup>nd</sup> respondent did not dispute the claims of breach of contract by the applicant but simply stated that the attached contract shows that the 2<sup>nd</sup> respondent has fulfilled her part of contract. Since there is claim that there is a breach of contract, then it is my view that there is a serious issue to be determined in the main case.

In the case of **Abdi Ally Salehe vs. Asac Care Unit Limited & 2 others**, Civil Revision No. 3 of 2012, CAT at DSM (Unreported), the Court of Appeal observed that;

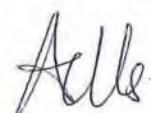
*"in deciding such applications, the court is to see only a prima facie case, which is one such that it should appear on the record that there is a bonafide contest between the parties and serious questions to be tried."*

The Court of Appeal went on to hold that;

*"at this stage the court cannot prejudge the case of either party. It cannot record a finding on the main controversy involved in the suit nor can genuineness of a document be gone into at this stage"*

From the above principle, I cannot at this stage prejudge the case of the rival parties. The applicant state that there is a breach of contract by the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent states that it has fulfilled its part of obligation in the contract. I find this to be a contest between parties which is to be resolved by the trial court.

I find that the first condition has been met by the applicant.





On the second condition, in the affidavit the applicant has claimed that his children are still young and in school. That he has no other source of income and that if the respondents will enforce the sale of mortgaged property, he and the children will be left homeless. At paragraph 8 of the affidavit, the applicant stated that if the respondents are not stopped from disposing the houses of the applicant, he will suffer irreparable loss.

In the submission in court, the counsel for the applicant stated that the houses set as collaterals helps the applicant in sustaining his life necessities with his family including payment of school fees.

It is not clear in which houses among the five houses named in the chamber summons is the residence of the applicant and his family. Nevertheless, the applicant have shown that he and his family will be rendered homeless and will suffer irreparably. The counsel for the 2<sup>nd</sup> respondent has submitted that the 2<sup>nd</sup> respondent being a financial institution, it is capable of atoning the applicant by way of damages. However it is my view that the monetary compensation cannot be equaled to the loss of the five already built and established houses.

It is my finding that the applicant is in a position of suffering more compared to the 2<sup>nd</sup> respondent. It is in record that the titles of the collaterals are in the custody of the 2<sup>nd</sup> respondent and this fact was not countered by the 2<sup>nd</sup> respondent. This shows that the suit properties are safely under custody of 2<sup>nd</sup> respondent.

*Alle*

I have already determined the third condition while determining the second condition. I find that on balance of convenience, the applicant is in a position of suffering mischief as compared to the 2<sup>nd</sup> respondent. I find that the second and third conditions have been met.

In totality, I find that the applicant has managed to fulfill all three conditions necessary for grant of temporary injunction. I hereby grant the Application.

However, the counsel for the 2<sup>nd</sup> respondent has pointed out to the Court that if the court will grant the sought injunction then house situated on Plot No. TMK/YBV/BMW29/33 should not be included in the order for the reason that the property has already been sold since 15/11/2023 and by that time, this Application has not yet been instituted. The counsel for the applicant have objected the request stating that he has no information of any sale of one of the houses.

Since there is no clear information on whether the said house was sold or not, then this Court cannot be a part of creating another dispute by making a stop order on a property which probably has already been sold to the third party who is not a part to this dispute.

I therefore enter an order of temporary injunction on the four (4) collateral houses described as Plot No. 2255 Block A, Plot No. TMK/YBV/BMW26/18, Plot Plot No. TMK/YBV/BMW30/60 and Plot No. TMK/YBV/BMW/39/70 at Barabara ya Mwinyi within Temeke Municipality. Except for the house on Plot No.

TMK/YBV/BMW29/33 also at Barabara ya Mwinyi, Temeke Municipality.

The temporary injunction is entered within six months to be counted from the date of this Ruling.

Each party to bear their own costs.

It is so ordered.



A handwritten signature in black ink, appearing to read "A. Msafiri". The signature is written over a horizontal dotted line.

**A. MSAFIRI**

**JUDGE**

**21/02/2024**