

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF ARUSHA  
AT ARUSHA**

**MISC. CIVIL APPLICATION NO. 36 OF 2022**

**JAMES NOKWE MUNIKO T/A HADY SCHOOL .....APPLICANT**

**VERSUS**

**EQUITY BANK (TANZANIA) LIMITED .....RESPONDENT**

**RULING**

31/05/2022 & 12/07/2022

**KAMUZORA, J.**

Under a certificate of urgency the Applicant brought this application seeking for on order of temporary injunction to restrain the Respondent, their servants, agents and whoever will be acting on Respondent's behalf from selling the landed property at Plot No. 504, 628 & 918 Block 'DD' located at Sombetini Area, within Arusha Municipality and or obstructing peaceful possession and enjoyment of the land in dispute by the Applicant and others currently residing in or in possession, pending final determination of the main suit.

The application was brought under Order XXXVII Rule 1(a) and 2(1), section 68(c) and section 95 and of the Civil Procedure Code Cap. 33 R.E 2019 and supported by an affidavit deponed by the Applicant's

counsel one Frank Wilbert Makishe. The application was opposed by the Respondent through a counter affidavit deponed by one Hery Choga, the Respondent's branch Manager. When the matter was called for hearing the Applicant was ably represented by Mr. Frank Wilbert, learned advocate while the Respondent was represented by Mr. John Mushi and they both argued the application orally.

The facts in the Applicant's affidavit and the submission by the counsel for the Applicant reveals that, the Respondent extended a loan facility of Tshs 1,150,000,000/= as per the loan facility dated 04<sup>th</sup> September 2015 annexed to the affidavit as annexure SH1. That, the Applicant charged his landed properties at Plot Nos. 504, 628 and 918, at Block 'DD' located at Somebetini area in Arusha Municipality. He claimed that, the Applicant has been paying the loan and according to the last reconciliation the amount paid was 616,524,783.20/= and is still paying the outstanding balance together with interest. That, since the Applicant's business is a school, the loan was for the development of the said school but the Applicants cash flow was much affected by the outbreak of COVID 19 pandemic which the government had to close schools from 17<sup>th</sup> March to 30<sup>th</sup> June 2020 hence there was no collection during that period and after the opening of the school.

The counsel submitted further that, despite all those facts, the Respondent raised an intention to undergo recovery measures through the sale of the mortgaged properties. It is the Applicant's submission that, the Applicant has filed Civil Case No. 22 of 2022 which is pending before this court which is yet to be determined. That, the school which the Respondent intends to sell contains almost 400 students who have paid their school fees and the parents to the children are not informed for them to look for alternative schools in case the school is sold. That, there are employees of the school and selling of the school will result in to their sufferings.

It was also submitted that, the restructuring of the loan was done twice based on the principal amount, interest and penalties. That, the Respondent benefited from the restructuring as no loss was incurred since the principal amount, interest and penalties were combined as a new loan. That, the Applicant is still paying the loan as admitted also by the Respondent under paragraph 5(d) of the counter affidavit. That, until September 2021 the outstanding loan was 1,676,262,459.39/= and the Applicant intends to pay the loan before the lapse of the loan period. The counsel finalised by stating that, if the school will be sold it will

cause inconvenience to the Applicant, students and the employees of the school as the main suit is yet to be determined.

Contesting the application Mr. Mushi submitted that, the orders of temporary injunction are equitable in nature in the sense that there must be equitable grounds for the court's intervention to grant injunction. That, for this court to grant injunction the question to ask itself is whether the application has met the three requirements of the law which were laid down in the case of **Atilio Vs Mbowe** (1969) HCD 284. That, the three tests provided in the case above must be met together and not separately and he also referred the case of **Christopher P Chale Vs Commercial Bank of Africa**, Misc. Civil Application No 635/207 HC at Dar es Salaam (Unreported).

Starting with the first condition as to whether there is a prima facie case. He stated that the principle of triable issue is a legal question thus, the issue to be triable must be genuine. He cemented his submission with the case of **Abdi Ally Salehe vs ASAC CARE Unit Ltd and three others**, Land case No 71/2011 HC at DSM.

He argued that, in this case there is no triable issue leave alone its genuineness as the same has not been pointed out by the learned counsel nor reflected in the affidavit. That, as per paragraph 3 of the

affidavit the Applicant admitted taking loan from the Respondent and is still paying the loan and it was his prayer that the Respondent should not proceed selling the mortgaged properties because there are almost 400 students and supporting staffs. The Respondent claimed that, such facts have no any supporting evidence hence, no proof of the genuineness of the allegations.

The Respondent's counsel submitted further that, under paragraph 5 of the affidavit the Applicant agreed to take loan from the Respondent and failed to pay and agreed to the bank recovery measures against the securities. For those reasons the Respondent instructed its debt collector namely INDEPENDENCY AGENCIES AND COURT BROKERS LTD to dispose off the mortgaged properties hence the publication to the public through Raia Mwema Newspaper of 15<sup>th</sup> March 2022.

Regarding the facility agreement of 23/01/2018 the counsel for the Respondent submitted that, the same is still valid but it does not give the Applicant a room to default in repaying the loan in the manner that was agreed. That, as per the terms under clause of 11.1 and 11.2.2 of the agreement the Applicant failure to repay even a single instalment constitutes a default where the full outstanding balance becomes due and payable and the Respondent had right to recover the loan amount.

In support of his argument that there was no any triable issue, he cited the case of **Mohamed Iqbal Haji and 3 others vs Zedem Investment Ltd and 2others**, Misc. Land Application No 5 of 2020 HC land division at DSM (Unreported). **Victoria water Co. Ltd and another vs Equity Bank Tanzania Ltd and another**, Misc. Civil Application No. 635 of 2018.

Regarding the second test which is irreparable loss the Respondent's counsel submitted that, in the Applicant's affidavit there is no particulars of irreparable loss which has been pointed out rather the Applicant stated that in the mortgaged properties there are 400 students. That, the counsel for the Applicant should have submitted the proof on the presence of the said number of students. He insisted that, it is the Respondent who stand to suffer irreparably by being restrained to recover its money which was entrusted to him by the public. That, it is the Respondent who has a bonafide claim of right arising from the breach of financial contractual terms. That, in business, the issue of breach of contract cannot arise where there is bonafide claim of right arising from breach of financial contractual terms. He cemented his argument with the case of **Jane Paul Mwikwabe Vs Paul Mkwabe and 5 others**, Land case No 82 of 2011 HC at DSM.

On the last test which is on balance of convenience he submitted that, the grant of injunction will cause more inconvenience to the Respondent being a bonafide lender. That, in order for the Respondent to remain in business it must have fund to lend which comes from the repaid loan. That, the policy of the central bank is to strength the recovery measures of the banks and financial institutions so as ensure that the banking sector remain sound, stable and profitable. That, the court should shun away from creating a bush for borrowers to hide simply by sympathising with the Applicant.

He added that, the Applicant claimed to have sought for settlement of the matter. He was of the view that, if the terms of the contract is still valid the Applicant had no reason of seeking for settlement. That, if the Applicant had the intention of settling the matter, he could not have instituted this suit. That, even in the main case the Applicant has no chance of success as he obtained a loan, he submitted security and he agreed to the recovery measures. He referred to the case of **Nitro Explosive Tanzania Ltd vs Tanzanite One Mining Ltd**, Civil Appeal No 175/2019 CAT at Dodoma. In concluding, the counsel for the Respondent submitted that, the Applicant has failed to show the presence of the three tests in granting temporary injunction

all together therefore the Respondent prays that the application be dismissed with costs.

Upon a brief rejoinder submission, the counsel for the Applicant addressed the three tests under the case of **Atilio Vs. Mbowe** (Supra). He submitted that, annexure HS2 annexed to the reply to counter affidavit has a proof of the loan repayment schedule showing the restructure of the loan and the amount paid until that time. He insisted that, the Applicants account is with the Respondent's bank and all school fees are deposited in the Applicant's account hence the claim that the Applicant is not paying the loan is not true.

On the submission that there is no any triable issue he replied that, since the Applicant did not admit everything, it is premature to regard that there is no any triable issue. Regarding the presence of students at school he stated that, annexure SH1 and EBTL12 contains the issue of students and the school performance. On the claim that the Applicant could not file a suit if he intended to settle the matter, he replied that, the intention of the Applicant is to stop the property from being sold as doing so will result to irreparable loss.

Regarding the issue of irreparable injury, the counsel for the Applicant submitted that, the Applicant is likely to suffer more as he is



subjected to interests and penalties that accrue every time as the same was rescheduled in the facility dated 23/1/2018. On balance of convenience, he argued that, since there is a disputed issue, the Applicant will suffer more if the property is sold as there are students and supporting staffs in the property intended to be sold. He thus prays for the application to be granted.

From what was submitted by parties, it is apparently that the instant application aims at obtaining a temporary injunction restraining the Respondent from disposing of the mortgaged properties until full determination of the main suit. The position of law on temporary injunction is clear. Order XXXV11 Rule 1 (a) and 2 (1) of the Civil Procedure Code, to which this application was preferred gives incidences upon which temporary injunction may be granted. It includes (among others) that, there is the existence of the suit. There must be proof by affidavit that, a property in dispute is in danger of being wasted, damaged, or alienated by any party to the suit or property is likely to suffer loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree. Thus, for the court to grant the order, the Applicant must establish existence of a serious question to be tried by the court on the facts alleged by the party and a

probability that the Plaintiff will be entitled to the relief prayed, also that, if the order is not issued then the Applicant will suffer an irreparable loss compared to the Respondent.

The requirement of the law has been embraced by court in a number of decisions. See the landmark case of **Atilio Vs Mbowe**, (Supra) which set out conditions to be satisfied by the Applicant for the grant of temporary injunction. In determining whether the current application is a fit one for the grant of a temporary injunction then all the three conditions set forth under the case of **Atilio Vs Mbowe** will be tested.

On the first condition on existence of a prima facie case, it is the Respondent's argument that there is no any triable issue as the Applicant had admitted to have taken the loan from the Respondent and not paying the same and had agreed to mortgage his properties which the Respondent will in turn use to recover the amount claimed. The Applicant in his submission as well as under paragraph 6 and 7 of the affidavit in support of the application has addressed what he call triable issues. He contended that, the loan term is still valid and the Applicant is still paying the loan thus, the sale of mortgaged property will be fettering the Applicant's right to reclaim the property contrary to the

agreed terms. He also claims that, the interest and penalties included and demanded by the Respondent are exorbitant and not previously agreed between the parties.

In considering the submission by the parties and the record, it is not a dispute between parties that there exists a main case that is, Civil Case No. 22 of 2022 which is pending before this court. As pointed out by the counsel for the Applicant there is triable issues to be determined by the court much as the duration of the loan term is disputed and the determination of the charges on interest and penalty imposed is in question. All these are matters worth the determination by this court thus, the first condition is met.

Regarding the second condition on irreparable injury, I find this condition is also met. I say so basing on the well elaborated submission by the counsel for the Applicant. There is no dispute that the property intended to be sold is a school building. The counsel for the Applicant categorically elaborated the existence of students and the supporting staffs who are present in the mortgaged premises that is much as annexure SH1 and SH2 to the Applicant's affidavit and reply to the counter affidavit. Similar facts can be obtained from the Respondent's documents annexed to the counter affidavit that is, annexure EBTL 12

and EBTL 18. It is evident that under the mortgaged properties there are students and the supporting staffs. In considering the decision in **General Tyre EA Ltd vs HSBC Bank PLC** Misc. civil Application 35 of 2005 TLR 206 that, the court should balance the danger of granting and or not granting the temporary injunction, I agree with the Applicant that, if the injunction is not granted it may lead to the flooding of cases from parents as well as teachers and other stakeholders connected to the school. For purpose of controlling this, granting injunction is the best option to pave way to the determination of the rights of the parties and prevent injuries likely to be suffered by other people not part to the suit. In my view monetary compensation will not in any how remedy the situation due to the nature of the properties intended to be realised.

On the last condition, that on balance of conveniency there will be mischief to be suffered, the question here is who is going to suffer greater hardship and mischief if the temporary injunction is granted or not granted. There is no doubt that the Applicant is likely to suffer more than the Respondent. The Respondent's counsel submitted that, if restrained by this court from selling the mortgaged property, the Respondent will be a candidate of bankruptcy. I understand that loan facilities are among the banking business. In my view, the Respondent

being financial institution does not depend on a facility issued to one customer to run a bank business. Thus, I do not see how the bank will cease to operate or become a candidate to bankruptcy merely because the auction to recover a single loan facility is only postponed. Much as the ownership documents (certificate of titles) of the mortgaged properties are still under custody of the Respondent, if the main suit will be decided in favour of the Respondent, it will still recover the amount claimed by selling the same.

For reasons above, the three conditions set in **Atilio Vs Mbowe (supra)** have been met by the Applicant. I therefore find merit in this application and proceed on granting the same. An order of temporary injunction is granted for six months in respect of disputed properties which are located in plot No. 628 under CT No. 27330 and plot No 918 under C.T No 40808 both at Block DD Sombetini Area in the name of the Applicant and the Plot No. 504 under C.T No 20629 at Block DD, Sombetini Area Arusha in the name of Hady Academy and Primary School. The Respondent, their agents, workmen or any other person related are restricted from selling, transferring or tempering in any way with the above listed properties for the period above mentioned unless

there is court order to the contrary. In the upshot, the application is granted with no order for costs.

It is so ordered.

**DATED** at **ARUSHA** this 12<sup>th</sup> day of July, 2022



  
D.C. KAMUZORA

JUDGE