

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**(IN THE DISTRICT REGISTRY)**  
**AT MWANZA**

**MISC. CIVIL APPLICATION NO. 67 OF 2022**

*(Arising from Civil Case No 33 of 2022 before the High Court of Tanzania  
Mwanza at Mwanza)*

**ESTER JAMES MAGITTA-----APPLICANT**

**VERSUS**

**CHRISTOPHER MARWA MKAMI-----1<sup>st</sup> RESPONDENT**

**BANK OF AFRICA TANZANIA LIMITED -----2<sup>nd</sup> RESPONDENT**

**JUIUS MWITA MAKERE-----3<sup>rd</sup> RESPONDENT**

**RULING**

*Last Order: 10.08.2022*

*Ruling Date: 31.08.2022*

**M. MNYUKWA, J.**

The applicant, Ester James Magitta has filed the present application for an order of temporary injunction pending the determination of the main suit against the respondents.

The application has been brought under a certificate of extreme urgency and it is made under sections 68 (c) and 95 of the Civil Procedure Code, Cap 33 R.E 2019 and Order XXXVII Rule 1(a) and 2(1) of the Civil Procedure Code, Cap 33 R.E 2019.

During the hearing of the application, the applicant was represented by the learned counsel Mr. Marwa Samwel while the 2<sup>nd</sup> and 3<sup>rd</sup>

respondents enjoyed the legal services of Mr. Juvenelis Motete and Malick Hamza, learned counsels and the 1<sup>st</sup> respondent did not enter an appearance while he was fully aware of the hearing date and therefore the matter proceeded ex parte against him.

The facts ascertainable from the affidavit of the applicant goes that: the applicant claimed to be the only and lawful wife of the 1<sup>st</sup> respondent. It is alleged that the 1<sup>st</sup> respondent loaned from the 2<sup>nd</sup> respondent and mortgaged their matrimonial home located at Plot No 15 Block C, Nkende Area, Tarime Township. It was further deponed that, the 1<sup>st</sup> respondent failed to honour the mortgage agreement and the security for the loan was sold in the public auction to the 3<sup>rd</sup> respondent.

The applicant further deponed that, the auction did not involve the local authority and that the official search was conducted and it was revealed that the 3<sup>rd</sup> respondent did not transfer the ownership of the disputed property to his name due to the caveat which was filed. The applicant claimed that, she knows nothing concerning the mortgage of their matrimonial home and she was not involved in any how by either the 1<sup>st</sup> respondent or the 2<sup>nd</sup> respondent. She further claimed that sometime in early January 2020, the branch manager and the officers of the 2<sup>nd</sup> respondent made an enquiry as to whether she was the wife of



the 1<sup>st</sup> respondent and if she was married to him. The applicant's affidavit further states that, the 3<sup>rd</sup> respondent is in the process of transferring the ownership of their matrimonial home from the names of the 1<sup>st</sup> respondent and since the applicant has protectable interest on the said mortgaged matrimonial property, it will be injustice and may result into an irreparable loss if the transfer will be effected for the benefit of the 3<sup>rd</sup> respondent. Thus, she prays this court to issue a temporary injunction against the respondents restraining them from transferring the ownership of the mortgaged property located at Plot No. 15 Block C, Nkende Area, Tarime Township from the name of the respondent to the names of the 3<sup>rd</sup> respondent or any other person pending the hearing and determination of the main suit.

During the hearing of the application, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents submitted that, they were not objecting to the applicant's application that's why they did not file their reply to the affidavit deposed by the applicant. They further prayed for the costs to be awarded in the main case. For the 1<sup>st</sup> respondent, though the matter proceeded exparte against him, he did not opt to file a reply to the affidavit.

Arguing in support of the application, the applicant's counsel prays the court to grant an application as prayed. He submitted that if the



transfer of ownership on Plot No 15 Block C, Nkende Area at Tarime township will not be restrained, the applicant will suffer irreparable loss because the 3<sup>rd</sup> respondent may use it for any purpose. He added that, the applicant who is the lawful wife of the 1<sup>st</sup> respondent had a protectable interest on the mortgaged property as she did not consent for the same to be pledged as a security for loan. He finalized his submission by stating that, since the applicant's consent was not secured, there is a triable issue in the main case and therefore prays the application to be granted for the reasons they have stated in the applicant's affidavit.

After carefully scrutinising the affidavit deponed by the applicant and its annexures as well as upon hearing the submission of the applicant and bearing in mind that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not object to the application, this court is placed with only one issue to determine as to whether the application is meritorious.

It is a settled position of law that, granting a temporary injunction pending the determination of the main suit is the discretionary power of the presiding Judge or Magistrate. Order XXXVII Rule 1(a) and 2(1) of the Civil Procedure Code, Cap 33 R.E 2019 to which this application is made, give the circumstances upon which the order can be granted. The same circumstances have been well articulated in the case of **Atilio v Mbowe**



1969 (HCD) 284 which are **first**, there must be a serious question to be tried and the plaintiff had a probability to succeed, in other words, there must be existence of the suit and the likelihood of the plaintiff to win in the suit, **second**, the court interference is necessary to prevent the applicant from suffering irreparable loss, this means that the court has to restraint the respondents from continuing on what they are doing so as to eliminate the chances for the applicant to continue suffering from it and the **third** condition is on the balance of convenience that there will be greater hardship if the injunction will not be granted.

Upon revisiting the affidavit filed by the applicant, it is my duty now to examine if an order of injunction can be granted or not based on the above criteria stated in **Atilio v Mbowe** (supra).

Starting with the first criteria, it is undisputed that there is a pending case before this court which is the Civil Case No 33 of 2022. The affidavit filed in this court shows that the mortgaged property was acquired by the joint efforts of the parties in 2014 and that the 1<sup>st</sup> respondent mortgaged the same without the 2<sup>nd</sup> respondent secured consent from the applicant.

From the record, the 2<sup>nd</sup> and 3<sup>rd</sup> respondent did not contend to the application as they opt to contest the main application. Since the applicant alleged that the 2<sup>nd</sup> respondent did not secure her consent when the 1<sup>st</sup>



respondent secured a loan and mortgaged the property acquired by the joint effort of both parties during their marriage, and since the applicant is still the lawful wife of the 1<sup>st</sup> respondent, it is my view that there is a triable issue because at this stage the court does not go deep into the merit of the case.

As to the second criterion, the applicant has to show that, there will be an irreparable loss if the injunction will not be granted. As per the decision of **Kibo Match Group Limited v H.S Impex Ltd** [2001] TLR 152, the applicant has to show that unless immediate action is taken, otherwise the applicant will suffer a quantified and or unquantified irreparable damage and if the temporary injunction is withheld, the final decision would be rendered nugatory. I am also aware that sometimes an order for injunction cannot be granted if recourse can be by way of compensation. In our present application, the applicant has shown that if the transfer is done to the 3<sup>rd</sup> respondent who bought the mortgaged property from the 2<sup>nd</sup> respondent, she will suffer irreparable loss because the 3<sup>rd</sup> respondent will be at large to do anything and to use for any other purpose the mortgaged property and therefore she will suffer irreparable loss since the property in question is the matrimonial property.



On the last criterion which is the balance of convenience, the applicant is likely to suffer more than the respondents if an order of temporary injunction will not be granted because the 3<sup>rd</sup> respondent will continue with the transfer process of the property in dispute and there is a possibility to complete the transfer process and the same to be in his name while the main case is not determined on merit.

All said and considered, it is my firm view that the applicant has managed to meet the criteria as articulated in the case of **Atilio v Mbowe**(supra) for this court to exercise its discretionary power to grant a temporary injunction pending the determination of the main suit. Thus, consequently, I proceed to grant the order for a temporary injunction for six months. Costs to follow the suit.

It is so ordered.



A handwritten signature in blue ink, appearing to be 'M. Mnyukwa'.

**M.MNYUKWA**

**JUDGE**

**31/08/2022**

**Court:** Ruling delivered in the presence of the parties' counsels.

A handwritten signature in blue ink, appearing to be 'M. Mnyukwa'.

**M.MNYUKWA**

**JUDGE**

**31/08/2022**