

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 498 OF 2021**

**RAYMOND FOCUS MLAY.....APPLICANT**

**VERSUS**

**KCB BANK TANZANIA ..... 1<sup>ST</sup> RESPONDENT**

**DOOREEN HURUMA MAWOLE also known as**

**DOREEN ALBERT TEMU ..... 2<sup>ND</sup> RESPONDENT**

**EVANS GENERAL TRADERS ..... 3<sup>RD</sup> RESPONDENT**

**MEM AUCTIONEERS & GENERAL**

**BROKERS LTD ..... 4<sup>TH</sup> RESPONDENT**

**FURAHINI JOSEPH LEMA ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

Date of Last Order: 21.04.2022

Date of Ruling: 25.04.2022

**A.Z.MGEYEKWA, J**

The applicant has brought this application under Order XXXVII Rule 1 (a) (b) 2 (1) of the Civil Procedure Code Cap.33 [R.E 2019]. The application was supported by an affidavit deposed by one. Raymond

Focus Mlay, the applicant. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents did not file counter-affidavits which means they did not oppose the application. On their sides, the 5<sup>th</sup> and 6<sup>th</sup> respondents resisted the application and demonstrated their resistance by filing separate counter-affidavit. The 5<sup>th</sup> respondent counter affidavit was deponed by Mr. Furahini Joseph Lema, the 5<sup>th</sup> respondent, and the 6<sup>th</sup> respondent counter affidavit was deponed by Mr. Saimon Onesmo Stephen, the Principal Officer of the 6<sup>th</sup> respondent.

The application is borne from the fact that there is a pending Land Case No. 126 of 2021 whereas the applicant is seeking an order of temporary injunction to restrain the respondent, its employees, agents, assignees, and workmen from auctioning or causing any interference to the applicant's property in any manner whatsoever pending hearing and final submission of Land Case No. 126 of 2021 which is pending before this court.

When the matter was called for hearing on 3<sup>rd</sup> March, 2022, the applicant enjoyed the legal service of Mr. Ndanu Emmanuel, learned counsel whereas the 5<sup>th</sup> and 6<sup>th</sup> respondents enlisted the legal service of Mr. Mussa Godwin Mwapongo. By the court order, the application was scheduled to be disposed of by the way of written submission whereby the applicant was required to file his submission in chief on or before 29<sup>th</sup>

March, 2022. The respondent was required to file a reply before or on 5<sup>th</sup> April, 2021. A rejoinder if any was scheduled on 11<sup>th</sup> April, 2022. Both parties complied with the court order.

In his written submission, Mr. Ndanu began by tracing the genesis of the matter which I am not going to reproduce in this application. Submitting in support of the application, Mr. Ndanu submitted that there is a chronological of facts that prompted the applicant to file this application. To buttress his submission he referred this court to paragraphs 1 -18 of the applicant's affidavit. He submitted that for one seeking temporary injunctive orders, he has to meet the criteria set out in the landmark case of **Attilio v Mbowe** [1969] HCD 283. The said criteria are such that:-

- (i) *There must be a serious question to be tiled on the facts alleged, and a probability that the plaintiff will be entitled to the relief prayed;*
- (ii) *That the Court's interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established, and;*
- (iii) *That on the balance there will be greater hardship and mischief suffered by the plaintiff from the withholding of the injunction than will be suffered by the defendant from the granting of it.*

Starting with the first condition, the learned counsel for the applicant submitted that the applicant is the lawful owner of Plot No. 548, Block 'N' Mbezi Beach Tangi Bovu in Kinodnoni District with a Certificate of Title No. 97630. Mr. Ndanu argued that the applicant has taken an oath that he has never mortgaged his title deed to the 1<sup>st</sup> respondent and never been a guarantor to the loan which was taken by the 3<sup>rd</sup> respondent who is the sole proprietor of the Evans General Traders and that he never signed any mortgage documents prepared by the 1<sup>st</sup> respondent.

Mr. Ndanu went on to submit that the applicant came to know that his title deed has been mortgaged to the 1<sup>st</sup> respondent after he saw a post or advert in the Tanzania Daima Newspaper of 17<sup>th</sup> January, 2017 and after making an inquiry to the 2<sup>nd</sup> respondent, she informed him that she is the one who mortgaged his property to the 1<sup>st</sup> respondent. Mr. Ndanu went on to argue that the applicant reported the matter to the Kinondoni District Commissioner and local authority in order to halt the auction.

He went on to submit that the matter was as well been reported to the Director of Criminal Investigation and the investigation report revealed that the applicant's signatures in the mortgage documents were forged and a criminal charge is instituted against the 2<sup>nd</sup> respondent at the Resident Magistrate Court of Dar es Salaam at Kisutu. He added that the applicant has filed a Land Case No. 126 of 2021 before this court.

The learned counsel for the applicant did not end there he stated that the 5<sup>th</sup> respondent purported that he is the bonafide purchaser of the applicant property which was auctioned by the 4<sup>th</sup> respondent. He added that the 5<sup>th</sup> respondent in his counterclaim has just attached scripts of papers issued by the 4<sup>th</sup> respondent. He went on to state that it is a common procedure by the financial institution that the process of property sold by their brokers by way of the auction is deposited in the recovery accounts but the 5<sup>th</sup> respondent failed to disclose the account to show if he deposited the said amount.

Regarding the second condition, whether the applicant stands to suffer irreparable loss requires court intervention before the applicant's legal rights are established. Mr. Ndanu submitted that the property in dispute is used by the applicant as a residential home as well as for commercial purposes. Mr. Ndanu stated that the applicant is an orphan both his father and mother have passed away the house was allocated to him. He added that the applicant is using the said house to generate income to pay for his fees and used it for his livelihood.

Mr. Ndanu valiantly submitted that the 1<sup>st</sup> respondent through the 4<sup>th</sup> respondent wants illegally auction the applicant's property. He added that the 5<sup>th</sup> respondent has illegally evicted the applicant without any legal right over the said property without any court order or notice and

the main suit is pending before this court for determination. it was his contention that the 5<sup>th</sup> respondent purports to have leased the applicant's property to the 6<sup>th</sup> respondent on 16<sup>th</sup> September, 2021 while the Land Case was already been lodged before this court on 9<sup>th</sup> August, 2021.

Stressing, Mr. Ndanu contended that the 5<sup>th</sup> respondent cannot allege that he was not aware of the existence of the case before this court as he was a part of Land Case No.25 of 2019 which was struck out and the applicant was directed to join the 3<sup>rd</sup> respondent. He added that Land Case No.25 of 2019 contains the same facts and issues in dispute as in Land Case NO. 126 of 2021, thus, the 5<sup>th</sup> respondent was aware that the matter was not determined on merit. He added that in the previous land case the 5<sup>th</sup> respondent filed a counter claim against the 1<sup>st</sup> respondent claiming a refund of his purchase money and the said counter claim was also struck out. Hence he has filed a fresh suit in Land Case No. 126 of 2021.

The learned counsel for the applicant continued to submit that under the said circumstances the applicant stands to suffer irreparable loss hence the court intervention before the applicant's legal right is established is of utmost importance. He spiritedly argued that the applicant's and tenant's belongings which were in the house are

nowhere to be seen as the result 5<sup>th</sup> and 6<sup>th</sup> respondents' illegal entrance and eviction. Mr. Ndanu believes that the second criteria are well articulated to move this court to exercise its discretionary power.

As to the third criteria, the learned counsel submitted that there will be a greater hardship and mischief suffered by the applicant/ plaintiff if this court will not grant the order of injunction because the property premises in dispute is used by the applicant as a home. He added that due to illegal eviction by the 5<sup>th</sup> respondent the applicant is being accommodated by friends and relatives, he is moving from one place to another like a refugee while his home is being illegally withheld by the 5<sup>th</sup> and 6<sup>th</sup> respondents.

Elaborating further, Mr. Ndanu submitted that on 16<sup>th</sup> September, 2021 the applicant was informed by his neighbours that the house is invaded by unknown people who were taking furnitures and other items out of his house. Mr. Ndanu added that when the applicant arrived at his home he found the entrance gate was locked and there were security guards from the 6<sup>th</sup> respondent who said they were instructed by the 5<sup>th</sup> respondent to guard his house. He reported the matter at Goba Police station however he did not get the support needed hence he lodged the case before this court on 17<sup>th</sup> September, 2021.

The learned counsel for the applicant spiritedly contended that continued to submit that the 5<sup>th</sup> and 6<sup>th</sup> respondents have nothing to lose. He added that the 5<sup>th</sup> respondent has filed a counter claim against the 1<sup>st</sup> respondent which is a reputable financial institution that can refund the purported purchased money in the event the whole process of mortgage and sale of the applicant's property is nullified. He went on to submit that in case this court will not grant the order and the 5<sup>th</sup> respondent dispose of the house by any means the applicant will suffer irreparable loss as he will lose a home and his major source of income as he is jobless. He added that the 5<sup>th</sup> respondent has no any place of abode known to the applicant or any immovable property known to the applicant.

The learned counsel for the applicant further submitted that the magnitude of suffering of the 5<sup>th</sup> and 6<sup>th</sup> respondents or the other respondents, if the order is granted, is very minimal compared to that of the applicant and this can be evidenced by the act of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents of not opposing the application and further the rest have recourse against each other. He added that unfortunately, the applicant has found himself in this situation or in danger of losing his home and not due to his negligence or inaction or deliberate actions but due to



illegal actions of other people. It was his submission that the third principle has also been met by the applicant.

On the strength of the above long and well-articulated submission, Mr. Ndanu stated that the applicant in his application has met the three principles set in the case of **Atilio v Mbowe** (supra). He urged for this court to find that the application has merit, thus, invoking its discretionary powers to grant the application with costs upon the 5<sup>th</sup> and 6<sup>th</sup> respondents.

In response, Mr. Godwin Mwapongo submitted that this application was filed on 17<sup>th</sup> September, 2021, and *ex parte* orders were granted, however, the order was not executed because the applicant had already been evicted on 16<sup>th</sup> September, 2021. To buttress his submission he referred this court to paragraphs 2, 16, and the last page of the applicant's affidavit and submitted that the orders being sought in the chamber summons have been taken by event, hence rendering this application helpless as the court cannot grant what does not exist.

Mr. Godwin went on to submit that the conditions in granting a temporary injunction were set out in the case of **Atilio v Mbowe** (supra). He added that the temporary injunction is a discretionary remedy but which ought to be used judicially since the court cannot grant them even

when it is convenient to do so if the applicable principles enumerated in the case of Atilio have not been fully satisfied. To buttress his contention he cited the cases of **ABLA Estate Developers & Agency Company Ltd v KCB Bank Tanzania Ltd**, Misc. Land Application No. 604 of 2017 HC of Tanzania –Land Division at Dar es Salaam (unreported), **Charles D. Msumari and 83 others v The Director of Tanzania Harbours Authority**, Civil Appeal No.18 of 1997, HC of Tanzania at Tanga.

The learned counsel for the 5<sup>th</sup> and 6<sup>th</sup> respondents went on to argue that accordingly to affidavits on records there is a dispute of ownership of the suit property which is situated at Plot No. 548 Block 'N' Tangi Bovu Mbezi area. He added that while the applicant claims to be the lawful owner and challenging to mortgage and subsequent sale of the suit property to the 5<sup>th</sup> respondent by the 1<sup>st</sup> and 4<sup>th</sup> respondents. He submitted that the 5<sup>th</sup> respondent through counter claim alleges to be the lawful owner of the suit property having purchased it at the public auction conducted by the 4<sup>th</sup> respondent and having paid the purchase price fully became a bona fide purchaser. It was his view that there is a valid question to be tried by the court to determine who is the lawful owner of the suit property between the applicant and the 5<sup>th</sup> respondent? Thus, in his view, the first principle is fulfilled.

On the second condition, whether irreparable injury loss is met. Mr. Godwin submitted that in the lease agreement between Raymond Focus Mlay and Alex Nguda for an annual rent of Tshs. 12,000,000/= the said contract was attested by Mr. Ndanu, learned counsel who is the applicant's counsel. In his view, the income generated from the suit premises is t Tshs. 12,000,000/= per annum in his view the same can be compensated, it is reparable in monetary form.

He added that the applicant has not given out any particulars of the loss which is not capable of monetary compensation. To bolster his submission Mr. Godwin cited the cases of **Christopher P. Chale v Commercial Bank of Africa**, Misc. Civil Application No. 635 of 2017 HC of Tanzania at Dar es Salaam whereas this court referred to the words of Lord Diplock in the case of **American Cynamid Co v Ethicon Ltd** (1975) 1 All ER 504 and the same was followed in various cases in Tanzania including **Hotel Tilapia Ltd v Tanzania Revenue Authority**, Commercial Case No.2 of 2000 (unreported). It was held that:-

*“ ...the object of the temporary injunction is to protect the plaintiff against injury by violation of his right for which he could not adequately be compensated in damages recoverable in the action of the uncertainty were resolved in his favour and trial...”*

As to the third condition, Mr. Godwin submitted that the records show

that the suit property is currently occupied by the 6<sup>th</sup> respondent as a tenant of the 5<sup>th</sup> respondent following the taking of possession or evicting the applicant from the suit property by the 5<sup>th</sup> respondent. To support his submission he referred this court to the applicant's counsel submission. He added that the 6<sup>th</sup> respondent in paragraph 5 of his counter affidavit deponed that he is the tenant of the 5<sup>th</sup> respondent. It was his view that granting this application means the 6<sup>th</sup> respondent who is the tenant of the 5<sup>th</sup> respondent shall have to be evicted from the suit property which is contrary to the purpose of temporary injunction. He added that the main purpose of the injunction is to preserve the status quo, pending determination of the right and obligations of the parties to the dispute.

It was his submission that the applicant has failed to meet the 2<sup>nd</sup> and 3<sup>rd</sup> conditions for granting a temporary injunction. Fortifying his position he cited the cases of *Mariam Christopher v Equity Bank Tanzania Limited & Another*, Misc. Land Case Application No. 1070 of 2017 HC of Tanzania – Land Division at Dar es Salaam (unreported).

Due to the given reasons, the learned counsel for the 5<sup>th</sup> and 6<sup>th</sup> respondents insisted that even if the three conditions would have been fulfilled this application could fail because it is overtaken by events that the suit property was auctioned and the 5<sup>th</sup> respondent is the successful buyer thus rented the same to the 6<sup>th</sup> respondent.

In conclusion, Mr. Godwin urged this court to find that the application is devoid of merit and dismiss the same with costs.

In his long rejoinder, Mr. Ndanu reiterated his submission in chief and submitted that the appellant's counsel submitted that the application is brought under Order XXXVII Rule 1 (a) (b) 2 (1) of the Civil Procedure Code Cap.33 [R.E 2019]. He stated that the relevancy of the provision is to rescue the Plaintiff against any loss or injury to property while he or she is pursuing his rights in a court of law. Mr. Ndanu went on to submit that it is not disputed that there is a pending case before this court in respect to Plot No. 548 Block 'N' Tangi Bovu at Mbezi Beach area which belongs to the applicant and his ownership has not been nullified by the court order or changed by the Commissioner for Lands.

The learned counsel for the applicant valiantly contended that the 5<sup>th</sup> respondent's counsel has decided to interfere with the proceedings of the court and illegally assume ownership of the applicant's property and illegally evict the applicant without any order of the court and without any notice. Mr. Ndanu submitted that the instant application was lodged on 17<sup>th</sup> September, 2021, and on the same date this court issued an *ex parte* order while the illegal eviction of the applicant was done on 16<sup>th</sup> September, 2021. Thus, in his view, the same cannot be said to have

been overtaken by the event because the act of the 5<sup>th</sup> respondent of trespassing into the applicant's land and forcefully removing him and his tenant was illegal and thus this court issued an order of *status quo ante*.

In the conclusion, Mr. Ndanu distinguished the cited case of Mariam Christopher (*supra*) from the case at hand in the sense that in the cited case the applicant failed to establish all three conditions while in the matter at hand the applicant has managed to do so.

In his conclusion, Mr. Ndanu prayed for this court to take action against the illegal acts of the 5<sup>th</sup> and 6<sup>th</sup> respondents.

Having heard the rival arguments of both learned counsels for the applicant and the 5<sup>th</sup> and 6<sup>th</sup> respondents as well as having accorded a deserving scan of the pleadings and the entire record of this matter, the only question to be determined here is *whether the application is meritorious*.

In determining this matter, I will be guided by the principle governing temporary injunction has been established in various decisions by the Court. **First**, *prima facie*, the court must be satisfied that there is a bona fide dispute raised by the applicant and the Court must be satisfied that there is a bona fide dispute raised by the appellant, that there is a strong case for trial that needs investigation and a decision on merits and on

the facts before the Court, there is a probability of the applicant entitled to the relief claimed by him. **Second**, an injury the applicant must satisfy the Court that he will suffer irreparably. Injury if injunction, as prayed, is not granted and that there is another remedy open to him by which he can protect himself from the consequences of apprehended injury. **Third**, a balance of convenience which is likely to be caused to the applicant by refusing the injunction will be higher than what is likely to be caused to the opposite party by granting it. The Courts have tested the above principles in various cases such notable cases include; **Atilio v Mbowe** (1969) HCD 284. **Agency Cargo International v Eurafrican Bank (T)** (HC) DSM, Civil Case No. 44 of 1998 (unreported), and **Giella v Cassama Brown & Co. Ltd** (1973) to mention just a few.

Relating the facts before me and the said principle I should take note that at this point I do not have the full evidence before me. The standard of proof required would be somehow below that which is generally required upon full trial. For example, the illegal disposition of the applicant's land by the 1<sup>st</sup> respondent to the 5<sup>th</sup> respondent needs to be proved at the main suit.

Expounding on the evidence on record, it seems the genesis of the saga arose back in 2019 and the recent incident which occurred on 16<sup>th</sup> September, 2021 when the 5<sup>th</sup> respondent evicted the applicant from suit

landed property. Now let me test the three principles mentioned in Atilio's case to find out whether the three principles in this Application were met or otherwise.

In regard to the first condition whether a *prima facie* case is established. Without wasting the precious time of this court I have to say that the applicant in his affidavit and his Advocate in his submission have proved that there is a triable case before this court. The applicant was residing in the suit landed property and suddenly he was evicted and the 5<sup>th</sup> respondent went further in renting the suit landed premises to the 6<sup>th</sup> respondent while this court had already issued an order of maintenance of *status quo ante*. In my view, I find that the first principle is met.

Getting to the second condition, the applicant must satisfy the Court that they will suffer irreparably injury if an injunction or court interference is important to protect the applicant. The fact that the applicant was living in the suit landed property, schooling and the disputed house was used as a source to generate income by collecting rents from his tenants from the said disputed premises. The same proof that the applicant in case this court will grant his application then he will suffer irreparable loss. Allowing the 5<sup>th</sup> and 6<sup>th</sup> respondents to illegally occupy the suit landed property definitely will cause irreparable loss to the applicant.



Taking to account that from the beginning this court issued an order of maintenance of *status quo ante* until the determination of this application.

It worth noting that the two phrases; *status quo* and *status quo ante* are distinguishable. *Status quo ante* is where the *status quo* involves maintaining a situation in its current state, while the *status quo ante* returns parties to the original state as it was before the dispute. In accordance to The word *status quo ante* is defined in the **Black's Law Dictionary**, Eighth Edition, 2004 to mean among other things:-

*"The situation that existed before something else (being discussed) occurred".*

Applying the above analysis, I have to say that with due respect to Mr. Godwin's it is not correct to firmly state that the orders sought in the chamber summons have been overtaken by event.

In my respectful opinion, this statement is met to disobey and disrespecting the court order as well depriving the rights of the applicant over the suit landed property. I am saying so because orders made during or after the proceeding binds all parties to the proceedings. In the present matter, the order of the court was to the effect that *status quo ante* be maintained. This was a valid and binding order against all the parties including the 5<sup>th</sup> respondent.

In the circumstances, therefore, an argument that the order of this court was overtaken by event becomes baseless, as rightly put by Mr. Ndanu that the order of this court cannot be said to have been overtaken by event. Continuing to stay in the disputed premises from the date when this court issued its order on 17<sup>th</sup> September, 2021 to date means the 5<sup>th</sup> and 6<sup>th</sup> respondents' acts are illegal. Thus, in my view, the applicant has proved that he has suffered and will stand to suffer irreparable loss more than the 5<sup>th</sup> and 6<sup>th</sup> respondents. In my view, this condition is met. In the of **Charles D. Msumari** (supra) cited by Mr. Godwin, the gist is for the court in granting injunctions to do justice to the parties.

For the sake of clarity, I have read the case of **Hotel Tilapia** (supra). In **Hotel Tilapia's** case, the issue for discussion was adequate compensation. In my view, this cited case is distinguishable from the instant case. In the instant case, unlike the cited case of **Hoteli Tilapia** (supra), the main issue apart from compensation is the right of the applicant to shelter calls for necessary action considering that this court has already issued an order of maintenance of *status quo ante*. As we speak the 6<sup>th</sup> respondent is in occupation of the suit landed property.

In the circumstances of the case, this court is required to protect the applicant's rights thus at this juncture before hearing the main case an

interim injunction is needed otherwise the applicant will suffer more irreparable injury.

With respect to the third condition, a balance of convenience, which is likely to be caused to the applicant by refusing the injunction will be higher than what is likely to be caused to the opposite party by granting it. Having determined the first two conditions in favour of the applicant, I fully subscribe to the submission made by the learned counsel for the applicant that, the applicant will suffer greater hardship than the respondents because he has no any permanent shelter. He is studying and thus required to pay school or university fees and obtain necessary needs. It is my considered view that in case the matter will be decided in favour of the respondents then the applicant will suffer more.

I totally disagree with the submission made by Mr. Godwin in that evicting the 6<sup>th</sup> respondent who is the tenant of the 5<sup>th</sup> respondent from the suit property is contrary to the purpose of temporary injunction. Mr. Godwin from the beginning disregarded the court order and tried to diverge to address the truth that the order of this court is for maintenance of *status quo ante* and not maintenance of *status quo*. Therefore this ground is totally disregarded by this court.

I have also considered the fact that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents did not oppose the application. Failure to grant this application for a

temporary injunction will affect the rights of the applicant to enjoy his peaceful life and smooth atmosphere in his studies. Therefore, the applicant has met the third condition.

The learned counsel for the applicant has urged this court to take action against the 5<sup>th</sup> and 6<sup>th</sup> respondents for disobeying the court order. However, the prayer to punish the said respondents has been made by the learned advocate and is not backed with facts. Prayers related to the punishment of a person alleged to have defiled court orders have to be made formerly in an application to show cause. Such application must be supported by an affidavit containing facts for such defilement. In the absence of such formal application, the Court cannot proceed to act based on the words from the bar.

Having weighed the different probabilities in this application, it is definitely that the applicant will suffer more hardship. The court order dated 17<sup>th</sup> September, 2021 was very clear that parties to maintain *status quo ante*. Consequently, this court has observed further that there is a pending Land Case No. 126 of 2021 before this court on the same subject matter.

For aforesaid reasons and findings, I order the 5<sup>th</sup> and 6<sup>th</sup> respondents to vacate the disputed premises immediately. I also issue an order to restrain the respondents or any other acting/ claiming on his behalf not

to interfere with the suit premises Plot No. 543, Block 'N' located at Mbezi Beach Tangi Bovu in Kinondoni District within Dar es Salaam Region pending the determination of Land Case No. 126 of 2021 on merits. Application is so granted with costs to borne by the 5<sup>th</sup> and 6<sup>th</sup> respondents.

Order accordingly.

DATED at Dar es Salaam this 25<sup>th</sup> April, 2022.



  
A.Z.MGEYEKWA

**JUDGE**

25.04.2022

Ruling delivered on 25<sup>th</sup> April, 2022 in the presence of Mr. Emmanuel Ndanu, learned counsel for the applicant, Mr. Semu, learned counsel for the 1<sup>st</sup> respondent, Mr. Godwin Mussa, learned counsel for the 5<sup>th</sup> and 6<sup>th</sup> respondents, 2<sup>nd</sup> and 3<sup>rd</sup> respondents.



  
A.Z.MGEYEKWA

**JUDGE**

25.04.2022