

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI

MISC. LAND APPLICATION NO. 22 OF 2021
(c/f Land Case No. 3 of 2021)

CUTHBERT ROBERT KAJUNA..... APPLICANT

VERSUS

EQUITY BANK TANZANIA LIMITED 1ST RESPONDENT
ADILI AUCTION MART LIMITED.....2ND RESPONDENT
EVANCE JOSHUA MASUKE.....3RD RESPONDENT

RULING

6th August & 13th August, 2021

SIMFUKWE, J:

The applicant under certificate of urgency is seeking for ex parte and inter parties orders pursuant to **Order XXXVII Rule 2(1) and section 95 of the Civil Procedure Code, CAP 33 R.E. 2019 (the CPC)** as follows;

- (i) That, the Honourable Court be pleased to issue an ex parte interim order of injunction to restrain the Respondents, their agents, servants, workmen, assignees and whomsoever purporting to act from transferring ownership of the Property with



Certificate of Title 056111063 for plot number 31- 33 and 50-53, Farm number 125 located at Kiboriloni, Moshi Municipality within Kilimanjaro Region, pending the hearing and determination of the main case.

- ii) Costs of this Application
- iii) Any other restraint reliefs deemed just to be granted by the Honourable Court.

The application was supported by the affidavit sworn by the Applicant Cuthbert Robert Kajuna.

In this application the Applicant was represented by Mr. Emmanuel Daniel assisted by Oscar Mallya, learned advocates, while the first and second Respondents were represented by Mr. Lyaro learned counsel who did not object the application. The third Respondent was represented by Martin Kilasara the learned advocate who objected the application by filing counter affidavit deponed by the third Respondent. The matter proceeded *viva voce*.

Mr. Emmanuel started by praying to adopt the affidavit of the Applicant together with its annexures to form part of his submissions. Then, the learned counsel narrated the facts and background of this application which I need not to reproduce but I will deal with it where necessary.



The learned counsel for the Applicant submitted that the Applicant filed the instant application under certificate of urgency on the reason that the Respondents had commenced unlawful process of transferring ownership of the suit premises while the same is the subject matter of pending suit. It was argued further that the said process of transferring the suit premises is illegal as the same arise from illegal sale which is challenged in Land Case No. 03/2021.

It was submitted further that if this application is not granted, the applicant stands to suffer irreparable loss, his right over the disputed land will be jeopardised and the Respondents will distort the evidence and hence frustrate proceedings and the outcome of Civil Case No 08/2018 and Land Case No. 3/2021. That the same will detriment the life of the Applicant, his family and business.

In support of his arguments, the learned counsel cited the case of **ATILIO MBOWE 1969 HCD 288** and the case of **T.A.T KAARE VS GENERAL MANAGER MARA COOPERATIVE UNION (1994) LTD [1987] TLR 17**, in which conditions for granting temporary injunction were illustrated to be;

1. That, there should be a prima facie case to be alleged.



2. That, there should be irreparable loss to be suffered if application not granted.

3. Balance of convenience.

On the first condition of existence of prima facie case, Mr. Emmanuel averred that there is a pending case which is **Land Case No. 3/2021** in which the Applicant herein is the Plaintiff and the Respondents herein are Defendants. It was argued further that in the said pending case there are triable issues which warrant this Court to grant temporary injunction so that both parties may be heard on merit. Thus, whether the Respondents followed proper procedures in auctioning the disputed property. Second whether the illegal auction and the transferring process commenced by the Respondents may distort evidence and outcome of **Civil Case No. 10/2018**. To cement his argument, the learned counsel cited the case of **GENERAL TYRE EAST AFRICA LIMITED VS HSBC BANK PLC [2006] TLR 60 at page 66**.

Submitting on the second ground of balance of convenience, the learned advocate for the Applicant stated that the Applicant will suffer more than the Respondents because he has invested in the suit land and there are raw materials of harvesting trees therein and workers of the Applicant are getting salaries from the said suit property. It will not be healthy for the same to be



transferred prior to determination of the main suit as this will amount to loss of income and employment. He stated further that the Applicant resides at the suit premises, thus he will be rendered homeless. On the other hand, Mr. Emmanuel was of the view that none of the Respondents will suffer any loss if the application is granted because the first Respondent is a banking institution which still operates and has financial muscles. Hence, it is in the interest of justice that both parties should be heard on merit. Otherwise, **Land Case No 3/2021** will be rendered obsolete. He cemented his point by referring to the case of **John P. Sakaya vs Azania Bank Ltd, Misc. Commercial Application No 62 of 2018**; where the Court held that the Applicant stand to suffer more hardship than the Respondent.

Supporting the 3rd ground of irreparable loss, the learned counsel contended that the Applicant will suffer irreparable loss which cannot be compensated as the suit property is used to generate income including raw materials for harvesting trees used in the business of distributing trees. Second, he reiterated the point that the Respondent will distort the evidence of the pending main case. Moreover, the Applicant will not be able to pay workers which may result into Labour Disputes. Such loss cannot be compensated by general damages. He supported his argument by citing the cases of **Hotel Tilapia vs TRA**



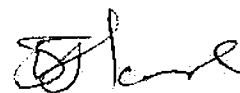
Commercial Case No 2 of 2000 and Kibo Match Group Ltd vs HS Impex Ltd [2001] TLR 152.

The learned counsel also referred to **Section 66(c) of the CPC** which allows temporary injunction to be granted in order to prevent ends of justice from being defeated.

Mr. Emmanuel concluded by praying that this application should be granted pending determination of **Land Case No 3/2021**.

In his reply, Mr Kilasara for the 3rd respondent adopted the counter affidavit of the third Respondent together with its annexures to form part of his submissions. The learned counsel was of the view that this application is misconceived and has been overtaken by events since the application was filed on 20/7/2021 while as per Annexure 'R1' (the transfer deed dated 25/6/2021), the transfer has already been effected from the first Respondent to the third Respondent who is the *bona fide* purchaser. In such circumstances, the injunction will not serve any useful purpose.

He attacked the argument that the Applicant is the owner of the property by stating that the suit property was mortgaged since 2018 and on May 2021 it was sold to the third Respondent who is a *bona fide* purchaser in a public auction.



It was submitted further by Mr Kilasara, that the applicant in his sworn affidavit admitted the facts that he secured a loan from the first Respondent and that he was issued with statutory default notice, the nature and extent of default. Despite the said notice and terms of the loan, the Applicant breached the loan agreement and did nothing to mitigate that default or seek court's intervention.

It was argued further for the third Respondent that pursuant to annexure R3 of the counter affidavit, demand notices were issued to the Applicant in October and November 2019 but the applicant opted not to comply. That in the same manner the second Respondent issued notices of public auction (annexure R1 of the counter affidavit) but the Applicant did not file caveat or injunction in court to restrain the auction.

Responding to the illegality of the sale, the learned counsel submitted that when the said auction was effected on 29/5/2021, there was no any incumbrance in respect of the disputed property. The third Respondent was a successful bidder and as it is evidenced by a certificate of sale annexed to a counter affidavit. Mr Kilasara was of the view that the said sale was absolute and that on balance of probabilities, there were no serious questions to be tried on the alleged facts.



In addition, the learned counsel submitted that it is not true that the property was sold below value since it was sold for more than 25% of the forced market value. He insisted that the third Respondent as a bona fide purchaser, his rights and interests on the suit property should be protected by all means.

Challenging the ground of irreparable loss, Mr Kilasara stated that the same had no merit since the particulars as stated at paragraph 24 of the Applicant's affidavit is just a mere statement without particulars which give rise to the said irreparable loss.

Responding to the claim that the Applicant will fail to pay workers the learned counsel argued that this was raised in the bar as the same was not included in the Applicant's affidavit. He said there is a chain of authorities restricting submissions from being raised from the back while they are not included in the affidavit. He cited the case of **Christopher P. Chale vs Commercial Bank of Africa, Misc. Civil Application No.635 of 2017** at page 5,6 and 7.

Mr. Kilasara also urged this Court to note that the suit property has already been sold and the Applicant has already given vacant possession. He said the Applicant is not praying to be reinstated at the sold premises, nor to restrain the third Respondent not to take possession of the suit premises, rather

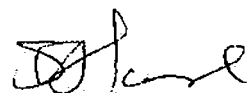


he prays to restrain transfer which has already been done. Thus, submissions in respect of irreparable loss are frivolous and grossly misconceived.

Concerning the issue that there is evidence which will be distorted if this application is not granted, it was submitted that the same was suspicion and had no merit. Moreover, the said claim was not included in the affidavit.

On the ground of balance of convenience, Mr. Kilasara was of the firm view that it is the rights of the third Respondent that were to be protected. That it was obvious that the agreement was between the first Respondent and the Applicant. The third Respondent was not a party thereto. Further, according to the record, the Applicant defaulted that loan agreement. It is the said default that led to the public auction of the suit premises. Thus, it is not in the best interest of justice, to protect the defaulting party as it will set bad precedent.

Mr Kilasara also faulted the Applicant for failure to comply with **Order XXXVII Rule 3 of CPC** which provide for another condition for granting temporary injunction which is security. That before granting temporary injunction the applicant should deposit security or make any undertaking either in the affidavit or in their submissions. He was of the view that since the Applicant did not comply with the said condition the application



is incompetent. It was stated further that, even if the main case will be decided in favour of the Applicant, then they can transfer ownership from the third Respondent to him and for that there will be no loss.

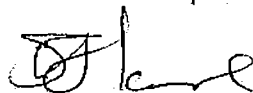
Regarding **Section 68 of CPC**, the learned counsel submitted that it provides for temporary injunction but it was not included in the Chamber summons as one of the enabling provisions.

It was concluded to the effect that the application is devoid of any merit and it deserve dismissal with costs.

In his rejoinder, Mr. Emmanuel re-joined under two limbs, first, on the principle that once a mortgage always a mortgage, and second, that no one should benefit from his own wrong.

Under the first limb, the learned counsel for the Applicant stated that the mortgage transaction was meant to be a financing tool and not stealing tool. Mortgaged property serves as security only to enable the mortgagee to secure a loan; and it is meant for the benefit of both sides. He reiterated that an interim order was necessary to protect the interest of the Applicant.

Under the second limb that no one should benefit from his own wrong, the learned counsel for the Applicant stated that Mr. Kilasara either by mistake or for the reasons known by him, tried to mislead the Court on the issue of irreparable loss. He



reiterated paragraph 15 of the affidavit of the Applicant that the Applicant is in a position of suffering irreparable loss.

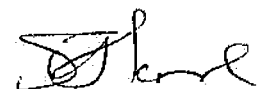
After considering the parties' affidavits and their rival submissions, the only issue for determination is;

Whether the Applicant has established sufficient grounds to have the temporary injunction granted.

The learned counsels have cited a number of cases law authorities for which I am very grateful. Each of these cases discusses various aspects of injunction proceedings and principles relevant thereto.

It should be noted that, the legal position on matters of injunctive orders is further developed in numerous cases for instance the cases of **Tanzania Breweries Limited versus Kibo Breweries Limited and Another (1998) EA 341**; **Vodacom Tanzania Public Co. T. Limited vs Planetel Communications Limited, Civil Appeal No. 43 of 2018** and **University of Dar es Salaam vs Silvester Cyprian and 210 Others [1998] TLR 175.**

Therefore, in determining this application, I will be guided by the principles enunciated in the above authorities, the

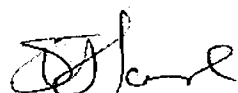


principles which require me to determine the following three questions:

- 1. Whether there is a serious issue to be tried in the main suit and a probability that the Applicant will be entitled to the relief prayed therein.*
- 2. Whether the court's interference is necessary to protect the Applicant from the kind of injury which may be irreparable before his legal right is established.*
- 3. Whether on balance of convenience, there will be greater hardship and mischief that will be suffered by the Applicant from withholding the injunction than will be suffered by the Respondent from granting it.*

Starting with the first question, it is undisputed that the Applicant has instituted **Civil Case No 10 of 2018** and **Land Case No. 3 of 2021** before this Court which are still pending. In both cases the subject matter is the suit premises of which temporary injunction is sought. Thus, there are arguable issues to be determined before this Court. Otherwise, the end results of the said pending cases will be pre emptied

Concerning the second question, it is apparent from the outset that Court's interference is necessary to protect the Applicant from suffering irreparable loss although the said suit property has already been disposed of to the 3rd Respondent. **Order**



XXXVII Rule (1) (a) of the Civil Procedure Code, 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 a reason of its continued use by any party to the suit, or wrongly sold in execution of a decree; or... the court may order temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting damaging, alienating, 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;


In the affidavit of the Applicant and submissions by Mr. Emmanuel it has been alleged that the suit property of the Applicant was auctioned illegally and destruction of some of the properties at the suit land was done by the Respondents, after the same had been sold to the 3rd Respondent whom Mr.



Kilasara claimed to be the bona fide purchaser. From this position it is clear that court's intervention is needed so that ownership of the suit property will remain with the Applicant pending final determination of the main case.

On the third question; whether there will be greater hardship and mischief to be suffered by the Applicant by withholding the injunction than will be suffered by the Respondent from granting it; I think that the answer to this issue is in the affirmative. From the affidavit and submissions of the Applicant there were ongoing activities at the suit property which is the subject of the main suit. Mr. Kilasara Claimed that the 3rd Respondent will suffer more as he is the bona fide purchaser. It is a considered opinion of this Court that the Applicant will be more affected if the injunction is denied than the third Respondent. The purchase was effected to the 3rd Respondent on 15/6/2021(*as per paragraph 3 of the counter affidavit*) and there is no evidence on record that the 3rd Respondent has made any development to the said property to the extent of suffering more loss compared to the Applicant.

The Court of Appeal in the case of **Vodacom Tanzania Public Limited Company vs Planetel Communications Limited, (supra)**, at page 9 had this to say; -

A handwritten signature in black ink, appearing to be 'J. K. K.', located at the bottom right of the page.

"Therefore, the purpose of an injunction in law is said to be interlocutory when granted in an interlocutory application and continues until a defined period. It aims at preserving the status quo until the final determination of the main application or suit"

Therefore, I am of settled view that the restraint order will neither affect the Applicant nor the Respondents as the disputed property's status will be maintained pending determination of the main suit.

Concerning the issue of security raised by Mr. Kilasara that the application is incompetent for failure of the Applicant to deposit security pursuant to **Order XXXVII Rule 3 of CPC**, with due respect, Mr. Kilasara has misinterpreted the said provision as the provision provides for the procedure where no application is made on a suit adjourned generally as seen in the marginal notes.

I will not detain my energy discussing the legality of the sale as submitted by the parties or the issue that the sale was below the valuation value of the property as this is subject to discussion at the main case.

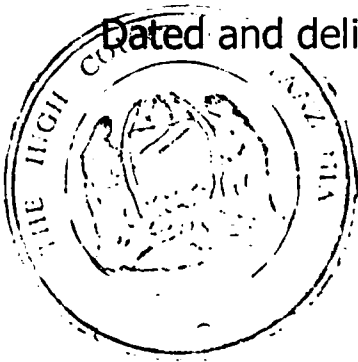
For the foregoing reasons therefore, due to the fact that the main case is yet to be determined, I hereby grant temporary



injunction restraining the Respondents, their agents or whosoever purports to act on the Respondents' behalf from transferring of the land in dispute (the Property with Certificate of Title 056111063 for plot number 31- 33 and 50-53, Farm number 125 located at Kiboriloni, Moshi Municipality within Kilimanjaro Region), pending determination of **Land Case No. 3 of 2021**. No orders as to costs.

It is so ordered.

Dated and delivered at Moshi this 13th August, 2021.




S.H. SIMFUKWE

JUDGE

13/08/2021