

TANZANIA / JUDGMENT

EXIM BANK TZ SCANNED

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7 February 2025

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA LAND DIVISION [AT DAR ES SALAAM] MISC. LAND APPLICATION NO. 1665 OF 2025 (Arising from Land Case No. 1568 of 2025 before Hon. Dr. E. I. Laitaika, J.) CONTINENTAL SERVICES LTD.....
APPLICANT VERSUS EXIM BANK (TANZANIA) LIMITED (A Successor in Title of First National Bank Tanzania Limited)..... 1st RESPONDENT ACCURATE RECOVERY AND AUCTIONS LTD..... 2nd RESPONDENT

RULING

Date of last Order: 7/2/2025 Date of Ruling: 10/2/2025 LALTAIKA, J, The Applicant herein, CONTINENTAL SERVICES LTD has moved this Court under Order XXXVII Rule 1(a) and 2(1) of the Civil Procedure Code, Cap 33 R.E. 2019, Sections 68 and 95 of the same Code, and any other enabling provisions of the law, seeking an order of temporary injunction restraining the Respondents from auctioning property located at 1 PLOT NO 59 BLOCK 45C with CT No. 186248/103 Kijitonyama Service Trading Area in Kinondoni, Dar es Salaam (the suit property) pending the determination of the main suit. The Respondents jointly filed a counter-affidavit opposing the application, to which the Applicant filed a reply to the affidavit. When the Application was called for hearing on Friday 7th February 2025, Representation by Counsel was as follows: Mr. Paschal Mshanga and Haron Oyugi, learned Advocates appeared for the Applicant. The Respondents, on the other hand, enjoyed the legal services of Ms. Daines Simkoko & Mr. Rajabu Bakari learned Advocate. The next part of this Ruling is a summary of submission by Counsel which lasted at least four hours. Mr. Mshanga, Counsel for the Applicant, addressing the legal principles governing the granting of a temporary injunction, contended that the position had long been settled by courts of record in two cases: ATILIO v. MBOWE (1969) HCD 284, with the same principles being expounded in KIBO MATCH GROUP LTD v. H.S. IMPLEX LTD [2001] TLR 158. He emphasized that, as established in those cases, three conditions must be met for an injunction to be granted: 2

1. A prima facie case
2. Irreparable loss

3. A balance of convenience in favor of the applicant Counsel proceeded to demonstrate how the application met the legal threshold. On the first condition, he argued that the existence of a triable issue could be determined from the plaint and the annexures attached thereto. He referred to paragraph 9 of the plaint, where the plaintiff, who was the applicant in the present application, stated that the second respondent, acting under the instruction of the 1st respondent, had been given a letter instructing him to sell the disputed property without being informed of the amount to be recovered. He asserted that a broker could not sell property in the absence of a debt or a specified amount to be recovered, citing Rule 23 of THE COURT BROKERS AND PROCESS SERVERS (APPOINTMENT, REMUNERATION, AND DISCIPLINARY) RULES, 2017 GN No. 363 of 2017, which requires a broker to value the property before a sale. He stressed that Rule 23(2) classified failure to comply with this requirement as misconduct. He noted that the joint counter affidavit contained no valuation report. 3 On the second condition, Counsel pointed to paragraph 4 of the respondents' joint counter affidavit, where they admitted the existence of Commercial Case No. 48 of 2018, which resulted in the filing of a Memorandum of Adjustment of the Consent Decree. He argued that this implied the disputed property had already been subjected to execution by the court. He further referred to paragraph 9(d) of the plaint, where the plaintiff alleged that the decretal amount subject to execution had already been satisfied. He observed that this fact was acknowledged by the respondents in paragraph 4 of their counter affidavit, where they attached the order of the Commercial Court at paragraph 5, annex E2. Mr. Mshanga raised the question of whether, given that the decree had been satisfied, the 1st respondent could still instruct the 2nd respondent to sell the disputed property. He further questioned whether the 1st respondent could legally issue such instructions to the court broker in the absence of a court order. Referring to the instruction letter to the court broker, he noted that the bank had informed the auctioneer that, if the sale was successful, he would be entitled to 2% of the auction proceeds, as stated in annex TC 3 (collectively, paragraph 10 of the plaint). He argued that the bank had no authority to fix remuneration for brokers, particularly in a contingent 4 manner, as this would incentivize the broker to ensure the sale took place, even at the expense of legal compliance. Counsel further contended that the 2nd respondent, the auctioneer, lacked a valid license at the time of issuing the notice on 17th January. Referring to annex E8, paragraph 8 of the counter affidavit, he pointed out that the license was issued on 22nd January 2025, meaning that on 17th January 2025, when the notice was issued, the auctioneer did not possess a valid license to lawfully conduct an auction. He cited Section 4 of the Auctioneers Act, Cap 227 R.E. 2002, which prohibits an auctioneer from conducting an auction without a valid license. He submitted that another key issue for determination was whether an auctioneer without a valid license could legally conduct an auction. On the presence of serious triable issues, Counsel referred to a similar matter previously decided by the court in *The Registered Trustees of the Evangelical Lutheran Church of Tanzania v. Commercial Bank of Africa, Misc. Land Case Application No. 1071 of 2017*, p. 7, paragraph 2, where illegalities in the main suit were held to constitute a *prima facie* case. Regarding the second condition, irreparable loss, Mr. Mshanga submitted that the loss at hand could not be adequately compensated in monetary terms. He

referred to paragraph 11 of the affidavit, which stated that the property subject to sale housed a higher learning institution—the Institute of Accountancy Arusha, Dar es Salaam Campus, a government institution, as well as Akiba Commercial Bank PLC, a publicly listed company. He emphasized that students were currently sitting for examinations, and if the sale proceeded, the operations of these institutions would be disrupted or halted, a situation that could not be remedied by monetary compensation. Mr. Mshanga stressed that the stress, frustration, and disappointment that would result from such a disruption could not be atoned for in monetary terms. He illustrated this by noting that a student who failed to sit for an examination due to the sale could not be restored to their original position through financial compensation. He pointed to the lease agreements for the two institutions, noting that the lease with the bank was valid until 31st July 2026 and that of the university until 31st September 2027 (Clause 3, paragraph 2 of the lease agreement).⁶ He invited the court to consider the embarrassment that would arise if a customer attempted to withdraw money only to find that the bank no longer existed at the premises or if an auction occurred while university lectures were in session. He reiterated that all this was happening despite the applicant having satisfied the decree of USD 2.5 million. On the third condition, Counsel referred to paragraphs 11, 12, and 13 of the applicants affidavit, arguing that if the sale proceeded, the applicant's reputation as a landlord to serious institutions would be significantly damaged, bringing his integrity into question. He contended that the auction had sparked shock and fear among the applicant, its employees, and tenants. He added that the applicant's tenants—the bank and university— would also suffer hardship if the purported auction proceeded, and that any hardship faced by the tenants would, in turn, be imposed on the applicant. Mr. Mshanga maintained that, in such circumstances, the applicant would suffer severe harm, whereas the bank, whose claim was purely monetary, would not suffer any damage if the injunction were granted. He noted that the bank's claims contained interest clauses that covered any delay in recovery.⁷ In conclusion, Counsel submitted that all three conditions had been met. He cited *CPC International Inc. v. Zainab Grain Millers Ltd*, Civil Appeal No. 49 of 1995, where the Court of Appeal of Tanzania (CAT) set aside a High Court decision that had refused to grant an injunction. He emphasized that the CAT had underscored that, in assessing whether a *prima facie* case had been established, the High Court was only required to consider whether the affidavit and plaint disclosed such a case, and that it would be premature to delve into the merits at that stage. Based on the foregoing, Counsel prayed for the application to be granted. Mr. Bakari, Counsel for the Respondents, submitted that the application before the court lacked merit and ought to be dismissed with costs. He argued that the 2nd Respondent held a valid auctioneer's license when issuing the demand notice referenced as Annex E7 in paragraph 19 of the Respondents' counter-affidavit. Citing Section 9 of the Auctioneers Act, he pointed out that such a license remained valid until December 31st of the respective year, which in this case was 2024. He further stated that the Applicant had acknowledged receipt of the said notice through a letter dated January 8, 2025. Accordingly, he contended that the claim regarding the 2nd Respondent's lack of a valid license was⁸ entirely baseless and should be disregarded. Additionally, he maintained that, as indicated in paragraph 20 of the

Respondents' counter-affidavit, the 2nd Respondent's license had been duly renewed. The act in question, which would have taken place on January 31, 2025, was when the 2nd Respondent possessed a valid license, as evidenced by Annex E8. Addressing the issue of a pending case, Mr. Bakari asserted that the Applicant's affidavit did not disclose the existence of any pending case instituted before the court, nor did it contain any averment suggesting a likelihood of success. He emphasized that parties were bound by their pleadings and that a statement from the Bar by the Applicant's counsel, quoting a paragraph from an alleged plaint that had not been properly served upon the Respondents, could not substitute for proper pleadings. Mr. Bakari went on to explain that submissions did not constitute evidence, as they merely reflected the general features of a party's case. He remarked that, as Respondents, they had expected the Applicant to annex a plaint to the affidavit or at least disclose its existence in the pleadings. The absence of such documentation, he argued, demonstrated that there were no triable issues in the application warranting the court's 9 intervention. He, therefore, concluded that the Applicant was merely abusing the court process. Mr. Bakari then submitted that the Respondents were executing a valid decree and that the Applicant sought an order to injunct a judicial process enforcing that decree. He contended that such a move amounted to a misapplication and misuse of injunctive relief. He further argued that, had the Applicant wished to challenge the execution, the appropriate remedy would have been an application for a stay of execution rather than an injunction. In support of this argument, he referred to the Court of Appeal's decision in NATIONAL HOUSING COOPERATION V. PETER KASIDI & 4 OTHERS, CIVIL APPLICATION NO. 243 OF 2016 (unreported), where the apex Court underscored that injunctive relief should not be used to frustrate the enforcement of a valid decree. Turning to the issue of the alleged debt, Mr. Bakari noted that the Applicant had argued that no outstanding debt existed. However, he pointed out that the Applicant had failed to provide any proof of full settlement, such as a receipt indicating complete payment or a letter from 10 the 1st Respondent acknowledging satisfaction of the debt. Citing Section 110 of the Evidence Act, he reminded the court that the burden of proof lay on the party alleging a fact, and in this case, the Applicant had failed to discharge that burden. Finally, he submitted that the three conditions for granting a temporary injunction had not been met. He outlined that, for such an injunction to be granted, the Applicant was required to establish a prima facie case with a probability of success, demonstrate that irreparable harm would be suffered if the injunction was not granted, and show that the balance of convenience favored the relief sought. Since the Applicant had failed to meet these cumulative conditions, he maintained that the application was without merit and ought to be dismissed with costs. In conclusion, he prayed that the court dismiss the application with costs. He then yielded the floor to his colleague, Ms. Dainess Simkoko, to conclude the Respondents' submissions. Ms. Simkoko, aligning herself with Mr. Bakari's submissions, reiterated that the Applicant had failed to meet the legal threshold required for the grant of an injunction. She maintained that injunctive relief should not be 11 misused to obstruct the lawful execution of a decree. In view of these arguments, she repeated the Respondents' prayer that the application be dismissed with costs. Mr. Mshanga, in his rejoinder submission in support of the

application, began by addressing the point at which Ms. Simkoko had concluded. He noted that she had asserted that the Applicant had not provided proof that they were not indebted to the Respondents and had referenced Section 110 of the Evidence Act. However, he contended that actual proof was to be presented in the main suit, whereas, at the injunction stage, the Applicant was only required to establish a prima facie case. He maintained that the Applicant had duly done so in the present matter. On the same issue, Mr. Mshanga pointed out that the Applicant, particularly in the reply affidavit, had explicitly stated that it had no contractual dealings with the 1st Respondent. He questioned how the Applicant could be expected to prove indebtedness to an entity with which it claimed to have had no lending relationship. Furthermore, he submitted that the Applicant had alleged that it had never dealt with the individuals who had sworn affidavits, emphasizing that the bank was the custodian of all the relevant documents. 12 Turning to the issue of service, Mr. Mshanga responded to the argument advanced by both Counsel for the Respondents, who had claimed that they had not been served. He observed that Mr. Bakari had cited Order XXXVIIA along with Sections 68 and 95 of the Civil Procedure Code (CPC) to support this claim. However, he pointed out that they had not cited any legal provision substantiating their assertion that they had not been served. He further noted that the learned friends who had claimed non-service had, on January 30, 2025, filed a joint affidavit in which they cited the very case in question. He argued that this affidavit clearly demonstrated the existence of Land Case No. 1568 of 2025, from which the present application had emanated. He emphasized that the provisions under which the application had been made required the existence of a main suit, which was indeed present. In his view, an application of this nature could not have been admitted in the absence of such a case. Addressing the manner of service, he explained that, upon recognizing the expediency of serving his learned colleagues, service had been effected virtually using the contact number provided by the Respondents in their pleadings. He asserted that this mode of service was supported by Order V Rule 30 of the CPC. He further clarified that the Applicant had not received 13 court summons, which would have enabled them to provide a copy of the plaint. Ordinarily, he observed, a plaint was accompanied by summons requiring the filing of a defense. Reiterating his position, he submitted that the existence of the case had been clearly stated in the pleadings and that the Respondents themselves had replied to it. Moreover, he argued that the Respondents had not demonstrated any prejudice that might have been suffered due to the alleged omission. Regarding the issue of the auctioneer's license, he noted that the Respondents had relied on Section 9 of the relevant statute to assert that licenses expired annually on December 31st. However, he argued that this position aligned with the Applicant's submission. He contended that, at the time the 14-day notice had been issued—specifically, the notice that had prompted the Applicant to seek court intervention—there had been no valid license in place. He pointed out that the Respondents had failed to produce a valid license covering January 17, 2025, when they had published the notice: He further noted that even the 2024 license referenced by the Respondents had not been attached, and in any event, if it had been, it would have already expired by the material time. He then distinguished between the demand notice issued by the auctioneer and the 14-

day notice in question, arguing that they were separate matters. On the issue of irreparable loss, he disputed the Respondents' assertion that the Applicant had not demonstrated such loss in the affidavit and had merely spoken on behalf of tenants. He referred to paragraphs 11, 12, and 13 of the affidavit, where the Applicant had stated that it was the landlord of several institutions. He pointed out that the Applicant had received rent from these institutions and had averred that its reputation would suffer serious harm. He contended that it was incorrect to assert that the Applicant lacked standing to advocate for the interests of its tenants, particularly since it sought to protect contractual relationships. Regarding the issue of indebtedness, he pointed to paragraph 8 of the reply to affidavit, where he asserted that such allegations had been retracted and vehemently denied. He also referred to paragraph 14 of the reply to affidavit to further substantiate this position. 15 On the assertion that the Respondents had merely been executing a court order, he argued that execution was a judicial process conducted by the court and not by the bank itself. He contended that if the Respondents had genuinely sought to execute a decree, they should have pursued execution proceedings before the court. He pointed out that Annex E6, attached to the Respondents' counter-affidavit, indicated that the same lawyers had previously written to the Commercial Court recommending the appointment of the 2nd Respondent as an auctioneer. However, he noted that the appointment had not been carried out through proper judicial channels, and instead, the Respondents had resorted to self-execution. Mr. Mshanga further highlighted that this action had been taken despite the existence of a court order indicating that execution had already been finalized. In his view, these circumstances clearly demonstrated that the matter raised serious legal issues requiring judicial intervention. At this juncture, Mr. Oyugi briefly took the floor and addressed the triable issue in the matter, which he identified as whether a pending debt existed. He submitted that the Applicant had refuted the existence of any such debt in paragraph 8 of the reply to the joint counter-affidavit. He also pointed out that Annex STA8 had been attached to support this assertion. 16 He noted that paragraph 8 of the reply specifically responded to paragraph 6 of the joint counter-affidavit. Finally, he took issue with certain matters addressed by the Respondents in paragraph 6 of their supporting affidavit. He observed that in paragraph 13 of the joint counter-affidavit, the Respondents had failed to specifically dispute several averments, particularly those in paragraph 17, apart from paragraph 14. For these reasons, Counsel for the Applicant maintained that the application was meritorious and reiterated their prayer that the court grant the reliefs sought. I have dispassionately considered the rival submissions. This Court is now tasked with determining whether the application meets the conditions necessary for the grant of a temporary injunction. The law governing temporary injunctions is well settled. In the landmark case of *Atilio v Mbowe* (Supra) three conditions must be satisfied for a temporary injunction to be granted:

1. Whether there is a prima facie case with a probability of success.
2. Whether the Applicant is likely to suffer irreparable loss if the injunction is not granted. 17

3. Whether the balance of convenience favors the granting of the injunction. I will address each of these conditions in turn below: On whether there is a Prima Facie Case, the Applicant's Counsel, Mr. Mshanga, argued that the Applicant has established a prima facie case, as it has disputed the existence of any lending relationship with the 1st Respondent. He pointed out that paragraph 8 of the reply affidavit strongly refutes any alleged indebtedness. Furthermore, it was argued that the 1st Respondent had not produced any documentary evidence proving the existence of a contractual lending arrangement between the parties. The Respondents, through Ms. Simkoko and Mr. Bakari, started with a total denial of existence of any main case upon which this application is based. Counsel vehemently denied any service or information, however remote, to Land Case No. 1568 of 2025. I consider it a lost opportunity to argue that the Appellant had no triable issue before this court. Our civil procedure law is not in favour of outright denial. Counsel for the Respondents also countered that the Applicant had not provided sufficient proof of non-indebtedness and cited Section 110 of the 18 Evidence Act, which places the burden of proof on the party asserting a fact. I think this is another faulty line in the arguments of Mr. Bakari and Ms. Simkoko. I agree with Mr. Mshanga that proof of indebtedness is a matter to be determined at the main suit. At the interlocutory stage, the requirement is to establish a prima facie case and not to conclusively prove the claims. In *GIELLA V CASSMAN BROWN & CO. LTD* [1973] EA 358, the Court held that a prima facie case is established when there are serious triable issues requiring adjudication. The existence of a dispute regarding the Applicant's indebtedness, coupled with the allegations of non-compliance with statutory auctioneer licensing requirements, sufficiently demonstrates a prima facie case worthy of judicial scrutiny. On whether the Applicant Will Suffer Irreparable Loss the Applicant contended that the suit property houses several institutions whose contractual relationships with the Applicant would be jeopardized if the property were to be auctioned. The Respondents, on the other hand, argued that the Applicant's allegations of irreparable harm were speculative and that any loss suffered could be adequately compensated by damages. 19 Noteworthy, an irreparable loss is one that cannot be adequately remedied by an award of damages. In *PATEL V DHANJI* [1975] EA 40, the Court emphasized that in matters involving land, irreparable loss may arise due to disruption of business and loss of goodwill. The Applicant has demonstrated that the property generates rental income, and its loss would significantly harm its operations and reputation. Given these circumstances, I am persuaded that the Applicant has demonstrated that it will suffer irreparable harm if the auction proceeds. Moving on to the last condition namely balance of convenience it is my finding that the Applicant stands to lose its property, whereas the Respondents, particularly the 1st Respondent, have alternative legal means to recover any sums due, if at all. Moreover, the Respondents have failed to show why execution proceedings were not pursued through the court, as execution is a judicial process and not one to be undertaken unilaterally by a bank. The decision in *AMERICAN CYANAMID CO V ETHICON LTD*

[1975] AC 396 underscores that where damages would be inadequate for either party, the Court should take a pragmatic approach and grant injunctive relief where necessary. 20 Based on the foregoing analysis, this Court finds that the Applicant has met the three conditions for the grant of a temporary injunction. Consequently, the application is granted. The Respondents, their agents, or any other persons acting on their behalf are hereby restrained from auctioning the suit property described as PLOT NO 59 BLOCK 45C with CT No. 186248/103 Kijitonyama Service Trading Area in Kinondoni, Dar es Salaam (the suit property) pending the determination of the main suit. The costs of this application shall be in the cause. It is so ordered.

vH^t\\IPrVrx Court: Ruling delivered in Court Chambers this 10th day of February 2025 at 11:37 AM in the presence of Ms. Mary Thomas, learned Advocate holding brief for Mr. Paschal Mshanga Counsel for the Applicant and Mr. Rajabu Bakari, learned Advocate, Counsel for the Respondents 21

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Prepared on 14 October 2026 · Esheria