

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM MISC. LAND APPLICATION NO. 4903 OF 2024 (Arising from Land Case No. 4767 of 2024, Land Division) HAPPINESS SIMON NDEKI..... APPLICANT VERSUS INTERNATIONAL COMMERCIAL BANK (T) LTD..... 1st RESPONDENT MBUZAX AUCTION MART AND COMPANY LTD..... 2nd RESPONDENT YONA AMBILIKILE SONELO..... 3rd RESPONDENT N AND J INVESTMENT LIMITED.....4th RESPONDENT JOSEPH JAMES MGANA..... 5th RESPONDENT

RULING

22nd to 30th April, 2024 E.B. LU VAN DA, J This is an application for temporary injunction made under the enabling provisions of Order XXXVII rule 1(a), (2)(1) and (4); sections 68(e) and 95 of the Civil Procedure Code, Cap 33 R.E. 2019. Basically, the Applicant above named is seeking for orders of temporary injunction restraining the Respondents named above from selling, disposing or transferring of title of the Applicant's matrimonial properties including: One, a house with title No. i 86341 Plot No. 998 Kawe Area Kinondoni Municipality Dar es Salaam; Two, a house title No. 79674 Plot No. 542 Block K Mbezi Beach Area Kinondoni Municipality Dar es Salaam; Three, house title No. 132151 Plot No. 195 Block 2 Mbweni Mpiji Kinondoni Dar es Salaam, all in the names of the Fifth Respondent, pending determination of the main suit above captioned. The reason taken in the affidavit in support of this application is that: the Applicant legally married to the Fifth Respondent as per certificate of marriage part of annexure HSN-1; the suit properties subject for protection are matrimonial properties/assets which were jointly acquired by the Applicant and Fifth Respondent; the Applicant had no knowledge and did not consent for the suit properties to be mortgaged by the Fifth Respondent as guarantor to the Third Respondent, as a collateral for a loan of loan of Tsh 600,000,000 borrowed by the Fourth Respondent to the First Respondent. In the counter affidavit of the First Respondent, the deponent stated that in Misc. Land Application No. 635 of 2023 the Applicant attached marriage certificate No. 0397392 which the office of Registrar of Marriage and Divorce on 20/12/2023 through a letter Ref. No. AB 149/219/01/190 confirmed that there was no registered marriage between Joseph James Mgana and Happiness Simon Ndeki, as per annexure B and C to the counter affidavit. 2 That the legal wife of the Fifth Respondent is one Nailah Joseph Mgana who is the business partner in the undertaking called N & J Investment Limited, as per annexure D. That the present application is

an abuse of the court process as the Court had already granted the requested orders of injunction on 26/10/2023, also the Court granted the order to maintain status quo on 14/08/2023 in Misc. Land Application No. 4888 of 2023 and Misc. Land Application No. 635 of 2023 and thereafter the Applicant withdraw the main suit Land Case No. 255 of 2023 attached to Misc. Land Application No. 635 of 2023. In the joint counter affidavit of the Fourth and Fifth Respondent stated that the Fifth Respondent is a guarantor of the Fourth Respondent and not the Third Respondent. That the Fifth Respondent mortgaged the three suit properties to the First Respondent as security for a loan of aggregate of Tsh 1,230,000,000 granted to the Fourth Respondent. Mr. Selemani Almasi learned Counsel for Applicant submitted that the pertinent issue to be determined by the Court as raised in the affidavit and facts on the plaint are: One, the legality and validity of mortgage created between the First and Fifth Respondent on a loan granted to the Fourth Respondent without knowledge and consent of a legal wife of the Fifth 3 Respondent, argued which fact is denied by the First Respondent in her counter affidavit; Two, legality of sale of house with title No. 79674 Plot No. 542 Block K Mbezi Kinondoni, as to whether sale of the matrimonial property which the Applicant and family reside has been illegally sold while there is court order for maintenance of status quo\n Misc. Land Application No. 488 of 2023; Three, whether there are fraudulent action and misconduct being committed by the First, Second and Third Respondent during sale of the suit property. On the second condition for grant of temporary injunction, the learned Counsel submitted that under paragraph eighteen, nineteen and twenty of affidavit the Applicant proved to the balance of probability that the court interference is necessary to protect the Applicant mortgaged matrimonial properties without her knowledge and consent, while she is a legal wife of the Fifth Respondent. He submitted that eviction of the Applicant will create chaos on relocating the family members to other settlement. For the third condition, the learned Counsel submitted that there is great hardship and mischief which the Applicant will stand to suffer more than the Respondents if an order for temporary injunction will be withheld. He submitted that apart from loosing ownership, control and enjoyment of 4 matrimonial properties out of unconsented mortgage by the Applicant as a legal wife, the Applicant will get problems of relocating family members to other place where there are no other residential properties. He submitted that if at the end judgment is entered in favour of the Respondents they will have lesser trouble in executing the decree on evicting the Applicant, argued on the contrary if the judgment is entered in favour of the Applicant she will have difficulty in reversing the ownership and evicting Respondents or purchaser from the suit property, for reason that the damage in monetary forms will not compensate Applicant's irreparable loss and family disturbance. Mr. Thomas Eustace Rwebangira learned Counsel for First and Second Respondent submitted that there is no prima facie case established for reason that: One, the Applicant has not established the existence of marriage between herself and the Fifth Respondent, on that there is no marriage certificate; Two, the Applicant was not specific to which property among the three properties mentioned above is a matrimonial property; Three, Plot No. 542 Block K Mbezi is already sold to the Third Respondent and the Registrar of Title is not a party in this case; Four, the Applicant was granted temporary injunction on 26/10/2023 through Misc. Land Application No. 653 of 2023 5 and she withdraw Land Case No. 255 of 2023, arguing the Court is functus officio to grant another injunction on the same issue and same subject matter; Five, the Fifth Respondent who filed joint

counter affidavit for the Fourth and Fifth Respondent, has not stated anything about the spouse consent and the position of his wife one Nailah Chacharia Mhuyuka @ Naila Joseph Mgana and the effect of the marriage certificate No. 0615930 of Naila Joseph, whereas the Registrar of Marriages has denounced the certificate attached to the Applicant's affidavit. On the second condition, the learned Counsel submitted that the Court has already interfered by granting temporary injunction through Misc. Land Application No. 635 of 2023. He submitted the view that Court's interference is not necessary to protect the Respondent from the kind of injury which will be irreparable. He submitted that the Applicant must blame herself for abusing the equitable remedy already granted to her when she withdraw her case. He submitted that an order for an injunction is valid for six months, arguing the injunction granted to the Applicant on 26/10/2023 will expiry on 25/04/2024. He submitted that Court cannot grant fresh injunction through fresh application, arguing she was supposed to apply for extension of temporary injunction. He submitted that the Applicant has not shown that she will suffer irreparable loss if the injunction is not granted, citing *Armstrong Nico Jerry and Another vs International Commercial Bank (T) Limited and Others*, Misc. Land Application No. 28581 of 2023, Land Division. He submitted that the Applicant pleaded loss for alleged lack of control and enjoyment of the matrimonial houses, arguing the Applicant has not stated which among the suit properties is used as residential house and that used by tenant as pleaded under paragraph twenty. For the third condition of balance of convenience, the learned Counsel submitted that it is not disputed that the Fourth Respondent borrowed substantial sum of money from the First Respondent and defaulted to repay the loan. He submitted that upon default the option to the lender, the First Respondent, is to exercise his power of sell under the mortgage as one means or recovery. He submitted that there is no any mischief committed by the First Respondent. He submitted that the Third Respondent is a bonafide purchaser for value without any notice in respect of auctioned properties among the three. The learned Counsel submitted that this Court has been reluctant to grant temporary injunction where all three conditions have not been established, 7 citing *3D System Contractors Ltd vs Blue Flowers Investment Ltd and Others*, Misc. Land Application No. 97 of 2022, Land Division. On rejoinder, the learned Counsel for Applicant submitted that the Court will have an opportunity to discuss in details in Land Case No. 4767 of 2024 as to whether the Applicant had a valid legal marriage with the Fifth Respondent so that her consent would have been necessary or not. He restated the triable issue indicated in the submission in chief. He submitted that the Applicant clearly outlined in the affidavit in support of this application that she has been using the properties subject of the suit with her family for residential purpose, arguing there is no law which require the Applicant to specify property as matrimonial property to make this application valid. He submitted that the Court is not legally barred from entertaining this application in respect of a house title No. 79764 Plot No. 542 Block K Mbezi for reason that the Registrar of Titles is not a party in this case. He submitted that the Fifth Respondent is not the one who brought into force the argument on the presence of consent of one Nailah Chacharia Mhuyuka @ Naila Joseph Mgana a person unknown to the Applicant. He submitted that the Court is not legally prevented from entertaining and granting temporary injunction orders on this application for reason that it was granted in Misc. Land Application No. 653 of 2023, argued it undergoes a natural death upon withdrawing Land Case No. 255 of

2023, and there is no extension of temporary injunction which will be made to nonexistence case or application. He submitted that the First Applicant did not cite statute or case law prohibiting the court not to grant new temporary orders of injunction following of new case after withdraw of the previous main case. Regarding irreparable loss, the learned Counsel submitted that the facts of irreparable loss are stated under paragraphs eighteen, nineteen, twenty of the affidavit in support, that the intending sale will relieve ownership, control and enjoyment of the mentioned properties on the part of the Applicant. Generally speaking, this application is doomed to fail, I will explain: Number one, the Applicant is very lucky that whenever she knock the door of this Court is either granted interim orders for maintaining status quo or temporary injunction. » First, on 14/08/2023 the Court granted the order to maintain status quo vide Misc. Land Application No. 488 of 2023, which was later struck out on 25/09/2023, as pleaded in paragraph seven of the affidavit in support of this application; 9 Second, on 26/09/2023 the Court issued an order for maintenance of status quo Misc. Land Application No. 635 of 2023. Third, on 26/10/2023 the Court granted temporary injunction vide Misc. Land Application No. 635 of 2023. For reasons which were not explained in this application, the Applicant withdraw the main suit Land Case No. 255 of 2023 attached to Misc. Land Application No. 635 of 2023. Fact in two and three were pleaded in paragraph eight of the affidavit in support of this application. Fourth, on 15/04/2024 this Court granted an interim order maintaining status quo, pending determination of this application. The learned Counsel for Applicant associated this application to abuse of court process. Certainly true. To my view, abuse of court process is meant to be imported to protect other litigants from being constantly sued and dragged to court here and there by the same claimant/applicant, over the same cause of action and the court keeping entertaining her/him at the detriment or expense of the other litigants. Number two, in the counter affidavit of the First Respondent stated that in Misc. Land Application No. 635 of 2023 the Applicant attached marriage certificate No. 0397392 which the office of Registrar of Marriage and Divorce io on 20/12/2023 through a letter Ref. No. AB 149/219/01/190 confirmed that there was no registered marriage between Joseph James Mgana and Happiness Simon Ndeki, as per annexure B and C to the counter affidavit. That the legal wife of the Fifth Respondent is one Nailah Joseph Mgana who is the business partner in the undertaking called N & J Investment Limited, as per annexure D. This factual deposition was not contested by Happiness Simon Ndeki who swore the affidavit in support of this application. Instead, one Selemani Almasi who is the learned Counsel for Applicant affirmed a reply to the counter affidavit, and disputed the above fact, where at the verification clause verified that this fact is true to the best of his knowledge. One could ask as to how the learned Counsel could know to the best of his own knowledge facts relating to marital status of the Applicant. Number three, the rationale of a requirement of spouse consent in creating mortgage, disposition or transfer, is to protect matrimonial house and not matrimonial properties or assets as pleaded by the Applicant herein. Section 59(1) of the Law of Marriage Act, Cap 29 R.E. 2019, provide, I bold a pertinent portion, 'Where any estate or interest in the matrimonial home is owned by the husband or the wife, he or she li I shall not, while the marriage subsists and without the consent of the other spouse, alienate it by way ofsale, gift, tease, mortgage or otherwise, and the other spouse shall be deemed to have an interest therein capable of being protected by caveat, caution or otherwise under any law for the time being in

force relating to the registration of title to land or of deeds' Section 114(10 of the Land Act, Cap 113 R.E. 2019, with margin notes, mortgage of matrimonial home, provide, . A mortgage of a matrimonial home including a customary mortgage of a matrimonial home shall be valid only if-

- (a) any document or form used in applying for such a mortgage is signed by, or there is evidence from the document that it has been assented to by the mortgagor and the spouse or spouses of the mortgagor living in that matrimonial home; or
- (b) any document or form used to grant the mortgage is signed by or there is evidence that it has been assented to by the mortgagor and the spouse or spouses living in that matrimonial home' In the entire affidavit in support of this application, the deponent referred to the suit properties as matrimonial properties or assets. There is no mention of any of the three suit properties as matrimonial house(s). To my opinion 12 matrimonial properties/assets and matrimonial home are mutually exclusive. To my respective view, for one to successful plead that she did not consent or assent to the mortgage or disposition or transfer to the matrimonial home, must establish that she/he is a legally married spouse; the marriage is subsisting; a property is used as a matrimonial home and in fact there must be evidence that the spouses are physically sheltered under the roof of the alleged matrimonial home. Number four, on 26/10/2023 the Court granted temporary injunction vide Misc. Land Application No. 635 of 2023, to protect the same properties. Now the Applicant is coming by way of fresh application for another fresh temporary injunction in respect of the same suit properties. A defence by the learned Counsel for Applicant, was that the learned Counsel for First and Second Respondent who fronted this argument did not cite any statute or case law which bars this practice. It is true that the learned Senior Counsel for the First and Second Respondent did not cite any law to aid his argument. Mulla, The Code of Civil Procedure, Sixteenth Edition, at page 3728, commented that, 13 'Res judicata does not apply to applications for injunction. However, the court may refuse to allow a matter to be reagitated if that would amount to abuse of the process of the court' Hereinabove, I have stated that the Applicant is lucky, has been protected by this Court four times, the first protection reckoned from 14/08/2023. To my respective view, granting this application will constitute abuse of the court process. With these remarks, the argument of the learned Counsel for Applicant who opined that there is an arguable case, is highly at stake; irreparable loss was not vindicated to meet the minimum threshold for the grant of temporary injunction and balance of convenient tilt in favour of the First Respondent who from 14/08/2023 has received four orders from this Court restraining her from taking recovery measures. The Application is dismissed with costs. 14

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