

TANZANIA / JUDGMENT

JOHN CLARET MDENYE 2222 edited

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB- REGISTRY OF
MANYARA AT BABATI MISC. CIVIL APPLICATION NO. 6121 OF 2024 (C/F Mise. Civil Application
No 23 of 2024 before the High Court) JOHN CLARET MDENYE.....
APPLICANT VERSUS UCHUMI COMMERCIAL BANK LTD..... 1st RESPONDENT
REGIZ COMPANY LTD..... 2nd RESPONDENT TANFIN CONSULTANT E. A
LTD..... 3rd RESPONDENT FELISTER MALYA..... 4th
RESPONDENT

RULING

4th June & 2nd July, 2024 KAMUZORA, J. The Applicant filed the instant application under sections 68(e) and 95, Order XXXVII Rule 1 of the Civil Procedure Code [CAP 33 RE 2019], (hereinafter referred to as the CPC) seeking for an interim order restraining the Respondents, their agents, servant assignee or whomsoever acting through them from transferring, disposing, mortgaging, assigning, giving gift or any transaction affecting the landed property described as Plot No. 53 Block "K" with title No. MNY situated at Old Majengo Babati Town (hereinafter referred to as the suit property) Page 1 of 11 pending determination of Mise. Civil Application No. 23 of 2014. The application is supported by an affidavit sworn by the Applicant and on the other hand, the Respondents filed a joint counter affidavit to contest the application. A brief factual background underlying the instant application as could be gathered from the record is that, the Applicant applied for a loan from the 1st Respondent secured by the suit property. It is on record that the Applicant defaulted in the payment of the loan thus, the 1st Respondent initiated the recovery measures. The Applicant decided to institute a suit by filing Civil Case No. 1 of 2023 before Babati district court. The record reveals that parties executed a settlement deed in which among other things, it was agreed that the Applicant was to make payment to the sum of TZS 45,560,985/= in three instalments as follows; TZS 8 million was to be paid on or before 30/08/2023, TZS 28 million was to be paid on or before 30/11/2023 and TZS 9,560,958/= was to be paid on or before 30/01/2024. It was also agreed that upon full payment of the payable loan, the 1st Respondent will cause the discharge of the mortgage of the title deed of the suit property. It was further agreed that should the Applicant breach the terms referred to above, the 1st Respondent through the debt collector will have all right to reinstate the recovery process, including but not limited to auctioning the suit property. Page 2 of 11 The Applicant claimed that, he honored all terms and the deed of settlement was still in force when the 1st Respondent authorized the 2nd

and 3rd Respondents to sell the suit property to the 4th Respondent. The Applicant instituted a revision application, Mise. Civil Application No. 23 of 2024 before this court intending to challenge the whole recovery process. Subsequently, the instant application was also instituted for injunctive orders restraining the Respondents from transferring or disposing of the suit property pending determination of the above application. When the matter was called for hearing, Mr. Filemon Maige, learned advocate appeared representing the Applicant while the Respondents were represented by Mr. Martin Kilasara, learned advocate. On prayer by the counsel for the parties, the application was disposed of by way of written submissions. Both parties' counsel complied to the submissions schedule save for the rejoinder submission. In his submission in support of application, Mr. Maige urged this court to grant the relief sought on account that they have met the three conditions for granting of injunction. According to the learned advocate, before the court can grant injunction it must be satisfied that there is serious question to be tried on the facts alleged with probability of success in the suit. The Applicant also must demonstrate that he is likely to suffer irreparable loss requiring court's intervention before the Applicant's legal Page 3 of 11 right is established and the last element is proof of greater hardship and mischief suffered by the Applicant if injunction is not granted than the Respondent if the order is granted. Reference was made to the case of Sigori Investment (T) LTD & another vs Equity Bank Tanzania Ltd & another Mise. Land Application No. 56 of 2019. The learned advocate submitted that there is a matter which is still pending in court namely Mise. Civil Application No. 23 of 2024 in which the Applicant has filed revision for this court to call and examine the record in order to satisfy itself as to propriety of the process of selling the suit property. That, the Applicant is likely to suffer irreparable loss since the suit property is being used for renting and business purpose thus, if the order for injunction is not granted the Applicant will lose business and confidence to tenants. The Applicant will also permanently be deprived of his right to property. He added that, on the balance of convenience, the Applicant stands to suffer an irreparable loss because he will be deprived of his right to the suit property guaranteed by Article 24 of the Constitution. He insisted that, there is no any other avenue in which the Applicant could raise his claim and therefore this court be pleased to grant the relief sought. In reply, Mr. Kilasara referring to the decision in the case of Attilio v Mbowe (1969) HCD 284 submitted that, there is no serious issue to be Page 4 of 11 tried because the suit property was auctioned after the Applicant defaulted in payment of the loan. He explained that, upon initiation of the recovery measures the Applicant filed Civil Case No. 1 of 2023 which was dismissed on 23/6/2023 and to date the dismissal order has never been varied or set aside. That, the purported settlement deed was executed on 14/8/2023 while there was no any pending case between the parties. That, the settlement deed was executed on strict understanding that the Applicant will not default to pay any of the agreed three instalments. That, the Applicant breached the terms of the settlement agreement for failing to pay any of the agreed instalments. To strengthen on the consequence of failure to pay the agreed amount, the Respondent's counsel referred to the case of Abdallah Yussuf Omar v the Peoples' Bank of Zanzibar & another [2004] TLR 399 and the case of National Bank of Commerce Ltd Vs Staphene Kyando T/A Asky Intertrade, Civil Appeal No 162 of 2019, Tanzlii. On the claim that the Applicant will suffer irreparable loss, the learned advocate for the Respondents submitted that the Applicant has not categorically indicated the particulars of loss

likely to be suffered. He argued that there is no lease agreement or rent payments to indicate that the suit property has tenants. That, there is no any proof of further dealings over the suit property and the assertions over existence of Page 5 of 11 tenants was raised in the submissions thus, be expunged. To support his arguments, the learned advocate referred to the case of Hassan Kapera Mtumba v Salim Suleiman Hamdu Civil Application No. 505/12 of 2017 Court of Appeal of Tanzania at Tabora. On the argument that on the balance of convenience the Applicant will suffer hardship as he will lose ownership over the suit property, the learned advocate for the Respondents argued that those facts are misconstrued. He submitted that, the Applicant freely mortgaged the suit property and he breached the loan agreement and settlement deed. That, the Applicant was issued with default notice but failed to pay. That, the sale was absolute and there is no irreparable loss likely to be occasioned to the Applicant which cannot be monetarily compensated. He argued that this application has been overtaken by event taking into account that the registration of the 4th Respondent's interest and transfer into her name has long lapsed. He submitted that the 4th Respondent is a bonafide purchaser for the suit property and her interests accrued over the suit property which need to be protected taking into account that she is not a party to the Mise. Civil Application No. 23 of 2024. He argued that on the balance of convenience and upon issuance of an injunction, the Respondents are likely to suffer irreparable loss in the lending business, lawful acquisition Page 6 of 11 of properties and denial of the enjoyment of the fruits of auctions and it will promote inaction for borrowers. To buttress his argument, the learned advocate for the Respondents referred to the decision of this court in the case of Christopher P. Chale Vs. Commercial Bank of Africa Mise. Civil Application No. 635 of 2017. Having gone through the parties' rival submissions and the record, the sole issue for determination is whether the application has merits. The merit of the application will be looked on the compliance of the standards set in the famous case of Attilio Vs Mbowe (supra). In the said case three elements must be established before the court can grant the injunctive order;

- (i) There must be serious question to be tried 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 (Hi) That, on the balance of convenience 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. Page 7 of 11 It is settled that, all the above elements are required to be cumulatively established for the court to issue injunction order. Starting with the first element on whether there is a serious issue for determination, the Applicant alleged that the Respondents went contrary to the settlement deed by selling the suit property without his consent and contrary to the settlement agreement. That, the suit property was sold while the settlement was still in force. There is no doubt that Mise. Civil Application No. 23 of 2024 is still pending in this court before Hon. Mirindo, J. The Applicant has moved this court by way of revision to call and examine the record in order to satisfy itself as to the propriety of the recovery measures. What is being challenged is the sale process of the suit property on allegation that it contravened the terms of settlement executed between the parties. That in itself, is a triable issue. I however hesitate from

making a conclusion that the same worth merit and the decision is likely to be in favour of the Applicant. I say so because, such a determination will require this court to assess the weight of evidence deposed in Mise. Civil Application No. 23 of 2024 thus, preempting its determination. There is no dispute that the Applicant intends to challenge the execution process of the settlement agreement which was signed between him and the 1st Respondent. The Applicant is complaining of the breach of obligations under the settlement Page 8 of 11 agreement by the Respondents. Thus, the fact that, the Applicant failed to pay any of the agreed instalments, does waive his right to have a legal action against the Respondents where he alleged breach on the party of the Respondents. Thus, the cases of Abdallah Yussuf Omar (supra) and National Bank of Commerce (supra) which were referred on the consequence of failure to pay the agreed amount, are not relevant to an application for injunction rather, will be more relevant to an application for revision where the court will have to assess propriety of the matter and the legality of the recovery measures. I therefore find the first element as well established by the Applicant. As to the second element on whether the Applicant stands to suffer irreparable loss, I agree with the argument by the learned advocate for the Respondents that there is no evidence to support the existence of tenants in the suit property. Such fact was not even deposed in the Applicant's affidavit. The loss alleged by the Applicant in the affidavit was that, since the sale did not follow legal procedure, the deed of settlement will still be in force in which, the appellant will be forced to continue paying the outstanding amount advanced as a loan. Nothing justifies such a claim because the sale intended to recover the loan amount and after recovery through sale, nothing could force the Applicant to pay the amount which was already recovered through the sale of the suit property. Page 9 of 11 There is no doubt that the sale is already effected and a 30 days' notice by the Registrar of titles has already lapsed for it was issued on 20th March, 2024 and was to lapse in 20th April, 2024 and today, is almost 3 months and 10 days since the notice was issued. There is no record showing that the transfer was not effected after the lapse of the 30 days stated in the notice. Thus, it will be unsafe to issue injunction order blindly for it may be issued on something already done. Despite that, I see no irreparable loss likely to be suffered by the Applicant if injunction is not issued to stop the transfer. The sale itself has already deprived him the right over the suit property until when a decision to the contrary is made. I therefore find that the second element was not clearly established by the Applicant. Coming to the third element, on who is likely to suffer hardship between the plaintiff and the defendant, this court finds that the Respondents are likely to suffer more than the Applicant if injunction is granted. The reason for saying so is that, the suit property is already sold to a third party (the 4th Respondent herein) who was not a party to the original dispute. The injunction may cause unnecessary disturbance to the 4th Respondent who has invested her money and this may attract a new legal action resulting to endless litigation. On the contrary, the Applicant still has a chance to recover his property if the decision is made in his Page 10 of 11 favour for the court can reverse the transfer process. I therefore find the second element not well established by the Applicant. Since the Applicant is required to establish the three elements cumulatively but he failed to establish two of the elements, it cannot be said that he was able to establish

reasonable grounds for the grant of injunction order. Consequently, the application is dismissed with costs for want of merits. DATED at BABATI this 02nd Day of July, 2024. D. C. KAMUZORA JUDGE Page 11 of 11

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