

TANZANIA / JUDGMENT

mussa mussa trading co ltd vs equity bank tanzania limited another 2022 tzhclandd 12577 15 november 2022

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15 November 2022

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM MISC. LAND APPLICATION NO. 599 OF 2022 BETWEEN MUSSA MUSSA TRADING CO. LTD..... APPLICANT VERSUS EQUITY BANK TANZANIA LIMITED..... 1st RESPONDENT COPS AUCTION MART & COURT BROKERS LIMITED..... 2nd RESPONDENT (Originating from Land Case No. 243 of 2022)

RULING

03/11/2022 & 15/11/2022 A. MSAFIRI, J. The applicant Mussa Mussa Trading Co. Ltd filed this application under Order XXXVII Rule 1 (a), (2), (1) and (4) and Sections 68 (e) and 95 all the Civil Procedure Code, Cap. 33 R.E 2019 (here in as CPC), seeking for a temporary restraining order against the respondents in respect of suit properties as described in the chamber summons, pending the hearing and determination of the main suit which is Land Case No. 243 of 2022. The application is supported by an affidavit of Mussa Sulleiman Mussa, the Managing Director of the applicant. Jv / L . i The application is vehemently opposed by the 1st respondent who has filed her counter affidavit through one Prisila Clemence, a Principal Officer of the 1st respondent. The 2nd respondent did not appear in Court nor filed her counter affidavit despite being served. Hence the hearing proceeded in her absence. The hearing of the application was by way of written submissions and the applicant was represented by Mr. Selemani Almasi, learned advocate. The 1st respondent was represented by Ms. Eugenia Mark Shayo, learned advocate. The parties complied with the Court's schedule except for the 2nd respondent who as stated earlier, never entered appearance of filed a counter affidavit. From the submissions by parties, they both agreed that, in every application for temporary injunction, there are three conditions which the applicant has to fulfill in order for the Court to grant the sought application. Both counsels for the applicant and the respondent have referred this Court to the famous case of Atilio vs. Mbowe (1969) HCD 284 where the said three conditions were set. The conditions are;

- a) There must be a serious question to be tried on the facts alleged, and a probability that the plaintiff will be entitled to the relief prayed.

- b) 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 2
- c) 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. The applicant through the submissions and in the affidavit, stated that the three conditions have been met. On the first question on there being a serious question to be tried on the facts alleged, the applicant stated that there is a pending Land Case No. 243 of 2022 between the parties. That, between April 2021 and June 2021 through the Bank's facility, the 1st respondent advanced a loan to the applicant amounting to TZS 600,000,000/= plus interest. The applicant submitted that there are serious dispute on which amount of loan has been paid and which amount remains unpaid. The applicant claims that, a sum of TZS. 500,000,000 has already been paid and the applicant continues to pay the remaining amount of TZS. 200,000,000/=. The applicant states further that the 1st respondent claims that the remained unpaid loan is more than TZS. 900,000,000/= as per the counter affidavit. Another serious issue as per the applicant's submissions is whether it is legal and valid for the respondents to intend to sale the mortgaged/suit properties while the 1st respondent has agreed with applicant to dispose landed property located at Mtopero Zanzibar which is enough to settle the loan amount of TZS 200,000,000/= On the second condition, on applicant's irreparable injuries, the applicant submitted that it is shown under paragraphs 20 and 21 of the affidavit. That, the sale of the mortgaged properties subject of application 3 and main suit by the respondents will automatically relieve ownership of lawful properties without justifiable cause. That in addition, the residential houses which are mortgaged properties and are resided by different families will be lost and this will create chaos. The applicant submitted further that the loss of ownership of the properties which families resides cannot be compensated by monetary forms or damages, hence it necessitates temporary injunction or Court's interference. On the third condition on balance of convenience, the applicant submitted that it is shown under paragraphs 20, 21 and 22 of the affidavit of the applicant. That, apart from losing ownership of landed properties, the applicant will have problems of relocating family members and tenants to other places. Further, the sale of landed properties will vest rights to third parties and that could create further claims against applicant resulting to endless ligations. The applicant said further that at the end of trial, if the judgment is in favour of the respondents, they will have lesser problems in executing decree. However, if the judgment will be in favour of the applicant, they will have great difficulty in reversing the ownership of the suit property, and that the damages in monetary forms will not compensate the applicant on the irreparable loss. To cement her submissions, the applicant cited various authorities which I have all taken into consideration. On reply, the 1st respondent, through their advocate Ms. Shayo, submitted that, the applicant has failed to meet the three conditions set in 4 the case of Atilio vs. Mbowe (supra). Starting on the first condition, Ms. Shayo submitted that there are no serious issues to be tried by this Court. The reasons are that, the applicant is merely aggrieved with the fact that the 1st respondent wants to exercise its security rights in order to recover

monies loaned to the applicant. She said further that the applicant is not the legal owner of the properties that form security of the 1st respondent. That the legal owners of the suit properties were served with the notice of sale and they have not disputed the 1st respondent's notice nor have they sought for any orders to restrain the respondent from disposing of its security. She insisted that, there are no triable issues between the applicant and respondents because if there was, the legal owners of the suit properties may have joined or instituted a suit. On the second condition, Ms. Shayo stated that, the applicant was supposed to establish through facts and evidence that she will suffer irreparable loss. However, since the applicant is not the legal owner of the disputed premises but a borrower, she cannot suffer any irreparable loss. She said that, it is the 1st respondent who stands to suffer if this application is granted. On the third condition, Ms. Shayo stated that the balance of convenience is in favour of the 1st respondent because the disputed properties are mortgaged properties and it is not disputed that the applicant defaulted to pay the loan as agreed. She urged the Court to dismiss the application with costs for being frivolous and vexatious. A i , 5 To support her averments, the counsel cited several authorities which I have considered in my determination. The pertinent issue here is whether the applicant has succeeded to fulfill all three conditions as set in the famous case of Atilio vs. Mbowe (supra). It is mandatory that all three conditions must be met cumulatively before the Court can exercise the discretion and grant the prayers sought. The three conditions as reproduced by the parties in their submissions are briefly that; the existence of a prima facie case, imminent irreparable loss incapable of being atoned by way of damages and a balance of inconvenience. It is clear in my view, and from the observation of pleadings and submissions by the applicant that the first condition has been met. My reason is that, there is a pending Land Case No. 243 of 2022 instituted by the applicant and one of the claims is that the 1st and 2nd defendants (who are 1st and 2nd respondents) have breached facility agreement of 2021. That, according to the said facility agreement, the 1st defendant advanced a loan of TZS 600,000,000/= and the suit properties were among the securities for the facility. That, the plaintiff have continuously managed to pay more than TZS. 500,000,000/= plus monthly interests. The applicant has averred that the remained loan amount does not exceed TZS.200, 000,000/= interest inclusive. However, the 1st respondent on their side, contended that the unpaid loan amount has reached to TZS. 901,815,263.75 as of 4th August 2022. 6 They added further that since the applicant has defaulted in the loan repayment, the respondents have a right to exercise their right of sale. Since there is a contention between the parties on the terms of facility agreement and the outstanding balance of the loan, it is my view that there is a bonafide contest between the parties and serious question to be tried. As it was held in the Court of Appeal's case of Abdi Ally Salehe vs. Asac Care Unit Limited & 2 others, Civil Revision No.3 of 2012 CAT, Dar es Salaam, (Unreported), at this stage, I cannot indulge in prejudging the case of either party. I find that there is a prima facie case between the parties hence the first condition has been met. On the second condition of imminent irreparable loss, I also find that the applicant stands to suffer irreparable loss. The applicant has submitted that the intended sale by the 1st respondent will automatically relieve ownership of the owners of mortgaged properties who are guarantors of the applicant. That

the intended sale of suit properties by the respondent can create chaos to the families residing on the said premises, and if they are sold to the third parties, it might lead to the endless litigations. The applicant stated that being a borrower, he has an interest on the mortgaged properties and has a duty to protect them as a borrower. By this, I agree that the suffering by the applicant if the Court will not interfere will be imminent and irreparable. I find that the applicant has also fulfilled condition number two. 7 On the third condition on balance of convenience, I believe that the applicant stands to suffer hardship and mischief if the Court will not grant this application more than the respondents. This is measured that, if the respondents went on to execute their intention to sale the mortgage properties, there will be much sufferance not only to the applicant but also to the owners of the mortgaged properties. At the end of hearing of main case, if the Court enters the judgment in favour of the applicant, he will have difficulty to reverse the ownership of the suit properties already sold previous to the determination of the main case. The properties would have been already sold to the third parties and this will create even more hardship to the applicant and his guarantors. On the part of the respondents, they stand to suffer much lesser if this application is granted as they still can exercise their rights of sale of the mortgaged properties if the main case is entered in their favour. I find that this third condition has also been met. From the totality of the above analysis, I find this application to have merit as the three mandatory conditions has cumulatively been met. I hereby grant the application. The temporary injunction is entered against the respondents on the suit properties as per the prayers in the chamber summons the hearing and determination of the main case. Costs A. MSAFIRI JUDGE 15/11/2022 8

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Prepared on 14 October 2026 · Esheria