

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)
AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO. 299 OF 2023

(Arising from Civil Case No. 127 of 2023)

GLENRICH TRANSPORTATION LIMITED..... APPLICANT

VERSUS

ADILI AUCTION MART LIMITED.....1ST RESPONDENT

NMB BANK PLC.....2ND RESPONDENT

RAMJI DHAVJI MAYANI.....3RD RESPONDENT

RULING

Date of Last Order:12/07/2023

Date of Ruling: 04/08/2023.

E.E. KAKOLAKI, J.

Under certificate of urgency and by way of chamber summons, the applicant instituted the instant application both ex-parte and inter parte, seeking for the injunctive Order that, the court be pleased to issue order for maintenance of status quo and restrain the 1st and 2nd respondents from alienating the title of the property described as property on Plot No. 45 Mandela Expressways Buguruni Industrial area, Ilala Municipality Dar es Salaam- Tanzania, in certificate of occupancy (CT) No. 43260 to the 3rd respondent or any other

person, pending hearing and final disposal of the suit currently pending for hearing before this Court, costs and incidental to this application to abide the results of the main suit and any further reliefs as the Court deems fit and just to grant. The application has been preferred under Order XXXVII Rule 1 (a), and 2 (1), section 68 (c) and section 95 of the Civil Procedure Code [Cap 33 R. E 2019] and supported by an affidavit of **Mohamed Anwer Rashid**, principal officer to the applicant accounting for reasons for the grant of the application. When served to the respondents each of them filed a counter affidavit vehemently challenging the merit of the applicant as the same were sworn and affirmed by Kennedy **Raphael Katera**, **Fredrick Mtei** and **Ramjan Dhanji Mayani**, for the 1st, 2nd and 3rd respondents respectively, the counter affidavits which were replied by **Mohamed Anwer Rashid**.

It is discerned for the applicant's affidavit that, sometimes on 22nd January, 2023 the 1st respondent acting as agent of the 2nd respondent, invited tenders from the public for sale by auction the above named property, on the terms and conditions clearly stated in the advert of invitation to tender (annexure TMA-1), following the decision of this Court in Land Case No. 31 of 2020 (annexure TMA-2), the advertisement which was published on the Sunday newspaper. It is contended since sale of the property was made in

pursuance of the deed of mortgage and decree of this Court the auctioning processes was required to follow strictly law and procedures, among them sell of the suit property to the successful bidder (winner) whose bid price meets the reserved price known by the law and for the purpose of this matter one drawn from the valuation report (annexure TMA-3) prepared and certified by the Government Valuer on 8th December, 2022, the certified market value being Tsh. 600,000,000.00 and forced value Tsh. 449,000,000.00 respectively. The applicant avers that she submitted her tender bid in respect of Tender No. AAA/NMB/MAYO/01/2023 which obtained the highest price of Tsh. 560,000,000.00 as she was so declared in the bid form results dated 6th February, 2023 (annexure TMA-4) issued by the 1st respondent, the 2nd respondent's agent unlike what the 1st and 2nd respondents stated in their letter dated 7th February, 2023 (annexure TMA-5) which illegally called for improved bids from the three highest bidders, the call which was resisted by the applicant vide her letter (annexure TMA-6). It is further contended by the applicant that, though participated in the said improved bid, the 1st and 2nd respondents' act to solicit for improved bid prices was illegal and contrary to law, terms and conditions as set out in the tender/invitation to tender. In view of the above the applicant contends this

Court can nullify the award of the said tender to the 3rd respondent because no good title has ever passed to him as the process of soliciting and obtaining improved bid price was illegal null and void and was known to 3rd respondent who also participated in these illegalities thus cannot benefit from her own wrongs. According to applicant if the respondents are not restrained from completing transfer processes, there exist all possibilities that they shall act secretly and proceed to complete the process given the fact that, their act constitutes gross violation of the sale terms and the law. It is her further lamentation that, the act complained of establishes a prima facie case with very high chances of success for being denied of her rightful entitlement known in law to be declared the highest and successful bidder of the suit property hence a loss that cannot be atoned in any damages for being the winner in the first place if grant of the application is withheld. And further that, withholding of grant of the application will render the applicant's suit nugatory and meaningless as on the balance of convenience tilts on her side hence the application be granted as prayed.

In response the 1st respondent contended that, the act of not inviting the applicant to pay the full price as tendered was legal and justifiable for not meeting the reserved price hence invited to submit improved bid price in

which she complied before the improved bids were opened on 10th February, 2023, in which the 3rd respondent emerged the winner and paid accordingly as per the terms and conditions and issued with the certificate of sale on 19th day of June, 2023 and later on handed the suit property by the 1st respondent. According to the 1st respondent, the applicant was a mere invitee thus, no assurance that she would have emerged as a successful bidder, and further that, no injury suffer by her which cannot be atoned by damages. In her side the 2nd respondent countered that, announcement of tenders in public was just an invitation to treat and that the request for improved bid constituted separate tender different from the one of 22nd January, 2023 hence no illegality was committed by her. It was averred further that the winner of the tender was not announced in respect of the tender advertised on 22nd January, 2023 and the terms and conditions of the tender advertised on 22nd January 2023 ceased when the bids submitted thereof were below the reserved price. Thus, the request for the three highest bidders to submit improved bids, commenced a closed tender process independent of the previous tender in which the applicants bid in the third tender was not successful. On the 3rd respondent's side it was averred that, the applicant's suit has been overtaken by event as the 3rd

respondent and bonafide purchaser of the property has already taken physical and legal possession of the property and that, the 3rd respondent did not solicit improved bids as alleged as both the applicant and the 3rd respondent were invited to submit their improved bids and attended during their opening exercise before the 3rd respondent was offered by the 1st respondent to purchase the property, thus the applicants suit and this application is an afterthought after her improved bid fell below the bid offered by the 3rd respondent.

Hearing of this application was done viva voce, as all parties were represented, whereby applicant had representation of Mr. Elisa Msuya, assisted by Ms. Regina Kiumba, and Ms. Neema Mahunga, whilst Mr. Sudi Khalid represented 1st respondent and Mr. Seni Malimi and Mr. Seneni Mponda, the 2nd and 3rd respondents respectively, all learned advocates.

Notably this court is seized with jurisdiction to entertain and grant prayers sought in this application upon the applicant establishing to the court's satisfaction that the three principles or conditions are established by the party. The principles are detailed in the cases of **Atilio Vs. Mbowe** (1969) HCD 284, **OTA Edward Msofu & Company Vs. Equity Bank Tanzania Limited and 4 Others**, Misc. Civil Application No. 681 of 2020, **EDU**

Computers (T) Ltd Vs. Tanzania Investment Bank Ltd, Commercial Case No. 38 of 2001, **Christopher P. Chale Vs. Commercial Bank of Africa**, Misc. Civil Application No.136 of 2017 and **The Registered Trustees of the Mount Meru University and Another Vs. The Development Bank Limited and 4 Others**, Misc. Civil Application No. 99 of 2022 (all HC-Unreported).The said principles are *Firstly*, there must be a serious question to be tried by the court and the probability that the plaintiff will be entitled to the reliefs prayed for (in the main suit), *Secondly*, if injunctive order is not issued the applicant would suffer irreparable loss that cannot be atoned in monetary terms and *thirdly*, that on the balance of convenience greater hardship and mischief is likely to be suffered by the applicant if the grant of the application is withheld than it would do to the respondent if it is granted.

The object and imperative requirements for the grant of injunctive orders have been given a prolonged and a more sophisticated postulation in several decisions. For instance, in the case of **Abdi Ally Salehe v. Asac Care Unit Ltd & 2 Others**, CAT-Civil Revision No. 3 of 2012, the Court of Appeal of Tanzania held as follows:

"The object of this equitable remedy is to preserve the pre-dispute state until the trial or until a named day or further order. In deciding such applications, the Court is only to see a prima facie case, which is one such that it should appear on the record that there is a bonafide contest between the parties and serious questions to be tried. So, at this stage the court cannot prejudice the case of either party. It cannot record a finding on the main controversy involved in the suit; nor can genuineness of a document be gone into at this stage. Once the court finds that there is a prima facie case, it should then go on to investigate whether the applicant stands to suffer irreparable loss, not capable of being atoned for by way of damages. There, the applicant is expected to show that, unless the court intervenes by way of injunction, his position will in some way be changed for worse; that he will suffer damage as a consequence of the plaintiff's action or omission, provided that the threatened damage is serious, not trivial, minor, illusory, insignificant or technical only. The risk must be in respect of a future damage. (Emphasis supplied)

Combination of the cited decisions conveys one key message that, an injunctive order should only be granted in a fitting circumstance. Guided with the above cited principles and having perused the affidavit, counter affidavits

and reply thereto and having sincerely considered and accorded the deserving weight both parties' submission, I am now set to determine this application addressing on the existence of the three principles one after another as submitted by the parties.

In support of the first principle, it was Mr. Msuya's submission that the auction conducted by the 1st and 2nd respondents resulted from a judgment that issued directives on how the property in dispute should be disposed. According to him, in the first bid which the applicant participated she was able to meet the highest bid as reflected in annexure TMA4 (bid form results) before the 1st and 2nd respondents called for submission of reserved price bid by the top three highest bidders as per annexure TMA 5, the process in which she participated after contesting the root taken as exhibited in annexure TMA 6 claiming that the proper cause was to re-advertise the tender if the bidding price was unsatisfactory. As the 3rd respondent was awarded the tender basing on the reserved price under closed/private auction and not public auction as it was in the first bid, unlike what is being claimed by the respondents hence a triable issue as to what amount to reserved price in the context of the applicant's contention or respondents' version. And further what happens under the law where an auction fails to

realize a successful bidder as according to Mr. Msuya, in auction of this nature GN No. 73 of 4/5/2001 "The Land (Conduct of Auction and tenders) Regulation of 2001 made under section 52 and 179 of the Land Act" ought to be used. Hence whether the auction was supposed to comply with the above cited law in which the respondents claim the opposite is also a triable issue.

Mr. Msuya went on submitting that, the other contentious issue is on the status of 3rd respondent, whether she is the bonafide purchaser in terms of section 135 of Land Act and as dictated by this court in the case of **Moshi Electrical Light Co. Ltd and 2 Others Vs. Equity Bank Tanzania Ltd and 2 Others**, Land Case No. 55 of 2015 at page 14 &15, and that, whether registration should be completed first or not before the land status is acquired by the 3rd respondent basing on the respondents contention that she has already been handed transfer documents and come into actual possession of the disputed property.

In rebuttal Mr. Khalid argued that the application is overtake by event as it was filed on 20/06/2023 and the transfer documents and the suit property was handed over to the 3rd respondent on 19/06/2023. He placed reliance in the case of **OTA Edward Msifu and Company** (supra) in which the

Court held that, Court cannot issue orders against what has been executed. On the first condition he said, the applicant has failed to establish a prima facie case as this case is frivolously filed thus an afterthought due to the reasons that, the applicant seek to challenge the award tender to the 3rd respondent as a winner and the process in which she admit to have participated as per paragraph 14 of the affidavit. It was his submission therefore that, applicant failed to substantiate existence of prima facie case.

In his side Mr. Malimi contended that, applicant was a bidder responding to the notice of sale issued to the public by the 1st respondent. To him, that was not an offer to the applicant to accept rather an invitation to treat (to proposal) and that, the advertised notice was inviting the public in general to bid to the tender, thus no prima facie case coming out of the said notice. He invited the Court to have a glance at the English case of **Spencer Vs. Harding** (1870) LR 5 CP and the paper on the subject of invitation to treat by MD, Abdul titled **Adoption of the Principle of 'Invitation to Treat' in Islamic Law of contract** (2012) 16 JUUM 79-92. He then argued that, the areas perceived by the applicant to be arguable issues are misplaced as the underlined cause of dispute is rested on notice. Concerning the submission that there was a judgment guiding the sale process in which parties were

bound to follow he said, it was incorrect as the applicant was not the party to that case so cannot drive any right there from.

On the status of the 3rd respondent, it was his submission that she is the bonafide purchaser of the suit property. Concerning application of the principle in the case of **Moshi Electrical Light Co. Ltd and 2 Others** (supra) he submitted, that the same is distinguishable to the fact of this case as that matter involved a mortgagor, purchaser and the lender and there was no bidder in that case, thus it was confined within the rights of purchaser of mortgaged property and the mortgagor as clearly seen at page 14 of the judgment, hence it cannot be applied in the case where the bidder is asserting his rights over the mortgagor.

Mr. Mponda for the 3rd respondent joined hands with the submissions by the 1st and 2nd respondents counsel that applicant failed to establish a prima facie case. He added that, the process of improved bids was undergone by the applicant too thus he cannot claim illegality therefrom. To him since there was no illegality, the applicant did not establish prima facie case against the respondents.

In a short rejoinder, Mr. Msuya attacked the submission that the application has been overtaken by event contending that, transfer of landed property is guided by the law and that in this case is section 71 of Land Registration Act. He argued that, apart from averments in the counter affidavits by the respondents that the property has been handled to the 3rd respondent there is nothing said therein to prove that there was transfer of the property as mere handling over of the documents and possessions is nothing in regard to the requirement of section 71 of the Land Registration Act.

Concerning the case of **OTA Edward Msofu & Company (supra)** relied by the 1st respondent's counsel he submitted that the same is distinguishable from the facts of this case as in that case, the land had already passed to third party unlike the case at hand.

With regard to the submission that the notice was just an invitation to treaty hence a submission that the applicant could not raise a cause of action against the respondent therefrom he countered that, where a sale is to proceed under public auction the manner in which a tender is to be floated and auction conducted as obtained in GN No. 73 of 2001 has to be followed. According to him, the way the improved bid was solicited remains

questionable hence raising a triable issue as to whether the same was compliance with GN No. 73 of 2001.

I have keenly revisited and considered the affidavit, counter affidavits, reply to counter affidavit and submissions by parties in favour and against the application. It is uncontroverted fact that, 1st respondent while acting as agent of the 2nd respondent invited tenders from the public for sale of the suit property before she later on requested the three highest bidders to improve their bids through the letter dated 7th February, 2023, annexure TMA5 to the applicant's affidavit, in which the applicant also participated. It is also undisputed fact that, despite of her participation the applicant contested the auctioning process through improved bid terming it to be illegal route as per annexure TMA 6, since the right cause to be taken according to her was to re-advertise the property for sale publically. Similarly parties are at one when it comes to what amounts to invitation to tender/propose or treat as it was rightly and extensively demonstrated in the case of **Spencer Vs. Harding** (supra) and the paper by MD. Abdul Jalil on '**Adoption of the Principle of 'Invitation to Treat' in Islamic Law of contract**' (supra). MD. Abdul Jalil in his article at page 80 that made reference to English cases describes the term '**invitation to treat**' as

merely an invitation to negotiate or bargain. Hence acceptance to a mere invitation to treat is not in fact an acceptance of an offer, it is simply a formal offer to buy something and the person who makes an invitation to treat has the option either to accept the offer or reject it.

In the present matter as gathered from both pleadings and submissions, the complaint by the applicant is not on the invitation to treat by the 1st and 2nd respondents through the Notice of Sale of Industrial Property Tender No. AAM/NMB/MAYO/01/2023 in annexure TMA-1 but rather the route taken by them after the first bid procedure for illegally and in contravention of the law soliciting the improved bid instead of re-advertising sale of the property publically, the course which the respondents contend was in accordance with the law as the 2nd respondent was exercising her rights of sale of the property by either conducting it under public auction or through reserved price under improved bid. And further that it is out of that process and procedure the 3rd respondent who is already handled with documents and taken possession of the property becomes a bonafide purchaser hence this application is overtaken by event.

It is worth noting that, in considering as to what constitutes triable issues the Court has to look on the materials presented before it and whether there

exists a right which has apparently been infringed by the opposite party calling for an explanation or rebuttal from the latter. In this test I find inspiration from the Kenyan case of **Mrao Vs. First American Bank of Kenya and Two Others** [2003] KLR 125, which though persuasive, I find it very relevant to the fact in issue, where the Court when deliberating on what might constitute a prima facie case or arguable case observed thus;

"...a prima facie case in a civil application includes, but is not confined to, a genuine and arguable case. It is a case which, on the material presented to the court a tribunal directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

It is settled law that, it is not conclusive evidence which is required in proving whether there is a serious question for determination by the court, but rather the facts as disclosed in the plaint and the affidavit. Meaning, at this stage the court has to examine whether there is a bonafide contest between the parties and serious questions to be tried by the Court that cannot prejudice the case of either party or record a finding on the main controversy involved in the suit. See the decision of this Court in **Surya Kant D. Ramji Vs.**

Saving and 12 Finance Ltd & three Others, Civil Case No. 30 of 2000, HC Com. Div. at DSM (unreported).

Applying the principle in the above authority to the facts of this case and after consideration of the pleadings and contending submissions by both counsel, it is my finding that, there are four triable issues inviting determination by this Court in the main suit Civil Case No. 127 of 2023. **One**, what was the reserved price?, **secondly**, whether the act of soliciting improved bids basing on reserved price was legally done by the 1st and 2nd respondents, **thirdly**, whether the award of tender to the 3rd respondent was lawful and entitled her to acquire the status of bonafide purchaser after the improved bid and **fourthly**, whether the 3rd respondent acquired title of the property without any proof of official transfer of the said title by the 2nd respondent. As to whether there are chances of the applicant to succeed in those raised issues, I find it is premature to determine it at this stage as that might require evidence from both parties in which this Court is not in position solicit now. In view of the above I am persuaded that, the first principle is established by the applicant.

Next for consideration is the second principle as to whether court's interference is necessary to rescue the applicant from suffering irreparable

loss. It was Mr. Msuya's submission that, despite the fact that this matter is founded on commercial transaction there is no dispute that it involves sale of landed property. He contended that, the applicant won the tender in the first bid as the highest and therefore should be pronounced successful bidder. According to him, if the landed property changes hands by way of transfer of title to the 3rd respondent, applicant's rights to be declared the successful bidder in the first bid where she emerged the highest bidder due to respondents' illegal act of wrongly annulling the initial bid and taking an improved bid route using reserved price in lieu of re-advertisement of tender, will be at jeopardy and cannot be atoned by any monetary value as stated in paragraphs 17.0, 18.0 and 19.0 of the affidavit. To buttress his position, he cited to the Court the case of **Lameck Msamaha Mwalimu Vs. EFC Tanzania Microfinance Bank Ltd & Another**, Misc. Land Application No. 106 of 2017 (HC-unreported), which quoted with approval the case of **Ramadhani Ally and 2 others Vs. Shaban Ally**, Civil Appeal No.3 of 2008 CAT where the Court of Appeal stated that, the attachment and sale of immovable properties will invariably cause irreparable injury because the pecuniary value is not the same as that of the house. It was his submission

that, any alienation of the property before determination of the main suit will cause irreparable loss on the appellant's part.

On the contrary Mr. Khalid for the 1st respondent argued that, the applicant failed to establish existence of irreparable loss on her side which cannot be atoned by damages taking into consideration that, the applicant was neither the owner of the suit property nor the mortgagee as she was a mere invitee to the tender and there was no promise that, she would emerge a winner. It was his further submission that, applicant failed to prove that, if the application is withheld the whole proceedings will be rendered nugatory as there is no proof of such loss which she is likely to suffer and which has been strictly proved.

Mr. Malimi for the 2nd respondent subscribed to the 1st respondent counsel's submission on the point that, the applicant did not convincingly establish that he will suffer irreparable loss. He then said, the complaint in the main suit is on how the 2nd respondent exercised her right of sale. To him, such complaints cannot attract an order of injunction. He clung that, in any case the remedy to the applicant if the main case is heard and determined on merit is in terms of damages as per section 135 (4) of the Land Act. On his side, Mr. Mponda for the third respondent joined hands with his fellow

counsel and was insistent that, the applicant failed to prove that interference of this Court is necessary to prevent him from suffering irreparable loss.

In a short rejoinder, Mr. Msuya submitted that, section 135 (4) of Land Act does not cover the applicant under the circumstances of this case as according to the pleadings especially paragraph 18 of the relief section of the plaint in relief No. 3 the applicant is not saying that she is prejudiced by unauthorized or improper exercise of respondents' right to sale rather the way it was exercised. He held the view that, the applicant cannot be remedied under that section as the claim does not fall under that section.

It is true as submitted by Mr. Malimi that, under the section 135(4) of the Land Act, [Cap. 113 R.E 2019] a person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power, which in this case might be the applicant who is seeking to challenge 1st and 2nd respondent's act of wrongly annulling the initial bid in which the applicant claim she emerged the highest bidder as per TMA-4 and the respondents illegally took an improved bid route using reserved price (private contract) and award the tender to the 3rd respondent, instead of re-advertising the same as the second tender, hence denying her (applicant) of the right to be declared

winner of the said tender. I so view as there is no dispute in this matter that, the whole exercise involved the 2nd respondent's right of exercising the power of sale though under Court' order. However this Court posed and asked itself a very pertinent question as to whether the claimed applicant's right of being declared a lawful winner/successful bidder as prayed in item No. 3 of the relief paragraph in the plaint can be atoned by the monetary value if this application is withheld and the property is dispute is transferred to the 3rd respondent as claimed by all respondents. It is trite law that, that, for the Court to find that the applicant is likely to suffer irreparable loss, the applicant is expected to show that, unless the court intervenes by way of injunction, his position will in some way be changed for worse; that he will suffer damage as a consequence of the plaintiff's action or omission, provided that the threatened damage is serious, not trivial, minor, illusory, insignificant or technical only. See the case of **Abdi Ally Salehe Vs. Asac Care Unit Ltd & 2 Others**, Civil Revision No. 3 of 2012 (CAT-unreported).

In this matter in paragraphs 18.0 and 19.0 of the affidavit the applicant averred that withholding of this application shall lead to illegal alienation of the property and deprivation of her rightful entitlements known in law, a kind of loss which cannot be atoned by way of damages and further that his main

suit will be rendered nugatory and meaningless. The said paragraphs 18 and 19 read and I quote:

18.0. Further the loss suffered which shall result to illegally alienating and depriving the applicant of her rightful entitlements known in law is a kind of loss that cannot be atoned in any damages especially because the appellant was winner in the first place.

19.0. That unless this Court intervenes, in the event the suit is registered in the names of the 3rd Respondent the pending suit shall be rendered nugatory and meaningless.

Having critically examined and considered the averment in the cited paragraphs I do not find how the applicant's right to be declared as the lawful winner/successful bidder of the first public bid on the ground that the second private bid was illegally conducted, can be atoned by monetary value by the 2nd respondent, more particularly under section 135(4) of the Land Act as Mr. Malimi would want this Court to believe. I so view as once the property transferred to the 3rd respondent's name even if such transfer is nullified there is no way the alleged infringed right by the applicant to be declared owner of the first public bid can be compensated in monetary value. I am therefore at one with Mr. Msuya's proposition that, withholding grant of this application will finally pave way for transfer of the suit property to the

3rd respondent hence suffer the applicant irreparable loss, leave alone rendering her main suit nugatory and meaningless as rightly submitted on. I am therefore persuaded that, if injunctive order is not issued the applicant is likely to suffer irreparable injury and not one which can possibly be repaired monetary as she has successfully demonstrated to the Court that there is an injury which need to be protected by the Court pending hearing and determination of his rights on the issues demonstrated above when considering the first principle. I am so convinced bearing in mind the fact that, this Court's business is not to grant or deny injunction for convenient purposes only but rather to do justice to the parties in terms of the enunciated principles and after satisfying itself that there is an injury or posed danger or hardship likely to befall the applicant that need to be protected or prevented. See the case of **Charles D. Msumari & 83 Others v. The Director of Tanzania Harbours Authority**, Civil Appeal No. 18 of 1997 (HC -unreported). In view of the above I find the second principle is also established.

Finally, is the third principle stating that, on the balance of convenience who will suffer more or be in hardship than the other party. In this matter Mr. Msuya is of the submission that, it is the applicant would do more than the

2nd or 3rd respondents would be. He so viewed, as according to the respondents, the 3rd respondent has been handed the documents and is in possession of the property already, thus she will suffer less than the applicant would do in case the application is withheld. In response, Mr. Khalid contended that, apart from the general claim that applicant will suffer more than the respondent, there is no proof that she will so do than the respondents. He added that, taking into consideration the fact that the suit property was sold to recover the loan against the client who failed to pay the loan, and in absence of proof that the applicant will suffer most, then the third condition is not established.

Mr. Malimi on his side joined hands with Mr. Khalid submitting that, the applicant has not established this condition as in the whole process he paid no single penny. To him, if the injunction is granted, it is the 2nd respondent who will suffer more in particular suffer her financial consequences for being supervised by BOT as she has to maintain the threshold of liquidity and discharge mortgage on loans otherwise be penalized by BOT. It was his further argument that, as the 3rd respondent has already paid the money in full, in case injunction is granted, she will have to recover the same hence leaving the 2nd respondent to suffer most. On the other hand, Mr. Mponda

subscribed to the position by his fellow counsel Mr. Malimi arguing that, the 2nd respondent will suffer most and added that, the 3rd respondent will also suffer more as she had already purchased the property, handed with all legal documents and taken possession of the property since 19/06/2023 and further that she is in use. To him, if it is weighed the balance of scale tilts in favour of the 3rd respondent.

In a short rejoinder, Mr. Msuya attacked Mr. Malimi's submission that, the 2nd respondent being a financial institution will suffer much for having contingent liability that might suffer her financial repercussions and penalised by the BOT for want of maintenance of bank ratio of liquidity submitting that, such submission comes from the bar for not being stated in the counter affidavit hence should be disregarded.

Concerning the submission that since the applicant has not paid anything then will not suffer any loss, he submitted that, paragraphs 17,18 and 19 answers the respondents worry as the same stated what irreparable loss the applicant will suffer if this application is not granted.

Having considered the fighting arguments by the parties and having revisited the affidavit, counter affidavits and reply thereto, I tend to agree with Mr.

Msuya contention that, the submission by Mr. Malimi that on the balance of convenience the 2nd respondent stands to suffer more for failure to meet the threshold set by the BOT on the ration of liquidity to be maintained is a submission from the bar unworthy of consideration by this Court, as *a statement of fact by counsel from the parties is not evidence and therefore, court cannot act on*. See the case of the Court of Appeal of Uganda in **Trasafrica Assurance Co. Ltd Vs. Cimbria (E.A) Ltd** (2002) E.A as cited in **Tina & Co. Limited and 2 Other Vs. Eurafrican Bank (T) Ltd Now known as BOA Bank (T) Ltd**, Civil Application No. 86 of 2015 (CAT-unreported). As the contention by Mr. Malimi is not evidence based borne out of counter affidavit, I disregard the same as prayed by Mr. Msuya. On the claim that if the application is granted will entitle the 3rd respondent to recover from the 2nd respondent the already paid purchase price of the property hence cause her to suffer more, with due respect to Mr. Malimi I do not find any merit on that contention. I so do as there is a pending case before this Court for determination of the legality of the said sale, thus it is until when the same is determined in disfavor of the 2nd responent that is when the 3rd respondent can be entitled to claim back her money.

As for the 3rd respondent it is true and I agree with Mr. Mponda that she paid the purchase price and handed with the legal documents and possession of the property in which he is in use of. I only differ with his proposition that if this application is granted the 3rd respondent will suffer more than the applicant would do as there is no material evidence advanced to the Court to that effect. I so view as there is no evidence that grant of this applicant will deprive him of the already handed over legal documents or possession of the property and its enjoyment. As alluded to above he will only to wait for determination of the main suit to have the property transferred to him as he has to answer the applicant's allegations therein that he was involved in the illegal sale tender process by the 1st and 2nd respondent. Unlike the 3rd respondent it is already established when discussing the 2nd principle that, the applicant will suffer him irreparable loss incapable of being atoned by damages as her right to be declared as lawful winner/successful bidder in the first bid cannot be reversed if the 2nd respondent is let to proceed with transfer of property to the 3rd respondent. As for the 1st respondent being auctioneer has nothing to lose if the application granted. All said I find the weighing scale on the balance of convenience tilts on the applicant's side, hence the third principle is also established.

It is trite that, in order for an application of injunction to be granted, all the three principles or conditions provided for in the case of **Atilio Vs. Mbowe** (supra) must be established conjunctively. In this application since applicant has managed to prove all the conditions this Court therefore exercises its discretion in her favour, the resultant consequence is to allow the application. It is hereby order that, status quo is maintained as the 1st and 2nd respondents are restrained from alienating the title of the property on Plot No. 45 Mandela Express- ways Buguruni Industrial area, Ilala Municipality Dar es Salaam- Tanzania, in certificate of occupancy (CT) No. 43260 to the 3rd respondent or any other person, pending hearing and final disposal of the suit in Civil Case No. 127 of 2023 pending before this Court.

Costs in the cause.

It is so ordered.

Dated at Dar es Salaam this 04th day of August, 2023.



E. E. KAKOLAKI

JUDGE

04/08/2023.

The Ruling has been delivered at Dar es Salaam today 04th day of August, 2023 in the presence of Ms. Irene Mchau assisted by Ms. Ndehorio Ndesamburo, advocate for the applicant, Mr. Khalid Sudi Rwebangila, advocate for the 1st respondent who is also holding brief for Mr. Seni Malimi, advocate for the 2nd respondent and Mr. Jacob Kaisi, advocate for the 3rd respondent and Mr. Oscar Msaki, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE
04/08/2023.

