

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL CASE NO. 158 OF 2003

HASSAN SALUM AHMED )

t/a STAR BUTCHERY ) .....APPLICANT/PLAINTIFF

V E R S U S

M/S JUPHIL GENERAL )

TRADING CO. LTD ) .....RESPONDENT/DEFENDANT

RULING

MASSATI, J.

The Applicant/Plaintiff, Hassan Salum Ahmed t/a STAR BUTCHER, has filed a suit in this court against the Respondent/Defendant for a declaration that the Respondent is a trespasser and that he be declared the lawful owner of all that farm known as Farm No. 1076 at Mbagala Mission Temeke, Dar-es salaam comprised in Certificate of Occupancy No. 34290. He has also claimed for damages at the rate of 300,000/= per day for loss of use, general damages to the tune of Shs. 3,000,000,000/= and interest therein. Along with the plaint, he has also filed a chamber application for temporary injunction. This is the ruling emanating from hearing of the said application.

In this court the Applicant is represented by Mr. UKWONGA learned counsel, while Mrs. Ringo, learned counsel appeared for the Respondent. In arguing the application, learned counsels have, sought to adopt and rely on their client's affidavits and ~~and~~ reply to the counter affidavit.

Mr. Ukwonga submitted that the Applicant has been in lawful occupation of the dispute farm since 1988. In December, 2001, he came to learn that the Respondent had trespassed into the farm, for a declaration that the Respondent is a trespasser and that he be declared the lawful owner of all that farm known as Farm No. 1076 at Mbagala Mission Temeke, Dar-es salaam comprised in Certificate of Occupancy No. 34290. He has also claimed for damages at the rate of 300,000/= per day for loss of use, general damages to the tune of Shs. 3,000,000,000/= and interest therein. Along with the plaint, he has also filed a chamber application for temporary injunction. This is the ruling emanating from hearing of the said application.

In this court the Applicant is represented by Mr. UKWONGA learned counsel, while Mrs. Ringo, learned counsel appeared for the Respondent. In arguing the application, learned counsels have, sought to adopt and rely on their client's affidavits and ~~and~~ reply to the counter affidavit.

On the other hand Ms. Ringo has submitted that the Respondent lawfully purchased the farm in a public auction on 8/12/2001 where he emerged the highest bidder in a public auction floated by M.S. M.K. Auctioneers, on behalf of Ms Tanzania Postal Bank, to whom the farm was mortgaged to secure a loan of Shs. 60,000,000/=. She submitted that this was exhibited in Annexure D2 of the Written Statement of Defence. She said it was not true that the Applicant did not know that the farm had been sold as the Applicant had filed in this court Civil Case No. 8 of 2002 against Tanzania Postal Bank and M.K. Auctioneers to block the sale which was dismissed by Bureshi, J. He also filed a Miscellaneous Civil application to nullify the sale, which was also dismissed. She finally submitted that the Applicant is legally no longer the owner of the farm so he has nothing to suffer, instead the Respondent stands to suffer immensely.

In reply Mr. Ukwonga, submitted that the Respondent has not exhibited a certificate of sale to show that he had legally purchased the farm. He submitted also that since the Auctioneer himself was a party to a suit instituted in the High Court against the Postal Bank, his report should be taken with care as he could be biased. The learned counsel ended by urging this court to find that there was no sale, therefore that Respondent was not a bonafide purchaser of the farm. Therefore, Mr. Ukwonga, submits his application should be granted.

The principles governing the grant of temporary injunctions, are I think, now well settled. First there must be a suit in which serious question<sup>s</sup> to be tried on the facts, alleged, and a probability that the plaintiff will be entitled to the relief(s) prayed. Secondly that the Court's interference is necessary to protect the plaintiff from irreparable injury. Thirdly on a balance of probability there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction than will be suffered from the granting of it. And last but not least, in a fit case whether the injunction would be in the public interest. (See NOORMOHAMED JONMOHAMED V. KASSAMALI VIRJI MATHANI (1953, 20 EKOS 8). The High Court against the Postal Bank, his report should be taken with care as he could be biased. The learned counsel ended by urging this court to find that there was no sale, therefore that Respondent was not a bonafide purchaser of the farm. Therefore, Mr. Ukwonga, submits his application should be granted.

The principles governing the grant of temporary injunctions, are I think, now well settled. First there must be a suit in which serious question<sup>s</sup> to be tried on the facts, alleged, and a probability that the plaintiff will be entitled to the relief(s) prayed. Secondly that the Court's interference is necessary to protect the plaintiff from irreparable injury. Thirdly on a balance of probability there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction than will be suffered from the granting of it. And last but not least, in a fit case whether the injunction would be in the public interest.

ATTILIO V MBOWE (1969, HCD n.234. TRANGEM TRUST TANZANIA VS TANZANIA CORPORATION LTD. (1962) HCD. n.501 IBRAHIM V. NGAIZA (1971/ HCD n.249. T.A. KANGI v GENERAL MANAGER, MARK COOPERATION UNION (1984) LTD 1987 TLR 17 DAVID SUPER MARKET v. B.P. TANZANIA LTD (1992) TLR 1989.


I will now proceed to apply these principles in dealing with the application before me. There is of course, a suit before this court on a dispute over farm No. 1076 Mbagala Mission, Dar es salaam. The Applicant claims he is still the lawful owner of the farm. The Respondent alleges he bought the farm in a public auction on 8.12.2001 and that the Applicant had filed a suit against the mortgagee Tanzania Postal Bank to prevent the sale but lost. The Applicant had also filed an application for nullification of the sale but lost. The applicant in reply, admits there was a civil case No. 8 of 2002 before this court. He also admits there was an application to nullify the sale. In both cases the Applicant lost the battles. Mr. Ukwonga submits that this should not be taken as final as there is now pending before the Tanzania Court of Appeal, an appeal against the decisions of Buboshi, J. This court is of the view, that a mere statement from the bar is not evidence that there is an appeal pending in the court of Appeal. This matter was raised in the counter affidavit and the Applicant was at liberty to file a reply in which he could have drawn his court's attention to the existence of such an appeal. Besides, the mere fact of there being an appeal cannot be taken as a stay of execution. This therefore means to me that prima facie, and without prejudging the suit before me there is no serious question to be tried between the Applicant and the Respondent. If there was any such question it would have been between the Applicant and the Tanzania Postal Bank who sold the property. It follows in my view that there is very little likelihood of the Applicant succeeding in the main suit against the Respondent. The Applicant also admits there was an application to nullify the sale. This court is also of the view that on the material before it there is sufficient evidence that the Respondent has taken title by the property through public auction. Mr. Ukwonga has submitted that in the absence of a certificate of sale, there was no sale in law. This is not evidence that there is an appeal pending in the court of Appeal. This matter was raised in the counter affidavit and the Applicant was at liberty to file a reply in which he could have drawn his court's attention to the existence of such an appeal. Besides, the mere fact of there being an appeal cannot be taken as a stay of execution. This therefore means to me that prima facie, and without prejudging the suit before me there is no serious question to be tried between the Applicant and the Respondent. If there was any such question it would have been between the Applicant and the Tanzania Postal Bank who sold the property. It follows in my view that there is very little likelihood of the Applicant succeeding in the main suit against the Respondent.

He did not cite any authority for this preposition. But assuming he was referring to r.92 of Order XXI of the Civil Procedure Code, I would put **serious** doubts on the applicability of that rule. For that rule refers to sales ordered by courts through attachment in execution of decrees. In the present case the sale is allegedly made under a power of sale in a mortgage issued by the Applicant to Tanzania Postal Bank a matter not disputed by the Applicant. Order XXI of the CPC does not apply where a mortgagee exercises his power of sale (See NATIONAL BANK OF COMMERCE V DAR ES SALAAM EDUCATION AND OFFICE STATIONARY (1995) TLR 272.)

The Respondent has submitted and the Applicant does not dispute that he has been in occupation of the farm since December 2001 after the purchase. Today, it is more than 17 months since occupation. The balance of convenience is in favour of him not being disturbed after such a long occupation. The Applicant has submitted that he is losing over 300,000/= daily. This means to me, that the Applicant's damages are reparable by liquidated damages, while there is no likelihood that the Respondent might recover any damages from the Tanzania Postal Bank or the Applicant for any improvements he may have made on the land in dispute.

In the result and for the above reasons I am of the considered view that this would not be a fit case in which to grant an injunction. I would therefore dismiss the application with costs.

Order accordingly.

  
S. A. MASSATI

JUDGE

9/6/2003

Ruling delivered in chambers on the 13th day of June, 2003 in the presence of Mr. Luguwa for Mr. Ukwonga for the Applicant, Mrs Ringo for the Respondent and the parties in person.

S.A. MACCATE

JUDGE

13/6/2003