

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**MISC. LAND CASE APPLICATION NO. 128 OF 2017**

**OSCAR J. TEMI.....APPELLANT**

**VERSUS**

**JACOB SABORE.....1<sup>ST</sup> RESPONDENT**

**NAMELOCK MSARIEKI.....2<sup>ND</sup> RESPONDENT**

**GODSON KIRITA.....3<sup>RD</sup> RESPONDENT**

**NUTMEG AUCTIONEERS.....NECESSARY PARTY**

**RULING**

**MAGHIMBI, J**

The Applicant named above filed an application before this court made under Order XXXVII Rule 1 (a) and section 68 (e) and section 95 of the Civil Procedure Code, Cap. 33 R.E 2002 applying for the following orders;

That the Honourable Court may be pleased to make an order for temporary injunction restraining the 2<sup>nd</sup> Respondent through the service of the Necessary Party or any other person acting on her instructions including her servants, employees or the 3<sup>rd</sup> respondent from demolishing a wall and other developments on a parcel of land

comprised in Certificate of Title No. 38625 pending the determination of the main suit.

This application is supported by the affidavit of Oscar J. Temi the applicant herein. Before this court the applicant was represented by Msando learned Advocate while the 2<sup>nd</sup> and the 3<sup>rd</sup> respondent were represented by Shirima learned Advocate. The hearing of this application was conducted by way of written submission and both parties filed their submission according to the scheduled order.

Arguing the application, the applicant's counsel submitted that, as to the merits of the prayers sought, the law requires the application to meet or prove the following three conditions;

1. There are serious issues (in the main application) between the parties and the applicant is likely to achieve the reliefs sought therein.
2. There is an alarming danger of irreparable loss (on the part of applicant) in case the application is not granted.
3. The balance of convenience is on the applicant's side and not the respondent's side.

As pronounced in the case of **Suryakant B. Ramji vs. Savings and Finance Limited and Others** (2000) TLR 21 and the case of **General Tyre E.A Limited vs. HSBC Bank PLC** (2006) TLR 60.

On the first condition that there are serious issues in the main case between the parties and the applicant is likely to achieve the reliefs sought;

he stated that the applicant herein bought parcels of land from the 1<sup>st</sup> and 2<sup>nd</sup> respondents in 2010 for a sum of Tshs. 40, 000, 000/= and agreed that the 1<sup>st</sup> and 2<sup>nd</sup> respondents together with their family be provided with alternative land. The applicant did honour the agreements and built houses for the 1<sup>st</sup> and 2<sup>nd</sup> respondent but surprisingly, came to the knowledge of the applicant that the 2<sup>nd</sup> respondent is now claiming to be the owner of a parcel of land which the applicant bought and subsequently transferred to his Company, Temi Investments (T) Limited and a Certificate of Title issued to that effect. He further stated that, the 2<sup>nd</sup> respondent demands vacant possession against the applicant and demolition of a wall basing on a decree issued against the 1<sup>st</sup> respondent. He said that this is a serious triable issue which need to be determined by the Court following the 2<sup>nd</sup> respondent's threat to demolish his wall/fence.

On the second condition, that there should be an alarming danger of irreparable loss on the part of the applicant in case the application is not granted; he submitted that the applicant has built a wall for security purposes as the land is being used as the headquarters of his various business, stores and yard for his vehicles hence to grant vacant possession and demolishing the security wall will cause irreparable loss to the applicant as his business will be altered and it will cause such inconveniences to the applicant. He further asserted that, if injunction order is no granted, the applicant will suffer irreparable loss which will lead to eviction of the applicant and his various business from the land before the determination of the main case which is pending before the court.

As for the third condition, that the balance of convenience is on the applicant's side and not the respondent's side; he stated that the applicant will suffer greater losses/harm than the respondents on the ground that the applicant has made a lot of improvements upon the land. He also operates his business from the premises, so if injunction order is not granted the applicant will suffer inconveniences than the respondent. To support his submission above, he cited the case of **Attilio vs. Mbowe** (1969) HCD 284 at page 486 -487 where it was held that;

*"it is generally agreed that there are three conditions which must be satisfied before such an injunction can be issued:- (i) there must be serious question to be tried on the fact 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 be established, and (iii) that on the balance there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendant from granting of it."*

Therefore, prayed an order sought in the chamber summons be granted so as not render the main suit nugatory.

Opposing the application, the respondents' counsel prayed the counter affidavit and annexures thereto be adopted to form part and parcel of his submission. He further submitted that the applicant does not deserve with the relief and orders sought because he is precluded to re-open the present suit pending before this court due to previous suits instituted by

the applicant in the tribunal competent to try the subsequent suit. He further stated that sometimes in 2014 the Applicant (suing as Themis Investment (T) Ltd) herein instituted a suit against the respondents in the District Land and Housing Tribunal for Arusha in Application No. 34 of 2014 which on 13/10/2015 was dismissed for want of prosecution, and again on 10/02/2016 the applicant suing as Themis Investment (T) Ltd instituted Misc. Application No. 100 of 2016 in the District Land and Housing Tribunal at Arusha with a view to extend time to restore Application No. 34 of 2014.

Responding to the application on merit, he admitted that on 17<sup>th</sup> August, 2017 the Necessary Party issued a Notice requiring the applicant who is the Managing Director of Themis Investment Ltd to demolish a wall fence and giving vacant possession of the land in dispute, thus the present application amounts to abuse of court process because the Applicant as Director of Themis Investment Ltd has not appealed against the decision of Application No. 34/2014 of the District Land and Housing Tribunal which dismissed the Application for non-appearance as well as the decision in Misc. Application No. 100 of 2016 was not challenged by way of appeal. He thus contended that, the applicant does not deserve with the prayers sought in chamber summons, granting the same will amount to abuse of court process. In support, he referred this court to the case of **Begumisa and Others vs. Tibebaga** (2004) E.A Vol. 2 at page 23 where it was held that;

*"The Defence of res Judicata is a bar to a Plaintiff whose claim was previously adjudicated upon by a court of competent jurisdiction in*

*an suit within the same Defendant or with a person through whom the Defendant claims."*

In regard to the case of **Suriyakant D. Ramji** as cited by the applicant's counsel; he submitted that this case cannot cure the present suit because the applicant has already given a right to be heard and misused the same. Therefore, stated that this application lacks merit and prayed the same be dismissed with costs.

I have considered the applicant's affidavit together with the respondents' counter affidavit opposing the application. Having gone through the respondents' submission, I find the respondent failed to respond to the merits of the application at hand, rather submitted grievances against the applicant's act of filling this application, that this application is an abuse of court process. To me I find these grievances are supposed to be raised by the respondent's counsel during the hearing of the main case, that is Land Case No. 25/2015 and not at this stage.

Proceeding to the merit of the application, I find the only issue to determine in this application is whether the application for injunction order has merits. The guiding principles or criteria need to be satisfied in order to grant an application for temporary injunction were stated in the case of **Attilio vs. Mbowe** (supra), where it was held that;

*"It is generally agreed that there are three conditions which must be satisfied before such an injunction can be issued;*

- (i) 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.*
- (ii) That, the court's interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal rights is established, and*
- (iii) That, on the balance of probabilities there will be hardship and mischief suffered by the plaintiff from the withholding of the injunction than will suffered by the defendant from the granting of it."*

Starting with the first principle that 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; the applicant claims that in 2010 he bought parcels of land from the 1<sup>st</sup> and 2<sup>nd</sup> respondents for Tshs. 40, 000, 000/= and subsequently transferred to his Company (Temi Investments (T) Ltd) a Certificate of Title issued to that effect. It was agreed that the 1<sup>st</sup> and 2<sup>nd</sup> respondents be provided with alternative land the agreement which was honoured by the applicant and he built houses for them. It is undisputed by the respondents that through a Necessary Party, issued a Notice requiring the applicant to demolish a wall fence and giving vacant possession of the said land. Since the applicant claims ownership of the said land, by purchasing the same from the 1<sup>st</sup> and the 2<sup>nd</sup> respondents and on the other hand the 2<sup>nd</sup> respondent demands vacant possession against the applicant by demolition of a wall based on a decree issued against the 1<sup>st</sup> respondent; I find the above facts prove that there is a

prima facie case serious enough to be tried and the applicant herein has high chance of success in the main case. Hence the first principle is satisfied in this application.

Coming to the second principle, that the court's interference is necessary to protect the plaintiff from the kind of injury which may be irreparable; considering the fact that the applicant has already transferred the Certificate of Title to his Company and that he has already made improvements to the suit land including installation of security wall and considering the fact that, the premise is the main business of the applicant's company, then I find court's interference is necessary to protect the plaintiff from kind of injury that cannot be adequately compensated by money as the award of damages as remedy for him will not put him into to the original position.

Based on the finding above, It is my view that in 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 granting it because transfer of Certificate of Title has already passed to applicant and he has made improvement to the said land while the respondent has done nothing irrespective to the suit land. Having said the above, I therefore allow the application for temporary injunction as sought by the applicant in the chamber summons.

Order accordingly.



Dated this 30<sup>th</sup> day of August, 2018



**S.M. MAGHIMBI**

**JUDGE**

