

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. LAND APPLICATION NO. 75 OF 2018

(C/F Land Case No. 11 of 2018)

VINCENT MARK LASWAI..... 1ST APPLICANT
MOZZAH SALIM MAULY..... 2ND APPLICANT
HUSSEIN OMARY HAJJI..... 3RD APPLICANT
JUBILEE TYRES 2002 LTD..... 4TH APPLICANT
MANOJKUMAR PRADIP KHAMBATA AND
VIMAL PRADIP KHAMATA..... 5TH APPLICANT
SKYTEL LIMITE..... 6TH APPLICANT

Versus

RAJUL MOTICHAND SHAH 1ST RESPONDENT
JONAS PATRICE POTEA 2ND RESPONDENT
NOLIC COMPANY LTD. 3RD RESPONDENT

RULING.

S.M. MAGHIMBI, J:

The 6 applicants herein have on the 21st day of June 2018 lodged this application under the provisions of Section 68(e) and Order XXXVII Rule 1(a) & 4 of the Civil Procedure Code, Cap. 33 R.E 2002 ("The CPC"). In their Chamber Summons, the applicants sought for the following orders:

1. That the court issue an order of temporary injunction restraining the respondents, their agents, servants, representatives and/or any other person appointed or acting in their behalf from evicting

the applicants or interfering with the applicant's ownership, possession and occupation of Plot No. 153/2/18, 153/2/19 and 153/2/20 which are the properties of the first applicant; Plot No. 153/2/7 and Plot No. 153/2/17 which are the properties of the 2nd applicant; Plot No. 153/2/21 which is the property of the 3rd applicant; Plot No. 153/2/16 which is the property of the 4th applicant; Plot No. 153/2/15 which is the property of the 5th applicant and Plot No. 153/2/12 which is the property of the 6th. All the described plots are situated in Block KK Oloirien within Arusha city which form part and or extracted from an area containing 6.146 acres of land held under certificate of Title 17242 issued in 1952 Land Registry Moshi (Ex-certificate of Title) subject of execution in Execution Application No. 172/2010 which the 2nd respondent claims ownership of the entire area.

2. The costs of this application.
3. Any other relief which this Honorable Court may deem fit and just to grant.

The orders sought are pending the determination of the Land Case No. 11/2018 which is pending before this court. The application is supported by six affidavits of each of the applicants. The 1st and 2nd respondents filed their counter affidavits accordingly. From the facts gathered in both the affidavits of the applicants and the counter affidavits of the 1st and 2nd respondent; the brief background of the matter is narrated. The orders sought and the main contention in the main Land Case No. 11/2018 arouse from the Arusha District Land and Housing Tribunal Execution Application

No. 172/2010 between the first and second respondents (The Tribunal Application). Following the execution of the Tribunal Application in 2010, the 2nd respondent complained to this Court and a Land Revision No. 05/2017 was opened by the Court suo moto in which this court quashed and set aside the proceedings and orders passed by the Tribunal in the Tribunal Application. Following an omission to make an order for restoration of the applicant (herein 2nd respondent) in his land and an order for compensation by the respondent (herein 1st respondent); a Land Review No. 06/2017 was filed in this court and the order for restoration of the then applicant (herein 2nd respondent) ex-ante Execution Application No. 172/2010 was made.

It was in due course of the execution of the two orders in Land Revision No. 05/2017 and Land Review No. 06/2017 that the District Land and Housing Tribunal vide its supplementary eviction order dated 27/04/2018 ordered that the 1st respondent herein be evicted from a piece of land measuring six point one four six (6.146) acres contained in Certificate of Title No. 17242. It is this order of the Tribunal that has triggered the current application and the Land Case No. 11/2018.

Before this court the applicants were represented by Mr. Boniface Joseph, Mr. Ipanga Kiimay and Mr. Nyirembe; learned Counsels. On their part, the first respondent was represented by Mr. Andrew Akyoo learned Counsel and the second respondent was represented by Mr. Hamisi Mayombo and Mr. Hamisi Mkindi both learned Counsels from the Legal and Human Rights Centre.

Before I embark in determination of this application, I must address an issue submitted by Mr. Boniface and emphasized by Mr. Mayombo. The issue raised touches the jurisdiction of this court to determine this application. In his reply submissions Mr. Mayombo pointed and emphasized the submission by Mr. Boniface that there is an objection proceedings at the Tribunal. That the objection proceedings were opened on 01/06/2018 and before the decision of the objection proceedings, the applicants filed the Land Case No. 11/2018 and the current application. He argued that since the basis of the pending application No.168/2018 at the Tribunal is for it to investigate and determine ownership of the said land; then the same applicants bringing the application beforehand shows that the applicants do not know exactly what they want. That if this court proceeds to entertain the application it may bring confusion in the determination of rights of parties.

In his rejoinder submissions, Mr. Boniface submitted that the law does not bar where there is execution process, the victims of the execution who have interest to open objection proceedings. He argued that the objection proceedings were preferred under Order XXI Rule 57 of the CPC and Regulation 22(d) of the District Land and Housing Tribunal Regulations, 2003, so that the court investigate the legality of the execution order. Further that to investigate as ordered under Rule 57, is not a bar of the applicants to open a suit to determine ownership. This is covered under Order XXI Rule 62 of the CPC and that the reliefs claimed in the Land Case are different from those claimed at the Tribunal. That the consequent

decision in both will not interfere each other and that the two matters are well in order as per the laws.

In his submissions, Mr. Mayombo implied that that the application before me and the Land Case No. 11/2018 is a sub-judice of the objections proceedings filed by the applicants at the Tribunal. On my part I am in agreement with the submissions made by Mr. Boniface that the two are totally independent of each other. What is pending before me is an application for injunction and **a suit to determine ownership** of the suit property. Before the tribunal on the hand is an application to investigate as to the ownership of the property. Whatever the case may be, the tribunal in the objection proceedings will not be able to make a declaration that the applicants are the rightful owners of the suit property. His investigation goes only to the extent that what is to be executed therein is actually the property of the applicants or the 2nd respondents. Furthermore, the application at the tribunal was made under Order XXI Rule 57 of the CPC and Regulation 22(d) of the District Land and Housing Tribunal Regulations, 2003 which is not bar to file a subsequent suit in this court. Therefore this application is properly before me and I shall proceed to determine it.

As for the substantive in disposing this application, I shall make my determinations basing on the principles laid down in the celebrated case of **Atilio Vs. Mbowe, 1969 HD 284**. The principles are that:

- 1. It must be satisfied that there exists a prima facie case serious enough to be tried on the facts alleged and with a probability of decree be issued in favour of the Applicant.*
- 2. the court interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his alleged right is established*
- 3. The Plaintiff stands to suffer greater hardship from the withholding of the injunction than that suffered by the Defendant if it is granted"*

Starting with the first principle on the existence of a prima facie case serious enough to be tried on the facts alleged and with a probability of decree be issued in favour of the Applicant. Mr. Kiimay's submission was that the applicants have never been a part of or been aware of Tribunal Application which is between the first and second respondent herein. He argued that the applicants have brought this current application along with Land Case No. 11/2018 for determination of the ownership between the 1st and 2nd respondents. He also referred to the orders passed by this court in Land Review No. 06/2017 between the 1st and 2nd respondent wherein this Court, observed that the respondent in that application who is the 1st respondent in this application shall be at liberty if he so desires to start afresh the process of determination of the parties' right of ownership with regard to the suit premises. He argued that the first respondent who has also filed a counter affidavit has not stated anywhere to have purchased the suitland from one Leonidas Nikolas Doukas and Pipelas, rather he stated to have purchased it from Ms. AGM Holdings Ltd and that is contrary to the averments of the contents of para 11 of the 2nd respondent counter

affidavit. Mr. Kiimay referred to the case of **Suriyakant D. Ramji Vs. Savinga and Finance Limited and Others, 2002 TLR 121** where the holding of the court at page 122 is that:

"what is basic in granting temporary injunction is that there should be in existence a serious triable issues between the parties, a looming danger of irreparable injury to plaintiff and, on a balance of convenience, the existence of more sufferings by the plaintiffs if injunction is refused that will be the case with the defendants if granted; between the two, therefore, the plaintiff stands to lose more if the injunction is refused."

Mr. Kiimay hence submitted that the applicants through their affidavits have established a serious triable issue or fact that they did purchase the disputed plots from the first respondent and the transaction involved the registered land and the copies of the titles in respect of the described plots were attached. Further that each of the applicant has developed his/her respective plots and they have never been part of any proceedings in court including the Tribunal Application. He concluded that the applicants have clearly demonstrated triable issues to be determined by this Hon Court as to the ownership of the disputed plot or suitland.

On his part, Mr. Boniface added that the basis of all the confusion is emanating from an execution process at the Tribunal Application, a power of which is derived from the Land Review Application No. 06/2017 between the 1st and 2nd respondents. He submitted that on page 7 of its ruling in the Land Review No. 06/2017 dated 18/01/2018, the court held:

"the applicant was illegally evicted from the suit premises explained above. His restoration to the suit premises or putting him in the position he was before the illegal order, is ordered with immediate effect".

Mr. Boniface submitted further that this ruling has been taken to the tribunal for execution purposes, and that in the execution process, Hon. Chairman Mr. Mdachi has inserted the size of the land which is not defined in the order and the ruling itself by describing at his own discretion that the 2nd respondent be restored to an area measuring 6.146 acres of land. He argued that there is nowhere in the said ruling which has defined that the second respondent should be granted the said size of land. That the order is very clear that he has to be taken back to where he was, he might have been under a tree or a tent or in a bare land which has not been defined in the said ruling.

In his reply, Mr. Akyoo confirmed to this court that his client, the first respondent, is only left with one plot in the said area and all the other plots were sub-divided and sold to various other people. On that note, he then conceded to the submissions put forth by the applicants' counsels. He then submitted that taking into account the nature of the area being a wholly fenced area, he extended the prayers of the applicants and prayed that an injunction be granted over the whole area fenced, pending the determination of the pending main suit filed by the applicants.

On his part, Mr. Mayombo started by admitting that there is an execution process going on at the Arusha District Land and Housing Tribunal which requires the 2nd respondent to be restored to his property that is in dispute

following an order issued by the High Court. His argument was that if the applicants are granted an order of temporary injunction, this court will be issuing a temporary injunction which will have the effect of staying the execution, something which will be un-procedural.

Mr. Mayombo further admitted that in the process of execution proceedings of the Tribunal Order, the size of the land was not an issue. That what was known then is that the 2nd respondent was living in the disputed and he was using it as residence and also as his farm for daily bread. His argument was that the Chairman of the tribunal explaining the size of the land was to help the broker in executing his order so that he should not remove other people from their land.

At this point I must admit this is where the whole contention arose. Indeed there is the execution process in the disputed property; however, from the year 2010 till now, all parties do not dispute the fact the size of the land was never mentioned. The mentioning of the land by the Tribunal in April 2018 has dragged other parties which were never in dispute in the Execution Application No. 172/2010 to be the subjects of effect of the said execution. Hence before me there is an obvious issue in contention, which is the size of the land subject of execution in Execution Application No. 172/2010 which digs its roots to the whole issue of ownership of the disputed land. In the case of **Kibo match Group Limited Vs. Mohamed Enterprises (T) Ltd, Civil Case No. 06/1999** (unreported) the court held:

"The applicant should show a prima facie case with a probability of success against defendant."

That being the case, it is to my satisfaction that the applicants have successfully established the existence of the first principle laid down in the **Atilio Vs. Mbowe** case (Supra), that indeed there *exists a prima facie case serious enough to be tried on* the facts alleged. I am always (and this case is no exceptional) hesitant to make any finding on the probability of decree be issued in favour of the Applicants. Because by doing so, I will be pre-judgmental effect of which may be compared to placing the cart in front of the horse. Suffice is for me to say that the established facts reveal existence of a prima facie case sufficient to call for the grant of this order.

This takes me to the second principle that the court interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his alleged right is established and third principle that the Plaintiff stands to suffer greater hardship from the withholding of the injunction than that suffered by the Defendant if it is granted. I shall discuss the two principles together because the determination of the second principle automatically affirms the third principle.

In his submission on the second principle, Mr. Kiimay contended that the interference of this Hon Court is necessary to protect the applicants from being evicted from the suitland before determination of the main Land Case No. 11/2018 between the parties herein.

As for the third principle he argued that if an eviction order is effected, and this application is refused, the applicants will suffer more hardship because each applicant has developed his/her respective plot/plots by constructing a residential/commercial buildings thereto. To support this argument, Mr.

Kiimay referred this Court to a Kenyan Author **Richard Kuloba, on "Principles of Injunction"** where he held at page 3:

"a temporary injunction is a provisional order to restrain the doing of a certain act or to require a certain state of affairs to be altered for the time being either until the trial of the suit or until further order or until a named date."

He argued that owing to the fact that this application was brought under Order XXXVII of the CPC, he referred this court to the case of **NBC Vs. Dar-es-salaam Education and Office Stationery, 1995 TLR 272**, where it was held at page 274:

"The object of Order XXXVII Rule 1 of the CPC 1966 is preventive; the whole purpose is to prevent or restrain so as to prevent the subject matter of the suit in status quo for the time being".

To that end, Mr. Kiimay prayed for the interference of the court to grant an order for temporary injunction.

In his reply, Mr. Mayombo submitted that prior to the purchase of the suitland, the applicants did not do any due diligence on the suitland. He argued that since the applicants did not conduct any due diligence, they will not be affected by the execution order of the tribunal as it will be a result of their own negligence.

On my part, since the first principle has been established, that there is a prima facie issue to be determined, I have revisited the records of this application. In all the affidavits of the applicants there is an important fact established which was not disputed by any of the respondents, that all the

applicants have constructed both commercial and residential buildings in the disputed properties. Therefore there being a serious issue to be determined, coupled with the fact that the applicants are well settled in the suit property, both the second and third principles are answered to the affirmative. I find it necessary that court interfere with the statutes of affairs of the disputed properties because on balance of convenience, the applicants will suffer more should this application be dismissed than what will be suffered by the respondents should the order be granted. After all, the issue of size of the land subject to Execution Application No. 172/2010 was buried for the eight years that the feud was going on between the 1st and 2nd respondent only to have emerged on the 27/04/2018 when the tribunal issued a supplementary eviction order at what I may term as the convenience of the 2nd respondent and not according to what the records demanded.

That said, and as per the principle lays down in the case of **Sukyakant D. Ramji** (Supra); I am satisfied that the applicants have successfully established the three principles laid down in the case of Atilio Vs. Mbowe (Supra). Consequently, pursuant to Order XXXVII Rule 1(a) & 4 of the CPC, this application is allowed and I hereby proceed to make the following orders:

1. An order of temporary injunction is hereby issued restraining the respondents, their agents, servants, representatives and/or any other person appointed or acting in their behalf from evicting the applicants or in any way interfering with the applicant's ownership, possession and occupation of Plot No. 153/2/18, 153/2/19 and

153/2/20 for the first applicant; Plot No. 153/2/7 and Plot No. 153/2/17 for the second applicant; Plot No. 153/2/21 of the third applicant; Plot No.153/2/16 for the fourth applicant; Plot No. 153/2/15 for the fifth applicant and Plot No. 153/2/12 for the sixth applicant which are all situated in Block KK Oloirien within Arusha city and which form part and or extracted from an area containing 6.146 acres of land held under certificate of Title 17242 issued in 1952 land Registry Moshi (Ex-certificate of Title); pending eh final disposal of the pending main Land case No.11/2018.

2. The execution processes at the Arusha District Land and Housing Tribunal's Execution Application No. 172/2010 shall not in any way affect the aforementioned properties elaborated on clause (1) above, status quo of which shall be maintained.
3. The costs of this application shall follow cause in the main Land Case No. 11/2018 pending before this court.



Dated at Arusha this 06th day of August, 2018

SGD: S.M. MAGHIMBI

JUDGE

I hereby certify this to be a true copy of the original

A handwritten signature in black ink, appearing to be "HL" or similar stylized initials.

S.M. KULITA

DEPUTY REGISTRAR

05/9/2018