IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 55 OF 2019

(Original case Land Case No. 44 No. 2019)

VALENCE SIMONI MATUNDA (Suing via Power of Attorney of MUSA YUSUF MAMUYA.. APPLICANT

VERSUS

SADALLAH PHILIP NDOSY ....1ST RESPONDENT

HUSSEIN BIBI.B. CHAKAAR...............................2ND RESPONDENT

JOSHUA MWAITUKA T/A FOSTERS AUCTIONEERS AND GENERAL TRADERS ....3rd RESPONDENT

RULING

MASABO, J

The Application was made under certificate of urgency. The Applicant moved this court by a chamber summon made under Order XXXVII of the Civil procedure Code, Cap 33 [RE 2002] and section 95 of the same Act. He is praying for the following orders:

EXPARTE

> This court be pleased to issue an order to the 2nd and 3rd Respondents their workmen por their agents to maintain status quo restraining the them from selling the property

identified Plot No. 358, CT 29489, Mikocheni area in Kinondoni District Dar es Salaam or evicting or disturbing in any manner the Applicant from peaceful occupation of the suit property pending the determination of this application

INTERPARTE

This court be pleased to issue an order to the 2nd and 3rd Respondents their workmen por their agents to maintain status quo restraining the them from selling the property identified Plot No. 358, CT 29489, Mikocheni area in Kinondoni District Dar es Salaam or evicting or disturbing in any manner the Applicant from peaceful occupation of the suit property pending the determination of this application

The application is supported by an affidavit deponed by Valence Simoni Matunda which was sternly disputed by a counter affidavit of Thomas Rwebangira, counsel for the 2nd and 3rd Respondents. Mr. Abdulkarim Nzoli, counsel for the 1st respondent also filed a counter affidavit which basically was basically not contesting the application. Upon the application been assigned to me I issued a summons for interparties hearing on 3rd October whereby the Applicant appeared represented by Mr. Mwombeki Kabyemela, Abubakar Nassoro and Abdallah Kazungu, learned counsels; the 1st Respondent was represented by Mr. Emmanuel Jonathan and Mr. Abdulkarim Nzoli whereas the 2nd and 3rd Respondent were represented by Mr. Thomas Rwebangira, learned counsel.

In brief, the injunction is sought to prevent the impending sale of the property pending the determination of the Land case No. 44 of 2019 now pending before me in which the Plaintiff (Applicant herein) is suing the Defendants over ownership of a house situated in Plot No. 358, CT 29489, Mikocheni area in Kinondoni District Dar es Salaam (the suit property). It is pleaded that the suit property is subject to sale in satisfaction of court decree in favour of the 2nd Defendant (2nd Respondent herein) against the 1st Defendant (the 1st Respondent herein) who was its original owner. The Applicant's claim is that prior to the decision of the High Court Land Division in Land Case No. 308 of 3008 which has culminated into the impending attachment and sale he bought the suit property from the 1st Respondent and paid a consideration of Tshs 800,000,000/ hence he has registrable interest over the suit property. It is pleaded upon learning that the suit property was subject to an attachment order he filed an objection proceeding (Misc. Land Application No. 849 of 2018) in the same court at no fruition. He has thus filed a fresh suit seeking for determination of ownership of the suit property.

The application been for temporary injunction, the question for me to determine is whether or not it would be proper for this court to exercise its discretion and grant the order of injunction restraining the impending sale of the suit property.

It is undisputed that "....the granting of a temporary injunction is a matter of discretion of the court ..." (**Alloys Anthony Duwe vs Ally Juu ya Watu**

[1969] HCD 268). This discretion has however to be judicially exercised in consideration of legal and factual grounds. It is on this basis; the court has set criteria/principles to be applied by judges when exercising their discretion in this area. The criteria as set by Georges, C.J in the landmark case of **Atilio vs Mbowe** [1969] HCD 284 are that before granting the order of injunction the court must be satisfied that:

i. There is a serious question to be tried on the facts alleged, and the probability that the plaintiff will be entitled to the relief prayed.
ii. the Applicant stands to suffer irreparable loss requiring the courts intervention before the Applicants legal right is established;
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.

These criteria have become a trite law in all injunction applications.

In the instant application the pendency of a suit is not disputable. As alluded to earlier as there is a land suit pending in this court where the applicant prays for declaration that the Plot 357 with Certificate Number 30642 has an area of 320 squire meters and not 3370 squire meters; that the Applicant is the lawful of Plot No. 358; and that the house on Plot No. 358 Mikochheni should not be sold. What is disputable is the whether the pending suit raises a serious question to be tried and whether there is a probability that the plaintiff will be entitled to the relief prayed. On his part, Mr. Kabyemela while citing the decision of the Court of Appeal in **Kibo Match Group Limited v**

HS Implex Limited (2001) TLR 113 he argued that there is a prima facie case. That, the Applicant has paid the 1st Respondent a consideration price of 800,000,000Tshs in respect of the suit property which is the subject of the attachment order against the 1st Respondent and that during the pendency of the suit leading to the attachment order he was given an opportunity to defend his interest and could therefore not defend his interest. He further submitted that the Applicant's attempt to defend his interest through objection proceedings turned futile as he was advised to initiate a new suit. Second that, the demarcation of the and size actual size of the disputed plots raise a serious issue in that the 2nd Respondent allegedly forged the title deed purporting to show that, Plot No. 358 in which the Applicant has an interest is within Plot No. 357 which is under the ownership of the 2nd Respondent. On his part, Mr. Rwebangira invited me to take judicial note of the decision of my learned sister Maghimbi J which according to Mr. Rwebangira addressed the issue of the ownership of the plot conclusively hence there is no triable issue.

I have taken time to read the said decision, which was in respect of the objection proceedings filed by the applicant, I will reproduce part of the decision of Maghimbi, J foe convenience and clarity.

> "it is the trite law in land matters where the land in dispute is a registered land the only proof of ownership under section 100 of the Evidence Act Cap 6 which provides that where the terms of a disposition of property have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document no evidence shall be

given in proof of the terms of such disposition of property except the document itself. As for the case at hand, since the disputed property is a piece of registered land then, the primafacies evidence to prove ownership is the title deed which is annexed to the affidavit and the supplementary affidavit. As per the records annexed the title deed does not bear the name of the said Musa Yusuph Msuya.

The court further held that:

> "in attempt to show that the applicant is the original owner of the disputed property, he attached to his affidavit a notice of deposit of certificate of title filed to the Registrar of Titles u/s 64(1) of the Land Registration Act, Cap 334 which with respect, is a document merely showing that in in 2018, the title to the estate was registered with him for the purpose of creating a lien thereover. Whether or not the lien was discharged is an issue which requires evidence.
> Hence, even if we were to believe the applicants averments of the sale arrangement between him and the first respondent the document attached do not show u/s 100 of cap 6 that the title had been transferred to the applicant. On that observation, since there is no adduce of evidence in objection proceedings like the one at hand it will be difficult to ignore the documentary evidence to prove ownership of the and submit to the applicant's allegation that the suit was transferred to him."

While I am alive to the fact that the requirement that "there should exist a probability that the matter would be decided in the plaintiff's favour" should not be exaggerated and taken to unproportionally limits as that would be

tantamount to giving verdict prematurely (Suryakant D. Ramji vs Savings and Finance Ltd and others, Civil Case No. 30 of 2000 HC (Commercial Division) at Dar, (Kalegeya,J), it is imperative that a *prima facie* case be established. The words of Mapigano, J, (as he then was) in **Colgate - Palmolive Company vs Zacharia Provision store & others Commercial case No.1 of 1997**, (unreported) which were cited in approval in **Kibo Match group** (supra) provide a nuanced basis in determining whether the first criterion has been met. In this case, the Justice Mapigano stated that;

> " I direct myself that in principle the prima-facie case rule does not require that the court should examine the material before it closely and come to a conclusion that the plaintiff has a case which he is likely to succeed for to do so would amount to prejudging the case on its merits. All that the court has to be satisfied of is that on the face of it the plaintiff has a case which needs consideration and that there is a likelihood of the suit succeeding.

Having considered the facts before me and upon regard to the authorities placed before the court and while avoiding to encroach on the main suit, I could not find tangible facts upon which to hold that the Applicant has established a *prima facie* case with the likelihood of success in the main suit. Just as observed in the decision above, the applicant has not appended to his application a title deed which would lead to an assumption that he has a right equal or superior than that of the 1st Respondent from which the likelihood of success could be inferred. All he has appended to his application is an addendum agreement showing that the loan agreement was converted

into a sale agreement and a notice of deposit of certificate of title filed to the Registrar of Titles u/s 64(1) of the Land Registration Act, Cap 334 which as stated by Maghimbi J does not constitute a proof of ownership as it merely shows that in 2018, the title to the suit property was registered for the purpose of creating a lien. Besides, I have noted as argued by the applicant that there is an affidavit sworn by the 1st Respondent on 27th January 2018 in which he claims to be the owners of the suit property which also punches holes on the likelihood to succeed.

The 2nd ground for consideration is whether or not the applicant stands to suffer irreparable loss requiring the courts intervention before the Applicants legal right is established. For clarity, the term "Irreparable damage" has been defined by Black's Law Dictionary, 9th Edition Page 447 to mean "damages that cannot be easily ascertained because there is no fixed pecuniary standard of measurement." It has also been defined as "loss that cannot be compensated for with money". In other words, the loss should be of the nature which cannot be atoned by way of damages regardless of whether they are compensated or not (**Haruna Mpangaos And Others v Tanzania Portland Cement Co Ltd**, Civil Reference No.3 of 2007 Court of Appeal of Tanzania (unreported) or where the dispute would be rendered nugatory (**Colgate - Palmolive Company vs Zacharia Provision store & others** (supra)). In the instant case, injunction is sought against a pending auction which if successfully conducted will vest the title of the suit property in a third party. This in my settled opinion, will render the suit

nugatory and the property would have changed hands to a person who is not party and this warrants the intervention of this court.

A scrutiny of the prayers in this application and the main suit dictates that it is the Applicant who is likely to suffer more than the Respondent if the Application is withheld. As stated, the auction of the suit property will vest its title on a third party and would that render the main suit nugatory. Although the Applicant's likelihood to succeed may seem to be on the periphery, wisdom demands this court intervene to maintain the status quo as the Applicant adjudicates his claims over the disputed property which he claims to have bought and paid a colossal sum of money. If at the end of trial judgement is entered in favour of the Respondent he will have lesser trouble in executing the decree. On the contrary, if the judgment is in favour of the Applicant, he will have greater difficulty in reversing the ownership of the suit property. Besides, the Applicant quantifiable claim is greater (Tshs 800, 0000, 0000) than the decretal sum which the 2nd Respondent seeks to enforce (Tsh 102,082.00)

On the basis of the foregoing, I allow the Application and grant an injunction for 6 months with effect from the date of this ruling during which the Applicant will work towards resolving the issue.

DATED at DAR ES SALAAM this 9th day of October 2019.

J.L. MASABO

JUDGE