

**THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION NO: 369 OF 2019

(Arising from Miscellaneous Civil Application No. 267 of 2019)

SAID RAJABU SINDEAPPLICANT
VERSUS
LIKU HAMISI KANDO.....1ST RESPONDENT
ALLY HASSAN GALU.....2ND RESPONDENT

RULING

MASABO, J.:

Said Rajabu Sinde has brought these proceedings under Order XXXVII rule 1 and 2 of the Civil Procedure Code [Cap 33 RE 2019]. He seeks that this court be pleased to issue a temporary injunctive order restraining the respondents and their agents from demolishing or constructing or making any occupation on the disputed house which is situated at Buguruni area in Dar es salaam. The injunction is sought pending an application for extension of time within which to appeal. The Application is supported by an affidavit sworn by the applicant. In this affidavit he states that the feud between the parties is in respect of a house which is part of the estate in Probate Cause No. 183 of 2016. That the Respondents have misappropriated the house and the 2nd respondent has unlawfully demolished part of the house and evicted all the residents therein and if not restrained his actions will occasion an irreparable loss. The application was strongly contested by the Respondent.

The Application was argued in writing. Submitting in support of the application the Applicant who was self-represented cited the provision of Order XXXVII Rule 1 and 2 of the Civil Procedure Code and the case of **Atilio v Mbowe** (1969) HCD 284 and submitted that this power has inherent powers to issue injunction and serve him from the injustices occasioned by the respondents who have misappropriated the house which is part of the estate of the late Habiba Salumu Rukolo to which he is a beneficiary. On his part the 2nd Respondent, represented by Helmes Marcel Mutatina, advocate argued that the application is devoid of merit as it does not meet the requirement of Order XXXVII as it is not predicated on any suit.

I have carefully considered the submissions from both sides. Applications for temporary injections are regulated by Order XXXVII of the Civil Procedure Code, Cap 33 RE 2019 which in Rule 1 provides as follows:

Where in any suit it is proved by affidavit or otherwise—

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit or suffering loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree; or
- (b) that the defendant threatens, or intends to remove or dispose of his property with a view to defraud his creditors, the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting,

damaging, alienation, sale, loss in value, removal or disposition of the property as the court thinks fit, until the disposal of the suit or until further orders:

In law, granting of temporary injunctive orders falls within the discretion of the court ..." (**Alloys Anthony Duwe vs Ally Juu ya Watu** [1969] HCD 268). 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.

The question to be determined is, therefore, whether the materials provided by the Applicant have sufficient established existence of the three conditions above or put otherwise, whether or not it would be proper for this court to exercise its discretion and grant the order of injunction restraining the impending demolition of the suit property.

Let me say straight forward that the answer to this in the negative because the first criteria has not been established in that, there is currently no

pending suit between the parties. As correctly argued by the respondent, existence of a suit is a condition *sine quo non* for temporary injunction and in the absence of which a temporary injunction cannot issue. The term "suit" is a technical one. It is defined under section 2 of the Law of Limitations Act, Cap 89 RE 2019 to mean, "*any proceeding of a civil nature instituted in any court but **does not include an appeal or application***". The wording of this definition are clear and sanctity. An application is not a suit and can therefore not be a basis for granting of temporary injunction. Under the premise, the temporary injunctive order being sought pending an application for extension of time cannot stand. As it could be seen from the definition above, even if the application for extension of time had been granted and the appeal had been instituted, the application would still fail because, an appeal is not a suit and can therefore not be relied upon in granting injunction.

All being said, in the final event, I dismiss the application with costs.

DATED at DAR ES SALAAM this 18th day of August 2020.



A handwritten signature in blue ink, appearing to be "J.L. MASABO".

J.L. MASABO

JUDGE