

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(ARUSHA DISTRICT REGISTRY)
AT ARUSHA**

MISC. LAND APPLICATION NO. 15 OF 2020

(C/F Land case No. 6 of 2020 of the High Court of Tanzania at Arusha)

GODFREY SEBASTIAN CHAKE @ CHAKY APPLICANT

VERSUS

ABDALLAH OMARI MWESONGO.....RESPONDENT

RULING

17/11/2020 & 10/2/2021

GWAE, J

In this application, I am moved by the applicant, Godfrey Sebastian Chake @ Chaky above under Order XXXVII Rule 1 (a) and Rule 4 and section 68 (c) & (e) of the Civil Procedure Code, Cap 33 R.E 2019 for an order of temporary injunction restraining the respondent herein above, his servants or his workmen or any persons whatsoever description from transferring the suit land to himself and or interfering with the applicant's peaceful enjoyment and or doing permanent developments in the suit property with a certificate of Title Number 353691, AR/MER/IMB/89 located at Usariver area within Arumeru District and Region of Arusha pending determination of the applicant's main case (Land Case No. 6 of 2020) filed in this court.

The applicant's application is supported by his sworn affidavit which is to the effect that the applicant and respondent entered into sale agreement in the December 2019. The applicant was to sell to the respondent the suit property while respondent was to purchase the same. According to the applicant the suit premises was to be sold at the tune of Tshs. 150,000,000/=payable in three instalments but the respondent paid only a total of Tshs, 50,000,000/=as final payment.

The applicant further averred that, to his dismay and surprise on the 28th December 2019, advocate Mnyiwala Mapembe informed him that he wrote a purchase price of the suit land at the tune of Tshs. 50,000,000/=. The applicant went on stating that he is not conversant with the English Language and that the time of executing the document was only being shown places to on which to sign without reading or explaining the contents of the written sale agreement. Hence no consensus adi dem.

On the other hand, the respondent vehemently resisted this application by filing his counter affidavit accompanied with an affidavit of a commissioner for oaths (Mr. Mnyiwala Mapembe) as well as affidavits of two other persons. The applicant's counter affidavit and that of Mr. Mapembe are essentially to the effect that the parties voluntarily reached into consensus that the purchase price of the suit land is Tshs.150,000,000/=and that the said advocate Mapembe was in a

process to make a transfer of ownership from the applicant to the respondent by filling the necessary land forms notably; Form No. 29, 30 & 35 after the purchase price was fully paid.

When this application was called on for hearing before me, the applicant was represented by **Yusuph Mlekwa**, learned counsel whereas the respondent enjoyed legal services from advocate **Mr. Oloomu Ojare**. With consensus, the application was disposed of by way of oral submission. I shall hereinafter consider the parties' written submissions while composing this ruling, to be more specific while dealing with each principle relating to the grant or otherwise of an application for temporary injunction. As of now, it suffices to heartedly thank the said parties advocates for their fruitful contributions towards making of this ruling.

Customarily and legally, in applications for temporary injunction, issues for consideration are; **firstly**, whether the pending case has triable issues or not, **secondly**, whether the applicant will suffer more irreparable loss not recoverable by way of damages and **thirdly**, whether balance of convenience if weighed favors the applicant that is the applicant has greater chance to suffer if an application is not granted than the respondent (See **Atilio vs. Mbowe** (1969) HCD 284, **Giela vs Cassman Brown & Co. Ltd** (1973) E.A 358 and **Gazelle Trucker Ltd vs Tanzania Petroleum Development Corporation**, Civil

Application No. 15 of 2006 and **Tanzania Breweries Ltd. vs. Kibo Breweries Ltd. And another** (1998) EA 341).

Applying the above principles and the circumstances of the case at hand, starting with the first principle whether the applicant's main case, Civil Case No. 6 of 2020 is triable, ascertaining the parties' affidavits and the main case, I am fully satisfied as rightly submitted by the applicant's counsel that there are triable issues for instance whether the agreed purchase price was in the tune of Tshs. 150,000,000/= or Tshs. 50,000,00/=as asserted by the applicant and respondent respectively and whether the applicant's consent to sell the suit property was obtained by misrepresentation. More so, I have distantly ascertained if the reliefs sought are awardable in the absence of any rebuttable testimony that on the face of the main case (See a decision of this court in **Palmolive vs. Zakaria Provision Stores and Others**, Civil case No. 1 of 1997 (unreported). Thus, it follows that; the first pre-condition has been met.

On the **second principle** of protecting the applicant from suffering any kind of injury which is irreparable. It is common ground as correctly submitted by the parties' advocates that the purpose of an order for temporary injunction as set out under Order xxxvii Rule 1 of Civil Procedure Code, Cap 33 Revised Edition, 2019 is to reserve and retain the status quo as was judicially demonstrated in the case of **Attilio v. Mbowe** (supra).

The purpose of this principle is basically to protect the applicant from suffering irreparable injury before his rights being determined by the court. One may ask what amounts to irreparable injury? Mapigano, J as he then was in the case of **Kaare vs. General manager Mara Cooperation Union** [1924] Ltd (1987) TLR 17 made a clarification as to what amounts to irreparable injury by stating that;

"By irreparable injury, it is not meant that there must be no physical possibility but merely that the injury would be material, for example one that could not be adequately remedied by damages."

Essentially, from the wording of my brother above, the irreparable injury referred to in this principle is the one that cannot be recovered by way of damages or if remediable but not sufficiently or adequately,

In our instant matter, the applicant has undoubtedly received the sum of Tshs. 50,000,000/= according to him (the applicant) being a partial payment of the purchase price while as per the respondent, the loss of Tshs.100,000,000/= is not in law irreparable loss since it is obviously quantified. The respondent's advocate cited the case of **Attilio** to cement his argument whereas it is the assertion by the applicant that he will not only suffer substantial loss but also intrinsic loss. Embracing his argument, the counsel for the applicant urged this court to refer to a decision of Court of Appeal sitting at Dar es salaam in **Swaibu**

A. Shendolwa vs. Frank Safari Nchuma, Civil Application No. 47 of 1997 (unreported).

I am of the view that, the loss or damage in this particular case, if any, is certainly awardable by way of damages since the value of the suit property is quantifiable as depicted in the applicant's valuation report attached to the suit and taking into account of the alleged purchase price (Tshs. 150,000,000/=). I think the respondent who was anxious to purchase the suit property will be able to pay the damages that may be awarded in the main case between the parties if he becomes a loser, equally, the applicant is, through his pleadings, willing to sell the property to the respondent. In the case of *Attilio* (supra), it was held and I quote;

"I am not satisfied that the plaintiff would suffer loss which could, in any sense, be termed irreparable if the injunction is not granted. He himself has quantified his loss at Shs. 700/- a day for rent, water charges etc. should he succeed the defendant will have a judgment entered against him for such of the damage as can be proved and the plaintiff will have recuperated his loss"

Presently, despite the fact that the issue of intrinsic loss or injury has not been averred in the applicant's affidavit contrary to what the applicant's counsel has attempted to establish in his written submission yet according to the facts of

the case the issue of intrinsic loss does arise since the applicant is not dwelling in the suit land and considering that he has already received the respondent's money. I say so simply because, according to the averments of the respondent which went unopposed as the applicant did not react against the affidavits of that other persons (**William** and **Simion**) by filing an affidavit in reply thereof. Thus, what has been stated in the affidavits of that other persons is deemed admitted by the applicant (See a decision of the Court of Appeal of Tanzania **Nderingo Elisante Ngowi vs. Josephine Joseph Meshack and 2 others**, Civil Application No. 35 of 2014 (unreported). In view of these reasons, I am of the considered view that, the **2nd pre-condition** for grant of temporary injunction has not been established by the applicant.

In the **last condition**, on the balance of convenience that is to say; if this application is not granted the applicant will suffer greater hardship and mischief than will be suffered by the respondent if this application is granted. This 3rd pre-condition was elaborated in the **Attilio v. Mbowe** (1969) TLR 284, where it was held;

"It is unnecessary, therefore, to consider the third pre-condition, the balance of convenience. The primary consideration there is the maintenance of the status quo pending the determination of the action. The status quo, in my view, is the status quo at the date of


the filing of the action. This can be maintained without the granting of a temporary injunction in the terms claimed”.

Considering the above discussions in the 1st element and 2nd elements as well as the decision in Attilio’s case (supra), I would think that balance of convenience should be fairly considered for both parties. To my decided view, convenience in this particular case is an order to maintenance of status quo to the extent that, if the respondent has been into possession of the suit property, he shall remain in such possession but without making any further permanent development or any transfer of ownership or in case the respondent has not been in possession, he **shall not** occupy the same and shall not do any development or make any disposition of any sort pending determination of the main suit.

That told, this application is granted to the above extent. Costs of this application shall be in the course.

It is ordered.




M.R. GWAE
JUDGE
10/02/2021