IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA

[IN THE DISTRICT REGISTRY]

AT ARUSHA

MISCELLANEOUS LAND APPLICATION NO. 51 OF 2019

(CF Land Case No. 21 of 2020, the High Court of Tanzania at Arusha District Registry)

RIGOBELT HURBERT KIATA.....APPLICANT

Versus

ANGELA USSO KIATA .....1ST RESPONDENT

MASHATI SACCOS LTD.....2ND RESPONDENT

TANFIN CONSULTANT.....3RD RESPONDENT

JACKSON SAMSON ZEGELY.....4TH RESPONDENT

RULING

27/11/2020 & 19/2/2021

MZUNA, J.:

Rigobelt Uisso Kiata (the applicant) is seeking for this court to issue an order of temporary injunction against the respondents. That they should be restrained from interfering with the suit premises situated at Kijenge Suye area in Arusha Region pending the hearing of the main application inter parties. The application has been preferred under Order XXXVII Rule 1 (a) and (4) of the Civil Procedure Code, Cap 33 RE 2002.

During hearing, Mr. Mushi on one hand, and Ms. Aziza Shakale, both learned counsels, appeared for the applicant and respondents respectively.

Hearing of the preliminary objection and the main application proceeded by way of written submissions.

Two issues are subject for determination: - First whether the affidavit is defective in form? Second whether this application should be allowed?

Let me start with the first issue which emerged after a preliminary point of objection was filed by the 2nd, 3rd and 4th respondents to the effect that the application is supported by a defective affidavit within the meaning of the provisions of section 43 (1) (a) and 44 (1) of the Advocates Act, Cap 341 RE 2002.

Submitting on the preliminary objection, the counsel for the respondents stated that the affidavit in support of the application has not properly moved the court to grant the prayers stated in the chamber summons. The gist of her argument is that the person who prepared the affidavit is not qualified as an Advocate within the meaning of that terminology in law. The respondents' counsel referred to the case of **Ashura Abdulkadri v. The Director Tilapia Hotel,** Civil Application No. 2 of 2005 cited in **Benadetha A. Rweyendera v. Euginia Ruwawa,** Land Case No. 276 of 2017 High Court of Tanzania at Dar es Salaam to support her submission.

In reply, the applicant's counsel submitted that affidavit was dully endorsed by the applicant as required by the law. In sum, he prayed the court to dismiss the preliminary objection with costs.

On the raised preliminary point of objection, there is nothing to suggest that the affidavit is defective as averred by the respondents. I say so because the said affidavit has been drawn and attested in line with the requirements of the law.

The case of **Benadetha A. Rweyendera** (supra) does not apply to this case because in that case the material facts were that the plaintiff had not inserted his name instead it was the name of the firm which cannot in law draw and file pleadings. In our case the affidavit indicates that it was drawn by the applicant who is actually known by the name stated in the affidavit. Even the name of the attesting advocate is shown thereon.

Even so, any defect whatsoever, would have been salvaged by the principle of overriding objective as stated in the case of **Yakobo Magoiga Gichere v. Peninah Yusuph,** Civil Appeal No. 55 of 2017 Court of Appeal of Tanzania (unreported). hHence the raised preliminary objection is misplaced and not proved. It is bound to fail.

I revert to the second issue, on the merits of the application. The factual background as put forward by the applicant is that the applicant is

the lawful owner of a property located at Kijenge Suye area. The property was mortgaged by the 1st respondent to the 2nd respondent without knowledge and consent of the owner. The 1st defendant defaulted the loan repayment and the 2nd and 3rd defendants sold the property in an auction to the 4th defendant.

In this application, it is averred by the applicant that if this application is not granted then he is likely to suffer most and the pending suit will be rendered to be of an academic exercise. The applicant prayed for the court to grant the application as he depends on the property in dispute for his living. He cited the case **Atilio v. Mbowe** (1969) HCD 284 to support his application.

Opposing the application, the 2nd, 3rd and 4th respondents maintained that the applicant has failed to establish a prima facie case against them. That the applicant does not have interest in the property in dispute as it belongs to his father. That the applicant suffers no loss. If any loss, the same is never irreparable. In rejoinder, the applicant's counsel submitted that his client is the real owner of the property in dispute.

I have gone through the submissions put forth by parties herein along with the cited authoritative case laws. The rules governing the grant of temporary injunctions are clearly stated in the case of **Attilio v. Mbowe**

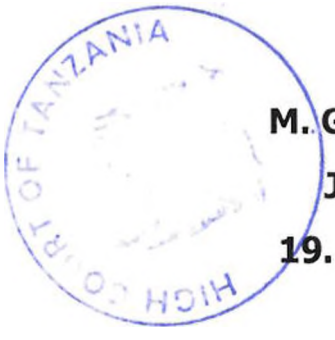
(supra). Basically, there are three conditions which must be satisfied for the grant of temporary injunction. I deem it proper to test them in line with this case. First, that there must be a serious question to be tried on the facts alleged and the probability that the plaintiff will be entitled to the relief prayed. This fact if tested on the facts of the case, it is clear that there is a pending suit between the parties.

In the applicant's affidavit and submissions, he alleges is the real owner of the house. However, he has not attached proof of such ownership as alleged in paragraph 2 of the affidavit. I tend to agree with the learned counsel for the 2nd, 3rd and 4th respondent that upon issuing of certificate of sale it means the 4th respondent is or ought to have been in full enjoyment of the suit premise since 16th March, 2018 when he purchased it. The temporary injunction cannot be issued if the applicant can be remedied the injury by way of compensation or otherwise, which is not the case here. Above all, there is nothing which warrants an injunction order for the auction and sale which had long been carried out since 2018. The application has been overtaken by events.

There is therefore, no proof of existence of a serious question for determination by the court in view of the principles set out in the case of **Attilio Mbowe** (supra).

The three conditions stated in the case of **Attilio Mbowe** (supra) must exist conjunctively not disjunctively. So, the second condition that the court's interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal rights are established as well as the third ground that on the balance, the applicant is likely to suffer more than the respondent if the application is not granted (sometimes referred to as "balance of convenience"), cannot overrule the first principle which have not been proved.

For the above stated reasons, this application lacks merit. It has been overtaken by events. Application stands dismissed with no order as to costs.



M. G. MZUNA,

JUDGE.

19. 02. 2021