

IN THE HIGH COURT OF TAZANIA
DAR ES SALAAM DISTRICT REGISTRY
(AT DAR ES SALAAM)
MISC.CIVIL APPLICATION NO. 187 OF 2021

ANTHONY HAJI.....APPLICANT

VERSUS

YASMINE HAJI.....1ST RESPONDENT

KINGSWAY PROPERTIES LIMITED.....2ND RESPONDENT

RULING

Date of last order: 18/10/2021

Date of Ruling: 13/12/2021

LALTAIKA, J.

This is a ruling on an application for a temporary injunction. The application is brought under section 2(3) of the Judicature and Application of Laws Act, Cap 358 R.E.2019 and section 95 of the Civil Procedure Code, Cap 33 R.E.2019. The application is accompanied with a chamber summons and an affidavit of **Mr. ANTHONY HAJI**, the applicant. The applicant is seeking for the following orders:

EX-PARTE

- a. This court to be pleased to grant an order for maintenance of status quo restraining the 1st respondent, her agents, workmen,

assignees or any other person acting under her instructions from removing any items from the property of the 2nd respondent situated on Plot No23, C.T.No.186031/87, Laibon Road, Dar es Salaam "suit property" or from dealing with or tempering with the suit property in any manner whatsoever pending inter parties hearing of this application.

b. Cost of this application

INTER-PARTIES

c. That this honourable court be pleased to grant a temporary injunction order to restrain the 1st respondent, her agents, workmen, assignees or any other person acting under her instructions from removing any items from the property of the 2nd respondent situated on C.T.No.186031/87, Laibon Road, Dar es Salaam "suit property" or from dealing with or tempering with the suit property in any manner whatsoever that is prejudicial to the interests of the applicant and other shareholders of the 2nd respondent pending hearing and determination of Misc. Civil Cause No.166 of 2021.

d. Any other order(s) as this honourable court may deem fit and just to grant.

e. Costs of this application.

When this matter was called for hearing Mr. Mlwale, learned counsel, appeared for the applicant while Mr. Kagirwa, learned counsel appeared for the respondents. Mr. Mlwale, in support of the application submitted that for the court to grant an injunction order the applicant must satisfy three conditions as laid down in the case of **Atilio vs Mbowe (1969) HCD at 284**, which are one, there must be a pending suit with triable issues, two, that irreparable loss will be suffered by the applicant if injunction is denied, three, that on the balance of inconvenience tilts in favour of the applicant.

Applying the above three conditions in the application at hand, Mr. Mlwale explained that for the question of triable issue it could be shown from the pleadings in support of the application. He specifically referred this court to para 7 of the affidavit that the first respondent has been claiming sole ownership of the suit property in exclusion of other shareholders of the second respondent whose shareholders are the applicant and the first respondent. He went on to submit with reference to paragraph 9 of the applicant's affidavit, that the first respondent does not acknowledge the fact that the applicant is also a shareholder of the second respondent following allegations that the applicant had transferred his one share and therefore has no right over the second respondent.

Mr. Mlwale is of the opinion that there are triable issues to be determined in Misc. Civil Cause 166 of 2021 which is pending before this court terming it as a main suit for the reason that under the Companies Act Number 12 of 2002 proceedings are not instituted by way of a plaint.

To cement on the question of triable issues, Mr. Mlwale cited the case of **John Pascal Sakaya versus Azania Bank Ltd Misc. Commercial case 62 of 2018**

Submitting on the condition of irreparable loss, Mr. Mlwale stressed on the facts stated in the affidavit of Anthony Haji, particularly para 6, 7, 8 and 18 that, the suit property is in danger due to the wrongful acts of the first respondent who is removing items and fittings from the suit property with the intention of exporting them to Europe without the sanction of the board of directors. To this end, the learned counsel avers, it is only an order of this court that would save the applicant from suffering irreparable loss from wrongful acts of the second respondent affecting the suit property. To amplify his argument Mr. Mlwale cited the case of **Kibo Match Group vs H.S. Impex Ltd 2001 TLR**. Drawing inference from the cited case he is of the view that this condition has also been satisfied.

On the third condition Mr. Mlwale submitted that the acts of the first respondent of removing the items and fittings from the suit property with the intention to export them to Switzerland where the first respondent resides are likely to result into more hardships and inconveniences to the applicant than it would be if those acts are restrained by a court order. He further submitted that if no order is granted the pending Misc. Civ. Cause 166 of 2021 would be rendered nugatory and would remain merely an academic exercise.

From the foregoing submissions and the case laws cited Mr. Mlwale prays that this court grants the injunction.

In reply Mr. Kagirwa strongly opposes this application. He maintains that the three conditions as per Mbowe's case (supra) have not been met in this application. On the first condition the learned counsel stated that there was no any suit pending before this court. Mr. Kagirwa explained that the instant application is brought under section 2(3) of the JALA which, in our jurisdiction, is concerned with Mareva injunction. Mr. Kagirwa opines further that there is no pending suit as per the decision of **Daudi Mkwya Mwita versus Butiama District Commissioner and the AG Land. App. No 69 of 2020** at page 3.

Mr. Kagirwa insists that an application for injunction under JALA can only be granted where the main suit cannot be instituted due to an existing legal impediment. Mr. Kagirwa faulted Misc. Civil Cause Number 166 of 2021 which Mr. Mwale presented in his submission as a suit in order to meet the first condition under **Atilio vs Mbowe**, (supra). He maintains that the said application seeks for interlocutory orders and not determination of the rights of parties. It is therefore Mr. Kagirwa's submission that the first condition has not been met as the applicant has not indicated if he is intending to institute a case in order to suit the condition for Mareva injunction.

Contesting on the issue of irreparable loss or injury, Mr. Kagirwa submitted by inviting this court to look at the affidavit in support of the application to find out whether there was any express provision of irreparable loss. In his reasoned opinion, nowhere in the affidavit has the loss been mentioned or specified to support M. Mwale's argument. To

buttress his argument, the learned counsel cited the cases of ***Mariam Christopher versus Equity Bank (T) Ltd Misc. Land Appl. 107 of 2017*** and ***Elias Mwita Somo & Others vs Bunda District Council & Others Misc. App No 27 of 2020*** where it was held that the particulars of the loss must be specified in the affidavit. He concluded this particular point by sternly maintaining that in this application the particulars of the loss were not specified.

Lastly, on the third condition, Mr. Kagirwa submitted that it was the 1st respondent who is likely to suffer greater hardship and mischief if this application is granted by this court on the ground that the house is the residence of the 1st respondent and the property of the 2nd respondent.

Borrowing the position in the case of ***Elias Mwita Somo's*** case, Mr. Kagirwa submitted that it is settled law that all the three conditions must be met and that, meeting one or two of the three conditions would not be sufficient for the court to grant an injunction. The learned counsel concluded that since this is an application for a Mareva injunction and there is no pending suit, the application should be dismissed with costs in favour of the first and 2nd respondent.

In his brief rejoinder Mr. Mlwale reiterated his position in the submission in chief.

Having carefully considered the submissions and the affidavits, the issue for determination is whether the applicant has properly moved this court to grant his prayers. It is settled law, as per the ***Daudi Mkwaya***

Mwita vs Butiama District Commissioner's case (supra) that an application brought under section 2(3) of JALA has to meet the following conditions; First, a *mareva* injunction cannot be applied or be granted pending a suit. It is an application pending obtaining a legal standing to institute a suit. Second a *mareva* injunction may be applied where an applicant cannot institute a law suit because of an existing legal impediment for instance where law requires that a statutory notice be issued before a potential plaintiff can institute a suit.

Looking at the application at hand, it is clear that Mr. Mlwale has misconceived this application. I say so because from his submissions it is evident that he departed from the enabling provision for this application. It is with commendable efforts that the learned counsel expounded on the principles laid down in the **Atilio vs Mbowe**, (supra). However, it does not take much thought to realize that the same is *parimateria* with Order XXXVII, Rule 1(a)(b) of the Civil Procedure Code, Cap 33 R.E.2019. A careful read of the section would inform that, for the court to grant a temporary injunction there must be, among other things, pendency of the main suit. Mr. Mlwale referred to Misc. Civil Application 166 of 2021 as a pending suit. To this end, I have taken liberty to have a look at prayers in the said application. As rightly submitted by Mr. Kagirwa the sum total of the prayers therein calls upon this court to grant interlocutory orders. In my view, Misc. Civil Application 166 of 2021 cannot be termed a pending suit. This is because the same would not conclusively determine the rights of the parties herein.

Mr. Mlwale has also admitted by pointing out in his submission that the dispute between the parties is centered on the rights of the applicant and the 1st respondent as shareholders of the 2nd respondent which owns the suit property. This being the case, the same can be properly challenged in accordance with the rules provided under the Companies Act 2002 which is the main legislation governing companies in Tanzania. In such circumstances, since there is no any legal obstacle for the applicant to challenge the same under the provisions of the Companies Act, it was not proper for the applicant to move this court by the provisions of section 2(3) of the JALA for the reasons aforementioned.

From the foregoing reasons I find this application with no merit. I hereby dismiss it without costs.

It is so ordered.

E.I. LATAIKA



JUDGE

13/12/2021

