IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 290 OF 2022

MOHAMED AHMAD MBARAK ..... APPLICANT

VERSUS

HILAL AHMAD MBARAK ..... RESPONDENT

RULING

12th, & 15th August, 2022

ISMAIL, J.

The applicant and the respondent are joint administrators of the estate of the late Ahmad Mbarak Abad, their father, who met his demise on 10th May, 2020. They are embroiled in a legal tussle that pits one against the other, along with other beneficiaries of the estate. While the applicant, together with a section of the beneficiaries, contend that the deceased died intestate, the respondent, his mother and three other beneficiaries hold the view that the deceased left a will that directs on how the 'spoils' of his estate should be shared. The matter, which was commenced in the Primary Court,

has graduated into PC Civil Appeal No. 12 of 2022, and it is pending in this Court.

While the matter on appeal in pending, the applicant has instituted the instant application, praying for a temporary restraint order. The application is supported by an affidavit affirmed by the applicants, setting grounds on which the prayers are sought.

The application has been resisted by the respondent. The counter-affidavit affirmed in reply disputes the respondent's alleged wrong doing. Besides, merits of the application have also been queried.

Hearing of the application pitted Mr. Juvenalis Motete, learned counsel, whose services were enlisted by the applicant, against Ms. Florens Tesha, whose professional services were enjoyed by the respondent.

Mr. Motete, who fired the first bullet, began by praying to adopt the contents of the applicant's affidavit. He submitted that of most significance are the depositions made under paragraphs 3, 9, 10 and 11 of the affidavit. Learned counsel argued that this matter arises from probate and administration proceedings for the estate of the parties' departed father. The disputants were appointed as joint administrators of the deceased's estate but, to the dismay of the applicant and other beneficiaries, the respondent

has placed the estate in his control and is misusing and embezzling the assets with impunity. The assets said to be in the respondent's control are cash sums in various bank accounts and commercial buildings that has over 100 office spaces (frames). With respect to bank accounts, the contention is that the respondent has been withdrawing monies through ATM cards, while the frames are rented out and proceeds thereof are pocketed by the respondent and a few of the beneficiaries. Mr. Motete contended that it is because of the respondent's continued stranglehold of the estate that administration thereof has been unduly delayed, as the respondent lacks the motivation to assume administration duties.

The applicant's advocate submitted that the respondent's continued control of the estate has led to dissipation in the value of the assets. In the case of business premises, his contention is that the same generate an estimated sum of TZS. 300,000,000/- per year and that, during the period under which the respondent has exercised control, the sum in the region of TZS. 700,000,000/- has been generated from renting out the frames, and that none of it was shared with the respondent's elder siblings. It was also submitted that iron sheets and bars, all of which are part of the estate, have been sold out by the respondent.

Mr. Motete made yet another contention. This was to the effect that in the recent past, potential buyers were seen inspecting a piece of land located at Tegeta Azania, in Dar es Salaam, fuelling a suspicion that this too will soon be sold, clandestinely.

Overall, learned counsel prayed that the orders sought in the application be granted pending determination of the appeal which is due for hearing on 16th August, 2022.

Mr. Tesha was valiantly opposed to the application. While praying to adopt the contents of the respondent's counter-affidavit filed on 5th August, 2022, as part of his submission, he urged the Court to reject the applicant's contention out of hand. He cited three reasons for his contention.

One, that the propriety or competence of the application is suspect. He argued that Order XXXVII of the Civil Procedure Code, Cap. 33 R.E. 2019 (CPC) under which the application was preferred deals with powers of the Court to grant injunction. Learned counsel argued that the provision requires that there must be a suit in court as the basis for the prayer of temporary injunction. Mr. Tesha argued that, in the instant matter, no suit is pending in this or any other court.

While acknowledging that an appeal is indeed in existence, Mr. Tesha's argument is that an appeal is not a suit. He submitted that the appropriate

procedure, in the circumstances, is to prefer an application for stay of execution of the decision that is a subject of the appeal. That would be done under Order XXXIX of the CPC. The alternative would be, Mr. Tesha contended, to await the conclusion of the appeal than waste the parties' financial resources to file the present application.

Two, even assuming that there is a pending suit, conditions for grant of injunction, as laid down in ***Atilio v. Mbowe*** (1969) HCD 284, and emphasized in ***Salehe Hamisi Lufeva v. TANESCO***, HC-Misc. Land Application No. 14 of 2017 (unreported), had not been fulfilled. He argued that there is no serious dispute between the parties; no irreparable loss has been suffered; and that, the balance of convenience militates against the applicant. Learned counsel maintained that the affidavit does not say anything on the hardship allegedly suffered by the applicant, more so, when it is considered that the applicant is residing in one of the houses forming part of the estate and is collecting rent from some of the frames. He urged the Court against being moved by submissions made from the bar.

Mr. Tesha's another line of argument is that restraint orders will cause hardship to the widow and children of the deceased as they will not have any means to sustain themselves. In this case, learned counsel argued, the estate has a component of the contribution of the widow in her marriage life

with the deceased and that the law, as it currently obtains, is to the effect that such contribution must be quantified, taken off the estate, and given to the widow ahead of any distribution. On this, learned counsel cited the decision of the Court in ***Paulo Lawrence v. Chausiku Halfan***, HC-Misc. Appeal No. 2 of 2002 (unreported).

Mr. Tesha attributed the stalemate in the matter to the failure to follow the wording and spirit of the will left by the deceased. He prayed that the application be dismissed.

In rejoinder, Mr. Motete decried what he considered as a re-introduction of the preliminary objection which was dropped by counsel for the respondent. He contended that that was wrong. On whether injunction would be granted even where there is no suit, Mr. Motete's argument is that such prayer would still be granted even in the absence of the suit.

Regarding the conditions for grant, learned counsel was of the view that conditions for grant of the orders have been clearly explained in paragraphs 3, 9, 10 and 11 of the supporting affidavit, and that the main intention is to forestall further depletion of the estate.

Mr. Motete disputed that the applicant or any of his disgruntled siblings stays in the frames which are part of the estate. Rejoining on the ***Salehe Lufeva's case***, the learned advocate argued that its relevance has not been

explained by the respondent's advocate. He considered his counterpart's contention that the deceased has left a widow as a concession that the estate is misused by one side.

Regarding the failure to list the properties, Mr. Motete's take is that the restraint is against the misuse of the estate, making the listing unnecessary at this stage. On the widow's contribution, the view held by him is that the same is misplaced as such issues come at the time of distribution of the estate. He maintained that there is no abuse of court process and that the prayers in the application are intended to tame the respondent's irregular action and conserve the estate.

From the parties' rival contentions the obvious question for determination is whether the instant application has what it takes to allow grant of temporary injunctive orders.

I will start with the nagging question that touches on the competence of the application. The contention made by the respondent's advocate is that absence of a suit has rendered the instant application incompetent. His contention is premised on what the enabling provision which is Order XXXVII rule 1 of the CPC. For ease of reference, it is apposite that the substance of the said provision be quoted as hereunder:

"Where in any suit it is proved by affidavit or otherwise–

(a) that any property in dispute in a suit is in danger

(b) of being wasted, damaged, or alienated by any party to the suit of 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:

Provided that, an order granting a temporary injunction shall not be made against the Government, but the court may in lieu thereof make an order declaratory of the rights of the parties."

While it is unanimously held by counsel for the parties that what is pending in this Court is an appeal against the decisions of the lower courts, on matters relating to administration of the estate, the question is whether the said appeal can be said to be a suit on which an application for injunction

may be premised. The respondent's advocate takes the view that the said appeal cannot serve that purpose.

An answer to this question requires an understanding of what a suit is. A suit is defined on *https://dictionary.law.com* to mean:

> *"generic term for any filing of a complaint (or petition) asking for legal redress by judicial action, often called a "lawsuit." In common parlance a suit asking for a court order for action rather than a money judgment is often called a "petition," but technically it is a "suit in equity."*

The foregoing is similar to the definition provided in Black's Law Dictionary, 8th Edition. It defines a suit to mean *"any proceeding by a party or parties against another in a court of law"* (at. P. 1475). This definition has included a case as the alternative of the word or term suit. Case is defined at p. 228 to mean *"a civil or criminal proceeding, action, suit, or controversy at law or in equity*."

The clear impression deduced from the cited definitions is that a suit is any proceeding by a party against the other, and that such proceeding must be in a court of law. It does not matter the stage at which the proceeding is and whether the same is an appeal or original suit. In my considered view, a pending appeal has been factored in the definition of a suit, and it follows, therefore, that the pending appeal is a suit and fits the

requirement under Order XXXVII rule 1 of the CPC. Consequently, I find the respondent's argument hollow and I dismiss it.

Turning on to the merits of the application, the question is: has the applicant done enough to lay a basis for triggering the court's discretion? As I move to answer this question, it behooves me to quote part of the scintillating decision of this Court in ***Charles D. Msumari & 83 Others v. The Director of Tanzania Harbours Authority***, HC-Civil Appeal No. 18 of 1997 (unreported). In the said decision, the Court emphasized on the proper application of the Court's discretion, in the following words:

> *"Courts cannot grant injunctions simply because they think it is convenient to do so. Convenience is not our business. Our business is doing justice to the parties. They only exercise this discretion sparingly and only to protect rights or prevent injury according to the above stated principles, court should not be overwhelmed by sentiments however lofty or mere highly driving allegations of the applicants such as the denial of the relief will be ruinous and or cause hardship to them and their families without substantiating the same. They have to show they have a right in the main suit which ought to be protected or there is an injury (real or threatened) which ought to be prevented by an interim injunction and that if that was not done, they would suffer irreparable injury and not one which can possibly be repaired."* [Emphasis added]

As Mr. Tesha submitted, the principles that are applied to gauge the merits or otherwise of the application for injunction were enunciated in the case of ***Atilio v. Mbowe*** (supra). These principles have been emphasized in a multitude of subsequent decisions. In ***T.A. Kaare v. General Manager Mara Cooperative Union (1984) Ltd*** [1987] TLR 17 (HC), this Court (Mapigano, J) held as follows:

> *"The power to grant such an application has always been discretionary, to be exercised judicially by the application of certain well - settled principles. The first such governing principle, as indicated supra, is that the court should consider whether there is a bona fide contest in between the parties. Secondly, it should consider on which side, in the event of the plaintiff's success, will be the balance of inconvenience if the injunction does not issue, bearing in mind the principle of retaining immovable property in status quo. Thirdly, the court should consider whether there is an occasion to protect either of the parties from the species of injury known as "irreparable" before his right can be established, keeping it in mind that by "irreparable injury" it is not meant that there must be no physical possibility of repairing the injury but merely that the injury would be material, i.e., one that could not be adequately remedied by damages. With due respect, let it be said that the learned magistrate did not pause to address his mind to these*

points, let alone pronounce on them, and I am disposed to think that if he had done so he would most probably have granted the application."

On whether there is an arguable case or existence of a *prima facie* case, I take the view that the pending appeal presents a *bonafide* contest between the parties, and that the same constitutes a *prima facie* case. Soundness or otherwise of the contest by the parties is something that is to be determined in the course of the hearing of the main contest. In my considered view, existence of the said appeal fulfils the first principle or condition for grant of injunction.

With regards to irreparable loss, the requirement of the law is that the applicant should be able to demonstrate that the loss to be suffered should not be capable of being atoned by way of monetary compensation. This has also been underscored in a multitude of the cases. In ***Abdi Ally Salehe v. Asac Care Unit Ltd & 2 Others***, CAT-Civil Revision No. 3 of 2012, it was held in part as follows:

Once the court finds that there is a prima facie case, it should then go on to investigate whether the applicant stands to suffer irreparable loss, not capable of being atoned for by way of damages. ***There, the applicant is expected to show that, unless the court intervenes by way of injunction, his position will in some way be changed***

> ***for worse; that he will suffer damage as a consequence of the plaintiff's action or omission, provided that the threatened damage is serious, not trivial, minor, illusory, insignificant or technical only.*** *The risk must be in respect of a future damage (see* ***Richard Kuloba Principles of Injunctions*** *(OUP) 1981)…."* [Emphasis added]

The applicant has not singularly pointed out the existence of this principle in his submission. However, the depositions in the affidavit give the clearest indication that the loss that the estate and the beneficiaries thereof are likely to suffer is not only significant or humongous, but also incapable of being recompensed. Dissipation of the value of the estate through the alleged wastage and alienation are some of the instances cited to justify the irreparable loss. In my considered view, this threat is serious and not trivial, minor, illusory, insignificant or technical only. It is a threat that has a future bearing on the rights of the beneficiaries as well. I am persuaded that this principle is demonstrable, as well.

On the balance of convenience, my take is that, since the balance of convenience is all about putting on a scale comparative losses to be suffered by either of the parties in case of issuance or non-issuance of the injunctive orders, such loss is bound to be higher if the order of temporary injunction

is not granted. This means that the applicant has ably demonstrated existence of this factor in his favour.

Consequently, the order of temporary injunction is granted and the respondent is hereby restrained from wasting, destroying, disposing of or alienating any of the assets constituting the estate of the deceased, pending determination of PC Civil Appeal No. 12 of 2020. In the pendency of the said appeal proceedings, the administrators are ordered to deposit into Court, all monies that are collected from the estate of the deceased.

No order as to costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 15th day of August, 2022.

M.K. ISMAIL

JUDGE

15/08/2022