

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

MISC. CIVIL APPLICTION NO. 426 OF 2021

(Arising from Civil Case No. 128 of 2021)

SIMON DAUD NYAGALU.....APPLICANT

VERSUS

FARIDA KHALID KHAMBUGA (As Administratrix of the Estate of the late KHALID ABBAS KAMBUNGA)1ST RESPONDENT

TAYNBURN SAID LEEY t/a TANZANIA FITNESS GYM.....2ND RESPONDENT

M/S NESTLING CO. LTD.....3RD RESPONDENT

GENES LEIYA SHAYO.....4TH RESPONDENT

PROSPER MSAKI T/A RAU LODGE.....5TH RESPONDENT

Last order:3/3/2021

Ruling date:16/03/2022

RULING

MANGO, J

By way of Chamber Summons made under Order XXXVII Rules 1(a)& (b), 2(1) read together with section 68(e) and section 95 of the Civil Procedure Code, [Cap. 33 R.E 2019], the Applicants prays for the following orders:

1. That this Court be pleased to grant an interim injunction order to restrain the Respondents, their agents, assignees, servants or any

other person acting under them to stop the on-going demolition and their intention to construct other houses after demolition of the existing houses and structures on the property registered in the Applicant's name as Plot No. 2190 Block L Mbezi Area, Kinondoni Municipality, Dar es salaam with Certificate of Title No. 113102, pending determination of Civil Case No. 128 of 2021.

2. Costs of the Application

3. Any other reliefs that this Court may deem fit to grant

The Application is supported by an affidavit sworn by SIMON DAUD NYAGALU. The Applicant. The first Respondent filed a counter affidavit opposing issuance of the orders sought in the Chamber Summons.

In prosecuting this Application, the Applicant was represented by Mr. Angros Jeston Ntahondi learned advocate while the first Respondent was represented by Mr. Derick Pascal Kahigi, learned advocate. On 21st February 2022 this Court ordered the Application be argued by way of written submissions.

Submitting in support of the Application, the Applicant's Counsel adopted the contents of the affidavit sworn in support of this Application to form

part of his submission in chief. The learned counsel highlighted background facts concerning the contractual relationship between the Applicant and the first Respondent as reflected in paragraphs 7,8,9,10,11,12 and 13 of the affidavit filed in support of the application. He submitted that, the Applicant and the late Khalid Abbas Kambunga (now deceased), entered into a lease agreement over the suit premises on the first day of January 2008. The agreement was to the effect that the said Khalid Abbas Kambunga was supposed to run a bar business, build a social hall and guest house on the suit property and run all the business. The lease agreement was for a term of one year, renewable at the option of parties. The agreed monthly rent was Tshs. 400,000/-, (Tshs. 4,800,000 annually) payable annually on the first day of the year. It was agreed further that construction costs incurred by the lessee will be approved by the lessor and deducted from monthly rent payable to the lessor. After the deduction of construction costs, the erected structures in the suit premises will remain the property of the lessor, the Applicant.

According to the learned counsel for the Applicant, as at the date of renewing the lease agreement in 2016, the total approved constructor costs was Tshs. 194,061,534. He also submitted to the effect that, monthly

deductions of the construction costs were to be made up to December 2020 and thereafter lease agreement will be considered to have expired and structures in the suit premises would have been Applicant's property.

As to what compelled the Applicant to file this Application, the Applicant's Counsel submitted that, the tenant, Khalid Kambuga passed away on 29th June 2018. Following the death of Khalid Kambuga, Farida Khalid Kambuga was appointed to be an administratrix of the deceased's estate. Unfortunately, the administratrix of the deceased estate, herein the first Respondent, did not comply with the terms of the agreement executed between the Applicant and the Late Khalid Kambuga. According to him, the first Respondent started to sublease the property contrary to the terms of the agreement and in some instances she introduced herself as the owner of the premises. The subleased tenants especially the third Respondent M/S Nestling Co. Ltd has demolished some of the already built structures such as the Kitchen, toilets and drinks counter. He added that, such demolition is still going on at the detriment of the Applicant, the owner of the suit premises.

The learned counsel cited the provisions of Order XXXVII Rules 1(a)&(b), 2(1) read together with section 68(e) and section 95 of the Civil Procedure

Code, Cap. 33 R.E 2019 and argued that this Court has powers to grant the orders sought in the Chamber Summons as provided by the cited provisions. As to the whether the Applicant deserve to be granted the orders sought, he is of the view that, circumstances in this Application establishes all prerequisite conditions for granting injunctive orders. He also cited the case of **Otilio Versus Mbowe** (1969) HCD 284 which expounded three conditions that need to be considered by the Court during determination of applications for injunctive orders. The conditions include existence of a serious triable issue, Irreparable loss to the Applicant in case the Application will not be granted and balance of convenience as to who will suffer more in case of grant or dismissal of the application for injunctive orders.

He argued that, circumstances in this matter establishes existence of all the three condition and prayed the Court to grant the orders sought in the Chamber summons. He argued that, there are several serious triable issues that need to be determined by the Court such as, the legality of the ongoing demolition, subleasing of the suit premises by the first and Respondent and justifiability of the first Respondent's action of introducing

herself as the owner of the suit premises while she is actually a mere tenant.

On the second condition he argued that the Applicant will suffer irreparable loss if the Respondents will not be restrained from demolishing structures constructed in the suit premises. He added that, the Applicant used his rent to construct the buildings and the actions of the first Respondent subleasing the suit premises, affects the Applicants enjoyment of his property to the extent that cannot be compensated by the Respondents.

On the third condition, he argued that the Applicant who is a registered owner of the suit premises and who is prevented from dealing and using the property will suffer more if the injunctive orders will not be issued than the Respondents. He is of the view that, the Applicant has a great chance of success in the pending suit than the Respondents. He concluded his submission by praying the Court to grant the orders sought by the Applicant.

The Respondents, with exception to the first Respondent did not file their submissions. They did not even file counter affidavits. It is only the

first Respondent who filed a counter affidavit and a reply submission against the Application. Failure to file a counter affidavit suggests that the Respondents are not contesting the Application. The fact that the Respondents did not file their submissions cements the Respondents' intent not to object the Application hand. Thus, this Court proceeded to determine this Application ex parte against the second, third, fourth and fifth Respondents.

In his reply submission Counsel for the first Respondent submitted that the Application is meritless and prayed the same to be dismissed with costs. He argued that, the Applicant failed to advance reasons that would have moved this Court to issue the orders sought in the Chamber Summons. He conceded on the principles to be applied by the Court in determining application for temporary injunctions as stated in the case of **Atilio Versus Mbowe** which was cited by the Counsel for the Applicant. He also cited the case **Kibo Match Group Limited Versus H.S. Implex Ltd** (2001) TLR 152 which summarized the three conditions for granting or dismissing application for injunctions contained in Atilio's case.

The first Respondent's Counsel is of the view that, there is no triable issue between parties to this Application as there is no dispute to ownership over

the suit premises. The first Respondent does not claim ownership of the suit premises but possessory rights acquired via long term tenancy agreement. According to him, the tenancy agreement will expire in the year 2033 thus, the main suit has been preferred prematurely. He added that, the actions of the first Respondent are mere enjoyment of his possessory rights as reflected in the contract executed by the Applicant and the Respondent on 1st January 2017. In such circumstances, he is of the opinion that the Applicant has no cause of action against the first Respondent and his case has no chances of success.

On the issue of irreparable loss, he argued that it is the first Respondent who will suffer the same and not the Applicant. The learned counsel quoted page 226 of Mulla (2007) The Code of Civil Procedure, in which irreparable loss has been defined to mean injury which is substantial and could never be adequately remedied or atoned for by damages, injury which cannot be possibly repaired. He submitted further that, the first respondent, who is a bonafide lesee, stands to suffer greater injury if the injunction will be issued as he will not enjoy his possessory rights which will expire in the year 2033.

On the third test, balance of convenience, the learned counsel argued that the same is in favour of the First Respondent because he is the one who will suffer more if the injunction order will be granted. To cement his arguments, he stated that the Applicant has nothing to lose if the injunction orders will be issued as he is enjoying his rent out of the lease agreement. It is the first Respondent who in exercising his rights to use the leased premises need to renovate the same to suit his demand. The improvements are allowed in the lease agreement.

I have considered submission by both parties and the nature of the dispute between parties in this Application. I agree with counsels of both parties on the tests to be applied by court in the course of determining applications for injunction orders. As correctly submitted by the learned counsels, the three tests mentioned in their submissions were enunciated in the famous case on injunction orders, **Otilio Versus Mbowe**, and have been restated in a number of decisions of our Courts.

On the first test, pleadings in this Application establishes existence of triable issues between the Applicant and the third Respondent. The triable issues include, life span of the lease agreement, rights and powers of the lessee during subsistence of the lease agreement and the manner

reconstructions of the leased premises can be effected by either party to the lease agreement. While the Applicant allege that the lease agreement between him and the first respondent expired in December 2020, the first Respondent alleges that, the lease agreement will expire in the year 2033. Unfortunately, the documents including the lease agreement does not indicate exactly when will the lease agreement expire. I donot wish to venture more on the contents of the lease agreement dated 1st January 2016 which has been annexed to the parties' affidavits because the matter has not yet been heard and perhaps parties have more evidence regarding the life span of the lease agreement between the Applicant and the first Respondent.

I have also noted some contention as to the rights and powers of the lesee during the subsistence of the lease agreement. This is evident from the contents of the affidavits filed by both parties. In paragraphs 16,17,18,19, and 20 of the affidavit sworn in support of the Application the Applicant avers that the first respondent subleased the suit premises without his involvement. Responding to the contents of the mention paragraphs of the affidavit, the Respondent, in paragraph 12 of his counter affidavit asserted

that, the lease agreement does not require the first Respondent to consult the Applicant prior to subleasing of the suit premises.

There is also an issue on how renovations should be conducted. Agreements annexed to the affidavit and counter affidavit indicates that renovations or any changes in the structure and usage of the leased premises were agreed upon by the parties before being done and were reflected in the agreements. For example, renovation of the bar were reflected in the agreement dated 20th May 2006. Renovations that changed of the club to lodge were reflected in agreement dated 1st January 2016. Given the serious nature of the triable issues in the pending suit, Civil Case No. 128 of 2021, I hereby grant the application and issue the following orders:-

- i. The first Respondent who is the administratrix of the estate of the late Khalid ABBAS KAMBUGA is restrained from continuing subleasing the property in dispute pending determination of Civil Case No. 128 of 2021.
- ii. The Respondents are restrained from demolishing and renovating the suit property without written consent of the Applicant pending the determination of the main case

- iii. The Respondents are restrained from conducting any new constructions in the suit land without written consent of the Applicant pending determination of the main case

In granting these orders the Court considered the nature of relationship between parties in this Application as reflected in the agreements entered by the Applicant and the late Khalid Abbas Kambuga.

The application is granted to the extent expressed in this ruling. Given the nature of the dispute between parties to this Application, I award no costs.

Dated at Dar es salaam on 16th March 2022



Z. D. Mango
Z. D. MANGO
JUDGE