

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI

MISC. CIVIL APPLICATION NO. 56 OF 2021
(Originating from Misc. Civil Application No 35 of 2021)

CUTHBERT ROBERT KAJUNA
T/A C.R. KAJUNA AND COMPANY..... .. APPLICANT

VERSUS

EQUITY BANK TANZANIA LIMITED 1ST RESPONDENT
ADILI AUCTION MART LIMITED.....2ND RESPONDENT
EVANCE JOSHUA MASUKE.....3RD RESPONDENT

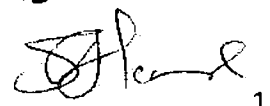
RULING

24th, January, 2022 & 24th February, 2022

SIMFUKWE, J.

The applicant under certificate of urgency is seeking for inter parties' orders pursuant to **Order XXXVII Rule 2(2)** and **section 95** of the **Civil Procedure Code, CAP 33 R.E. 2019** (the CPC) as follows:

- (i) *That, the Honourable Court may be pleased to issue summons to the 3^d Respondent one **Evance Joshua Masuke** and the Principal Officers of **Pama Online Security Company** who are the 3^d respondent's agents/assignees*

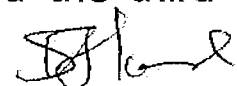

1

Melbourne Mkuchu and Subira Juma to appear and show cause as to why they should not be committed as Civil Prisoners for not obeying the Order of this Honourable Court in Misc. Civil Application number 35 of 2021 by Hon. Simfukwe, J Dated the 13th day of October 2021.

- (ii)** *The Honourable Court be pleased to order the 3^d Respondent, its servants, workmen, agents, assignees and or whomsoever purporting to act for and on behalf of the 3^d Respondent to respect, adhere to and observe the **Order of this Honourable Court in Misc. Civil Application number 35 of 2021 by Hon. Simfukwe, J dated the 13th day of October 2021.***
- (iii)** *Costs of the Application*
- (iv)** *Any other relief as the Honourable court may deem just to grant in the premises hereof.*

The application was supported by the affidavit sworn by the Applicant Cuthbert Robert Kajuna.

During the hearing, the Applicant was represented by Mr. Dismas Raphael learned counsel, while the first and second Respondents were represented by Mr. Lyaro learned counsel and the third

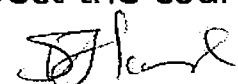


Respondent was represented by Mr. Martin Kilasara, also learned counsel. The matter proceeded orally.

Mr. Dismas for the applicant submitted to the effect that this court on 13/10/2021, through Misc. Application No.35/2021 filed by the applicant issued an interim order of injunction to restrain the Respondent, its servants, workmen, agents, assignees and or whomsoever purporting to act from evicting the Applicant from his landed property with Certificate of Title No. 056111/63 for Plot Number 31-33 and 50-53, Farm No.125 Kiboriloni Area Moshi Municipality within Kilimanjaro region(suit property), pending the hearing and determination of the main suit being Land Case No. 3/2021.

It was further submitted that throughout the hearing, the counsel for the 3rd respondent insisted that the court's order will never be executable or enforceable. Thus, he was so determined to make sure that the court knows what they will be doing continuously and that they will always disrespect what will be ordered.

It was also contended that in several occasions, the applicant has been threatened, thrown away and shaken by the 3rd respondent and his assignees. He reported the matter to the police and the letters reached this court but still the 3rd respondent is unmoved and never bothers to respect the court's



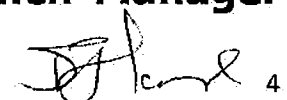
order.

That, strangely and to the detriment of the Applicant, the 3rd respondent and Principal officers of Pama Online Security Company who are the 3rd respondent's agents/assignees Melbourne Mkuchu and Subira Juma continued to evict the Applicant and unlawfully proceeded to occupy the suit property.

It was submitted further that, the applicant and his advocate noticed the same and informed the police and the court in normal hearing days of the suit and the counsel for the 3rd respondent one, Martin Kilasara undertook to advise and guide the 3rd respondent not to go against the court orders but he pressed that the 3rd respondent insisted the order will never be adhered to. Thus, the applicant decided to write a letter to the court and the same was responded.

It was further narrated that, as the applicant was struggling to rescue his property, the applicant was again evicted from the suit property and the house which is the main home of the applicant was demolished and rendered inhabitable.

Mr. Dismas insisted that the High Court and Court of Appeal have at all material times insisted that the court's order must be obeyed or respected or otherwise challenged by following set procedures. He referred to the case of **Sanyou Service Station Ltd and PB Tanzania Limited and the Branch Manager**

 4

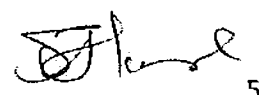
Standard Chartered Bank (T) Ltd International House Branch, in which **Hon. Kalegeya, J** held that:

"If the respondent's behavior was to be condoned, court's orders would be violated and disobeyed with impunity making the court's duty impossible to achieve, with disastrous consequences to the machinery of justice."

It was further stated that the Honourable Judge quoted the following cases with the same holding **Kwiga Masa v. Samwel Mtubwata [1989] TLR 103 (HC)** and **Lampit & Another, third Party (1990) ALL.ER 887** and proceed to hold that;

"The respondent's action was contempt, again as rightly sourced by the Applicant's counsel, as defined in both the Black's Law Dictionary, 8th Edition, page 336 and the Penal Code, Cap 16 R.E 2002). The former defines contempt as: ...a disregard of, or disobedience to the rules or orders of the legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."

While the latter has the following:



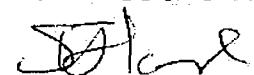
"...any person who willfully obstructs or knowingly prevents or in any way interferes with or resists the execution of any summons, notice, order, warrant or other process issued by court, or any person lawfully charged with execution thereof is guilty of an offence and shall be liable upon conviction to imprisonment for a term not exceeding one year."

Basing on the above noted authorities, the applicant's counsel was of the view that the respondent's act fit in the four corners of those definitions.

In reply the learned counsel for the Respondent adopted the counter affidavit and all annexures thereto of Henry Damas Choga, Principal Officer of 1st respondent who also deponed for the 2nd respondent, agent of the 1st Respondent.

Mr. Lyaro for the 1st and 2nd respondents stated that the orders sought in the chamber summons should not be granted and the application be dismissed with costs.

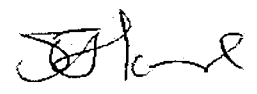
Mr. Lyaro also submitted to the effect that, the disputed land was auctioned on 29th May 2021 and the 3rd respondent was the highest bidder who paid Tshs 480,000,000/= . Thereafter, the 2nd respondent issued notice dated 18th June 2021 which was served to the applicant on 22nd June 2021 as evidenced by Annexure EBTL. Thus, by the time the order of this court was



issued on 13th October 2021 in Misc. Civil Application No. 35 of 2021, the applicant had been evicted from the suit premises way back on 10th July 2021 and the 3rd respondent was then handed over, vacant premises/property together with certificate of title No.056111/63 of the disputed property by the 2nd respondent. The applicant pleaded the said eviction in paragraph 23 of the Plaint in Land case No.3 of 2021 as evidenced by **Annexure EBTL 2.**

Basing on these arguments, it was submitted that the applicant was not residing on the disputed property on 26th October 2021 the date he claimed to be evicted for the disputed property by the 3rd respondent in contempt of this court's order of 13th October,2021. Therefore, the order of this court in Misc. Civil Application No.35 of 2021 dated 13th October,2021 was issued after the eviction of the applicant in the disputed property. Thus, the 3rd respondent cannot be held to have made contempt of this court order. The learned advocate quoted part of the decision of this court at page 13 that;

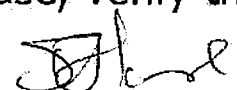
"This court is of the firm view that even if the suit premises were handed over to the third respondent, it is of utmost importance that the status quo of the same should be maintained, pending determination of the above noted cases."



7

It was further argued that, the 1st and 2nd respondents are respecting this court order since it was issued on 13th October, 2021 and were wrongly included in this application. Mr. Lyaro questioned that; how could the applicant's good faith be established if he trespassed back to the disputed property despite being ordered by this court to maintain status quo having been evicted from the disputed property before he filed Misc. Civil Appl. No .35 of 2021 on 30th August, 2021? The learned advocate referred the court to paragraphs 20 and 21 of Applicant's affidavit in Misc. Civil Application No. 35 of 2021 where the applicant stated that he was evicted from the suit premises on 10th July, 2021 and that: *"...he has been unjustifiably caused to part with his properties and business including the suit premises to his detriment, which has thereby caused the applicant to suffer general damages, apart from being exposed to unnecessary hardships and expenses..."*

Regarding the cited case of **Sanyou Service Station Ltd (supra)** Mr. Lyaro prayed the court to disregard and turn a blind eye on it since its copy was neither annexed with the submission served to them nor did the applicant supply to the 1st and 2nd respondents of such copy of unreported case cited in his written submission filed on 31st December 2021. It was thus argued that, since the 1st and 2nd respondents were deliberately and unjustly denied the opportunity and right to peruse, verify the

 8

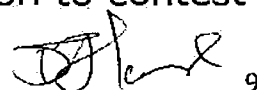
authenticity, comment or distinguish the unreported authority relied upon by the Applicant, the authority is wrongly cited such that the court and the Registry where it was delivered is unknown, effort to trace it was not successful.

As per the case of **Kwiga Masa vs Samwel Mtubatwa (supra)** and the case of **Lampit & Another (supra)**, Mr. Lyaro submitted that these cases are distinguishable on the ground that the same referred to obstruction of an execution process while the current case is on allegations of contempt of this court's order of temporary injunction. Thus, the cited authorities are not applicable in the current case.

He concluded that, there is no breach of this court's order dated 13th October 2021 in Misc. Civil Appl. No.35 of 2021 and the orders sought in the chamber summons should not be granted and this application be dismissed with costs.

On the other hand, the learned advocate for the 3rd respondent prayed for the court to adopt the counter affidavit with its annexures to form part of this submissions.

It was submitted to the effect that it is on record that the applicant in Misc. Land Application No. 35 of 2021 where the order of an interim injunction purporting to restrain the respondents herein from evicting him from the suit property and the 1st and 2nd respondent emanates, had no reason to contest

 9

since all along, the applicant has never disputed that he was duly served with 14 days' notice by the 2nd respondent to give vacant possession of the suit property. That, since 10/7/2021 he had vacated the same, hence, his claim in the main suit for return of the alleged damaged/stolen properties or payment in lieu thereof. Annexures R1 to wit, the eviction Notice dated 18/6/2021 and handing over report dated 10/7/2021 refers; he referred to paragraphs 19 and 20 of Applicant's affidavit in support of Misc. Land Application No. 22/2021 and 35/2021.

It was submitted further that, it was also noted by this court at page 13 of the impugned ruling that if the suit property has been handed over to the 3rd respondent, then it is important to maintain status quo pending determination of the main suit. The question is what was the status of the suit property when the impugned order was issued on 13/10/2021 and two, was the applicant in possession, occupying or using the suit property when the impugned order was issued on 13/10/2021?

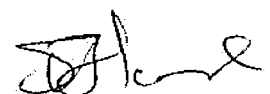
It was further stated that upon handing over of the suit property on 10/7/2021, the 3rd respondent began to substantially develop part of the suit property by clearing the area, demolish inhabitable/condemned structures and renovate one structure up to roofing stage. The 3rd respondent also employed security firm (Pama Online Security Co.) to guard the place and asset



therein. As directed by this court to cease transfer process and further development, on 13/8/2021 when delivering ruling in Misc. Land Application No.22/2021, the 3rd respondent has since then to date suspended all developments thereon though to his detriment. The learned advocate made reference to Annexure R2 which are pictures showing the status of development made since August 2021 and R3 being affidavit of the security guard.

In respect of that argument, Mr. Kilasara argued that the status quo on 13/10/2021 when the impugned interim order was issued, is that the applicant had long vacated the suit property and the 3rd respondent is the one in possession of the same since 10/7/2021. He was of the view that the cited cases of **Sanyou Service Station (supra)** and **Kwinga Masa (supra)** are distinguishable and inapplicable in the circumstances of this case.

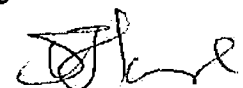
It was further submitted by Mr. Kilasara that neither the 3rd respondent nor his counsel has ever dishonored or at all instigate defiance of any court order as contended by the Applicant as the applicant was evicted from the suit property since 10/7/2021. Therefore, the applicant's allegation that he resides or was using the suit property and or the 3rd respondent is bent to defy court orders are indeed frivolous, unfounded and grossly misleading.



In addition, the 3rd respondent's counsel reiterated that it is on record that the applicant vacated the suit property since 10/7/2021. Thereafter, the suit property was handed over to the 3rd respondent who briefly made substantial development thereon and now continues to merely occupy and guard the same while awaiting final determination of the main suit.

As to what transpired, Mr. Kilasara submitted that on 26/10/2021 the applicant and his advocates Dismas Raphael and Oscar without any notice, court order or at all any local authority present went to the suit property with intent to forcefully reinstate the applicant into the suit property while threatening the guard therein. Mr. Kilasara made reference to Annexure R3 being the affidavit of the Guard (Juma Msangi) who was present at the scene on that material date. After being informed about such incident, the 3rd respondent went to the scene with his advocate to verify the facts. The applicant and his advocates were then dully advised to follow and adhere to the rule of law. The report was further made to the police and local authority to avoid probable breach of peace.

Mr. Kilasara insisted that since July 2021 the applicant no longer resides or occupy the suit property to date. The applicant attempts to unceremoniously reinstate himself into the suit property with the aid of his advocates while blaming the other



party for defying court orders is indeed unwanted and grossly misconception.

The learned advocate for the 3rd respondent was of the opinion that this application which is without any substance is abuse of court process used as scapegoat to delay prompt hearing and disposition of the main suit whose effect is to frustrate the court process and the 3rd respondent who is a bona fide purchaser for value of the suit property. He was of the view that this application should thus be dismissed with costs and let the main suit be determined without further ado.

In conclusion, Mr. Kilasara suggested that under the circumstances and in view of the allegations set forth in this matter, that the 3rd respondent and or his agents threatens and or continues to evict the applicant from the suit property where he still resides/occupy and or use, it is pertinent for the court at this stage to visit the locus in quo to ascertain its current status before rendering ruling of this application.

In rejoinder, the applicant's advocate reiterated what he had submitted in chief. He added that the applicant in all material times was occupying the suit premises and doing his economic activities but he was evicted on 26/10/2021 and the house in which the applicant used to reside was demolished and rendered inhabitable.



Mr. Dismas also reiterated the authorities and the prayers as submitted in chief.

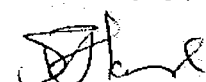
I have considered the affidavit of the Applicant, the counter affidavits of the Respondents and submissions of the learned counsels of both parties.

The Applicant has moved this court under **Order XXXVII rule 2(2)** and **section 95 of CPC. Order XXXVII Rule 2(2) of the CPC** provides that:

"(2) In case of disobedience or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained as a civil prisoner for a term not exceeding six months, unless in the meantime the court directs his release."

What is gathered from the above provision is that, in case there is disobedience of injunction order, the court has discretion to do the following; **first**, *to order the property of the person guilty of such disobedience or breach to be attached* and **two**, *order such person to be detained as a civil prisoner for a term not exceeding six months.*

It is my considered view that it is the discretion of the court since the word used in that provision is "**may**" which as per



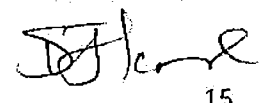
section 53(1) of the Interpretation of Laws Act, CAP 1 R.E 2019, whenever the law uses the word 'may' it imports that the power so conferred may be exercised or not.

The present Applicant herein opted for the second option. Considering the circumstances of this case, I am of considered view that for a person to be committed as a civil prisoner under **O.XXXVII rule 2(2)** there must be enough established evidence to establish the same since the outcome of this order lead to detain the person as a civil prisoner. To cement this point, I subscribe to the **HALSBURY'S LAWS OF ENGLAND**, 4th Edition, Vol 9 (1), and paragraph 469 at page 287 which provides that:

"The power to order committal for civil contempt is a power to be exercised with great care. The court will only punish disobedience to an order of the court or non-compliance with an undertaking if satisfied that the terms of the order or undertaking are clear and unambiguous, that the Defendant has proper notice of the terms and that a breach of the order or undertaking has been proved beyond reasonable doubt."

(Emphasis mine)

It is trite that this Court is conferred with powers to punish parties who commit contempt in civil matters in order to ensure



that orders of the court are complied with as it was held in the case of **TANZANIA BUNDU SAFARIS LTD VS DIRECTOR OF WILDLIFE & ANOTHER** [1996] TLR 246 HC; by **Hon. Mapigano J** (as he then was) that:

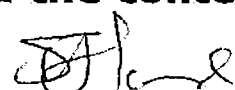
*"The prime object of contempt proceedings is to **vindicate the rule of law**, rather than to **punish an individual**. The punitive jurisdiction of the court to punish for contempt is based upon the fundamental principle that it is for the good of the public and the parties that **such orders should not be despised or slighted.**"*

(Emphasis supplied)

Regarding the onus of proof in cases of this nature, the learned authors of **HALSBURY'S LAWS OF ENGLAND** (supra) at page 312 state that:

"The burden of proof is on the party seeking to establish that contempt has been committed."

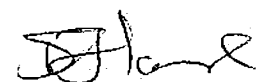
In the instant matter, there is no doubt that the 3rd Respondent is aware of the order of this court dated 13/10/2021 which is to the effect that the Respondents are restrained to evict the Applicant and that in case the Applicant was already evicted, the status quo of the suit premises should be maintained. The issue is **whether the Applicant has proved the contempt**



beyond reasonable doubts as required by the law?

Looking at the affidavit of the Applicant especially paragraph 5 and 7, there are mere allegations that the respondents continued to evict the applicant despite the order of this court. That is the only evidence the applicant has. There is nothing in addition to substantiate his claims. On the other hand, the 3rd respondent's counter affidavit under paragraph 8 and 9, the 3rd respondent averred that since the issuance of the first interim order, he has ceased all the planned developments thereof to date and that the applicant was evicted on 10/7/2021 before the order of this court was issued. The 3rd Respondent attached to his counter affidavit the copies of the pictures of the suit premises and the affidavit of one Subira Juma Msangi a security guard alleged to have been found at the suit premises on 26/10/2021 when the Applicant and his counsels invaded him.

On the basis of the above quoted authority, since the applicant is the one who alleges, then he ought to present enough materials in his affidavit to substantiate his claim beyond all reasonable doubts. The burden never shifts until the one who alleges prove. Since the affidavit is a substitute for oral evidence, I expected the applicant to furnish this court with enough materials in his affidavit. See the case of **Jackson Sifael Mtares and 3 others vs DPP, Civil appeal No.180**



of 2019 CAT at Dar es Salaam, where at page 16 the court stated that;

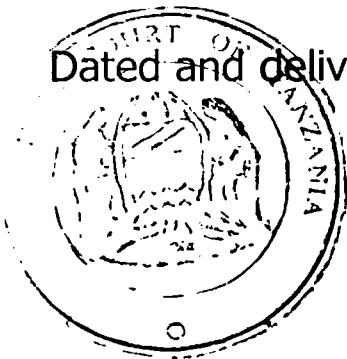
"As a general rule of practice and procedure, an affidavit for use in court is a substitute for oral evidence..."

To the contrary, the affidavit of the Applicant as well as the written submissions of his learned counsel do not suffice to prove on the required standard that the 3rd Respondent committed contempt as alleged, thus, beyond reasonable doubts.

Having stated as such, I hesitate to grant the orders sought in this application for lack of enough evidence. In the circumstances, I dismiss this application with costs.

It is so ordered.

Dated and delivered at Moshi this 24th, February 2022.



A handwritten signature in black ink, appearing to read 'S.H. Simfukwe'.

S.H. SIMFUKWE
JUDGE
24/2/2022