

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB-DISTRICT REGISTRY)
AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO. 105 OF 2023
(Arising from Civil Case No. 189 of 2021)

**ASHURA HUSSEIN MWASA (As former Administratrix
of the estate of the late HUSSEIN OMARI MWASA.....1ST APPLICANT**
**SAKINA M. MWASA (As former Administratrix
of the estate of the late HUSSEIN OMARI MWASA.....2ND APPLICANT**

VERSUS

PRIME ALOYCE MUSHI..... RESPONDENT

RULING

Date of last Order: 23/03/2023.

Date of Ruling: 21/04/2023.

E.E. KAKOLAKI, J.

This ruling seeks to address the application by the applicants for interim injunction order restraining the respondent, his agents, workmen, assignees or any other persons working on that behalf from conducting any construction on the property located at Plot No. 27, Block No. 20. House No. 28, Kipata/Nyamwezi street, Kariakoo area within Ilala Districti, Dar es salaam region, pending determination of Civil Case No. 189 of 2021 before this Court between the parties.

The application which is brought under certificate of urgency and under section 68(e) and Order XXVII Rule 1(a),(b) and Rule 2(1) of the Civil Procedure Code, [Cap. 33 R.E 2019] (the CPC) supported by the joint affidavit of applicants, is strenuously contested by the respondent who filed the counter affidavit to that effect.

Briefly as deciphered from the pleadings, the applicants herein in Civil Case No. 189 of 2021 pending before this Court are sued by the respondent for the payment Tshs. 785,000,000/=, being claim breach of contract of sale of land in Plot No. 27, Block No. 20. House No. 28, Kipata/Nyamwezi street, Kariakoo area within Ilala District, Dar es salaam region, allegedly executed on 21/03/2019. It appears there is ongoing construction in the plot of land above mentioned allegedly conducted by the respondent, hence the present application in which the respondents seeks intervention of this Court to restrain him from progressing with the said construction by way of injunctive orders.

When the matter came for hearing on 23/03/2023, the applicants appeared represented by Mr. Hamza Matongo, while the respondent hired the services of Ms. Victoria Paulo and Daniel Nsurwa, all learned counsel. It was Mr. Matongo who staged the floor first and adopted the affidavit in support of

the application to form part of his submission. He then informed the Court that, before this Court there is a pending suit Civil Case No. 189 of 2023, in which the applicants are sued by the respondent claiming for damages for breach of contract on the sale of land which was entered on 19/03/2019 between the parties, whereby the applicants were selling their property as lawful owners. He contended in pendency of that suit the applicant noted that, there was ongoing construction on the said landed property and the respondent is behind it as there is evidence that, he possesses 60% shares of the said land as shown in Land Form No. 30 (Application for approval of disposition) annexure SK1 to the affidavit, though the building permit was issued in the names of **Hussein Ibrahim Sadiki & Sons**, as per annexure SK2. Since there is pending suit in this Court involving both parties, the applicants' rights will be prejudiced, if the respondent's act is not restrained, Mr. Matongo stressed

The learned counsel submitted further that, there are three principles guiding grant of temporary injunction orders as stated in the celebrated case of **Atilio Vs. Mbowe** (1969) HCD 284 as cited in the case of **Nelson M. Matiku Vs. EFC Tanzania Microfinance Bank Ltd and Another**, Misc. Land Application No. 1023 of 2017 (HC-unreported), in which the applicant

has satisfied in this matter. One, he noted there is a pending suit involving both parties in the main suit awaiting for determination of the claim for damages out of breach of contract of sale of the property in dispute in this matter. There is a triable issue pending before the main suit. Secondly he mentioned, if the construction on the said landed property by the respondent is not restrained the applicants will suffer irreparably as the respondent will benefit twice for having the damages in the main suit and the constructed house in the property at dispute. And lastly, that on the balance of convenience the applicants stands to suffer more than the respondent would do, if the grant of sought orders is withheld. He therefore urged this Court to grant the application with costs.

In rebuttal, Ms. Paulo who also adopted the counter affidavit to form part of her submission, told the Court that, the application is devoid of merit for not meeting the test or conditions for the grant of injunctive orders as well settled in the case of **Atilio Vs. Mbowe** (supra) and restated in a number of cases. To her there is no prima facie case established by the applicants in this matter as the respondent's claim in the main suit Civil Case No. 198 of 2021, is for breach of contract of sale of land and payment of a total of Tshs. 785,000,000/=, being the sale price of the said land and not for the landed

property in which this application is stemmed. That aside he added the said land as per the respondent's search in annexure VLC1 to the counter affidavit is owned by **Hussein Ibrahim Trading by the name and style of Hussein Ibrahim Sadik & Sons** and not he respondent. And further to that there is decision of this Court in Civil Case No. 251 of 1994 and Court of Appeal Civil Appeal No. 53 of 2000, declaring the said **Hussein Ibrahim Sadiki & Sons** as lawful owner of the said land, hence no dispute over ownership of the said disputed landed property.

It was Ms. Paulo's submission that, it is wrong for this Court to entertain or grant the sought orders as the same will affect the said Hussein Ibrahim Sadiki & Sons, the owner of said property, as he is not a party to this application, hence condemning him unheard which is against the principles of natural justice. She relied on the decision of this Court in the case of **Mchungaji Barnabas Juma Mbondya Vs. Majembe Songora (Adminstrator of the estates of Gregory Metebesha Nyawaya)**, Land Appeal No. 73 of 2021 (HC-Musoma-unreported), where it was held no one should be condemned unheard. To her view, if the application is granted against the owner of the property without affording him with an opportunity of being heard that, will be tantamount to sitting as appellate court to the

already determined ownership of the landed property which also is not a subject matter in the main suit. Relying on the case of **International Airlines of the United Arab Emirates Vs. Nassor Nassor**, Civil Appeal No. 379 of 2019 (CAT-unreported), Ms. Paulo insisted, it will be a total misdirection for this Court to try to once again inquire on the ownership of the property in dispute. As there is no established prima facie case, it is obvious the applicants stand to suffer no any irreparable loss and for that matter the balance of convenience tilts on the respondent's side, meaning the application is devoid of merit, hence deserving to be dismissed with costs and she so prayed.

In a brief rejoinder submission Mr. Matongo attacked the submission that the Court is functus officio to determine this application as the issue here is not whether this Court is functus officio to determine this matter or not as it was in the case of **The International Airlines of the United Arab Emirates** (supra) relied on by the respondent, hence irrelevant to out matter. Regarding the issue of ownership of the disputed land he maintained that, the same belongs to the applicant as the letters in annexure VLC3 (letter for removal of applicants from the suit property) is not a proof that applicants were required to provide vacant possession of the property for

want of proof that it was received. He therefore prayed the Court to grant the applications prayed.

In have dispassionately considered the rivalry submissions by the parties and took time to peruse the affidavit and counter affidavit in support and against this application in a bid to establish whether the application is meritorious or not. Undisputedly this Court is seized with jurisdiction to entertain and grant the prayers sought in this application upon the applicants establishing to the Court's satisfaction that the three principles or tests, as stated in cases without numbers led by the celebrated case of **Atilio Vs. Mbowe** (1969) HCD 284, have been met. See also the cases of **Nelson M. Matiku** (supra); **Hash Energy Tanzania Limited Vs. Richol Company Limited and 3 Others** [2016] TLS LR 340, **Christopher P. Chale Vs. Commercial Bank of Africa**, Misc. Civil Application No.136 of 2017 [2018] TZHC 11; **Urafiki Trading Agencies Ltd and Another Vs. Abbasali Aunali Kassam and 2 Others**, Misc. Civil Application No. 53 of 2019 and **The Registered Trustees of the Mount Meru University and Another Vs. The Development Bank Ltd and 4 Others**, Misc. Civil Application No. 99 of 2022 (All HC-unreported). The said three principles/tests are:

1. That, on the facts alleged, there must be a serious question to be tried by the Court and a probability that the plaintiff will be entitled to the reliefs prayed for (in the main suit);
2. That, the temporary injunction sought is necessary in order to prevent some irreparable injury befalling the Plaintiff while the main case is still pending; and
3. That, on the balance of convenience greater hardship and mischief is likely to be suffered by the Plaintiff if temporary injunction is withheld than may be suffered by the Defendant if the order is granted.

In this matter therefore the applicants are expected to simply establish that, **one**, there is a prima facie case or arguable case in the main case calling for this Court's intervention hence injunctive orders are necessary to avail it with time to hear and determine the same, **second**, to demonstrate that they will suffer irreparable harm or loss if the injunctive orders are not granted and **third** that, the balance of convenience tilts in favour of the applicant on the hardship to be suffered if the prayer for injunction order is withheld by Court than it would do to the respondent.

To start with the first test, it is Mr. Matongo's contention that the cause of action in the main suit which is claim of damages for breach of sale of landed

property touches the property which is the subject of this application as it is the one allegedly the applicants sold to the respondent, while Ms. Paulo is of the contrary view in that, respondent's cause of action is premised on the breach of contract of sale of the said landed property and not its ownership, hence lack of triable issue. It is true and shoulder up with Ms. Paulo's proposition that, since the respondent's cause of action is not premised on ownership of the said property but rather breach of contract of sale of the same, then there is no triable issue pending for determination before this Court in Civil Case No. 189 of 2021, over land located in Plot No. 27, Block No. 20. House No. 28, Kipata/Nyamwezi street, Kariakoo area within Ilala Districti, Dar es salaam region, subject of this application. I so find as in the main suit the respondent has no any claims over the said property which would have brought out about a serious question for determination by this Court pending disposal of this application. The applicants have therefore failed to establish to the court's satisfaction that the first principle do exist.

As there is no arguable case in the main suit relating to Plot No. 27, Block No. 20. House No. 28, Kipata/Nyamwezi street, Kariakoo area within Ilala Districti, Dar es salaam region, subject of this application, I do not see how can this court's decision withholding the grant of application can suffer

irreparable loss to the applicants to cause the weighing scale of the balance of convenience to tilt on their side, since all three conditions must be established. I therefore hold the applicants have failed to meet the 2nd and 3rd tests too, hence in agreement with Ms. Paulo's submission that this application is devoid of merit deserving to be dismissed.

Having so found, I see no gain in discussing other submission by the parties on whether by granting this application the Court would be functus officio or not and whether who is the owner of the landed property in dispute for being inconsequential as there is no claim by the applicants that, they raise serious questions for determination in the main suit.

All said and done, the application is wanting in merit, hence is hereby dismissed with costs.

It so ordered.

Dated at Dar es Salaam this 21th day of April, 2023.



E. E. KAKOLAKI

JUDGE

21/04/2023.

The Ruling has been delivered at Dar es Salaam today 21th day of April, 2023 in the presence of Mr. Hamza Matongo, advocate for the applicants, Mr. Daniel Nsulwa, advocate for the respondents and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE
21/04/2023.

