

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

MISC. LAND APPLICATION NO. 116 OF 2022

(Originating from Land Case No. 44/2022)

MWAJI GROUP WORKSHOP LTD APPLICANT

VERSUS

1. CRDB PLC

2. MEM AUCTION MART

3. ALLAN MWILE MWAIGAGA

..... RESPONDENTS

RULING

13th February & 24th March 2023

NONGWA, J.

The applicant has brought this application under Order XLIII Rule II and Order XXXVII Rule 1 (a) and (b) and section 68 (c) and 95 of the Civil Procedure Code Cap. 33 R. E. 2019, praying for order of temporary injunction restraining the 1st respondent, their agents, servants, assignees, or whomsoever will be acting under their instructions or authority not to dispose or do anything and or transfer the suit premise with title number 7623-MBYL, LO 174021 located at Plot no. 18/2 Block 'F' Uyole area Mbeya pending the hearing and final determination of the main case filed in this court or until further orders, costs and any other order (s) the court may deem fit and just to grant.

The application has been supported by the affidavit of the Principal Officer of the Applicant one Mr. Patrick Allan Mwaigaga.

The applicant has been represented by Mr. Emmanuel Clarence while the 1st and 2nd respondents under the representation of Mr. Baraka Mbwilo. The 3rd Respondent had no representation.

The background of this application is the pending land case no 44 of 2022 challenging the consent judgment entered before the District Land and Housing Tribunal for Mbeya being procured out of fraud, mistake of fact and misrepresentation.

It is from the affidavit of the applicant that way back on 13th August, 2018 the 3rd Respondent lodged a land case before the Land and Housing Tribunal under the applicant's name without any authorization from the Applicant and the same was registered as Application No. 207 of 2018, the subject matter being the suit premise named above. It happened that the 3rd Respondent entered into settlement with the 1st and 2nd respondents in that case on behalf of the Applicant and they executed the deed of settlement which the terms affect the Applicant. There followed consent judgment which led to decree on consent judgment issued by the tribunal on 19th February 2019. It happened also that one of the conditions was that the first and second Respondents had power to dispose of the suit premise without prior notice to the Applicant. That, the first respondent is in the process to dispose the suit premise by de registering the applicant and register the same in the name of Karimjee Jivanjee limited, Hence this application for injunction.

At the hearing, Mr. Emmanuel Clarence, learned counsel for the applicant started by submitting on wrong citation of orders and rule in the chamber summons. Citing the case of **Beatrice Mbilinyi vs. Ahmed Mabkhut Shabiby, Civil Application No. 475/01 of 2020 at page 16**, he prayed that the chamber summons be read as made under Order XLIII Rule II and Order XXXVII Rule 1 (a) and (b) and section 68 (c) and 95 of the Civil Procedure Code Cap. 33 R. E. 2019, in that the mix up is curable as per the decision of, as it was just a slip of the pen and so long as the court has jurisdiction the application can proceed for hearing.

Mr. Emmanuel Clarence went on submitting that the applicant's prayer that this court be pleased to grant an order for temporary injunction against CRDB Bank in respect of the suit premise which is a subject matter in the consent judgment with Registration No. 7623 MBYLR located at Plot No. 18/2 Block F; Uyole area, Mbeya.

The counsel insisted that all the grounds referred in the case of **Atilio vs. Mbowe case 1969 HCD No. 284** on conditions for the court to grant temporary injunction, exist in the case at hand, these are;

1. The court has to find a serious question to be tried on the facts alleged and probability that Plaintiff will be entitled to the relief so prayed, i.e. on prima facie case.
2. That the court interference is necessary to protect the Plaintiff from injury be incurred that can be irreparable before legal right is established.

3. On the balance there will be greater hardship and mischief suffered by the Plaintiff from the withholding of the injunction than will be suffered by the Respondent from granting of it.

Explaining on the pleadings in land case no. 44/2022 which brought up this application, the counsel stated that the Plaintiff is challenging consent Judgment on ground of fraud or misrepresentation, paragraph 4 – 10 of the Plaintiff and para 2 – 8 of the affidavit. That, it is a settled principle of law that a consent Decree can be set aside on any ground which would invalidate an agreement which was procured through misrepresentation, fraud or mistake. He referred this court to the case of **Mohamed Enterprises Tanzania Ltd vs. Masoud Mohamed Nasser, Civil Application No. 33 of 2012 CAT (unreported) page 15-17.**

Mr. Emmanuel submitted further that paragraph 8 a, b and c of the Plaintiff and paragraph 3, 4 and 8 of the affidavit, states the grounds to challenge consent Judgment as per the law, and that, the issue of misrepresentation or mistake has its basis in section 147 (a) and (b) of the Companies Act No. 12, which vests power to the Company Director to manage all business of the Company subject to board resolution.

On that basis, Mr. Emmanuel said that, all what has been one in the Application No. 207 of 2018 before the District Land and Housing Tribunal Mbeya, which gave out a consent Judgment, had no board resolution.

Submitting on the issue of necessity for the court's interference, Mr. Emmanuel submitted that, the applicant will suffer the irreparable loss, as shown at paragraph 2 and 9 of the affidavit, the applicant only depends on

the suit premises for his survivor and without court interference, the loss to be suffered is irreparable including loss from rent collected from the suit premises.

Submitting on the last principle of balance of hardship the learned counsel stated that, if the order is not granted the applicant is the one who will suffer more than the respondent when it is not granted while from the circumstances the 1st respondent stands not to suffer anything for being stopped pending hearing and determination of the main suit.

Arguing on the supplementary counter affidavit by the 1st Respondent, Mr. Emmanuel stated that, the deponent's supplementary counter affidavit is based on hearsay because the deponent says the official search was done by Baistar Advocates, and that he states on the search he did not do.

That, on the verification clause states that all what he has stated is true to the best of his knowledge if the deponent did not do the official search, how did he come to have this information. He had the duty to explain as the Baistar Company has Advocates and had to name the source of information, so it is hearsay information and the court should not act up that.

In the alternative and without prejudice to his submission, he stated that, the supplementary counter affidavit tries to show that transfer has been done. They base on annexure 1 of the supplementary affidavit, which is a receipt and the search. In the search, there is a disclaimer note; that the official search does not guarantee genuine of the certificate of title. Therefore, the annexure 1 is questionable and the court cannot rely upon as the content of document speaks for itself. There is no certification of title to

show that transfer has been done, it is doubtful if at all the whole process is complete and the title deeds are out. That, on the contrary, on paragraph 2 of the supplementary affidavit, the applicant has annexed the certificate of occupancy, which is in his names and since the opening of the main suit and the application, the applicant endeavored to inform the Registrar of titles and as he wanted to file caveat he found a valid caveat already there filed by 3rd Respondent.

On those grounds, Mr. Emmanuel prayed that this court has mandate to grant the temporary injunction and that the prayers in the chamber summons be granted with costs upon respondents.

On reply, Mr. Baraka Mbwilo, learned counsel for the first and second respondent, while praying for the counter affidavit and supplementary counter affidavit of 1st and 2nd Respondents be adopted to form part of his submission, stated the reasons for the application to have no merit.

Mr. Baraka Mbwilo submitted that application has been overtaken by event, that reading the chamber summons on prayer no. 1, the prayer before this court is for restraining the first respondent agent, or assignees not to dispose or do anything or transfer the suit premises.

That, reading paragraph 8 of the counter affidavit the 1st and 2nd respondent stated that the property subject to the application has been sold to Karimjee Jivanjee Ltd, the fact which is known to the applicants so disposition has been done. He referred the attached result of the official search.

Submitting on the issue that the supplementary counter affidavit is hearsay, Mr. Baraka argued that, the supplementary counter affidavit cannot be a hearsay for it is attached with proof of ownership and it has been clearly stated that it was done by the Baistar's Advocate who is now representing the 1st and 2nd Respondents., and therefore, the fact that the 1st and 2nd Respondents did not do the official search, that argument cannot change the fact that the ownership has changed.

On the argument that a certificate of title ought to have been given, Mr. Baraka stated that since the 1st and 2nd respondent are 3rd parties to that title, the owner is the one who is having the title deed, as such they cannot bring a title which is not in their hands. What can be brought is only the official search that can be by anyone as it has been done now in this case. That, the fact the applicant has attached the certificate of occupancy in his affidavit and existing caveat in respect of that suit premises. Does not guarantee ownership and to know the current owner one must conduct an official search.

Mr. Baraka argued further that any matter that is overtaken by event the court cannot do anything because there is nothing to stay. He supported his contention by the case of **Felix Emmanuel Mlongwa vs. Andrew Kimwaga, Civil Application No. 249 of 2016 CAT, DSM (Unreported) page 7 – 8** as the aim of injunction and stay of execution are the same, to maintain status quo, then it cannot be done where the status has already changed.

In the alternative, Mr. Baraka went on submitting that the applicant has not demonstrated the existence of conditions for granting temporary injunctions.

Referring to the 1st condition, on allegation of fraud or misrepresentation, Mr Baraka argued that in the main suit and the District Land and Housing Tribunal the party who filed the application and the one who filed this main suit is the same.

That, Paragraph 9 of the counter affidavit by the 1st and 2nd Respondent replying paragraph 7 of the applicants' affidavit, states clearly that the sale of the mortgaged property subject to this case was due to default by the applicant to service the loan; and the aim was to extend the time to the applicant to pay the loan. Therefore, presence of consent judgment or not, still the suit premises was to be used to recover the loan, therefore there is no prima facie case there.

That, as to the second condition on court interference, it has not been stated anywhere in the affidavit or supplementary affidavit of the applicant.

Nowhere is shown anywhere if she will suffer irreparable loss if this injunction is not granted.

Referring paragraph 2 and 9 of the affidavit of the applicant, Mr. Baraka submitted that paragraph nine does not state that the applicant will suffer irreparable loss only it states that the applicant depend on that property for finance of business activities, and that if disposition is done will deny her the enjoyment of the suit premises, so denying the right to use the suit premises cannot be the loss that cannot be remedied by compensation.

So, failure to state so, the submission by the counsel remains to be words from the Bar not from the parties.

As to the last condition, Mr. Baraka stated since it has not been indicated anywhere in the affidavit, the balance of inconveniences, as to who will suffer more of this injunction is not granted, failure to do so simply is the first respondent who will suffer more loss. The applicant has taken a lot of money, which has been partly recovered. So, by granting temporary injunction, the borrower of the loan will be benefiting from his own wrong, the applicant who is no dispute that is indebted, then he cannot enjoy orders of the court at the detriment of the 1st respondent. Mr. Baraka cited number of authorities about the company existence and guiding grant for orders of temporary injunction and the interference of the court when the mortgagee is exercising the right over the mortgaged property these are;

1. **Camel oil Tz Ltd vs. Bahidela Co. Ltd, Misc. Civil Application No. 377/2021 HCT DSM**, (Unreported) page 11 – 16.
2. **Gwabo Mwansasu & others vs. TANROAD and another, Misc. Land Application 72/2020 HCT – Mbeya** (unreported) page 4 – 6.
3. **Nelson Matiku vs. EFC TZ Microfinance Bank Ltd and Another, Misc. Land Application No. 1023 of 2017 HCT Land Division DSM** (unreported) page 3 – 5.
4. **Mwakyeye Investment Ltd vs. Access Bank Tanzania Ltd, Misc. Land Application No. 654/2016 HCT Land Division DSM** (unreported) page 3 – 6.

5. **Said Hussein Abdallah Lupande vs. CRDB PLC and Another, Misc. Land Application No. 1125 of 2017 HCT Land Division DSM** (Unreported) page 4 – 6.
6. **Mariam Christopher vs. Equity Bank TZ Ltd and Another, Misc. Land Application No. 1070 of 2017 HCT Land Division DSM** (unreported) page 4 – 9.
7. **Abed Mwaulas Mlowe and Another vs. NMB PLC and another, Land Case No. 3/2019 HCT Iringa** (unreported) page 10 – 15.
8. **Cosmos Properties Ltd vs. Exim Bank Tanzania Ltd, Misc. Civil Application No. 514 of 2021, HCT DSM** (unreported) page 6 – 11.

Rejoining, Mr. Emmanuel Clarence insisted that the instant matter is not about sale, therefore the argument that transfer has already been done, that the court be guided by the principle that content of a document speak for itself and the annexure of search does not guarantee as to the genuiness of the contents contained in itself. That, the 1st respondent ought to have a copy, because it was for his interest. The court should not assume that what the deponent stated in the affidavit has been begotten from the attachment because if it is so then the deponent ought to have stated that.

As to the case of **Felix Emmanuel Mlongwa (supra)**, Mr. Emmanuel stated that the case is distinguishable on ground that it was on stay of execution on eviction that had already been done, unlike the circumstances of the application at hand. In respect of grounds or conditions for granting the temporary injunction, Mr. Emmanuel insisted that the grounds have been met.

Having considered the two sides submission, I wish to deal with what has been contained in the supplementary counter affidavit which was not objected by the applicant before testing the three conditions for the grant of temporary injunction. In the supplementary counter affidavit, the 1st Respondent states that the transfer has already been done and have attached a copy of receipts of official search that he made the search through Baistar Advocates. The result of the search showing that the property has been transferred to Kalimjee Jivanjee limited of P. O. Box 409 Dar es salaam.

For clarity I wish to reproduce the supplementary counter affidavit;

1. *'That on 19 day of January 2023 through Baistar Advocates which is subject of this application we made search.*
2. *That on 27/01/2023 the results of the official search we supplied which indicates the suit premises has changed the ownership from the applicant to **KARIMJEE JIVANJEE LIMITED of P.O.BOX 409, DAR ES SALAAM. Copies of receipts and official search is attached and marked as Annexure 1 to form part of this affidavit.***
3. *That the current owner of the suit premises is **KARIMJEE JIVANJEE LIMITED of P.O.BOX 409, DAR ES SALAAM.***

As much as Mr. Emmanuel, the counsel for the applicant does not dispute the result of the search, it been his argument that supplementary affidavit contains hearsay matters on the search as the deponent says the official search was done by Baistar Advocates, he states on the search he did not do and that, on the verification clause states that all what he has

stated is true to the best of his knowledge if the deponent did not do the official search, how did he come to have this information. That there is no explanation the source of information, so it is hearsay information and the court should not act up that. Moreover, Mr. Emmanuel argues that the said document speaks for itself that it is not a conclusive on ownership for it has a close that states that and I quote;

'NOTE: The records shown on the Official Search does not guarantee as to the genuineness of the certificate of title, if you intend to do any transaction you are advised to submit the Certificate of Titles before the office of Registrar of the Titles for authenticity.'

I have endeavored to trace the company under which Mr. Baraka is working and I found it from the addresses on records that Mr. Baraka is from Baristar Advocates. I agree with Mr. Baraka that, the supplementary counter affidavit cannot be a hearsay for it is attached with proof of ownership and it has been clearly stated that it was done by the Baistar's Advocate who is now representing the 1st and 2nd Respondents, and therefore, the fact that the 1st and 2nd Respondents did not do the official search, that argument cannot change the fact that the ownership has changed. In the case of **The Director of Public Prosecutions vs Dodoli Kapufi and another criminal application no. 11 of 2008 (unreported)** one of the definitions of an affidavit was that, a statement in the name of a person, called a deponent, by whom it is voluntarily signed or sworn to or affirmed and it must be confined to such statements as the deponent is able of his own knowledge to prove but in certain cases may contain statements of

information and belief with grounds thereon, so is the supplementary counter affidavit in the case at hand.

The deponent has stated that through Baistar advocates they made search to the Registrar of titles and found the ownership to have changed and has attached the results of the search. On annexure 1 to the supplementary counter affidavit it is clearly shown that the search was requested by Baistar Advocates. Since the Deponent has attached the evidence for his averment, then the same cannot be said to be hearsay, the deponent is able to prove the same using the search report which has been an obvious *modus operandi* when searching for proof of ownership of a property, save for genuineness of the title deed as stated on the report.

As a general rule of practice and procedure an affidavit for use in court, is actually a substitute for oral evidence. It has to be believed when meets the required standards of an affidavit. In the application at hand, the supplementary counter affidavit is taken on its own weight.

It is trite law that the primary objective behind temporary injunction is to maintain status quo, determining what is the status quo as of now is crucial. It is not advisable to grant an injunction without defining what the status quo is. I am asking myself in the application at hand which status quo to be ordered, on which party's favour. In this case at hand the current status quo is that the transfer has been done. Now whether the process of transferring was illegal or not, cannot be determined by this forum.

Having said so, I also find that since the process of changing ownership has already been done as analyzed above, then the order to stop the same


cannot serve any purpose. As such, I cannot even go further to test the conditions enshrined in the **Atilio case**.

Therefore, the application has no merit; it is hereby dismissed with costs.

It is so ordered.

Dated and delivered at Mbeya, this 24th March, 2023.




V.M. NONGWA
JUDGE
24/3/2023