

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB REGISTRY

AT ARUSHA

MISC. LAND APPLICATION NO. 109 OF 2023

**(C/F Land Appeal No. 48 of 2023 in the High Court of the United Republic of Tanzania,
Arusha Sub Registry)**

AHMAD ABDILLAH RAJABU.....APPLICANT

VERSUS

REHEMA ALI MOLLEL.....RESPONDENT

RULING

4/03/2024 & 15/03/2024

NDUMBARO, J

The applicant has brought this application under the provision of Order XXXVII Rule 1 (a) and section 95 of the Civil Procedure Code Cap 33 R.E 2019 seeking an order of temporary injunction restraining the respondent, her agents, servants or any person acting on her behalf from disposing of by way of sale or mortgage it or otherwise Plot No. 418 Block "X" area "F" situated at Levulosi Street within Arusha City. Pending the full hearing and determination of Land Appeal No. 48 of 2023 before this Court.

Secondly, it was also the prayer of the applicant that this Court be pleased to grant a temporary injunction restraining the respondents,

their agents, servants or any person acting on their behalf from collecting, taking and keeping rent from any rented house or business in Plot No. 418 Block "X" area "F" situated at Levolosi Street, within Arusha City. In the alternative, the applicant prayed that the rent from the rented house or business in Plot No. 418 Block "X" area "F" situated at Levolosi Street, within Arusha City be collected and deposited in an account directed by this Honourable Court pending the full hearing and determination of Land Appeal No. 48 of 2023 before this Court.

The applicant's application is further supported by his affirmed affidavit where reasons for his prayers are stated. In his affidavit, the applicant stated that he is the elder son of the respondent and the applicant in application No. 150 of 2020 which was filed in the District Land and Housing Tribunal where he was the losing party. Dissatisfied by the decision of the DLHT, the applicant has filed his appeal in this Court and the same is yet to be determined. The applicant went on to state that, the respondent through one Abdulrahim Tumaini Rwaburakilya and Swaleh Mohamed Elbusaidy intended to dispose of the property in dispute by way of sale and that is what triggered him to file the present application. The applicant added that he is likely to suffer

irreparable loss if the application is not granted and the property is sold before the determination of the Appeal.

On the other hand, the respondent through one Abdulrahim Tumaini Rwaburakilya holding a special Power of Attorney opposed the application through his affirmed counter affidavit. He argued that the applicant has no interest in the disputed property and went further to state that the applicant has no any proof that the respondent intends to dispose of the said property as alleged and in fact, it was his contention that the respondent does not have any intention of disposing the disputed property as alleged. He concluded that, if this application is granted, it is the respondent who is likely to suffer irreparable loss as the property in dispute is solely owned by the respondent and it is the only source of income used for her sustenance.

When the matter was called on for hearing, the applicant enjoyed legal representation from the learned counsel **Gabriel Ruahira**, whereas the respondent was represented by advocate **Zuberi Ngawa**.

Supporting the application, the applicant's counsel submitted that, his client unsuccessfully filed a suit at the DLHT. He has now lodged his appeal to this Court and he is also seeking for temporary injunction restraining the respondent from selling, mortgaging and collecting rent

from the disputed property pending the determination of an appeal that has been lodged in this Court. The counsel went on to state that, his client is an elder son of the respondent who is now an old woman of 90 years, sick and also has mental issues. Therefore, it was his argument that the process of disposing the disputed property is done by her agents one Swalehe and abdulrahim which if effected will make him suffer irreparable loss in case he succeeds in his appeal. The counsel supported his argument with the case of **Sofia Aamir Mrisho vs New Sudan Building Materials Cooperative Societies Ltd**, Civil Application No. 235 of 2014 CAT.

Responding to the above submissions, Mr. Zuberi strongly opposed the application and stated that the grant of an application for temporary injunction is in the discretion of the Court however, there are principles set out in the case of **Atilio vs. Mbowe** 1969 HCD 284 which the Court must be satisfied before granting the application. The counsel went on to state that the applicant in this application has failed to establish the principles set out in the above-cited case in particular on the existence of a suit. According to him the word suit does not include appeals and therefore cannot be a basis of the grant of temporary injunction as sought by the applicant. Secondly, the learned counsel submitted that

the applicant has also failed to establish the second principle that he is likely to suffer irreparable loss if the application is not granted. Lastly, the learned counsel submitted that it is the respondent in this application that is likely to suffer hardships if the application is granted than the applicant. It was therefore his prayer that his application be dismissed.

In his short rejoinder, the applicant's counsel insisted on the grant of this application and maintained that the appeal is also a suit as opposed to what has been submitted by the respondent's counsel. He thus urged this court to protect the interest of his client by granting the application.

I have carefully considered the rival submissions by the parties in this application and I have this to say; For the application of temporary injunction to be granted by the court there must three conditions to be fulfilled as it has been enunciated in the case of **Atilio vs. Mbowe (Supra)** in which the court pointed out three conditions to be satisfied for the court to consider when granting an order of injunction, these conditions are;

- (i) there must be a serious question to be tried on the facts alleged, and a probability that the plaintiff will be entitled to the relief prayed;
- (ii) that the court's interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established; and
- (iii) that 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 defendant from the granting of it.

I have also considered the provision of law to which this application has been brought, and for easy of clarity I wish to reproduce Order XXXVII Rule 1 of the Civil Procedure Code hereunder;

1. Where in any suit it is proved by affidavit or otherwise-

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit 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."

From the above provision of the law, it is apparent that the court may grant temporary injunction upon being satisfied that the conditions under rule 1 (a) & (b) above have been fulfilled and the order shall be effective until the disposal of the suit or until further orders.

It is depicted in the applicant's affidavit that, the applicant in this application is seeking for a temporary injunction pending the determination of an appeal which has been filed in this Court. (Land Appeal No. 48 of 2023). I have noted that the respondent while opposing the application, among others challenged that the application

at hand is untenable on the reason that the grant of applications of this nature is done only where there is a pending suit and not an appeal. The respondent went further to state that an appeal in this regard is not a suit and thus this application should be dismissed.

Perhaps, the question as to whether the application at hand is tenable before this Court will open up my discussion before going to the gist of the application. To begin with, I shall start by defining what a suit is. Section 2 of the Law of Limitation Act Cap 89 R.E. 2019 has clearly given an interpretation of a suit in the following words;

"means any proceeding of a civil nature instituted in any court but does not include an appeal or application;"

The above provision of the law has with clear eyes resolved the question as to whether a suit includes an appeal. Back to the application at hand, the applicant herein through his affirmed affidavit informed this Court that he has filed this application pending the determination of an appeal which has been lodged in this Court. Again, reading from Order XXXVII Rule 1 it is imperative that the law has set out a condition that the application is grantable pending the determination of a suit and

since a suit in this regard does not include an appeal it is undoubtedly that the application before this Court is misplaced.

This position has also been reiterated by the Court of Appeal of Tanzania in the case of **National Housing Corporation vs Peter Kassidi & 4others**, Civil Application No. 243 of 2016 CAT sitting at Dar es Salaam (Reported Tanzlii) which cited with approval the decision of a Single Justice (Lubuwa, J.A as he then was) in the case of **Gazelle Tracker Limited v. Tanzania Petroleum Development Corporation**, Civil Application No. 15 of 2006 whereby among others he had the following to say;

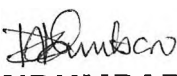
*"It is common knowledge that the Civil Procedure Code, 1966 does not apply in this Court. In view of the fact that no provision is made in the Court Rules, 1979, for injunctive reliefs, I am persuaded by Mr. Kilindu's submission that applications **for injunctive reliefs such as this, are more appropriately suited for the court exercising original jurisdiction and not the Court of Appeal**. The logic is not far to seek. As provided for under Rule 1, Order 37 of the Civil Procedure Code, 1966, temporary injunction may be granted where in any suit, the property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to*

*the suit. It is therefore clear that **injunctive reliefs are, according to the law as set out above, generally invoked at the stage where the trial of a suit is in progress or pending.***"

Guided by the above provisions of the laws and case laws, it is my firm view that this application is misconceived, and in that regard, I am constrained to dismiss it. However, given the nature of the relationship between the parties (Mother & Son), I refrain from giving orders as to costs.

It is so ordered.




D. D. NDUMBARO
JUDGE
15/03/2024