IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 64 OF 2014

SULTAN BIN ALI BIN HILAL EL ESRI ..... . APPLICANT

VERSUS

MOHAMED HILAL
MANSOUR HILAL ..... **RESPONDENTS**
BERA ANDREW

26th November, 2015 & 18th February, 2016

RULING

MWAMBEGELE, J.:

The applicant is a plaintiff in Commercial Case No. 91 of 2013 which was filed on 30.07.2013. Therein plaintiff the prays for *inter alia* judgment and decree against the defendants for an order restoring a property allegedly disposed through an illegal transaction that resulted into dispossession of property and some financial loss.

Along with that plaint, another miscellaneous application christened as No. 66 of 2013 certified to be of utmost urgency by one Aisha Zubeda, Advocate and filed on 30.07.2014 seeking for *exparte* interim orders set for preserving the status quo by restraining the respondents/defendants from alienating the suit

property named as plot 158 in Kigoma-Ujiji Municipality under a Certificate of title No. 5296 pending hearing and determination of the said application *interpates* was instituted.

On 05.08.2013 before this Court (Nyangarika, J.), Mr. Yusuf, the learned counsel who appeared for the applicant told this court that notice to other parties should be dispensed with because as suggested, the attempted service did not bear any fruits. He also stated that the suit property was under imminent danger of being disposed by the 1st and 2nd respondents to the 3rd respondent as they had attempted to do so by use of forged title deed. His fear was that the property could be alienated and tenants evicted even before rights and obligations of parties were determined in the main suit and the application. According to him, since the matter was filed under a certificate of urgency, it was necessary that *Status quo* order could be made.

Apparently, from the record, his *exparte* submissions convinced this court and His Lordship Nyangarika, J. made an order, *inter alia*, that "status quo ante as of today be maintained until further orders from this court".

Upon being served, the defendants through the services of Mr. Semgalawe, learned counsel filed a counter affidavit preceded by a notice of preliminary objection against the application for interim injunction to the effect that the suit upon which it is based was *resi judicata*. In a ruling delivered on 14.4.2014, the objection along other points was dismissed.

As the record shows, while in pendency of Miscellaneous Application No. 66 of 2013, another application; Miscellaneous Commercial Cause No. 64 of 2014

was filed under a certificate of urgency seeking for an order that the 3rd respondent be arrested for disrespecting the judicial order of maintenance of *status quo*. Apparently, the application; No. 66 of 2013, has never been heard nor determined after the advent of this latter application. It is still pending in this court.

The latter application once again met with an objection from the same Mr. Semgalawe, learned counsel, which nevertheless was dismissed for want of merit by the ruling of this court of 26.10.2015. Therefore this ruling is in respect of this latter application; Miscellaneous Commercial Cause No. 64 of 2014 for contempt of court orders.

In an affidavit supporting the application, one Sultan bin Ali bin Hilali El Esri states that, having obtained an interim order of maintaining the *status quo*, the same was, made known and communicated to the 3rd respondent. He depones further in effect that despite such order, the 3rd respondent went ahead and evicted the tenants, demolished the said suit property and started construction. It is his deposition that, he has been caused loss and denied his right since he was not even part of the illegal sale of the said property to the 3rd respondent.

The respondents had entered their counter affidavit flanked by a notice of preliminary objection on the 25.4.2014 to the effect that since the 3rd respondent was executing a decree of this court (High Court Tabora Registry) in Land Case No. 7 of 2010 his actions cannot be held to be in contempt of court. As apparently from the record and subsequent preliminary objections

which were raised and dismissed as intimated hereinabove, this P.O seems to have been abandoned. I will treat the same as such in this ruling.

In the said counter affidavit the 3rd respondent puts mainly that, he was acting in accordance with the judgment and decree of this court at Tabora registry as he was declared as a lawful owner of the suit property and further that what was done was lawful and followed due process of law.

At the hearing of this application, the applicant and 3rd respondent were represented by Mr. Mnyeshi and Mr. Semgalawe respectively. Their oral arguments were preceded by written skeleton arguments as required by he provisions of rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012. For the applicant's counsel, his are to the effect that the 3rd respondent's intention and actual carrying out of the same by evicting the tenants and demolishing the suit property despite being served with the said court order had the intention of denying the applicant his right which he is imploring this court to protect. The learned counsel, having canvassed various authorities both foreign and local goes further to argue that the 3rd respondent's act cannot be tolerated and should be punished. He argues that the respondent's argument that he was executing this court's decree in Land Case No. 7 of 2009 should be ignored because the applicant was not a party therein save during the review proceedings where he was a mere interested party. He contends that as such he had no right to appeal nor apply for stay of the said proceedings but to the contrary, the 3rd respondent was a party to the proceedings that resulted to the said order of this court. Citing **Black's law Dictionary** and Section 114 (1) of the Penal code, ***Morris Vs Crown Office*** [1970] 2 QBD, ***Bundu Safaris Ltd Vs***

Director of Wildlife and Another [1996] TRL 246, he stressed that the 3rd respondent's act aims at disregarding and disrespecting the court's order as well as depriving the rights of the applicant over the suit property and therefore vouched this court to follow the above decided cases and the law not to tolerate such acts.

On oral elaboration and having adopted the above submissions, the learned counsel added that the 3rd respondent should not be sentenced to pay fine as the same is Tshs. 500/- which will not pinch him but rather the applicant is seeking for custodial sentence, costs and and other relief.

Mr. Semgalawe, learned counsel for the 3rd respondent, on the other, hardly incomprehensible as are his skeleton arguments, attacks the submission stating in the main that the property was transferred to the 3rd respondent and the applicant's prayer to have consent judgment stayed was dismissed on 09.05.2013. According to him, the act of evicting the tenants and demolishing the suit property cannot, in any way, be termed as alienating transferring and selling the suit property and that the sale, transfer which amounts to alienation of the applicant was completed by 29.08.2008 almost five years before the application present was instituted.

He stated further that the said property was "pulled down" and the tenants were evicted after the a ruling of this Court - Land Division in Miscellaneous Land Case No. 51 of 2013 delivered by the Registrar whereas the applicant through one Aisha Salehe failed to produce the said order of maintaining the *status quo* whereby the court ordered execution to proceed. The learned counsel in his skeleton arguments adds that the applicant has even not been

able to prove beyond reasonable doubt that he served the 3rd respondent with the said order of this court.

Elaborating orally, he stressed that failure by the applicant to prove service of the order to the 3rd respondent, and further that since the suit property had been sold to the 3rd respondent since 1998, it was not correct to seek for an order to maintain *status quo* in this court as the same had been overtaken by events. Further, he attacked the legality of the said order for maintenance of *status quo* that the said existed only for six months from when it was issued on the 05.08.2013 and since there had been no extension of the same there was no order of the court which was disobeyed. To hammer home his attack, he cited to me the provisions of Order XXXVII rule 2 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 as well as the case of ***African Trophies Vs A. G*** [1999] which, apart from undertaking to supply a copy to this court, none was so supplied by the learned counsel.

In a brief rejoinder, Mr. Mnyeshi, learned counsel, retorts, and rightly so in my view, that the argument that the 3rd respondent was not served with the said order is an afterthought because the same is not stated in the counter affidavit. I wish to add here in passing that counsel's submission is not evidence and equally does not form part of the litigant's pleadings. Accordingly the same cannot be relied on to establish a matter of fact. At most, they are an exposition of an advocate's stance regarding a matter of fact or law in respect of the case which is always backed up by authorities such as case laws, legal texts *e.t.c*

Mr. Mnyeshi, did not end there but also, surmising, said that since the said fact about being served with the said order are not disputed in the counter affidavit, then on the basis of section 60 of the Evidence Act, Cap. 6 of the Revised Edition, 2002, the applicant was not required to prove the same. Mr. Mnyeshi, was of the further view that an order for interim injunction is different from an order for maintenance of *status quo* since the latter has no time limit. It was his contention, once again, rightly so in my view, that the order of this court was to the effect that *status quo* should be maintained until further orders of this court and there was no any further order yet.

Having keenly heard the rival arguments of the learned counsel for the parties a well having accorded a deserving scan the pleadings and the entire record of this matter, the only question to be determined here is whether the third respondent is guilty of an offence of contempt of this court's order dated 05.08.2013.

From the pleadings as well as the records of the case file as shown hereinabove and submissions by the land counsel for the parties, the following matters are lucidly undisputed:

1. That this court made an order for maintenance of *status quo* of the suit property until its further orders;
2. That the 3rd respondent was aware of the said order; and that
3. That the 3rd respondent, despite being aware of the said order had proceeded to evict the tenant and later demolishing the suit property on plot No. 158 Kigoma-Ujiji Municipality.

The immediate question here is whether the said order was extending to cover the said property, and if in the affirmative, whether the 3rd respondent was bound by the same. As intimated earlier, along with the plaintiff, an application which still lies undetermined was filed, seeking for a preservative orders of the suit property on plot No. 156 Kigoma-Ujiji comprised on CT No. 5296. That on 05.08.2013, after one Yusuph had convinced the Court on the urgency of the matter and essence of the prayer, the said order was made.

It is trite law, that any order made during or after the proceedings following a judgment or ruling, as the case may be, binds all parties to the said proceedings save where some of them are expressly excluded by the same orders. In the present matter, the order of the court was to the effect that *status quo* should be maintained. This was valid and a binding order as against all the parties including the 3rd respondent.

At this juncture, the question as to whether or not the same was communicated to the third respondent becomes mere dilatory and irrelevant. It was never disputed by the said respondent, who, along his pleadings tendered various justifications for proceedings with eviction of the tenants and demolition of the suit property. These justifications tendered include the alleged transfer of the said property to him through sale effected in 1998, existence of a court order endorsing him as owner of the same and thirdly, from the bar, absence of proof of service of the said order to him as well as invalidity of the order due to lapse of time.

With due respect to the 3rd respondent and his learned legal counsel, none of these justifications can foot a derogation from the valid order of this court.

The reasons I say so are simple. First, in my well considered opinion, where there exists two conflicting orders of the court affecting the rights and duties of the parties to proceedings, in the absence of a clarification by the same court or a court of higher hierarchy, such litigant has no power to pick and choose as between to orders. Accordingly, in such circumstances, a respective party is enjoined to seek, via due process of law, a clarification and or direction from the court. This, obviously, will entail disclosure in utmost good faith of all circumstances and facts leading in the knowledge of the party pertaining to the order in question.

In the present case, the 3rd respondent contend that the property was transferred to him through sale and further that through a court order, execution was sanctioned to proceed. However, he does not seem to dispute the fact that first, that there was a court order to maintain the *status quo*, and further that on the basis of available pleadings of the parties and submissions by learned counsel, it cannot be concluded with certainty that he was not aware of the applicant's opposition to whole transaction leading to acquisition of the said property by him.

Apparently therefore, instead of relying on the applicant's failure to tender this court's orders before the court in Tabora when delivering a ruling in Miscellaneous Land Case No. 51 of 2013 as stated by the 3rd respondent, it was prudent, and he was obliged to admit the existence of that order and seek the said guidance as how to proceed in safeguarding his interests over the said property.

That apart, an order having been made *exparte*, it was imperative upon all the parties to adhere to the same, until, as the order expressly stated, further orders of this court either vacating or otherwise confirming the same. Therefore, immediately upon taking notice of the same, the 3rd respondent desirous of proceeding with his project on the said property should have come to court, on due process, to seek for the direction or such further orders including an order for vacation of the said order. This, the 3rd respondent did not do.

In the circumstances therefore, an argument that the order had lapsed becomes merely academical in that, as rightly put by Mr. Mnyeshi, there had been no any further orders to either re-do or undo the previous one. In the actual fact, that order made on 05.08.2013 by this court, was in contemplation of further hearing of the application *interpartes*. Hence, in so far as it was concerned, its lifespan extended to the date when another order in that respect could have been made particularly upon hearing and determination of the main application for interim injunction pending hearing of the suit. For this reason, therefore, I agree with counsel for the applicant that there is a difference, though in my considered view, a limited one, between an order for maintenance of *status quo* and that of interim injunction. I maintain such a view because an order to maintain *status quo* seeks to have the property/thing left/kept as it is as at the date of issuance of such order. It always is made on the basis of the nature of the surrounding circumstances and the property/thing sought to be preserved, contrary to an interim injunction order which is often issued after a full-scale hearing followed by a decision of the court. Perhaps this was put more succinctly, by my Brother at the Bench Utamwa, J. in ***Acaste Corporation Ltd Vs***

Maryflorent S. Mtetemela and 2others, Land Case No. 24 of 2012 (unreported) in the following terms:

> "... In law, such an order is not granted upon proof of rights. The proof of rights is demonstrated during the hearing of the case where both sides may bring evidence ... if not granted under the circumstances the application may be rendered nugatory ..."

In that accord, where an order to maintain a *status quo* is made, parties are compelled to desist from dealing with the property subject of the said order in any manner, irrespective of their titles thereto.

It goes without saying therefore that assuming that indeed the 3rd respondent acquired the said property through the said sale, the same could not be a justification to proceed and deal with the property in total contravention of the court's order. This is so because, as I have intimated hereinabove, the court, when issuing such order is always not having advantage of all facts and evidence in relation to the matter at hand but rather depending on the evaluation of the surrounding circumstances and merits as appearing from applicant's application as well as affidavit supporting it and any submissions.

Be it as it may, the facts as disclosed in the pleadings show and leave no doubt that indeed the 3rd respondent proceeded to act in total disregard of the court order made on 05.08.2013. Indeed, following the cited authorities, it would not be healthy for the justice system, if the same was to be left unattended to. In my considered opinion, contrary, to the suggestion by Mr.

Mnyeshi, and in light of the decision by my Brother at the bench Mlay, J., in ***Silent Inn Hotels Ltd Vs Interstate Office services Ltd,*** Civil case No. 464 of 1999 (unreported), justice will be met by imposing a fine, apart and or in conjunction with imprisonment.

But let me say the obvious at this stage in respect of the punishment to be met to a person who is found guilty under this person. The provisions of section 114 of the Penal Code, Cap. 16 show that any person commits offence under the subsection 1 (a) – (k):

> "... is guilty of an offence, and is liable to imprisonment for six months or to a fine not exceeding five hundred shillings."

The punishment for fine is, undoubtedly, obsolete. This provision was entrenched in the Penal Code in and has never been amended to date. However, that remains the law unless and until the legislators amend it.

Considering the fact that the 3rd respondent has evicted the tenants and proceeded to demolish the structure or suit property, in blatant disregard of this court's order, surely, a more stringent sentence of fine should have befitted him. But it appears my hands a tied. I am supposed to follow the letter of the law. In the premises, I sentence the 3rd respondent to pay fine of Tanzania shillings five hundred (Tshs. 500/=); the maximum provided by the law, or, in default, to imprisonment for a term of six months in prison. The 3rd respondent is further ordered to pay applicant's costs of this application.

Meanwhile, and for the purpose of regularizing the proceedings, and taking into account of what has already transpired in the whole matter, let all parties concerned with their respective counsel appear before me on a date to be slated to agree on the way forward in respect of Commercial Case No. 91 of 2013 and Miscellaneous Commercial cause No. 66 of 2013.

Order accordingly.

DATED at DAR ES SALAAM this 18th day of February, 2016.

J. C. M. MWAMBEGELE
JUDGE