

**IN THE HIGH COURT OF TANZANIA**

**LAND DIVISION**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 365 OF 2019**

*(Arising from Land Appeal No.182 of 2018, pending for hearing)*

**FATUMA ALLY MOHAMED.....APPLICANT**

**VERSUS**

**MOHAMED SALEHE..... RESPONDENT**

**RULING**

**I. MAIGE, J**

The applicant has, under order XXXVII rules 1(a) and 2(1) read together with and section 68 (b) and Civil Procedure Code Cap 33 RE 2019, applied for temporary injunctive orders restraining the respondent and or their agents of any kind from evicting her from the suit property pending hearing and determination of the appeal. The applicant has deposed an affidavit to support the application. In opposition, the respondent has filed a counter affidavit.

The application was argued by written submissions. The applicant personally presented the written submissions. Mr. Yahaya Njama, learned advocate, filed the written submissions for and on behalf of the respondent. In his brief written submissions, the applicant urged the Court to grant the application on account that, the respondent

did not file a counter affidavit within the allotted time. He has relied on the decision in **FINN VON WURDEN PETERSEN & ANOTHER AND ARUSHA DISTRICT COUNCIL**.

On his part, Mr. Yahya Njama urges the court to treat the failure of the applicant to submit on the substance of the application as tantamount to abandonment of the matter and hence dismiss the application for want of prosecution. He submits further that, failure to file a counter affidavit does not mean that the respondent has waived his right to be heard on the application. He is only precluded from denying the facts in the affidavit by way of written submissions. His submission was based on the authorities of the Court of Appeal in **The Editor Msanii Africa Newspaper v Zacharia Kabengwe**, Civil Application No.2 of 2009 Court of Appeal of Mwanza and **Silent in Hotels ltd v Interstate office service ltd, Civil Case No.464 of 1999** Court of Appeal of Tanzania at Dar es salaam (both unreported), among others. In both cases, the Court of Appeal held that failure by the respondent to file counter affidavit does not mean that such an application is uncontested, and that the respondent may still appear and contest the application.

The counsel further criticizes the applicant in not demonstrating the three conditions for the grant of temporary injunctive orders set out in **ATILIO V MBOWE (1969) HCD 284**. He submits therefore that, the application is devoid of any merit and ought to be dismissed with costs.

I have considered the rival submissions and examined the affidavit and counter affidavit. The position of law on the file to failure a counter affidavit is settled. The respondent is deemed to have not contested the factuality of the affidavit. I agree with Mr. Njama that, omission to file a counter affidavit does not render the application uncontested as to deny the respondent a right to address the Court on the merit or otherwise of the application. Neither does it release the applicant with a duty to argue his case. This position was clearly stated in among others, in **Finn von Wurden Petersen and Another v Arusha District Council Civil Appl No.562/17 of 2017**).

In this matter, I cannot say that, the applicant did not file his submissions. Whether the submissions addressed the issues sufficiently as to justify his application is the question for determination. I am of course expected to determine the question in consideration of the facts in the affidavit and the arguments in the written submissions. Three conditions have to be established for the application to be granted according the authority in **Attilio Mbowe**. First, the existence of prima facie case. Two, necessity of the application to prevent irreparable injury. Three, balance of convenient.

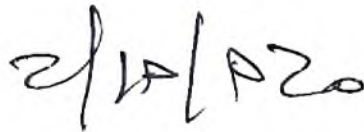
I have read the affidavit and the applicant's submissions. I could not come across any paragraph demonstrating any of the three conditions. Much as I understand that this Court enjoys wide discretion to grant or not an injunction, the discretion must be

exercised judicious with sound judicial principles. There being no demonstration of the mandatory conditions set out in Attilio Mbowe, this Court remains with no factual basis to exercise its jurisdiction. The application is therefore dismissed. I will not give an order as to costs in the circumstance.

**Dated at Dar es Salaam on 2<sup>nd</sup> day of October 2020.**

A handwritten signature in black ink, appearing to read 'I. Maige', with a large, stylized initial 'I'.

**JUDGE**

A handwritten date in black ink, '2/10/20', indicating the 2nd day of the 10th month of the 20th year.

**Date:** 02/10/2020

**Coram:** Hon. C. Tengwa - DR


For the Applicant: Present – Aligavesa, Advocate

For the Respondent: Yahya Njama, Advocate

**RMA:** Bukuku

**COURT:** Ruling delivered today in the presence of both sides.



  
C. Tengwa

**DEPUTY REGISTRAR**

**02/10/2020**