

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. LAND CASE APPLICATION NO 658 OF 2020

(Originating from Land Case No. 180 of 2020)

KHALID MOHAMED.....1ST APPLICANT
SALUM MOHAMED.....2ND APPLICANT
RAHMA MOHAMED.....3RD APPLICANT

VERSUS

MAHADI HADI.....RESPONDENT

Date of Last Order: 16.04.2021
Date of Ruling 12.04.2021

RULING

V.L. MAKANI, J

The applicants named above are seeking for the following orders:

- 1. That this honourable court be pleased to dispense with notice requirement.*
- 2. That this Honourable Court be pleased to grant temporary injunction restraining respondents, his agents and any other persons acting under his instructions to do anything whatsoever with the effect of interfering with the applicants' peaceful ownership of Property namely house on PLOT NO.1189/208, BLOCK 7, House No.51, KARIAKOO, ILALA, DAR ES SALAAM (the **suit Property**) pending hearing and determination of suit interparties.*
- 3. Costs of this application.*

The application is under Order XXXVII, Rules 1 and 2, Order XLII Rule 2, sections 68(c) and (e) and 95 of the Civil Procedure Code CAP 33 R.E 2019 (the **CPC**).

The application is supported by the joint affidavit of the applicants, who were represented by Mr. Abdulfattah Abdallah Al-bakry, Advocate, whereas the respondent was represented by Mr. Nickson Eliah Mgaya, Advocate.

Submitting in support of the application Mr. Abdallah said that the underlying principles governing an application for temporary injunction are stated in the case of **Atilio vs. Mbowe (1969) HCD 284** where the following principles were established:

- (a) That there must be a serious question to be tried on the facts alleged and probably that the plaintiff will be entitled to be the relief prayed for.*
- (b) That the Courts interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his alleged rights is established.*
- (c) That on balance of convenience there will be greater hardship and mischief suffered by the plaintiff from the withholding of injunctions than will be suffered by the defendant from granting it.*

On the first principle, Mr. Abdallah said that the applicant together with other two relatives are the lawful owners of the suit property as per Title Deed since May 2005. He said that the respondent is a trespasser who is neither the owner nor the beneficiary of the suit property. He said that the respondent unlawfully interfered and caused a lot of problems which lead the applicants to hardship and suffering in managing and controlling their property due to the said unlawful interference caused by the respondent during daytime where the respondent goes to the tenants and claims to be paid or collect the rent from the tenants. He said that the interference made by the respondent continues day by day as until today some tenants have not paid the rent to the owners of the suit property. He referred to the case of **Mrao Limited vs. First American Bank of Limited (2003) ECLR**. He added that the applicant asked before this court for legal redress by filing Land Case No.180 of 2020 followed by this application for temporary injunction pending determination of the main suit. He cemented his argument by citing the case of **The University of Dar es Salaam vs. Silvester Cyprian and 210 others, Civil Application No.5 of 1995 (CAT-DSM)** (unreported).

On the second principle, Mr. Abdallah submitted that the applicant would suffer irreparable loss if this application is not granted. He said that paragraphs 6,7 and 8 of the supporting affidavit clearly shows how the respondent unlawfully trespassed into the property owned by the applicants and therefore courts intervention is required. He referred to the cases of **Christopher P. Chale vs. Commercial Bank of Africa, (Misc. Civil Application No.136 of 2017) (2018) TZHC 11**. He said that unlawful interference which is caused by the respondent destroys reputation of the house to the tenants and potential tenants. He said that if the injunction will not be granted the interference will lead to uncertainty of the business, loss of customers and peaceful possession due to respondent's interference. He said that if goodwill is continued to be destroyed by the respondent will lead all the tenants to quit the suit property. He insisted that the respondent has nothing to lose in the suit property. He added that there is danger of some tenants who have not paid the rent to vacate the premises without paying any rent. He added that the act of vacating the premises will render the applicants to suffer irreparable loss.

On the balance of convenience, he said that the Title Deed shows that the applicants are the lawful owners of the suit property. That there is no negotiation between the parties as the respondent refused to attend the meeting so as to settle the matter out of court. He said that the intention of the applicant is to protect the rights and not otherwise. He referred to the case of **American Cyanamid Co. vs. Ethicon Limited (1975) A AER** page 504. He insisted that the applicants would suffer more than respondent. He further said that the applicants are the lawful owners as they are holding the suit land and practically, they are the ones who are supposed to enjoy the fruits of the property and not the respondent. He prayed for this application to be granted.

In reply, Mr. Nickson prayed to adopt the contents of the counter affidavit. He said that the applicants and respondent are blood related. He said that in proving that there is prima facie case the applicants are not only supposed to show that they filed Land Case No.180 of 2020 but also, they are supposed to show that there is absence of opposition to the relief they pray to the Court to grant. He referred to the case of **Sigori Investment (T) Ltd and Moses Stephano Sigori vs Equity Bank Tanzania Limited and Billo**

Star Debt Collectors, Misc Land Application No.56 of 2019, (HC-DSM) (unreported). He said that Land Case No.180 of 2020 instituted by the applicant is not only frivolous and vexatious but also untenable given that it is based on the property which is part of the estate of the Late Mohamed Mahfudh Mbaraka whose estate has not been closed in the Probate Court. He said that the 1st and 2nd applicants as well as the respondent were litigants in the case of **Salum Mohamed and Khalid Mohamed vs Mahadi Hadi, Civil application No.2017 of 2019 (HC-DSM)** (unreported) in which the respondent's administratorship was revoked on the ground of failure to file inventory of the estate of the late Mohamed Mahfudh Mbaraka. He added that the court observed that the deceased left two houses namely House No.6 on Plot No.6, Block 7 at Mchikichini Street, Kariakoo and the suit property, House No.2 located on Plot No.1189/208, Block 7 Mchikichini street, Kariakoo, Dar es Salaam. He said that this application is without merit as nothing in Mirathi No.44 of 2002 which shows that the suit property had been distributed to the applicant. He said that the respondent has never transferred the suit property to the applicants and that the respondents wonders how the applicants got the Certificate of Title over the suit property.

In respect of second principle for injunction, Mr. Nickson said that the tenants in the suit property are confident of doing business since the respondent is the one who let the same to them. He said that respondent has never been trespasser in the suit property since 1982 when the deceased Mohamed Mahfudh Mubaraka took him and upon his demise the deceased's family entrusted the suit property to the respondent until 2019 when the applicants commenced to have him evicted notwithstanding the vested interests. He insisted that the respondent stand to suffer irreparable loss more than the applicants because he devoted not only his time but also source of income to build the current commercial complex which is beneficial to the applicants. He said that the applicants have collected rent from the tenants and have not settled the respondent's claims. He insisted that the second point for temporary injunction do not support the applicants. He said that there is neither danger of losing the suit property nor tenants therefore the applicants are not likely to suffer unbearable and irreparable loss.

On the third principle, he said that it is the applicants who refused settlement of the matter and not respondent. He said that hardship and mischief is likely to be suffered greatly by the respondent unlike the applicants whose intention is to deprive respondents right to claim interests he has unto the suit property. He said that the applicants referred the dispute to the Organisation of Muslim Scholars in Tanzania in order to settle the same but the settlement proved futile after the applicants had failed to adhere to the terms of settlement. He insisted that the applicants' intention is not to protect the rights as they allege, but to use the court of law as shield to fulfil their ill motive of depriving the respondent his right to enjoy the interest in the suit property. He insisted that the applicants have no sufficient cause for the court to exercise its discretionary powers to grant temporary injunction. He prayed for this application to be dismissed with costs.

In rejoinder Mr. Abdallah reiterated his main submission and added that the respondent has admitted in the reply that the applicants are the lawful owners of the property which the respondent is trespassing.

In determining this application, I will be guided by the principles set out in the case of **Atilio vs. Mbowe (1969) HCD 284**, in which it was held that, the plaintiff/applicant has to establish that there is a prima facie case, a balance of convenience, and that he will suffer irreparable injury if the injunction is refused. These principles have been followed in a number of cases, amongst others being that of **Gazelle Trucker Limited vs. Tanzania Petroleum Development Corporation, Civil Application No. 15 of 2006** where Hon. Lubuva, JA (as he then was) had the following observations regarding temporary injunctions:

"As provided for under Rule 1 order XXXVII of the CPC, temporary injunction may be granted where, in any suit, the property in dispute 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 act out above, generally invoked at the stage where the trial of a suit is in progress or pending".

The wording of the above quoted case indicates the discretion of the court to grant or to decline the application for temporary injunction.

In the instant case, the grounds stated in the joint affidavit for granting of the application are that the applicant's suit properties are

subject to interference and trespass by the respondent before the determination of the pending Land Case No.180 of 2020.

On the issue of prima facie case the applicant has successfully manifested that there is a prima facie case. The applicants in paragraph 4 of their joint affidavit alleges to have a Certificate of Title over the suit property. On the other hand, the respondent at page 3 of the written submissions stated that:

"the respondent has never transferred the suit property to the applicants. The respondent wonders how the applicant got Certificate of Title over the suit property."

From the quoted part of respondent's submission, it is obvious that there is triable issue of lawful ownership of the suit property as the applicants claims to have possession of the Certificate of Title while the respondent wonders how the same title came into the applicants' possession. The applicant's therefore have prima facie case against the respondent.

On the balance of convenience, it is obvious that if the injunction order will not be granted, the applicants stand to suffer a lot of inconvenience. This is because some parts of the suit property have

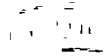
been leased and is open to potential tenants. If the alleged trespass by the respondent is not restricted the tenants might flee and the applicants will miss out the rent or rather be required to refund the tenants whose lease will be terminated by the respondents act of trespassing.

As for the principle of irreparable loss I do agree with the applicants that they stand to suffer irreparable loss. This is because if the suit property is trespassed then applicant will miss out the rent from the tenants. Further and as correctly submitted by Mr. Abdallah, reputation of the suit property will be ruined and therefore the suit house will attract fewer potential tenants. The amount of rent likely to be lost and the bad reputation cannot easily be quantified and compensated in monetary terms.

Basing on the above findings, the applicants have adduced sufficient grounds to warrant this honourable court to invoke its discretionary powers of granting injunction, therefore this application is granted. The respondent, his agents and any other persons acting under his instructions are hereby restrained from doing anything whatsoever with the effect of interfering with the suit property namely the house

on Plot No.1189/208, Block 7, House No.51, Kariakoo, Ilala, Dar es Salaam pending the hearing and determination of the Land Case No.180 of 2020.

It is so ordered.





V.L. MAKANI
JUDGE
12/04/2021

