

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

MISC. LAND APPLICATION NO. 272 OF 2022

MPEGAV AUTO LINK (T) LTD APPLICANT

VERSUS

JOHN FREDERICK MUSIRARESPONDENT

Date of last Order: 17/08/2022

Date of Ruling: 27/09/2022

RULING

I. ARUFANI, J

The applicant filed the present application in his court under section 68 (e) and Order XXXVII Rule 1 of the Civil Procedure Code, Cap 33, R.E 2019 urging the court to issue an order of temporary injunction to restrain the respondent, his agents, servants and or workmen from disposing, leasing or doing any other similar business on the suit land located at Plot No. K-3, Mivinjeni Kurasini Area, Temeke Municipality in Dar es Salaam pending determination of the main suit. The applicant is also seeking for any other relief the court will deem just and fit to grant.

The application is supported by an affidavit sworn by Peter David Gawile, Principal Officer of the applicant and it was opposed by the counter affidavit of the respondent. At the hearing of the matter the applicant was represented by Mr. Shaban Mlembe, learned advocate and

the respondent was represented by Mr. Emmanuel Marwa, learned advocate. The counsel for the parties were directed to argue the application by way of written submissions.

The background of this matter as can be deduced from the submissions of the counsel for the parties and the affidavit and counter affidavit filed in this court by the parties is to the effect that, the applicant was a tenant of the respondent on the land mentioned hereinabove for business of Customs Bonded Warehouse from 2010 via the lease agreements which were being signed by the parties in every year. The last lease agreement was signed on 1st July, 2021 and ended on 31st December, 2021.

After the last lease agreement came to an end the respondent notified the Tanzania Revenue Authority (TRA) his intention of not renewing the lease agreement with the applicant due to the applicant's failure to pay rent when it was required to be paid. The TRA gave the applicant 90 days' notice with effect from 4th February, 2022 to clear their all items which were currently on the suit land and suspended the operation of the Custom Bonded Warehouse under the name of the applicant. The respondent stated the applicant complied with the TRA directives and ceased its business operation on the suit land with effect from 10th June, 2022.

The applicant stated that, the respondent has an intention of using the rented premises for other unknown business after directing the TRA to require the applicant to remove all the properties belonging to them from the suit premises while there is a dispute pending in court concerning the suit premises. The applicant stated that, the act of the respondent to write a letter to the TRA on 18th May, 2022 to require the applicant to order them to remove their properties from the suit premises while the applicant was still using the suit premises creates unnecessary chaos and it will cause the applicant to suffer severe loss. He added that, if the order sought in the application will not be granted and the suit land is destroyed, sold or demolished it will render the main case Civil Case No. 27 of 2022 pending in court meaningless.

In supporting the application, the counsel for the applicant prayed to adopt what is contained in the affidavit supporting the chamber summons and stated that, the principle applicable in granting injunction were laid in the case of **Attilio V. Mbowe**, [1969] TLR 284 which are prima facie case, irreparable loss and balance of convenience. He explained how each of the stated principles are in existence in the present application.

He stated in relation to the first principle that, there is a dispute before the court which needs determination and decision on merit and there is possibility of the applicant to be entitled to the relief claimed which

is Tshs. 856,000,000/= being the current value of the suit land after the effective innovation and development of the rented suit premises. He stated if the sought injunctive order will not be granted and the suit premises sold or modified or used for another business it will be difficult to obtain its previous value as the suit premises will be totally different from its current value.

He argued in relation to the principle of irreparable loss to be suffered by the applicant that, the loss to be suffered by the applicant will be greater if the injunction order sought will not be granted because the respondent has not accepted to pay for the costs of development and innovation effected in the suit premises by the applicant. As for the third principle of balance of convenience the counsel for the applicant stated that, the applicant will lose all development and his innovation costs incurred in developing the suit premises. He submitted that, the loss to be suffered by the applicant will be greater than what is likely to be suffered by the respondent.

To support his submission, he referred the court to section 95 of the CPC which provides for inherent power of the court to make necessary orders to meet the end of justice. He also referred the court to the cases of **E. A. Industries Ltd V. Trafford Limited**, [1972] EA 420 and **Giella V. Cassman Brown & Co. Ltd**, [1973] EA 358 where the above stated three conditions for granting temporary injunction were deliberated. In

addition to that he referred the court to the case of **Esther Joseph Ogutu V. Equity Bank**, Misc. Land Application No. 523 of 2021, HC Land Division at DSM (unreported) where the court granted the order of temporary injunction after being satisfied the applicant would have suffered greater hardship if the temporary injunction would have not been granted.

In his reply the counsel for the respondent submitted that, granting or refusing temporary injunction is a matter of court's discretion which must be exercised judiciously. He stated that, in order for the court of law to exercise such discretion the applicant must give the court materials upon which such discretion may be exercised. He argued that in granting an injunctive order three conditions provided in the case of **Attilio V. Mbowe**, (supra) must exist conjunctively and not in isolation.

He supported his argument with the case of **Christopher P. Chale V. Commercial Bank of Africa**, Misc. Civil Application No. 635 of 2017, HC at DSM (unreported) where it was held all the conditions set out for grant an order of injunction must be met for the court to exercise its discretion to grant the injunctive order. He submitted that the applicant has failed to meet the said three conditions for granting an injunctive order.

He argued in relation to the first condition that, the applicant did not read properly the letter the respondent wrote to the TRA dated 18th

May, 2022. He stated the respondent was just informing the Commissioner for Customs and Excise Duty about the letter he wrote to give the applicant 90 days to clear all of their items in the Bonded Warehouse and to stop the operations. He argued that, the applicant was required to establish a legal right which is claiming was violated by the respondent. He supported his argument with the case of **Wilson George Petro V. The CRDB Bank PLC & Two Others**, Misc. Land Application No. 706 of 2017 where it was stated that, a legal right must be established in the main suit and likelihood of the applicant to succeed in the main suit.

He argued further that, in determine whether the applicant has managed to established a legal right is claiming against the respondent the court is required to look at the pleadings filed in the court and all factors surrounding the application. He stated paragraph 2 and 3 of the affidavit supporting the application shows the applicant has generally stated the respondent intent is to use the premises for other business. He stated the applicant has forgotten the TRA wrote a letter to them with full directives to remove their properties from the suit premises. He stated the applicant did not object the said directives but she went on acting upon the stated directives.

He argued in relation to the condition of irreparable loss that, the object of interim injunction is to protect the applicant against injury which may be suffered by violation of her right for which she could have not

been adequately compensated in damages. He stated that, the applicant has failed to show any irreparable injury which she will suffer which cannot sufficiently be remedied. He stated the claim of the applicant in the main suit is specific damages of Tshs. 856,000,000/= being costs for developing the rented area for Bonded Warehouse.

He stated that being the claim of the applicant there is no any irreparable loss to be suffered by the applicant which cannot remedied by award of damages. He supported his argument with the case of **Paul Mtatifikolo V. CRDB Bank & Others**, Land Case No. 89 of 2005, HC Land Division at DSM (unreported) where the court refused to grant temporary injunction after seeing the irreparable loss which was found the applicant was likely to suffer could have been adequately compensated by award of damages.

In arguing the condition of balance of convenience the counsel for the respondent stated that, the position of the law is that the court should not grant injunction merely on convenience but rather on justice. He referred the court to the case of **Fatuma Mohamed Salum & Another V. Lugano Angetile Mwakyosi Jengela & 3 Others**, Misc. Land Application No. 90 of 2015, HC Land Division at DSM (unreported) where it was stated court cannot grant injunction simply because they think it is convenience to do so because convenience is not the business of the court as business of the court is to do justice to the parties.

He argued that, the respondent is a retired officer who was earning his living by renting part of area of his land of residence and currently is not earning anything as the applicant has filed the main suit in the court which is Land Case No. 27 of 2022 in respect of the land in dispute. He argued the applicant was rented the suit premises but failed to honour the lease agreement and caused the debts of rent to accrue to the sum of USD 181,695.20 for the area for Customs Bonded Warehouse and Tshs. 106,920,000/= for the area of Clearing and Forwarding Offices.

He submitted that the court should not look on balance of convenience but also has a duty to make such an order if any as is appropriate. At the end he invited the court to dismiss the application with costs for want of merit as the applicant has failed to meet the tests for grant of temporary injunction is seeking from the court.

In his rejoinder the counsel for the applicant stated that, paragraph 4 of the affidavit supporting the application shows there is a triable issue in the matter. He added that, the applicant filed the main suit in the court after seeing the letter written by the respondent states the respondent want to use the suit premises for another business while there is a dispute which has not been determined by the court. He went on submitting on why the applicant is entitled to be granted an injunctive order is seeking from the court and supported his submission with various cases which

whenever it is necessary and relevant, I will refer to them in the course of determination of this application.

Having carefully considered the rival submissions filed in this court by the counsel for the parties and after going through the chamber summons, affidavit supporting the application and the counter affidavit filed in the court by the parties the court has found the issue to determine in this application is whether the applicant deserves to be granted the order is seeking from this court. The court has found that, as rightly argued by counsel for the parties the conditions governing grant of temporary injunction in our jurisdiction were well laid down in the famous case of **Attilio V. Mbowe** (supra) to be as follows: -

- (i) *There must be a serious question to be tried on the facts alleged, and the probability that the plaintiff will be entitled to the relief prayed.*
- (ii) *The applicant stands to suffer irreparable loss requiring the courts intervention before the applicant's legal right is established.*
- (iii) *On the balance of convenience, there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendant from granting of it.*

Starting with the first condition the court has found it is required to be satisfied there is a triable issue or in other words the applicant has a prima facie case against the respondent. The court has found that, as

stated in the case of **Surya Kant D. Ramji V. Saving and Finance Ltd & 3 Others**, Civil Case No. 30 of 2000, HC Commercial Division at Dar es Salaam (unreported), in determining whether there is a prima facie case or serious issue for determination in the main suit the court is required to use the facts as disclosed in the plaint and in the affidavit supporting the application.

The court has also found that, as rightly argued by the counsel for the applicant in his rejoinder and as stated in the case of **Colgate Palmolive Company V. Zacharia Provision Store & Others**, Com. Case No. 1 of 1997, HC Com. Division at DSM (unreported), in looking into the pleadings filed in the court by the parties and the circumstances surrounding the matter the court is not required to examine the material before it closely and come to a conclusion that the plaintiff has a case which is likely to succeed. To the contrary the court is required to be satisfied on the face of the case presented before it that the applicant has a case which need consideration and determination by the court and there is likelihood of the suit to succeed.

While being guided by the position of the law stated hereinabove the court has found in relation to the present application that, as argued by the counsel for the applicant, and as appearing in the plaint and affidavit filed in this court by the applicant, the claim by the applicant is that he has invested in the suit premises the sum of Tshs. 856,000,000/=

being costs for developing and improving the rented area for Bonded Warehouse, the costs which has not been settled by the respondent. On the other hand, the respondent has disputed the claim of the applicant and argued the applicant has defaulted to pay the agreed rent and caused the debts of rent to accrue to the sum of USD 181,695.20 for the area used for Customs Bonded Warehouse and Tshs. 106,920,000/= for the area used for Clearing and Forwarding Offices.

The court has found that, as for the court to find there is a triable issue the applicant is required to establish there is an apparent right which has been infringed by the opposite party which calls for an explanation or rebuttal from the opposite party. The court has found the facts stated hereinabove have managed to satisfy the court there is a triable issue between the parties or in other word the applicant has managed to establish he has a prima facie case against the respondent which if is proved by evidence to be adduced in the court has a likelihood of success. In the premises the court has found the first condition for granting an injunctive order has been established in the application at hand.

Coming to the second condition, the same requires the applicant to establish the applicant will suffer irreparable loss if the order of temporary injunction will not be granted. The court has found that, as stated in the case of **Eliezer Liwali V. Bay View Properties Limited**, Misc. Com. Application No. 110 of 2021, HC Com. Division at DSM (unreported) cited

in the rejoinder of the counsel for the applicant, in determine whether the applicant will suffer irreparable loss the court is required to consider varieties of reasons including the reason to prevent the relief sought from being rendered nugatory and even need to maintain the status quo.

The court has found it was also stated in the case of **T. A. Kaare V. General Manager Mara Cooperative Union**, [1987] TLR 17 that, the court is required to consider whether there is a need to protect either of the parties from the species of injuries known as irreparable injury before right of the parties is determined. It was further stated in the book of **Sohoni's Law of Injunction**, Second Edition, 2003 at page 93 that: -

"As the injunction is granted during the pendency of the suit the court will interfere to protect the plaintiff from injuries which are irreparable. The expression "irreparable injury" means that, it must be material one which cannot be adequately compensated by way of damages. The injury need not be actual but may be apprehended."

Under the guidance of the position of the law stated in the above cited authorities the court has found that, although the counsel for the applicant argued if the injunctive order the applicant is seeking from this court will not be granted the applicant will suffer irreparable loss but the court has failed to see irreparable loss which will be suffered by the

applicant which cannot be compensated by way of being awarded damages as stated in the book of **Sohoni's Law of Injunction**.

The court has come to the above stated view after seeing that, it has not been stated anywhere in the pleadings filed in the main suit or in the present application that there is any lease agreement which is in existence between the parties after expiration of the last lease agreement which ended on 31st December, 2021. The court has also found the applicant is claiming for specific damages of Tshs. 856,000,000/= being the costs incurred in developing and improving the suit premises.

That being the claim of the appellant the court has failed to see how the stated claim cannot be compensated by way of being awarded damages. The court has considered the need of the court to be propelled by the interest of justice and fairness as stated in the rejoinder of the counsel for the applicant but failed to see any interest of justice or fairness which will be affected by the refusal to grant the order of injunction the applicant is seeking from this court. The court has found that, as stated in the case of **Paul Mtatifikolo** (supra) cited in the submission of the counsel for the respondent the claim of the applicant is a loss which can adequately be compensated by award of damages.

In the premises the court has found the second condition for granting an injunctive order has not been established in the present application to the extent of making the court to accept if the sought order of temporary

injunction sought will not be granted and the respondent proceeded with his intention of using the suit premises for other uses the applicant will suffer irreparable loss which cannot be compensated by way of damages.

As for the last condition for granting an order of temporary injunction which is balance of convenience the court has found that, as stated in the book of **Solonis Law of Injunction** (supra) the court is required to balance and weigh the mischief or inconvenience to be suffered by the parties before issuing or withholding the sought injunctive order. After considering the submissions filed in the court by the counsel for the parties and what is averred in the pleadings filed in Land Case No. 27 of 2021 the court has found there is no sufficient material placed before the court to establish the applicant will be more inconvenienced if the injunction order will be withheld.

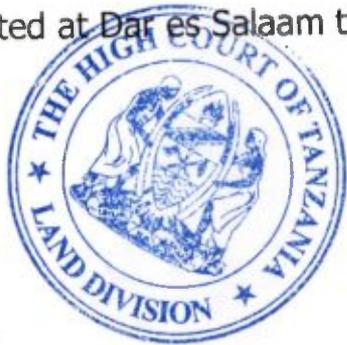
The court has arrived to the above stated view after seeing the counsel for the respondent has stated in his submission that, the applicant has already been directed by the TRA to remove his items from the suit premises and the applicant has already complied with the stated directives and the said averment has not been disputed by the applicant. If the applicant has already started to remove his items from the suit premises, the court has failed to see why the respondent should be restrained to use the suit premises for other businesses which will give him means of living.

The court has come to the stated view after seeing the counsel for the respondent has stated in his submission the respondent is a retired officer and is depending on the stated premises for getting his means of living. Under that circumstances the court has found the respondent is the one stand to be more inconvenienced if the order of temporary injunction will be granted than the applicant if the order of temporary injunction will be withheld.

It is in the light of what have been stated hereinabove the court has found the applicant has not managed to establish two out of three conditions for granting an order of temporary injunction laid in the case of **Attilio V. Mbowe** (supra). As it was stated in the case of **Christopher P. Chale** (supra) that all conditions for granting temporary injunction must be met conjunctively to move the court to exercise its discretion to grant an order of temporary injunction and the applicant has failed to establish all the required three conditions, the court has found the present application cannot be granted.

Consequently, the application of the applicant seeking for an order of temporary injunction to restrain the respondent, his agents, servants and workmen from disposing, leasing or doing any other similar business on the suit premises pending determination of the main suit is hereby not granted hence the application is dismissed with costs. It is so ordered.

Dated at Dar es Salaam this 27th day of September, 2022



I. Arufani
I. Arufani

JUDGE

27/09/2022

Court:

Ruling delivered today 27th day of September, 2022 in the presence of Mr. Emmanuel Marwa learned counsel for the respondent and also holding brief of Mr. Shaban Mlembe, learned counsel for the applicant. Right of appeal to the Court of Appeal is fully explained.



I. Arufani
I. Arufani

JUDGE

27/09/2022