

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

MISC. LAND APPLICATION NO. 246 OF 2022

(Arising from Land Case No. 121 of 2022)

UNIVERSAL CARGO TRANS-SHIPMENT

HOLDINGS LIMITED APPLICANT

VERSUS

KINGS GROUP COMPANY LIMITED 1ST RESPONDENT

MAJEMBE AUCTION MART 2ND RESPONDENT

RULING

Date of Last Order: 02/6/2022

Date of Ruling: 16/6/2022

A. MSAFIRI, J

The applicant Universal Cargo Trans-shipment Holding Limited filed this application under Order XXVII Rules 1(a) and 2(1) and Section 68(c) and (e) of the Civil Procedure Code Cap 33 R.E 2019 (CPC), praying for the following orders;

- a) That, for the interest of justice, the Honourable Court be pleased to make order(s) for temporally injunction restraining the 1st and 2nd respondents not to evict the applicant from the demised property

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located at Plot No. 22, 23 and 24 at Mbagala Industrial Area, Tememe Municipality, Dar es Salaam City.

- b) Costs of this application be provided for.
- c) Any other order(s) and relief(s) this Honourable Court may deem fit to grant.

Before the hearing, the applicant through her counsel prayed to amend the pleadings and struck off the name of the 2nd respondent. The prayer was granted and the pleadings were amended by hand where the Court ordered that, the application should read to have one respondent only i.e. Kings Group Company Limited.

The application was supported by the affidavit of Simon Kuwa Kisenya, the Director of the applicant. The respondent also filed their counter affidavit in opposition of the application. It was sworn by Edwin Enosy, the counsel for the respondent.

The hearing was by way of written submissions whereas the written submission and the rejoinder by the applicant was drawn and filed by Nehemia Nkoko, advocate and the written submissions in reply by the respondent was filed by JELIS Law Chambers.

Mr. Nkoko, started by praying to adopt the contents of the applicant's affidavit to form part of their submissions. He submitted by reiterating the three conditions set in the case of **Atilio vs. Mbowe** (1969) HCD No. 284. He said that the pertinent issue is whether this application satisfies or *Alls.*

meets the stated three conditions. He stated that it is clear that paragraphs 2,3,4,5,6,7,8 and 9 of the affidavit establishes that there is a prima facie case, and this is also demonstrated in the counter affidavit where it contains evasive denials which shows that, a prima facie case has been established.

The counsel for the applicant stated further that, the applicant has shown that she has a fair question to raise as to the existence of her rights. That, the move made by the respondent by intending to take possession and evict the applicant and her tenants from the demised premises is something which will cause substantial financial loss to the applicant and her tenants.

The counsel submitted that the applicant stands to suffer even much greater loss on the intention of the respondent to deprive the applicant her lawful occupation and possession of the disputed demised premises permanently. This will automatically affect the applicant's rights over the demised premises including the tenants of the applicant and their businesses.

He stated that, if the respondent will be allowed to continue with her intention to evict and take possession of the demised premises, the applicant will greatly suffer which cannot be compensated by money. He argued that, the balance of convenience in this matter tilts in favour of the applicant. And if a temporary injunction is granted, it will restrain the

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applicant from doing anything prejudicial to the respondent until determination of the main suit. He concluded by stating that the applicant has satisfied the conditions required for injunctive orders. To cement his submissions, the counsel cited the case of **Deusdedit Kisiswe vs. Protaz B. Bilauri**, Civil Application No. 13 of 2001 (unreported) (CAT, Dar es Salaam).

In response, the counsel for the respondent submitted that, the applicant did not file reply to counter affidavit as per the order of the court dated 31/5/2022 hence he prayed for this court to draw an inference that the applicant has accepted the averments in the counter affidavit. He also prayed for the counter affidavit deponed by the counsel for the respondent to be adopted and form part of this submission.

He stated that, this application is devoid of merit as the applicant has failed to establish and justify the conditions set in the case of **Atilio vs. Mbowe (supra)**. He submitted that, on the issue of existence of the serious question to be tried, the law requires the applicant to satisfy the court that there is a bonafide dispute which needs an investigation of the court. He said that, in the present matter, the applicant does not show/prove that there is a prima facie case or serious question to be determined.

He argued that, the act of respondent taking possession of the suit premises is not a serious question as it is in conformity with item 4.5 of the lease agreement which gives right to the respondent to take possession of *Allis*.

the suit premises when rent is not paid. That, the applicant has not attached the proof of rent payment.

On the issue of irreparable loss, the counsel argued that, it is the law that the applicant is required to show what kind of loss is to be suffered in case an injunction is granted and such loss must be irreparable that it cannot be remedied by way of damages. He argued that, in the present application, the loss is already computed to be Seven Billion (7 Billion) as money injected for the so called renovation of the demised premises. He said that, in this case, the loss is capable of being compensated by way of damages in case of applicant wins the main suit. Therefore, the second condition is not met by the applicant.

On the issue of balance of convenience, as to who will suffer more hardship between the parties, the counsel stated that it is the respondent who stands to suffer more hardship than the applicant. This is because first, the respondent will continue to suffer loss for losing rent while there arrears of Tshs. 488,057,665/- which has not been paid by the applicant, and the debt will keep accruing which will make it more difficult for the respondent to recover. Second, the applicant intends to sublease the suit premises to the 3rd parties. This means that, if the injunction is granted, the respondent will be subjected to multiplicity of suits in future to recover her property from this parties. Third, unlike the applicant who is a mere tenant, it is the respondent who stands to suffer more hardship because he

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depends on rent from the leased premises for survival. The counsel prayed that this application be dismissed with costs.

In rejoinder, the counsel for the applicant mainly reiterated his submission in chief. He added that, the applicant did not file a reply to counter affidavit since filing the same is optional. But the contents of the affidavit are well enough to establish all the three conditions for issuing temporary injunction.

The counsel for the applicant submitted that the amount of seven billion shillings cannot be atoned by way of damages as it was claimed by the respondent. If so, the applicant is wondering how the amount could be paid by the respondent and that it will invite endless litigations. He insisted that the applicant is the one who will suffer more as she has erected buildings/ warehouses with the consent of the respondent. That the loss which the applicant will suffer will be irreparable that mere money cannot replace.

Having heard the submissions from the parties in the application, and read the contents of affidavit and counter affidavit, the main issue is whether the applicant has successfully met the three conditions set in the case of **Atilio vs. Mbowe (supra)**. These conditions have been repeatedly reiterated and elaborated in the numerous other decisions. The conditions are;

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First; that on the facts alleged, there must be a serious question to be tried by the court and a probability that the plaintiff will be entitled to the relief prayed for in the main suit.

Second; that the temporary injunction sought is necessary in order to prevent some irreparable injury befalling the plaintiff while the main case is still pending, and

Third; that on the balance, greater hardship and mischief is likely to be suffered by the applicant/plaintiff if temporary injunction is withheld than may be suffered by the respondent/defendant if the order is granted.

It is trite law that all conditions set out must be met cumulatively and meeting one or two conditions will not be sufficient for the court to exercise its discretion to grant an injunction.

On the first condition on whether there is a serious question to be determined by the court, the applicant stated in the affidavit that the applicant and respondent has entered into a lease agreement, and the term of the lease was six (6) years from 22/12/2019.

That the plaintiff/ applicant has been complying with the terms of lease and the rent has already been paid on time and without any inconveniences. That, the respondent has neglected to observe and comply with the terms of the lease agreement and has issued a 14 days eviction Notice to the applicant without any justification. In the main suit, among the reliefs prayed by the applicant/plaintiff is for the Court's declaration

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that the defendant has breached the terms of the lease agreement, and that the 14 days eviction Notice is illegal since the applicant/plaintiff has no rental arrears towards the defendant.

In the counter affidavit, the defendant has denied vehemently and stated that the applicant is the one in serious breach of lease agreement for failure to pay rent for the past two years. That, until to date, the rent has accumulated to the tune of Tshs 488,057,665/-

From the pleadings and submissions from both parties, it is clear that there is a serious issue to be determined by this Court and it revolves around the claims of breach of lease agreement between the parties. The applicant is accusing the respondent of breach of lease agreement by their intention of evicting her from the suit premises while she believes that she has been paying rent on time as per their lease agreement. The respondent on her side is also accusing the applicant on serious breach of lease agreement by her failure to pay rent for the past two years which has caused the rent to accumulate.

The issue whether the rent has been paid or not and which party has breached the terms of lease agreement, is the one to be determined by the Court on hearing of evidence from both sides of the rival parties. With this, I find that the first condition necessary in this application has been met by the applicant.

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The second condition on whether the applicant will suffer irreparable injury if the prayers sought are not granted, the applicant in the affidavit stated at paragraphs 5,6 and 9 that, the applicant has injected the money to the tune of Tshs 7,000,000,000/- for the purposes of renovating the suit premises and make it habitable. Thus, the applicant incurred costs in renovating and refurbishing the suit premises, and these costs are still not been compensated by the respondent as agreed.

He added that, the applicant is operating under loss for actions of the respondent and unless the injunction orders are granted, the applicant will suffer irreparable loss that money cannot compensate.

In the written submission, the counsel for the applicant contented that, the move by the respondent intending to take possession and evict the applicant and her tenants will cause substantial financial loss to the applicants and her tenants. In rejoinder, the applicant stated that Tshs Seven Billion were injected in erecting buildings/ warehouses on the suit premise, and if evicted, the applicant's injuries will be irreparably financially. He said further that, the applicant stands to suffer even if the respondent can be ordered to compensate the applicant by money substitute. That the matter will be even more complicated since the applicant has tenants in the suit premises.

In this, the question is whether the applicant has demonstrated irreparable loss which cannot be compensated in monetary terms. To meet this second condition, the applicant is required not only to show loss but such loss

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must be irreparable. The applicant has stated that she has renovated the suit premises by injecting Tshs Seven Billion which the respondent has not compensated the applicant. I am of the view that this is monetary compensation.

Further, the applicant has stated that, if the injunction order is not granted, she will suffer irreparable loss that mere money cannot compensate, and that, the applicant is operating under loss for the actions of the respondent. However, the applicant did not show how she has been operating under loss, and whether this loss is not financial loss which can be compensated.

The applicant has also submitted on the tenants which she has in the suit premises. That, intended eviction will open door for flood gate of suits being filed for the same cause of action. It is my view that, this is still in the terms of reparable loss which can be monetary compensated.

The applicant has cited the case of **Deuseddit Kisiswe vs. Protaz B. Bilauri, (supra)**, However, I find the circumstances of the cited case to be distinguishable from the application at hand. In the cited case the Court of Appeal held that, the attachment and sale of the property will, invariably, cause irreparable injury.

In the present matter the respondent is not seeking to attach and/or sale the suit premises but to evict the applicant who is a tenant.

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In the case of **Mariam Christopher vs. Equity Bank TZ Limited & another**, Misc. Land Application No. 1070 of 2017, this Court observed that;

"In considering the question of irreparable loss, the court of course has to look at the injury which is one of irreparable loss which cannot be compensated by monetary"

In this application, it is my finding that what has been submitted as irreparable loss/injury by the applicant, can be compensated in monetary terms. Therefore, the applicant has failed to meet the second condition.

On the third condition, on balance of convenience, the applicant submitted that, the applicant will be deprived of her rights of possession of the suit premises if the temporary injunction is not granted and that, the balance of convenience tilts in favour of the applicant. The respondent averred that, she is the landlord of the suit premises who stands to suffer more hardship because she depends on rent from the suit premises.

On this, I am constrained to agree that, the respondent is much likely to suffer more because she is the landlord who depends on leasing the suit premises. It is different from the tenant who can lease and move his business elsewhere. Also, as already pointed out, the injuries to be suffered by the applicant is monetary ones which can be atoned by way of damages. I find that the third condition has also not been met by the applicant.

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Since the applicant has failed to meet the two conditions, I find the application to have no merit and I hereby dismiss it with costs.

It is so ordered.

Dated this 16th day of June, 2022.



A. MSAFIRI

JUDGE