

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 145 OF 2022**

*(Arising from Land Case No. 68 of 2022)*

**INNOCENT FODE MAMOUDOU SHANGO..... 1<sup>ST</sup> APPLICANT**

**ANNA LEORNARD SHANGO.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**EFC TANZANIA LTD.....1<sup>ST</sup> RESPONDENT**

**MEM AUCTION & GENERAL BROKERS.....2<sup>ND</sup> RESPONDENT**

**TANZANIA QUALITY AUCTION MART LIMITED .....3<sup>RD</sup> RESPONDENT**

**NGABANI PATRICK MTENGA.....4<sup>TH</sup> RESPONDENT**

*Date of last order: 12/5/2022*

*Date of ruling: 13/6/2022*

**RULING**

**A. MSAFIRI, J.**

On the 1<sup>st</sup> day of April 2022, the applicants lodged an application in this Court by way of chamber summons under Order XXXVII Rule 1 (a) and Section 68 (e) of the Civil Procedure Code [CAP 33 R.E 2019], for the following orders;

- i. *That this Honourable Court be pleased to issue an order for temporary injunction restraining the 5<sup>th</sup> respondent, its agents, Adde*

*workmen, assignees or any other persons working on that behalf, from evicting the applicants herein with their family from the suit property with Certificate of Title No. 44779 Plot No. 243-245 Block C situated at Kimara-Mavurunza within Kinondoni Municipality, Dar es Salaam pending final and conclusive determination of the Land Case No. 68 of 2022 at High Court of Tanzania (Land Division) at Dar es Salaam.*

- ii. *Costs be provided for*
- iii. *Any other order(s) this Honourable court deems proper to grant.*

The application has been taken at the instance of the Law Offices of Catherine A. and is supported by an affidavit sworn by Catherine A. Lyasenga, learned advocate for the applicants herein.

The application by consent of the learned counsels for the parties was disposed of by way of written submissions. The applicants are represented by Catherine Lyasenga learned advocate, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents are represented by Mayombo Stephen learned advocate. Whereas the 4<sup>th</sup> respondent though lodged counter affidavit, he never filed reply submission. *Alle.*

The applicants submitted that the court's powers to grant temporary injunction are derived from Order XXXVII Rule 1 (a) and Section 68 (e) of the Civil Procedure Code [CAP 33 R.E 2019], (the CPC). The applicants submitted further that conditions which must be satisfied before granting such orders have been enunciated in the landmark case of **Atilio v Mbowe** (1969) HCD No. 284, whereby Georges, C. J. held as follows;

- i. There must be a serious question to be tried on the alleged facts and a probability that the plaintiff will be entitled to the relief prayed.*
- ii. That the court's interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established.*
- iii. That on the balance 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 it.*

Elaborating on the above grounds, the applicants are claiming for illegal sale by auction of the suit property by the 1<sup>st</sup> respondent through the services of 2<sup>nd</sup> and 3<sup>rd</sup> respondents. The applicants contended that the auction procedures were not adhered to hence the applicants have serious legal rights they claim.

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As to the second condition, the applicants contended that they will suffer irreparable loss because the suit property is the family property that is used for dwelling at one side and another side is used for business so as to assist the 1<sup>st</sup> applicants' parent, hence the act of evicting the applicants and their family members will cause irreparable loss such as psychological torture and even death to 1<sup>st</sup> applicant's father who is seriously sick.

As to the 3<sup>rd</sup> condition, the applicants contended that in the balance of convenience it will be a greater mischief or hardships suffered by the applicants if the injunction won't be granted rather than suffered by 4<sup>th</sup> respondent herein from withholding of the injunction of the suit property may be disposed to another person and render the main application nugatory.

On reply, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents having adopted their joint counter affidavit, contended that the applicants have failed to prove the existence of the conditions stipulated in the case of **Atilio v Mbowe** [supra].

Regarding the 1<sup>st</sup> condition, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents contended that the applicants have failed to demonstrate if there is any *Alles*.

serious question to be determined in the main suit. The reasons advanced by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents are, the suit property has been transferred and it is now registered in the name of the 4<sup>th</sup> respondent.

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents contended further that according to annexure EFC-1 annexed in the counter affidavit, the applicants were served with notice of transfer by the Registrar of Title on 15<sup>th</sup> March 2017 hence they ought to have challenged the sale within 30 days to the High Court but they waived such right. As a result the Registrar of Title proceeded with registration of the said title.

As to the 2<sup>nd</sup> condition, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents contended that, there is no tangible proof to establish that the suit property is family house. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents submitted further that there is no medical report to establish that the 1<sup>st</sup> applicant's father is sick hence this condition has not been proved by the applicant.

As to the 3<sup>rd</sup> condition, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents contended that the applicants have failed to demonstrate how they will suffer if this application won't be granted. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents contended further that the applicants are no longer in possession of the suit property *Atle.*

as it has been registered in the name of the 4<sup>th</sup> respondent herein. The respondents contended that the three conditions for granting of temporary injunction must be cumulatively met.

Reference has been made to the cases of **Caroliana Alex & 16 others v Saad Thomas Maulid**, Miscellaneous Application No. 447 of 2017 and **Neem Salha Company Limited v Dar es Salaam Development Corporation (DDC) & another** Miscellaneous Application No. 92 of 2022 High Court of Tanzania (both unreported).

In rejoinder, the applicants mostly reiterated their submissions in chief.

Having gone through the submissions of the parties rival and in support to the present application the sole issue calling for my determination is whether the applicants have shown sufficient cause to justify their application.

The present application has been preferred under the provisions of Order XXXVII Rule 1 (a) of the CPC. The said provision requires the applicant to prove by affidavit that the property in a suit is in danger of *Acte*.

being wasted, damaged, or alienated before the Court can grant an injunction.

In the present matter, as rightly submitted by the applicants before granting an injunction the conditions stipulated in the land mark case of **Atilio v Mbowe [supra]** have to be established. To add, the said conditions must be cumulatively established as per the decision of this Court in the case of Neem **Salha Company Limited v Dar es Salaam Development Corporation (DDC) & another [supra]**.

I wish to point out that throughout the chamber summons and affidavit in support of the application, the applicants are seeking injunctive orders against the 5<sup>th</sup> respondent. However there is no 5<sup>th</sup> respondent in the present application. It can be said with certainty that the prayers are being sought against the non-existing party.

But I will still proceed to determine whether the application has met the conditions stipulated in the case of **Atilio v Mbowe [supra]**. Going by the affidavit in support of the application, the applicants have demonstrated the loss they are likely to suffer that, the applicants' family will be evicted from the suit house which they primarily depend for shelter and also by doing business on one side of it and similarly the 1<sup>st</sup> applicant's

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father is seriously sick such that if the intended eviction is not stopped there may be serious loss on the applicants' family.

But other conditions have not been stated on the affidavit like whether there are any serious issues calling for determination by this Court, likewise the affidavit does not state how on the balance that there will be greater hardship and mischief suffered by the applicants from withholding of the injunction than will be suffered by the respondents from granting it.

Instead the applicants have stated those grounds in the course of their submission. It follows therefore that the other two conditions surfaced for the first time in the course of the submissions. In applications in which evidence has to be proved by affidavit like the one at hand the applicant is required to state all the facts on the affidavit and not on the submission. Submissions are not evidence and cannot be a substitute of affidavit rather an elaboration or arguments on evidence and law.

The applicants ought to have stated on the affidavit in support of the application such facts as the irreparable loss they are likely to suffer, the serious issues for determination by the Court as well as why the application should be granted on the balance of convenience. This would have enabled

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the respondents to respond to them by counter affidavit. Hence as the facts have been brought up in the course of submission and not in the affidavit, those statements remain mere and unproven assertions because no evidence has been given by affidavit to prove the allegations in the statement.

In the case of, **The Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman, Bunju Village Government & 11 Others**, Civil Appeal No. 147 of 2006 (supra), the Court of Appeal held:

*" . . Submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence.*

It is for the foregoing reasons that I hold that the application lacks merits and it is hereby dismissed with costs.



  
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**A. MSAFIRI,**  
**JUDGE**  
**13/6/2022**