IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 138 OF 2022

(Arising from Land Case No. 72 of 2022)

FANTUZZI INVESTMENT LTD ..... APPLICANT

VERSUS

MWANANCHI ENGINEERING AND CONTRACTION COMPANY LTD..... RESPONDENT

Date of last Order: 31/05/2022
Date of Ruling: 21/06/2022

EX PARTE RULING.

I. ARUFANI, J

This ruling is for the application for temporary injunction filed in this court by the applicant under section 68 (c) and order XXXVII Rule 1 (a) of the Civil Procedure Code Cap 33 [R.E 2019]. The applicant is seeking for an order to restrain the respondent, its workmen, employees, licensees, agents and whoever is acting under it from evicting the applicant from the property known as Plot No. 2 and 3B, located at Monrovia Road (off Nyerere Road) Temeke Municipality at Dar es Salaam (hereinafter referred as the demised premises) leased to the applicant by the respondent pending hearing and determination of the main suit (Land Case No. 72 of 2022) filed in this court by the applicant.

The application is supported by an affidavit sworn by Meleck Shange the applicant's General Manager and is opposed by a counter affidavit affirmed by Abdulkadir Shekhe Mohamed, the respondent's principal officer. The applicant was represented in the application by Mr. Josia Noah Samweli, learned advocate and the respondent was represented by Mr. Hilali Hamza, learned advocate. When the matter came for hearing, the counsel for the applicant prayed the court to allow the matter to be argued by way of written submission and as there was no objection from the counsel for the respondent, the prayer was granted and the court set a schedule for filing the written submission from the parties in the court.

The counsel for the applicant filed in the court the applicant's written submission on the date set by the court. Although the respondent was served with the applicant's written submission on time but the respondent failed to file in the court its reply to the applicant's written submission within the time fixed by the court. The prayer by the counsel for the respondent to be granted extension of time to file their reply in the court out of time was refused by the court after being found the respondent's counsel had not managed to satisfy the court they were delayed by good and sufficient cause to file their written submission in the court within the time fixed by the court. That caused the court to decided to proceed to

determine the application at hand by basing on the submission filed in the court by the counsel for the applicant alone.

In support of the application the counsel for the applicant stated in his submission that, the provision of the law cited in the chamber summons empowers this court to grant the order of temporary injunction the applicant is seeking from the court to restrain the defendant, its workmen, agent or whoever is acting under its instruction from evicting the applicant from the demised premises. He stated that, the court is given discretionary power to grant temporary injunction and such powers must be exercised judiciously as per the principles provided by the law.

He referred the court to the book authored by Mulla titled **The Code of Civil Procedure**, Volume 3, 18th Edition (2011) where the author stated at page 3314 the principles for granting temporary injunction are whether the plaintiff has a prima facie case, whether the balance of convenience is in favour of the plaintiff and whether the plaintiff will suffer an irreparable injury if his prayer for an order of temporary injunction is disallowed. He stated that, the same principles were laid in the case of **Atilio V Mbowe** (1969) HCD 284 where it was stated that, in deciding whether temporary injunction should be granted or not the court is required to see there is a prima facie case, who will suffer most between

the parties if temporary injunction is granted and likelihood of success on the part of the applicant.

He argued in relation to the first test of whether the applicant has demonstrated serious questions to be tried or prima facie case that, it is undisputed fact that on 25 September 2019 the applicant entered into a lease agreement with the respondent, for the applicant to run a business of empty containers at the demised premises for a period of 5 years from 24 October 2019. He went on stating that, as stipulated at clause 5.1 and 5.2 of the lease agreement the agreed rent was US$ 35,000/= per month which would have been reviewable after every two years of lease. He added that, despite the fact that the rent would have been reviewed upon mutual agreement between the parties and increased by 20% but as stipulated under annexure "Fantuzzi 2" in the affidavit supporting the application, the respondent increased the rent unilaterally by 20% without consulting the applicant.

He went on stating that, it is alleged under paragraph 6 of the counter affidavit that the respondent increased the rent unilaterally because there is no clause in the lease agreement requiring rent to be reviewed upon mutual agreement of the parties and recital 'c' and clause 4.1 of the lease agreement referred by the respondent are merely restricting an increment of rent by not more than 20%. The counsel for

the applicant argued that, even though there is no such express term in the lease agreement but the respondent has no right to change the lease agreement unilaterally without consulting the applicant as clause 12.7.2 of the lease agreement provides that, any variation or modification of any provision of the lease agreement shall be confirmed in writing and signed by both parties.

He argued that, the applicant is not objecting the increase of rent but none involvement of the applicant in the whole process of increasing the rent. He stated that, despite several pleas by the applicant to the respondent to reconsider its decision regarding the increment of the rent, on 15th November, 2021 the respondent served the applicant with a notice of eviction. He stated that the stated notice is contrary to clauses 12.1.1 and 12.1.2 of the lease agreement which requires the respondent to issue a notice of default prior terminating the lease agreement.

He argued that, after several request for amicable resolution of the dispute on 29th December, 2021 the respondent verbally undertook to cancel and withdraw the notice of eviction. He stated that, on 30th December, 2021 the respondent issued an invoice which is annexure Fantuzzi 9 in the affidavit supporting the applicant for payment of rent from 1st January, 2022 to 31st March, 2022 and the applicant effected payment as evidenced by Telegraphic Transfer (TT) which is part of

annexure Fantuzzi 9 in the affidavit supporting the application. He submitted that, the act of the respondent to withdraw the notice of eviction and issuance of invoice for payment of rent shows impliedly the notice of eviction was overtaken by event and automatically cancelled.

He argued that, surprisingly, on 23rd February, 2022 the respondent wrote a letter to the applicant which is annexure Fantuzzi 10 to the affidavit supporting the application purporting to remind the applicant about the same notice of eviction and demanded the applicant to vacate the demised premises and handover the demised premises. He submitted that, the allegation by the respondent that the notice of eviction is due to none payment of the rent is misconceived because before increment of the rent the applicant had been paying rent timely and thereafter the applicant and the respondent had not reached into consensus regarding increment of rent. He argued that, the negotiations between the parties failed due to lack of cooperation from the respondent. He stated that, thereafter the applicant paid the rent increased unilaterally by the respondent as evidence by annexure Fantuzzi 6 to protect his business.

He stated that, upon payment of the said rent the applicant requested for the meeting to solve the matter amicably as shown by annexure Fantuzzi 6 and the respondent replied through annexure Fantuzzi 7 that, still the notice of eviction stands as he wants to use the

demised premises. He stated that shows the reason for the respondent to terminate lease agreement was not due to breach of lease agreement by the applicant but rather is because the respondent want to hand over the demised premises to the new tenant while there is a lease agreement which is still in existence between the parties.

He submitted that, the prima facie case in the applicant's case is the breach of the lease agreement by the respondent and referred this court to the case of **Abdi Ally Salehe V. Asac Care Unit Ltd & 2 Others,** Civil Revision No.3 of 2012, Court of Appeal of Tanzania at Dar es Salaam (unreported) where it was stated at page 8 that, the object of this equitable remedy is to preserve the pre dispute state until the trial or until another date fixed by the court. He submitted that, in deciding this application the court is required to see prima facie case on the record of the matter that there is a *bona fide* contest between the parties and there is a serious question to be tried.

He stated the court is required to grant the sought temporary injunction so as to determine the following issues; lawfulness of the act of unilateral increment of rent by the respondent without consulting the applicant, lawfulness of the act of the respondent's issuance of notice of eviction without first issue a notice of default, whether the act of the respondent to recall the notice of eviction that was cancelled or withdrawn

is justifiable, lawfulness of the act of the respondent to dispose of the demised premises to a third party while the lease agreement between them is subsisting and whether there was a prior notification to the applicant regarding the disposal of the demised premises.

As regards to the second condition of who between the applicant and the respondent will suffer more if the order of temporary injunction will be granted, the counsel for the applicant submitted that, it is necessary to afford protection to the applicant's rights which will immensely be injured by the respondent. He stated that, it is pleaded under paragraph 4 of the affidavit that, bearing in mind that the lease agreement would have continue to the completion of its term, the applicant carried out major improvements on the demised premises which included inter alia laying a concreate base or slab on the floor so as to meet the regulatory standard.

He stated that, the said improvement costed the applicant US$ 100,000 and the said improvement was done with expectation that the applicant would be accorded time to recoup its costs and realise considerable profit out of the investment made through the long-term lease. He argued that, the allegation from the respondent in their counter affidavit that there is no proof of the alleged improvement is required to

be disregarded as it cannot be dealt at this time rather at the hearing of the main case.

He submitted further that, if the order of temporary injunction is not granted the respondent will evict the applicant from the suit property and that will occasion great loss and damage to the applicant because the applicant has not recouped out costs of improvement made in the demised premises and has not realized profit out of the said investment. He argued that, the applicant has entered into third-party contracts based on the agreement to operate its business on the demised premises until the expiration of the lease agreement, which the said third-party contracts are inclusive of employment and other service contracts.

He submitted that, the applicant will suffer irreparable injury in terms of financial loss, loss of its hard-earned corporate reputation and loss of potential customers to whom it has been providing empty containers storage and handling services using the demised premises. He submitted further that, to vacate a demised premise within a short period of time will occasion irrepealable costs of reallocation of the applicant's business to another premise and the applicant will suffer general loss and damages, mental distress or anguish to the applicant's shareholders, directors and officers.

He referred the court to the case of **Al Outdoor Tanzania Ltd V. Alliance Media Tanzania Ltd**, Commercial Case No.25 of 2005 HC Commercial Division at Dar es Salaam, where it was stated that, a temporary injunction is an equitable remedy and whoever come to the equity must come with clean hands. He argued that, the applicant has come to equity with no wrong done on its part because it has never breached the lease agreement. He submitted that if the order of temporary injunction will not be granted the applicant will suffer more than the respondent.

As for the issue of likelihood of success on the part of the applicant the counsel for the applicant argued the court is required to consider matters demonstrated in the first and second principles for grant of temporary injunction which are prima facie case and possibility of suffering loss and damages. He added that, the applicant has high chance of success in the suit because of the controversy involved in the main issue of determination raised in the first principle for grant of temporary injunction. He argued that, as stated in the case of **Abdi Ally Salehe** (supra) it is an established condition that, when all the minimal conditions are established, the court, before deciding one way or another should then consider other factors, such as the conduct of the parties, delay, acquiescence, lack of clean hand, etc. This is because as seen above, the

remedy of injunction has its roots in equity and so, equitable principles may be applied in appropriate cases.

He argued that, the conduct of the applicant at all material time have been optimistic as opposed to the ill motivated conducts of the respondents. He submitted that, there is no inordinate delay by the applicant in instituting these proceedings. He stated that the applicant instituted the present proceedings after the respondent recalled the notice of eviction and after failure to issue invoice pursuant to the applicant's letter date 1st and 9th March, 2022 which are annexures Fantuzzi 11 and 12 in the affidavit. He stated the applicant took the present step after realizing the respondent had an ill motive to forcefully evict them from the demised premises. At the end he prayed the application be granted.

After considering the submissions from the counsel for the applicant the court has found the issue to determine in this matter is whether the applicant deserve to be granted the order is seeking from this court. The court has found that, as rightly argued by counsel for the applicant the conditions governing grant of temporary injunction in our jurisdiction were laid in the famous case of **Atilio 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 10 withholding of the injunction than will be suffered by the defendant from granting of it.

Starting with the first condition of existence of triable issue or a prima facie case the court has found it is required to be satisfied there is a triable issue or in other words the applicant has a cause of action 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 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 found that, as argued by the counsel for the applicant, the applicant want the court to determine lawfulness of the act of the respondent to increase the rent unilaterally without consulting them, lawfulness of the act of the respondent to issue notice of eviction without first issuing a notice of default, whether the act of the respondent to recall the notice of eviction that was cancelled or withdrawn is justifiable,

lawfulness of the act of the respondent to dispose of the demised premises to a third party while the lease agreement between the parties is still subsisting and whether there was a prior notification to the applicant regarding the disposal of the demised premises.

To the view of this court there is no justifiable reason to say the above stated issues, which were derived from the plaint and affidavit of the applicant have not established a prima facie case between the parties which is required to be determined by the court. The court has arrived to the above finding after seeing the applicant has averred at paragraph 4 of the plaint that they entered into lease agreement with the respondent for a period of five years commenced from 24th October, 2019. However, on 15th November, 2021 the respondent served the applicant with a notice of eviction on allegation that the applicant had failed to pay the rent and the applicant is arguing it has never default to pay the rent.

To the view of this court, the stated issues can only be properly determined after receiving evidence from the parties in the full trial of the case and cannot be determined in the application at hand where the applicant is just seeking for an injunctive order. In the premises the court has found the first condition for granting temporary injunction which is establishment of existence of prima facie case or triable issue in a case has been established in the applicant's application.

Coming to the second condition for granting temporary injunctive order which is irreparable loss to be suffered if the order is not granted the court has found that, as stated in the case of **T. A. Kaare V. General Manager Mara Cooperative Union,** [1987] TLR 17, 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 also 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 for in damages. The injury need not be actual but may be apprehended."*

Under the guidance of the position of the law stated in the above referred case and the book the court has found that, as rightly argued by the counsel for the applicant, the applicant has deposed categorically at paragraphs 6 and 23.2 of the affidavit supporting the application that, the applicant has carried out major improvement in the demised premises by laying a four inches concrete slab or base to suit the business is carrying

at the demised premises which costed them US$ 100,000 and they have not managed to recoup out the said costs.

He stated further that, if the injunctive order will not be granted, they will be subjected into irreparable loss which will arise from the contracts they have entered with other third parties like the employees and other service providers. They will also suffer a loss of its hard-earned corporate reputation and loss of potential customers to whom it has been providing empty containers storage and handling services by using the demised premises. The above stated losses caused the court to find the second condition for granting an order of temporary injunction has been established in the matter at hand to the extent that, the court has found the loss which the applicant will suffer if the order of temporary injunction will be refused cannot adequately be attorned by way monetary payment.

As for the third 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 either side before issuing or withholding the injunction. After considering all what is deposed in the affidavit supporting the application and in the counter affidavit together with what is stated in the pleadings filed in the Land Case No. 72 of 2022 the court has found the applicant is the one stand to

be more inconvenienced than the respondent if the injunction will not be granted.

The court has found that, as the applicant has stated they have massively invested in the demised premises and they have not managed to recoup out the costs of investment done on the demised premises the court has found that, if the order of temporary injunction is not granted and the applicant is evicted from the demised premises before their claims are determined by the court, the applicant will be more inconvenienced than the respondent if the injunctive order will be granted. The court has found the respondent will not be subjected into any inconvenience as they will continue to get the rental fees from the applicant for the period the applicant will continue using the premises while waiting their rights to be determined by the court.

It is because of the above stated reasons the court has found all the three conditions for granting an order of temporary injunction laid in the case of **Attitlio V. Mbowe** (supra) have been established in the application at hand. Consequently, the application is granted and the order of temporary injunction is granted to restrain the respondent, its workmen, employees, licensees, agents and whoever is acting under the instruction of the respondent from evicting the applicant from the demised premises pending hearing and determination of Land Case No. 72 of 2022

pending in this court. Each party to bear his own costs in this applicant. It is so ordered.

Dated at Dar es Salaam this 21st day of June, 2022

I. Arufani

JUDGE

21/06/2022

Court:

Ruling delivered today 21st day of June, 2022 in the presence of Mr. Dismas Mallya, Advocate for the applicant and also holding brief of Mr. Denis Msafiri, Advocate for the respondent. Right of appeal to the Court of Appeal is fully explained.

THE HIGH COURT OF TANZANIA
LAND DIVISION

I. Arufani

JUDGE

21/06/2022