

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

MISC. LAND APPLICATION NO. 97 OF 2022

(Arising from land Case No. 31 of 2022)

3D SYSTEMS CONTRACTORS LIMITED APPLICANT

VERSUS

BLUE FLOWER INVESTMENT LIMITED 1ST RESPONDENT

ARIF HAJI SADIK 2ND RESPONDENT

WESSY PIRBHAI MEGHJI 3RD RESPONDENT

RULING

Date of Last Order: 22/6/2022

Date of Ruling: 12/7/2022

A. MSAFIRI, J

The applicant 3D systems contractors limited filed this application under Order XXXVII Rule 2(1) of the Civil Procedure Code, Cap 33 R.E 2019, praying for the following orders;

- a) That this Honourable Court may be pleased to issue a temporary injunction restraining the respondents, their employees, licensees, servants or agents or any other corporate entity or person acting directly or indirectly under the authority from occupying, selling, leasing, subleasing, altering or/and conducting any act or activity on the suit premises Plot No. 597/1 situated at Mbezi Beach, Dar es Salaam pending the determination of the land Case No. 31 of 2022.
- b) Costs of this application. *Adls*

c) Such other and further order and directions that this Honourable Court may deem fit and just to grant.

The application was supported by the affidavit of Deus Samwel Nyanza, the Principal Officer of the applicant company. The respondents vehemently opposed the application and filed their counter affidavits.

During the hearing which was orally, the applicant was represented by Ms. Maira and Joyce Maswi, learned advocates, Mr. Rwebangira, learned advocate appeared for the 1st respondent and the 2nd and 3rd respondents were jointly represented by Mr. Semu, learned advocate.

Ms. Maira started her submissions by praying to adopt the affidavit and supplementary affidavit of the applicant as part of her submissions. She said that it is a general rule that there are three conditions to be satisfied before a temporary injunction can be granted. That, this principle is set in the famous case of **Atilio vs. Mbowe** (1969) HCD 284 and has been observed by this Court on several cases. She pointed the three conditions that first, there must be a serious question to be tried on a matter raised, second, the court interference is necessary to prevent irreparable injury and third, the balance of convenience.

On the condition of prima facie case, Ms. Maira stated that, it is shown in the applicant's affidavit from paragraphs 2-9. That, the applicant and 1st respondent entered into an agreement whereby the applicant was to

Attilio

purchase the disputed property and the same has paid part of the purchase price amounting to USD 262,150.

She said that due to unforeseen circumstances as expressed in the affidavit, the applicant was unable to pay the purchase price as agreed. That, the applicant communicated to the 1st respondent, who ignored all the communications and was uncooperative despite all efforts made by the applicant to secure loan from the Bank to finalize the payment. According to the applicant's counsel, these are triable issues to be determined by the court.

On the 2nd condition on the irreparable loss, the counsel submitted that, it is shown on the supplementary affidavit that the disputed property is likely to be transferred to the 2nd and 3rd respondents who purchased the property. Hence, if the injunction is not granted, the applicant might suffer loss which is substantial and cannot be reparable by any means.

On the 3rd condition which is on balance of convenience, she stated that the applicant stands to suffer more than the respondent if the application is not granted. This is because the intended purchase of property was based on the use of property to generate income, and the location of the disputed property is potential for the business of real estate. She submitted further that, should the disputed property be sold to the 3rd parties, the likelihood of the applicant to secure same property of similar quality is minimal. *Alle*

She pointed that, in their counter affidavit, the 1st respondent has raised that the reliefs prayed for an injunction are taken care of by the caveat filed before the Registrar of Titles. However, the said caveat is different from the interim order which is sought by the applicant. She prayed that the prayers for injunction be granted so as to safeguard the disputed property.

In reply Mr. Rwebangira, counsel for the 1st respondent submitted in opposition of the application. He stated that, the relationship between the applicant and 1st respondent is contractual as proved in annexures "3D-A P1" and "3D – AP2" which are the documents attached to the affidavit. These annexures are agreements for disposition and addendum. He said that these agreements had the time limit for execution and the applicant has admitted at paragraph 4 of the affidavit to be in default to perform his obligations.

Mr. Rwebangira submitted further that on 18/9/2020, there was a termination of contract by Notice, so there is no contract which can be enforced in Court of law between the applicant and the 1st respondent. He contended that, there is no serious issue to be determined by the Court as the applicant is the defaulter who has failed to comply with agreements, so she cannot come to the Court for equitable reliefs.

On the issue of irreparable loss, Mr. Rwebangira submitted that it is the 1st respondent who has suffered a lot by failure of performance on the part of the applicant for a contract which was executed on 25/6/2019. *Alle*

He said that the first respondent has not been able to sell her property which she had intended to sale. After default of the applicant, the 1st respondent has secured another purchaser but the applicant wants to prevent the 1st respondent from selling. He added that, the applicant is not in possession of the property nor is she the owner of the property, she has not acquired any interest on the property so there is no injury which she has suffered or she will suffer.

On balance of convenience, Mr. Rwebangira stated that, the respondents will suffer more than the applicant. This is because the consent for transfer has been given for disposition of property, and what remains is registration of the Title Deed in the name of the purchaser. He said further that, the applicant's only relief is for the refund for a non-refundable sum which is a liquidated loss which is reparable.

He concluded by praying to adopt the contents of counter affidavit of the 1st respondent. He cited numerous cases including the case of **General Tyre East Africa Ltd vs. HSBC Bank PLC**, TLR [2006] page 60. He urged the Court to dismiss the application with costs.

Mr. Semu prayed to adopt the affidavit of 2nd & 3rd respondents as part of his submissions. On the first condition of triable issues, Mr. Semu submitted that, it is the reliefs in the main suit which guides the establishment of the triable issue. He said that, the reliefs in the plaint defeats the prayers in the chamber summons. That, the prayers in the chamber summons have been

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overtaken by events. Paragraph 3 of the supplementary affidavit shows that the land authorities are in the process of registering a transfer of the disputed property. However, in the chamber summons, the prayers are for stopping a sale which had already taken place, so the disposition which is claimed by the applicant has already taken place. Hence, in the circumstances, the likely issue before the Court will not be on ownership but who is the rightful purchaser.

On the 2nd condition, Mr. Semu stated that, the constitutionality of the injunction is to protect not to deprive. Hence, the applicant may have rights but does not have exclusive rights of purchasing the respondent's property. He said that, the respondents are the one who will suffer because they have genuine and legal transaction which have been acknowledged under supplementary affidavit under paragraph 3. He referred this court to the case of **Chai Bora Ltd vs. Alvic Builders (T) Limited and others**, Misc. Civil Application No. 133 of 2021 High Court Dar es Salaam (unreported).

In rejoinder, Ms. Maira responded on the submissions for all respondents. She reiterated her submissions in chief and prayed to adopt the case of **SJ3 Iwawa's Company Limited vs. Access Bank Tanzania Ltd**, Misc. Civil Application No. 387 of 2019, High Court Dar es Salaam Registry (unreported), which was previously cited by the counsel for the 2nd and 3rd respondents.

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Having heard the submissions from the parties and read the contents of the affidavit and counter affidavits, my major task is to determine whether this application is meritorious. It is trite law that the Court's power to grant injunction is predicated upon the applicant meeting the three conditions set out in the celebrated case of **Atilio vs. Mbowe (supra)**.

This principle is not disputed by the parties in this application. They agree that a party seeking an order for a temporary injunction must meet all the said conditions before the court exercises its discretion to grant a temporary injunction. The three conditions as pointed out by the counsel for the applicant are briefly that first; there must be a prima facie case/serious questions to be tried, second, the court interference is of necessity to prevent irreparable injury befalling the applicant and third, the balance of convenience.

Before I embark on determining the merit of the application, it is important that the brief background of the dispute is known. According to the affidavit, the applicant and 1st respondent entered into Sale Agreement whereby the 1st respondent agreed to sell her property in dispute to the applicant. The purchase price was USD 1,300,000.00. It was agreed that the buyer (the applicant), shall have to pay the full purchase price in the agreed manner, and in event of default, the seller (1st respondent) shall be at liberty to terminate the agreement and the first instalment of purchase price of USD 150,000 shall not be refunded. *Atilio*

That, the applicant has paid to the 1st respondent a total of USD 262,150.00 for the purchase of the property in dispute, but due to unforeseen circumstances including Covid 19 pandemic and decline in real estate business, the applicant failed to pay the remaining balance on time as agreed but continued with efforts to seek for facilities from the Banks to complete the purchase price, efforts which the 1st respondent was aware of.

Following the default, on 18th September, 2020, the 1st respondent issued the applicant with a Notice of termination of sale Agreement. On 22nd October, 2020, the applicant replied the Notice stating that she was still interested in the property and has been making efforts to get the remaining amount and is in the final stages with the bank for securing the sum so as to pay the remaining amount.

On 21st march 2022, the applicant received a notice from the Registrar of Title dated 8th March, 2022 informing her that the ownership of suit property will be transferred to 2nd and 3rd respondents unless there is a Court Order. Hence he prayed for maintenance of status quo pending this application which was granted by this Court on 06/04/2022.

After giving brief background, I will start the determination of the application by analyzing on whether the first condition on establishment of a serious issues (s) to be determined by this Court has been met. Doing that, I have to be careful not to dig deep into the merit of the case. At this stage, the Court's only obligation is to see whether there is a bonafide contest between

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the parties and serious questions to be tried. It was held in the Court of Appeal's case of **Abdi Ally Salehe vs. Asac Care Unit Limited & 2 others**, Civil Revision no. 3 of 2021, CAT at Dar es Salaam (unreported), that at this stage, the Court cannot prejudge the case of either party.

Holding to the above finding, in the present matter, having looked at the contents of the plaint and the affidavit, there was an agreement of sale between the parties, hence there was a contractual relationship between the parties. The applicant as a plaintiff in the main case is claiming against the 1st defendant for a specific performance of the sale agreement for sale of the property of dispute and that, the 1st defendant is compelled to accept the final payment and hand over the disputed property to the plaintiff. The 1st respondent/1st defendant, vehemently disputed the plaintiff's claims and averred that there is no contractual relationship between the parties as the sale agreement between the parties was mutually terminated upon the plaintiff's failure to comply with the terms of contract. The 1st defendant maintains that the plaintiff breached the contract due to non-performance of her part of bargain. The 1st defendant states that she is not liable to refund any sum paid by the plaintiff, while the plaintiff claims for refund of the partly paid sum.

From the pleadings, it is my view that there is a serious question or issue to be determined by the court on whether there is a contractual relationship between the parties and who has breached the said contract. Furthermore, I agree with the submissions by the counsel for the 2nd and 3rd respondents

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that the likely issue in this matter will not be on ownership but on who is the rightful purchaser. This issue was also supported by the counsel for the applicant. In this position, I find that the first condition has been met by the applicant.

The second condition is on whether the applicant will suffer irreparable injury if the prayers sought are not granted. It is an established rule that an injury capable of being compensated by money is not an irreparable one. In considering the question of irreparable loss, the court has to look at the injury which is one of irreparable loss which cannot be compensated in monetary terms.

In the case of **Abdi Ally Salehe vs. Asac Care Unit Limited & 2 others (supra)**, the Court of Appeal held that;

"There, the applicant is expected to show that, unless the Court intervenes by way of injunction, his position will somehow be changed for the worse; that he will suffer damage as a consequence of the plaintiff's action or omission, provided that the threatened damage is serious, not trivial or minor, illusory, insignificant or technical only. The risk must be in respect of a future damage".

Further, in her submissions, Ms. Maira, counsel for the applicant took a note on the Book of Mulla on Code of Civil Procedure, 13th Edn. Vol 3 at page 2132 and went on to quote the same as follows, *Ally*.

"Where in any suit it is proved that the defendant threatens to dispose the plaintiff's or otherwise cause injury to the plaintiff in any relation to the property in dispute, the Court may order an injunction against such act".

Guided by those principles, it is my observation that the contents of the affidavit and submissions by the counsel for the applicant does not show any threat, the present or future one to the applicant which may cause her to suffer irreparable injuries. Looking at the affidavit and the reliefs sought in the plaint, the applicant and 1st respondent had a contractual relationship, and it is my view that if the reliefs sought in the plaint will be proved, the respondents are in a position to redress the applicant by way of damages.

The applicant's counsel has submitted that in the supplementary affidavit, it is shown that the disputed property is likely to be transferred to the 2nd and 3rd respondents who purchased the property. And that, if injunction is not granted, the applicant might suffer loss which is substantial and cannot be reparable by any means. However, as observed earlier, the applicant has not shown how she stands to suffer that loss which is substantial. She merely pointed out that the purchase of property was based on the use of the disputed property to generate income and if it should be sold to the 3rd parties, the likelihood of the applicant to secure same property of similar quality is minimal. *Atls*

These observations by the applicant cannot be termed as the "irreparable loss" as enunciated in numerous authorities as I have pointed herein above. I agree with the 1st respondent's counsel submissions that desire and wishful thinking to acquire the quality property is not irreparable loss. The threatened damage should be serious, not trivial, minor or illusory. It is my finding that, the applicant has failed to meet the second condition as the reliefs she seek can be redressed by way of damages.

The third condition is on balance of convenience. The question is who is going to suffer greater hardship and mischief if the injunction is not granted. In this, as I have already found that the applicant's injuries can be atoned by way of damages, it is my belief that, the applicant is not in possession of the property and has not acquired any interest on the disputed property since the purchase of the same has not yet completed following failure by the applicant to pay the final sum.

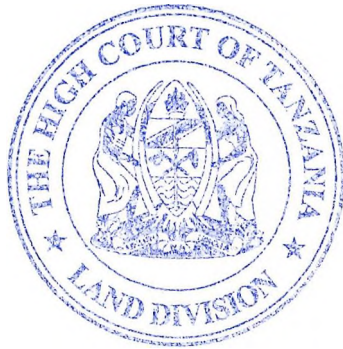
The 1st respondent being the owner of the disputed property has a right over the same. In exercising their right over the disputed property, they had intended to sale the same to the applicant. However, the applicant has defaulted in final payment to conclude the sale, the facts which she does not dispute. I agree with the 1st respondent's submission that she has suffered more in this whole business between the parties. I find that the applicant has also failed to meet the third condition.

In order to secure an order for temporary injunction, the applicant has to establish in whole the three co existing conditions. As the applicant has failed

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to establish the two conditions, I find no merit in the application. I hereby dismiss it with costs.

It is so ordered.



A handwritten signature in blue ink, appearing to read "A. Msafiri", is written over a horizontal line.

A. MSAFIRI,
JUDGE
12/7/2022