IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 263 OF 2022

(Originating from Land Case No. 125/2022)

EXAUD ELIAS MACHANGE ..... 1ST APPLICANT

CLAUD PAUL FERDINAND ..... 2ND APPLICANT

THEOBARD MUGANDA ..... 3RD APPLICANT

VERSUS

VICTOR STEVEN MANG'ANA ..... 1ST RESPONDENT

(Being an Administrator of the Estate of Steven Mang'ana)

KAM COMMERCIAL SERVICES ..... 2ND RESPONDENT

JUMA KALEMBO ..... 3RD RESPONDENT

RULING

A. MSAFIRI, J:

The applicants Exaud Elias Machange, Claud Paul Ferdinand, and Theobard Muganda, has instituted this application seeking for the interpartes orders that;

i) This Honourable Court be pleased to issue an order of temporary injunction to restrain the respondents, their agents, employees, workman or any person working on their behalf to do anything with the suit land pending the hearing and conclusive determination of the main suit in which this Application arise.

ii) Any other order(s) as this Honourable Court may be pleased to grant.

iii) Costs of this suit to be borne by the defendants (sic).

The application was brought under Order XXXVII Rule (1) (b) of the Civil Procedure Code Cap 33 R.E 2019 (the CPC). It was supported by a joint affidavit of the applicants. The 1st respondent filed his counter affidavit contesting the application. The 2nd respondent refused the service and was served by substituted service through publication in Mwananchi and Uhuru Newspapers on 15/6/2022 and 21/6/2022. The proof was supplied to the Court and hence the matter proceeded ex-parte against the 2nd respondent. The 3rd respondent appeared in person but he was not contesting the application so he did not file a counter affidavit.

At the hearing which was argued orally, the applicants were represented by Isaac Tasinga, learned advocate, the 1st respondent was represented by Francis Mgare, learned advocate, while the 3rd respondent appeared in person.

Mr. Tasinga prayed to adopt the joint affidavit of the applicants as part of his submissions. He said that paragraphs 13, 14 and 15 of the said affidavits disclosed the grounds for the grant of injunction. Submitting on the mandatory three conditions for the Court to grant the prayers of injunction, Mr. Tasinga submitted that, first, there is triable issue between the two parties before this Court. That, the centre of dispute is about the ownership of pieces of land situated at Mtaa wa Salasala, Kilimahewa Juu, Wazo Ward,

Kinondoni Municipality (here in as land in dispute). He said that the applicants owns separate pieces of land located at the land in dispute which they have purchased from various former owners. That, while enjoying the ownership of those pieces of land, the father of the 1st respondent trespassed on the land and demolished their landed properties.

He said further that, the 1st respondent's father who is now deceased, alleged that he was executing a decree order of Kinondoni Land and Housing Tribunal (the District Tribunal). Mr. Tasinga argued that this is a triable issue as the alleged decree of the District Tribunal is unknown to the applicants and they have never been part of it.

On the second condition, Mr. Tasinga stated that, the 2nd respondent has been trespassing on the disputed land taking intended buyers over there with an attempt to sale the land in dispute while there is a suit pending in this Court. He submitted that if the prayers for injunction is not granted, the 1st respondent will sell the disputed property to the 3rd party and the applicants will suffer irreparable loss. He said that for the sake of justice, the respondents be restrained from selling the land in dispute.

Third, on the balance of convenience, he said that if the 1st respondent will be declared the owner of suit land then he can proceed to sell the same but if he do so while the case is pending, then the applicants stands to suffer serious loss if they win the main case while the suit land is already sold to the 3rd party. He prayed for the application to be granted with costs.

In reply, Mr. Mgare started by submitting that this application is brought under the wrong provisions. That under the cited provisions, the disputed property should be under threat of being removed or disposed of. However, the dispute before the Court is that the applicants are disputing the decision of the District Tribunal. He said that if the landed properties on the land in dispute have already been demolished, then this Court have nothing to restrain.

On the three conditions set in the famous case of **Atilio vs. Mbowe** (1969) HCD 268, on the first condition, Mr. Mgare averred that there is no serious issue to be determined by this Court. He submitted that, there is already Court judgment and decree on the land in dispute where the 1st respondent's late father was declared the lawful owner of the land in dispute. That, it was not the 1st respondent's father who demolished the landed properties but it was the 2nd respondent who did that and he was executing order of the Court in Land Application No. 15 of 2008.

On the 2nd condition, the counsel for the 1st respondent submitted that there is nothing on the land in dispute as the execution has already been done and it was against the 3rd respondent, so there is no irreparable injuries on the applicants.

On the 3rd condition, the counsel averred that, there is no irreparable loss which have been established by the applicants in their affidavit. That, the applicants have also not shown any threat that the 1st respondent intends to sale the land in dispute.

Mr. Mgare submitted further that this Court has to get records of the decree of the District Tribunal which is also cited at paragraphs 7 of the affidavit. He averred that, the applicants were supposed to seek for other remedies but not coming by way of suit as there is already a court decree. He argued that if the applicants have any claim it should be directed to the 3rd respondent. He prayed for the dismissal of the application with costs.

On rejoinder, Mr. Tasinga readily agreed that the chamber summons was brought mistakenly under Order XXXVII Rule 1(b) but the intention was Order XXXVII Rule (1) (a). He prayed for the mistake to be rectified under the slip of the pen rule and moved the Court to invoke the principle of Overriding Objection under Section 3A (1)(2)(3), B(1)(a) (c) and 2 of the CPC.

On the issue of execution of decree of the District Tribunal, the counsel for the applicant stated that, that is the core issue in the main case and has to be proved during the trial of the main case. He reiterated his prayers.

Before I embark on determination of the merit of the application, I will first deal with the preliminary objection raised by Mr. Mgare, counsel for the 1st respondent.

In his submission, he pointed that this application has been brought under the provisions of Order XXXVII Rule 1(b) of the CPC which direct the applicant to prove by affidavit that the respondent intends to remove or dispose of his property with a view to defraud his creditors. That the current Acts.

application does not relate to the cited provisions, so the application is incompetent before the Court.

The applicant has admitted the citing of the wrong provision and stated that the correct provision was order XXXVII Rule 1(a) of the CPC. The counsel for the applicant was quick to resort to the principle of overriding objective which urges the courts to deal with cases justify, speedily and with regard to substantive justice instead of basing on technicalities.

I have seen the enabling provisions on which the application has been brought, and it is true as correctly pointed by the counsel for the 1st respondent and admitted by the counsel for the applicant that, the citing of the provision was wrong. Instead of preferring this Application under Order XXXVII (1) (a), the same was brought under Order XXVII (1) (b).

The next issue is what are the consequences for non-citation of the correct provisions of the law? While the counsel for the 1st respondent contends that the application is incompetent, the counsel for the applicant is of the view that it was a mistake which can be cured under the slip of the pen rule and the principle of overriding objective.

The Court of Appeal of Tanzania in a number of cases has dealt with this aspect of non-citation of the enabling provisions of the law. In the case of **Beatrice Mbilinyi vs. Ahmed Mabkhut Shabiby**, Civil Application No. 475/01 of 2020, CAT at Dar es Salaam (unreported), the application for striking out notice of appeal was preferred under Rule 89(1) instead of Rule

89(2). However, the Court of Appeal invoked its powers and caused a proper provision of the law to be inserted and the matter proceeded on merits.

Basing on that position, it is my view that the same stance can be applied in the present application where instead of citing order XXXVII Rule 1(a), the applicant has cited Order XXXVII Rule 1(b). It is my finding that the omission is not fatal and can be rectified by inserting the proper provision. In addition, the omission can be cured under the principle of overriding objection as long as this Court has jurisdiction to entertain the application, which I am of the firm belief that it has.

Therefore, for the interest of justice, I invoke the principle of overriding objective and I rectify the mistake and order that the enabling provisions of the application be read as Order XXXVII Rule 1(a) of the CPC instead of Order XXXVII Rule 1(b) of the CPC. I overrule the objection on the citation of wrong provisions raised by Mr. Mgare, counsel for the 1st respondent.

Back to the application on merit, the Court's powers to grant temporary injunctions are governed by the provisions of Order XXXVII Rule 1 and 2 of the CPC and other enabling provisions which have been interpreted and elaborated in a number of decisions the famous one being the case of **Atilio vs. Mbowe** (supra). The cited case set three conditions which must be satisfied before such an injunction can be issued. The conditions briefly are, there must be a serious question/prima facie case to be tried on the facts alleged, second, the court's interference is necessary to protect the plaintiff from the kind of injury which may be irreparable and third; that, the balance

of convenience should be in favor of the party who will suffer the greater inconvenience in the event the injunction is or is not granted.

The three conditions must be met cumulatively by the applicant before the order for injunction is granted. The main issue here is whether the applicants have met the said three conditions cumulatively.

On the first condition on the existence of a serious question or prima facie case to be tried on by the Court, in their joint affidavit, the applicants have claimed that they are the legal owners of the land in dispute (parcels of land on land in dispute) where they have erected the residential houses and started living in. And that on 07/6/2019, the 2nd respondent and deceased who was a father of the 1st respondent trespassed on their properties and demolished the same claiming that they were executing Court decree issued by Kinondoni District Land and Housing Tribunal dated 21/5/2019. The applicants argued that there were no decree dated 21/5/2019 before the District Tribunal but the alleged order by the 1st and 2nd respondents has no any legal foundation. The applicants claim that the alleged decree was not known to the applicants and they have never been parties in the said Court case or any Court case.

On their part, the 1st respondent through his advocate, have contended that there is no any serious issue to be determined as the 1st respondent's late father was on 16/2/2016 declared by the District Tribunal to be the lawful owner of the land in dispute.

In was held in the Court of Appeal 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;

> *"In deciding such applications, the Court is to see only a prima facie case, which is one such that it should appear on record that there is a bonafide contest between the parties and serious questions to be tried. So, at this stage,* ***the Court cannot prejudge the case of either party. It cannot record a finding on the main controversy involved in the suit; nor can genuineness of a document be gone into this stage "... (emphasis supplied).***

In the present application, it is my observation that the major contention in the matter is the ownership of the land in dispute.

Furthermore, there is a controversy between the parties on the purported decree issued by Hon. Rung'wecha dated 21/5/2019 of Kinondoni District Land and Housing Tribunal. The applicants stated that there was no such decree while the 1st respondent stated that the said decree declared him as the lawful owner of the suit land so the execution was legal.

Guided by the principle set in the case of **Abdi Salehe Ali (supra)** as quoted herein above, at this stage I cannot divulge on the merit of the main case. Mr. Mruge asked the Court to get records of the contended decree of Kinondoni District Tribunal. With respect, I find that the Court cannot do so at this stage. I cannot prejudge the case or record a finding on the main

controversy involved in the suit. Basing on that stance, I find that there are serious issues to be determined by this Court in the main case.

On the second condition, in their joint affidavit, the applicants have stated that the act of the 1st respondent's late father and 2nd respondent of demolishing the applicant's residential houses has caused untold losses to the applicants in terms of denying them with their lawful accommodation, and subjecting them to tenancy costs, emotional and mental stress. They stated further that, if the prayers sought won't be granted, it will open door for the respondents to use the disputed land and they may even dispose the same to any 3rd party and that will cause irreparable loss to the applicants.

The counsel for the 1st respondent has argued that there is nothing on the disputed land as the execution has been already effected and that the execution was against the 3rd respondent not the applicants.

In the case of **Abdi Ally Salehe (supra),** the Court of Appeal observed that, in the second condition, the applicant is expected to show that, unless the Court intervenes by way of injunction, his position will in some way be changed for the worse.

I find that that applicants have managed to establish that if the orders sought will not be granted, their position might change for the worse. I say so because they have submitted that the land in dispute is in danger or threat of being disposed to the 3rd party by the respondents. The 1st respondent has not denied this allegations by the applicants and through his advocate,

has told the Court that he has already been declared the owner of the land in dispute and even the execution has already took effect. In the respondent's views, there is no any irreparable loss on the applicant's side.

In such circumstances, I agree with the applicants that the land in dispute is under threat of being disposed of by the respondents particularly the 1st respondent. If that will happen and the main controversy on the ownership of the same has not yet been determined by the Court, then the applicants might suffer irreparable damage.

Again, in the case of **Abdi Ally Salehe**, the Court of Appeal was of the view that, the threatened damage must be proved to be serious, not trivial or minor, illusory or insignificant, and that the risk must be in respect of a future damage. I find that in the current application the applicants have established the future damage i.e. if the land in dispute is sold to the 3rd party then their loss will be irreparable.

On the third condition, having found that the applicants are in the risk of suffering future irreparable damage, I also find that the applicants will suffer greater injury if the injunction is refused than the respondents if this application is granted. The applicants have established this condition under paragraph 15 of their joint affidavit. The reason for my finding is that, the 1st respondent is claiming to be the owner of the suit land. As this application is not on declaration of ownership, the respondents stand to suffer nothing as they wait for the hearing and determination of the main case, compared

to the applicants who claims that the land in dispute is in danger of being disposed of by sale by the 1st and 2nd respondents.

I find that the applicants have cumulatively meet the three conditions necessary for the Court to grant temporary injunction. I hereby grant the application and order temporary injunction on the land in dispute as described in the chamber summons and joint affidavit of the applicants. Costs to follow the events in the main cause.

It is so ordered.

A. MSAFIRI,

JUDGE

02/08/2022