

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION) AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 356 OF 2023.

ABDULKADIR ELIMANZI RASHIDI & 136 OTHERS APPLICANTS

VERSUS

THE HONORABLE ATTORNEY GENERAL..... 1ST RESPONDENT

BOARD OF TRUSTEES, NATIONAL SOCIAL

SECURITY FUND 2ND RESPONDENT

Date of Last Order: 28/08/2023

Date of Ruling: 05/10/2023

RULING

I ARUFANI J.

The applicants filed in this court the instant application under section 68 (e) ,95 and Order XXXVII Rule 5 of the Civil Procedure Code [Cap 33 R.E 2019) and any other enabling provisions of any other law. The applicant is seeking for an order of the court to vary its order dated 1st June, 2023 which directed the applicants to continue paying their monthly instalments as per their agreement while awaiting the hearing and determination of Land Case No.118 of 2021.

The application is supported by the Affidavit of Mr. Benitho Mandele and opposed by the counter affidavit sworn by Mr. Frank Mgeta. While the applicants are represented in the matter by Mr. Benitho Mandele,

learned advocate the respondents are represented in the matter by Mr. Frank Mgeta, learned state Attorney.

In support of the application the counsel for the applicant prays to adopt the prayers in the chamber summons together with the grounds deposed in his affidavit as part of his submission. He submitted that the basic prayer is for the variation of the order in the ruling dated 1st June 2023 and the reasons for the said prayer are contained at paragraphs 3, 4 and 5 of the affidavit supporting the application.

He submitted further that, the reason for seeking for variation of the stated order of the court is that on 1st June, 2023 this court granted an application for maintenance of the status quo of the suit premises and also made an order that the applicants should continue paying the monthly instalments in accordance with the higher purchaser agreement between the applicants and the second respondent. He argued among the issues involved in the dispute between the applicants and the respondents is about determination of the amount paid by the applicants to the second respondent and the amount which the second respondent is claiming from the applicants as arrears of monthly instalments.

He argued the second respondent's balance sheet in respect of the monthly arrears required to be paid by the applicants to the second

respondent does not reflect the true liability of the applicants to the second respondent. He submitted the second respondent's claims of monthly arrears are unrealistic hence there is a need for determination of the rate of the amount required to be paid by the applicants as monthly instalments. He added that the dispute between the parties is in respect of the prices of the houses which touches the issue of monthly instalments and that the stated monthly instalments are in issue in the main case because the main case is challenging the Hire Purchase Agreement on ground of being entered fraudulently.

In his reply, the counsel for the respondents submitted that the application before the court is challenging the ruling and drawn order delivered by this court. He argued they have scrutinized the application and the submission filed in the court by the counsel for the applicants but they have failed to understand what the applicants are intending this court to do. He argued the rationale for coming to the stated finding is that, normally when the court issue an order it becomes functus officio and whoever aggrieved with such an order he may appeal or apply for review of such order.

He submitted that the court can vary an order of injunction and not any other order as provided under Order XXXVII rule 5 of the CPC. He

stated for that matter the present application is an appeal in disguise. He submitted the court order has to be respected until set aside according to the law and not to challenge it through backdoor. He submitted that, to grant this application will amount to an abuse of the court order and it is against the principle that there should be an end to litigation.

He added that, what the applicants intends is to move the court to correct its own decision outside the ambit of the rules and procedure provided by the law. He referred the court to the case of **Mohamed Enterprises (T) Limited V. Masoud Mohamed Nasser**, Civil Application No. 33 of 2012 CAT At DSM at page 17 where it was held that, Judge of the High Court is not allowed to determine the matter already dealt with the same judge or by himself.

He submitted that, the sale agreement under higher purchaser arrangement was executed between the second respondent and the applicants whereby the second respondent sold to the applicants the suit premises under the higher purchase agreement and the applicants agreed to the terms and conditions of the purchase agreement. He cited in his submission clauses 1 (ii), 2 (3) and 3 (3) of the Higher Purchase agreement which provides for the terms and conditions for payment of monthly instalments.

In conclusion he submitted that, grant of the application would mean to affect the performance of the Higher Purchase Agreement by allowing the applicants to remain in occupation of the suit premises without paying their monthly instalments. He stated as much as the applicant are desirous of remaining in occupation of the suit premises then they have a reciprocal duty to pay for the same as ordered by the court.

After painstakingly considered the rival submissions from the counsel for the parties the court has found the issue to determine in this application is whether the application filed in this court by the applicants deserve to be granted. The court has found the order the counsel for the applicants is seeking to be varied is the order which directed the applicants to continue paying the monthly instalments agreed in their Hire Purchase Agreement while waiting determination of the suit pending in this court.

The stated directive was made by the court following the submission of the counsel for the respondents made in Misc. Land Application No. 265 of 2022 that, if the court will grant the order of maintaining the status quo of the suit premises sought by the applicants, the second respondent will fail to pay their members their legal entitlements. The court gave the stated directive after seeing the order the applicants were seeking from

the court is an order of maintaining the status quo ante of not being evicted from the suit premises and not to stop paying the monthly instalments agreed in the Hire Purchase Agreement.

The court has found it is deposed at paragraph 4 of the affidavit supporting the application that the dispute between the parties in the main suit involves the issue of mis determination of the amount actually paid by the applicants to the second respondent and the amount which the second respondent is supposed to claim from the applicants as arrears of monthly instalments. It is also deposed at paragraph 5 of the affidavit supporting the application that the second respondent's balance sheet in respect of the arrears of monthly instalments payable does not reflect the true liability of the applicants to the second respondent. It is further stated in the same paragraph that the claims of the second respondent are unrealistic hence there is a need for determination of the actual rates to be paid by the applicants to the second respondent as monthly instalments.

The court has considered the averments deposed in the above referred paragraphs of the affidavit supporting the application of the applicants and the submission made by the counsel for the applicants in support of the application and find that, although the stated issues might

be among the issues to be determined in the main suit but they cannot make the court to vary the directives it made in the impugned ruling that the applicants are required to continue paying the agreed monthly instalments if they desirously wish to continue to stay in the suit premises.

The court has come to the stated view after seeing that, as stated earlier in this ruling the application which was before the court was for an order of maintenance of the status quo ante of the applicants to continue to stay in the suit premises without being evicted therefrom and not to stop paying the agreed monthly instalments. The argument that there is dispute on the actual amount which has been paid by the applicants to the second respondent and the balance sheet of the second respondent does not reflect the true liability of the applicants to the second respondents has been found by the court cannot be a ground for varying the order of the court.

The court has come to the stated finding after seeing that, as there is nowhere stated the applicants have already finished paying their agreed monthly instalments there was nothing wrong in the directive made by the court that the applicants are required to continue paying the agreed monthly instalments while waiting for determination of their dispute with the second respondents. Since there was no prayer or order of stopping

the applicants to pay the monthly instalments agreed in the parties' Higher Purchase Agreement the court has failed to see any reason which can make it to vary the directive it gave in the ruling which the applicants are praying to be varied.

It is because of what has been stated hereinabove, the court has found there is no sufficient reason which has been advanced to the court to move it to vary the directive it gave in the ruling delivered on 1st June, 2023 in Misc. Land Application No 265 of 2022. Consequently, the court has found the application of the applicant is devoid of merit and it is hereby dismissed in its entirety with costs. It is so ordered.




I. Arufani
JUDGE
05/10/2023

Court:

Ruling delivered today 05th day of October, 2023 in the presence of Ms. Winnie Mandele, learned advocate for the applicants and in the presence of Mr. Stanley Mahenge and Mr. Baraka Mgaya, learned State Attorneys for the respondents. Right of appeal to the Court of Appeal is fully explained.




I. Arufani
JUDGE
05/10/2023