IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 574 OF 2023

(Arising from Land Case No. 293 of 2023)

THREE ROAD COMPANY LIMITED .... APPLICANT

VERSUS

SERAFINA LIMITED ..... RESPONDENT

RULING

19/10/2023 & 02/11/2023

A. MSAFIRI, J.

The applicant have brought this Application under Order XXXVII Rules 1(a) and (b) of the Civil Procedure Code, Cap 33 R.E 2019, (herein the CPC) praying for the order of this Court to restrain the respondent, her servants, employees, agents or anyone acting under her instructions from conducting sale of Plot No. 39, Mikocheni Light Industrial Area, Kinondoni Municipality, Dar es Salaam and not to evict the Applicant from the suit premises pending final and conclusive determination of the main suit.

The Application is supported by the affidavit deposed by Samuel Shadrack Ntabaliba, advocate for the applicant. The Application was

contested by the respondent through the counter affidavit deposed by Muslim Jaffer, a Principal Officer of the respondent.

The hearing was conducted by written submissions whereby submission in chief and rejoinder by the applicant was drawn and filed by Mr. Samuel Shadrack Ntabaliba, learned advocate, while the reply submission by the respondent was drawn and filed by Mr. Shehzada Walli, learned advocate.

In submissions, Mr. Ntabaliba started his submissions by adopting his affidavit in support of the Application. He averred that the affidavit has clearly demonstrated grounds and reasons warranting this Court to grant the orders sought. He stated further that, the applicant entered into Memorandum of Understanding (herein as MOU) with the respondent for leasing of Plot No. 39 located at Mikocheni Kinondoni Light industrial Area, Kinondoni Municipality for the lease tenure of ten (10) years from 1st October 2022 up to 30th September 2031.

That, because it was a long term lease, the MOU permitted constructions hence the applicant made huge investment and constructions having been assured of long term lease of ten(10) years.

The counsel submitted that according to clause 25 of the MOU, it is provided clearly that the tenant (applicant) will be given first priority to

purchase the suit property in case the landlord wants to sell it. He contended that the respondent has breached the terms and conditions of lease agreement which warrants this Court to grant temporary injunction.

The counsel for the applicant argued that on 7th June 2023, the respondent wrote a letter to the applicant on her intention to sell the rented premises and the applicant replied promptly on 20th June, 2023. In the reply letter, the applicant matched the offer as per MOU and lease agreement which has set that the applicant has to respond within 14 days.

Mr. Ntabaliba stated that, before communicating the intention of sell to the applicant, the respondent advertised of the said intention in the social media through KITISYA REAL ESTATE. Furthermore, on 10th July 2023, the respondent wrote a letter to the applicant of Notice of termination of lease agreement effective from 10th July 2023. That this was contrary to clause 25 of MOU which states that no party shall terminate the lease agreement before expiration of two years on which the lease agreement commenced on 1st January 2022 and by two years it has to expire on 1st January 2024.

That, despite that the applicant complied with clauses 25 of MOU and clause 5.8 of lease agreement, yet the respondent is in negotiations with other buyers to sell suit property instead of the applicant.

Mr. Ntabaliba submitted on the three mandatory conditions set in the case of **Attilio vs. Mbowe** (1969) HCD 284 and averred that they have been met.

On the first condition, that there must be triable issues in the main suit, he submitted that, the applicant has been denied the first offer to buy the property as per clause 25 of MOU and clause 5.8 of the lease agreement. That the notice of termination of lease agreement is prematurely issued before the expiration of two years as per MOU and that the respondent has failed to consider the huge investments done by the applicant on the suit premises in anticipation of ten years lease agreement.

On the second condition of necessity of protecting the applicant from irreparable injury, Mr. Ntabaliba submitted that it is obvious that if the sought order is not granted, the applicant will suffer irreparable loss because the applicant has made huge renovations to suit her business to the tune of TZS 15,000,000,000/=. That according to the terms of MOU and lease agreement, the applicant was to be given the first priority to purchase the rented premises but the respondent has given the permission to KITISYA REAL ESTATE to sell the same, hence the need for the Court interference to protect the applicant's rights or else she will

suffer irreparably.

On the third condition, the counsel submitted that if the sought order will not be granted, it is the applicant who will suffer more inconvenience as she will be forcefully evicted from the rented premises which he has heavily invested with the anticipation of long term lease of ten years.

He prayed that the prayers be granted.

Mr. Walli, counsel for the respondent, responded and vehemently denied the applicant's allegations. He prayed to adopt the contents of the counter affidavit and submitted that it is trite law that the power to grant an injunction is discretionary on the part of the Court and such discretion has to be exercised judiciously. He referred the Court to the famous case of **Attilio vs. Mbowe (supra)** where the three mandatory conditions for the grant of temporary injunction were set.

Mr. Walli submitted further that they have gone through the contents of the affidavit in support of the application but the same does not disclose any of the conditions necessary to prompt this Court to grant the sought injunction. He contended that even if it is presumed that the affidavit contains the missing information, still the applicant has not managed to establish the three ingredients as per the requirement.

He argued that on the first condition of prima facie case, the applicant

failed to disclose a prima facie case. That she have failed to establish ownership of what they are claiming. That on this condition, the duty of the applicant is to show that there is a prima facie case in the substantive suit with probability of success. He contended further that what the applicant claims is frivolous and vexatious since they claim for the amount of money which does not belong to them.

Mr. Walli argued that, the applicant's claims emanates from an MOU which ceases to exist or govern the parties' business relation immediately after the execution of lease agreement on 5th June 2022. Hence there is no prima facie case as per the applicant's claims.

That in the main suit, the applicant is praying for a declaration that the respondent has breached the MOU and lease agreement. And that, these means that the applicant has conceded to the termination notice and is praying for the remedies and is not praying to continue with the lease. That the Court cannot grant the prayers in the plaint since they do not coincide with the Application for injunction.

On the second condition of irreparable loss, the counsel for the respondent submitted that the injunction which is granted to prevent the party from an irreparable injury is aimed at preventing irreparable injury which is substantial and which cannot be adequately remedied or atoned

for by damages.

He said that the applicant ought to have stated in the affidavit on how she is likely to suffer but she chose not do so and instead she opted to explain it through the back door in her advocate's submission. He argued that submissions are not evidence and the applicant did not state in the affidavit on how she will suffer if the injunctive order were not granted. He added that what the applicant is claiming is money and the same can be repayable and compensated in case of any damage.

On the third conditions on balance of convenience, Mr. Walli submitted that the applicant have not demonstrated in her affidavit that there will be greater hardship and mischief suffered by them if the injunction is withheld than will be suffered by the respondent if it will be granted. That, instead the applicant has brought all those grounds during the submission of her counsel before the Court. He insisted that evidence has to be proved by affidavit as submissions are not evidence. To cement this point, the counsel cited the case of **the Registered Trustees of the Archiodese of Dar es Salaam vs. the Chairman, Bunju Village Government &11 others,** Civil Appeal No. 147 of 2006 where the Court of Appeal held that submissions are not evidence.

The counsel contended that, on a balance of convenience, the

respondent is going to suffer more losses as not only will he be not allowed to exercise the legal rights conferred to him as the legal owner of the suit property but also will be in breach of agreement to the potential buyers who intend to buy the property.

He reiterated that the applicant have failed to meet all conditions as set in the case of **Attilio vs. Mbowe (supra)** and hence the Application lacks merit and should be dismissed with costs.

In rejoinder, Mr. Ntabaliba argued that the applicant in her affidavit at pages 7 up to19, have clearly stated good cause for warranting this Court to grant temporary injunction. He mainly reiterated his submission in chief and prayers.

Having heard and considered the submissions from the parties in support and in contest of this matter, I have also read the contents of the affidavit and counter affidavit along with the attached documents.

As was correctly put by the counsels for both rival parties, conditions for granting the temporary injunction were set out in the famous case of **Attilio vs. Mbowe (supra).** These conditions are also reflected in many other cases after Attilio vs. Mbowe's case. The conditions are namely existence of serious question to be tried on the facts alleged, demonstration that the applicant stands to suffer irreparable loss if Adle.

injunction is not granted, the loss incapable of being monetary compensated and the balance of convenience in favour of the party who will suffer greater inconvenience if injunction is or is not granted.

It is also trite law that the conditions are to be met cumulatively and meeting one or two conditions will not be sufficient for the purpose of the court exercising its discretion to grant an injunction. Therefore in the instant Application, the pertinent question to be determined is whether the facts disclosed in the Application for temporary injunction satisfy the conditions for granting the injunction which has been prayed for.

Starting with the first condition of prima facie case, it is a settled position of law that in the said condition, the applicant is required to show that there is serious question to be tried on the alleged facts and the reliefs sought by the applicant in the main suit must be the one that the court is capable of awarding.

Furthermore, in the same breath, the Court is required to look at the said reliefs sought by the applicant/ plaintiff in the main case and the claims made in order to see if they raise a serious question for determination of the Court.

In the affidavit, it is my view that the applicant has managed to establish that there is a serious question for determination by the Court.

This is clearly shown from paragraphs 3-18 of the affidavit. The applicant have established at a minimal that there is a question of breach of MOU and lease agreement by the respondent who is the landlord.

It is shown that the applicant and respondent has entered a lease agreement for a long period of ten years and according to MOU clauses they had agreed not to terminate the lease agreement until the lapse of two years from the commencement date of 1st January 2022. That, it was also agreed that in the event the landlord wants to sell the suit premises, then the landlord will communicate the same to the tenant who will have the right to match the offer if any and on failure to do so, the landlord will proceed with sale.

The applicant claims that the landlord, respondent has breached all those terms which they agreed between them. The respondent disputed the claim in her counter affidavit and contended that the MOU ceased to exist immediately after the execution of the lease agreement on 5th June 2022. About the claimed right to match the offer, the respondent denied and replied that the applicant did not match the offer as was expected but requested for one month time to raise funds.

All these contentions between the applicant and respondent in their affidavit and counter affidavit respectively have convinced me that there

is a triable issue between the parties to be determined in the main case.

I have also gone through the plaint in the main case and I am also satisfied that the claimed reliefs raise a serious question to be determined by this Court and the Court is capable of awarding them if proved. Among the reliefs claimed are a declaration that the defendants are in breach of MOU and lease agreement and the payment for the compensation for the breach.

For those reasons, I find that the applicant have managed to establish the first condition.

On the second condition of irreparable injuries, I have gone through the whole of the affidavit and it is only paragraph 20 which states that unless there is an order of this Court restraining the respondent from conducting constructions (eviction?), the applicant stands to suffer irreparable loss. The affidavit is silent on how the applicant will suffer the irreparable loss. At paragraph 19 of the affidavit, the applicant states that despite of the letters sent by the plaintiff to the respondent about the breach of agreement by the defendant, the latter have insisted on evicting the plaintiff on October 2023. However, the applicant did not explain on how she will suffer great loss by that act of being evicted from the suit premises.

Instead, it was in the submission in Court where the counsel for the applicant elaborated on the kind of injury which is irreparable. He submitted that the applicant has made huge renovations on the suit premises to the tune of TZS 1,500,000,000/=.

It is trite law that the sufferance capable of being atoned by monetary payment cannot be termed as irreparable loss.

The second condition mandatory for the grant of temporary condition states that; *the applicant have to establish that he will suffer irreparable loss if injunction is not granted,* ***such loss being incapable of being compensated by an award of damages.***

Also in the case of **Kaare vs. General Manager Mara Cooperative Union (1924) Ltd, (1987)** TLR 17, it was stated that;

> *"By irreparable injury it is not meant that there must be no physical possibility of repairing the injury but merely that the injury would be material e.g. one that could not be adequately remedied by damages".*

From the above holding, it should not be only loss, but irreparably one if the injunction is refused.

This principle was further reiterated in the case of **Mariam Christopher vs. Equity Bank Tanzania Limited & Another**, Misc.

Land Case Application No. 1070 of 2017 where this Court observed as follows;

> *"In considering the question of irreparable loss, the Court of course has to look at the injury which is* ***one of irreparable loss which cannot be compensated by monetary".*** ***(Emphasis mine).***

Guided by the above principle of law, it is my finding that first, the applicant did not state in her affidavit how she will suffer the irreparable loss. Second, even if I rely on the counsel for the applicant's submissions in Court, I am of the view that the loss which is demonstrated is capable of being atoned by way of damages. I say so for the reason that the applicant claims to have made huge renovations to the tune of TZS 1,500,000,000/=.This is monetary loss which can be atoned by compensation. Looking at the reliefs being prayed by the applicant in the main suit, the applicant/plaintiff is asking for payment of TZS 1,500,000,000/= being compensation for the breach of contract. This shows clearly that the loss claimed by the applicant is reparable by way of compensation. I find that the applicant have failed to meet the second condition.

On the third condition, in the submissions, the applicant through her counsel averred that she will suffer more inconvenience. However, as

correctly observed by the respondent, this condition is not reflected at all in the affidavit supporting the application. The affidavit is silent on this condition, it 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. (See the case of Court of Appeal 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 (Unreported).

From this, I find that the applicant have also failed to establish the third condition.

As observed earlier, it is trite law that, all conditions set out must be met cumulatively and meeting one or two conditions will not be sufficient for the purpose of the Court exercising its discretion to grant an injunction. [See the case of **Christopher P. Chale vs. Commercial Bank of Africa**, Misc. Civil Application No. 635 of 2017 High Court (unreported)].

In the event, the applicant have failed to meet the two conditions out of three conditions, so I find no merit in the Application. I hereby dismiss it with costs.

It is so ordered.

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A.MSAFIRI

JUDGE

02/11/2023