IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 265 OF 2022

ABDULKADIR ELINAZI RASHID & 136 OTHERS .... APPLICANTS

VERSUS

THE ATTORNEY GENERAL .... 1ST RESPONDENT

BOARD OF TRUSTEES,

NATIONAL SOCIAL SECURITY FUND .... 2ND RESPONDENT

Date of last Order: 16/03/2023

Date of Ruling: 01/06/2023

RULING

I. ARUFANI, J

The applicants filed in this court the instant application seeking for an order that the *status quo ante* be maintained and the applicants be allowed to remain in the suit premises pending hearing and determination of Land Case No. 118 of 2022 pending in this court. The application is made under sections 68 (e) and 95 and Order XXXVII Rule 1 (a) of the Civil Procedure Code, Cap 33 R.E 2019 and it is supported by an affidavit sworn by Mr. Benitho Mandele, learned advocate for the applicants.

The application was opposed by the joint counter affidavit of the respondents which was sworn by Mr. Geofrey Timothy, Estate Manager of the second respondent. while the applicants were represented in the matter by Mr. Benitho Mandele, learned advocate the respondents were represented by Mr. Mugeta Frank, learned State Attorney. By consent of

the counsel for the parties the application was argued by way of written submissions.

In arguing the application, the counsel for the applicants prayed to adopt the chamber summons and the supporting affidavit together with the reply to the counter affidavit as part of his submission. He based his submission on the conditions required to be established to enable the application to be granted as enunciated in the case of **Atilio V. Mbowe** (1969) HCD 284 which are serious question to be tried, irreparable loss to be suffered by the plaintiff and balance of convenience.

He argued in relation to the first condition of serious question to be tried that, the pleadings filed in this court raise the serious issues of fraud, misrepresentation and breach of an agreement which need to be determined by the court. He stated the applicants' allegation of fraud against the second respondent is based on the CAG Report and the Property Tax Invoices pleaded at paragraphs 13 and 14 of the applicants' affidavit dated 20th May, 2022. He argued the stated report and the invoice raises a greater chances and probability of entitling the applicants to the reliefs prayed in the plaint which is a first condition for the grant of an order of temporary injunction.

He argued in relation to the second condition for granting the order of temporary injunction which is about irreparable loss to be suffered that,

paragraphs 23, 24 and 25 of the affidavit dated 20th May, 2022 are loud in this requirement. He stated it is averred in the stated paragraphs that, the notice issued to the applicants by the second respondent are aimed at evicting the applicants and dispossess them the suit premises which are in their ownership. He argued that, if the respondents will not be restrained and left to implement their intention the applicants will lose their properties and they will be rendered homeless as they are used the by the applicants as their only available residential houses.

He went on arguing that, rendering the applicants homeless will subject them to untold serious human suffering which will be irreparable injury to them as the injury will not be capable of being replaced or atoned or compensated by money. He supported his submission with the case of **Agnes Kosia & Others V. The Board of Trustees of NSSF & Another,** Misc. Land Case Application No. 590 of 2016 where it was stated inter alia that, if the initiated eviction process is left unchecked the applicant will be rendered homeless which will lead into difficult and unpleasant life suffering from lack of shelter which is one of the basic needs in life.

As for the third condition of balance of convenience the counsel for the applicants argued that, the same is satisfied by what is averred at paragraph 24, 25 and 26 of the affidavit supporting the application. He

argued that, the misery and hardship the applicants will suffer because of withholding the order of temporary injunction outweigh the inconvenience the respondent may suffer, if the order will be granted. He submitted the respondents will not suffer any inconvenience. He referred the court to the case of **Agness Kasia & Others** (supra) where it was stated that, the respondent will not suffer inconvenience like the applicants if the process of eviction will be halted. It was stated as the suit premises are immovable the second respondent will repossess them if the matter will be determined in their favour. At the end he prayed the application be granted.

In his reply the counsel for the respondents started by arguing that, grant of an ad interim injunction order is something purely within the discretion of the court. He stated it is the discretion which must be exercised in accordance with the sound judicial principles in the light of the facts and circumstances in each case. He submitted that the principles which governs grant of temporary injunction are well articulated in the case of **Atilio V. Mbowe** (supra) which requires establishment of presence of prima facie case, if the injunctive order will not be granted that party is likely to suffer a great mischief and the interference of the court is necessary to protect the party from an irreparable injury.

He went on giving a background of the matter and stated the applicants' case is based on the Higher Purchase Agreement entered by the second respondent and the applicants. He stated the second respondent sold to the applicants the houses in dispute on conditions that the applicants were required to made a down payment equivalent to three months instalments and the suit premises were handed to the applicants. He stated the parties agreed the applicants would have paid the remaining balance in 180 equal monthly instalments without default. He stated it was upon full payment of the purchase price the title would have passed to the applicants.

He made reference to what is provided under clauses 1 (ii), 2 (3), 3 (3) and 4 (1) of the Hire Purchase Agreement and stated that, the applicants have failed to honour the agreement they entered with the second respondent by failure to pay monthly instalments. He argued that, the stated failure caused the second respondent to issue several demand notices, eviction notices and intention to repossess the suit premises as provided under clause 4 (1) of the Hire Purchase Agreement. He argued that, clause 3 (3) of the Agreement states the purchaser shall not withhold monthly repayment for any reason or under any circumstances whatsoever.

He submitted it is a settled principle that parties are bound by the terms of their contract and referred the court to the case of **Agnes Kosia & Others** (supra) where it was stated that, a purchaser of Hire Purchase Agreement should not stop paying the purchase price and yet remain in occupation of the suit premises. It was argued that, the purchasers are required to continue paying the purchase price while continuing to pursue their legal rights in court. He also referred the court to the case of **Lulu Victor Kayombo V. Oceanic Bay Limited**, Consolidated Civil Appeals No. 22 and 155 of 2020, CAT at Mtwara (unreported) where it stated that, once parties have freely agreed on their contractual clauses, it will not be open for the court to change those clauses but to enforce them.

He submitted the applicants are in default of payment of monthly instalments. He argued that, grant of temporary injunction would mean to affect the performance of the Hire Purchase Agreement by encouraging and allowing the applicants to remain in occupation of the suit premises without paying monthly instalments. He added that, to grant the order it will mean to restrain the second respondent from exercising her contractual right. He submitted the prima facie case required to be established for the injunctive order to be granted implies the probability of the plaintiff to obtain the reliefs on the material placed before the court.

He referred the court to **Misc. Land Case Application No. 540 of 2020** and **Land Review No. 324 of 2021** filed in this court by the applicants against the respondent which were decided against the applicants. He argued that, the applicants are required to pursue their matter under the provisions of the new Arbitration Act and not otherwise. He submitted the applicants have not managed to establish the first condition for granting the order of temporary injunction they are seeking from this court articulated in the case of **Atilio V. Mbowe** (supra).

He also referred the court to the Commentary by Mulla on the **Code of Civil Procedure**, 17th Edition, Vol. 4 where the writer commented that, injunctions are form of equitable reliefs and they have to be adjusted or moulded in aid of equity and justice to the fact and circumstances of each particular case. He argued that, equity require those who come to equity to come with clean hand. He submitted that, the applicants are in total breach of the signed agreement and in breach of the court's order issued in the case of **Agnes Kosia & Others** (supra) where the applicants were ordered to resume paying their respectively monthly instalments.

He argued that, the second respondent is a pension fund and the money in its possession belongs to her insured employees. He stated the project was implemented through financing scheme based on the

contributions deducted from the insured employees. He stated that the applicants' occupation of the suit premises without paying their monthly instalments will affect the operations of the second respondent and it will fail to meet its obligation of paying statutory social security benefits to their members. He submitted the second respondent's members will suffer irreparably for being denied payment of their statutory entitlements.

He went on submitting that, the applicants have no prima facie case whatsoever, so as to override the rights and interest of the numerous beneficiaries of the social security scheme. He stated the applicants stand to suffer no any harm as they have been in occupation of the suit premises without paying their instalments which is a total contravention of the agreements, they entered with the second respondent. He finalized his submission by stating the applicants have failed to meet the legal threshold for being granted the order of temporary injunction they are seeking from this court and prayed the application be dismissed with costs.

In his rejoinder the counsel for the applicants adopted his submission in chief and continued to submit that, the application is based on challenging the validity of the agreement entered by the applicants and the second respondent on grounds of fraud and misrepresentation.

He argued the counsel for the respondents is wrong to say the applicants have paid only the first three months instalments. He stated the respondent's counsel has omitted to include or consider payments made by the applicants subsequent to the first three monthly instalments. He stated one of the issues to be considered and determined in the main suit relates to the monies paid by the applicants to the second respondent.

He stated the applicants are challenging the purchase price of the suit premises in the suit pending in this court basing on the CAG report and Land Rent Invoices from the Temeke Municipal Council. He stated what is provided under clause 3 (3) of the Agreement is not enforceable as the agreement is in question in the main case on grounds of fraud. He stated the case of **Lulu Victor Kayombo** (supra) is not applicable in the present application. He went on arguing that, the respondent's right to repossess the suit premises is in dispute in the suit pending in the court.

He argued that, the decision made in the case of **Agnes Kosia & Others** (supra) collapsed when the suit on which it was based collapsed in the court. He stated that, the argument that Misc. Land Application No. 540 of 2020 shows the main case has no chance of success as is subject to Arbitration is not correct because all the attempt to initiate arbitration process have failed and pave way for the suit present before the court. In conclusion he prayed the application be granted.

I have painstakingly considered the submissions fronted to the court by the counsel for the parties. After going through the documents filed in this application and in the main suit the court has found the issue to determine in this application is whether the applicants deserve to be granted the order of temporary injunction they are seeking from this court. The court has found that, as rightly argued by the counsel for the parties the conditions governing determination of an application for an order of temporary injunction in our jurisdiction were well articulated in the case of **Atilio V. Mbowe** cited in the submissions of the counsel for the parties. The conditions laid in the foregoing cited case are as follows:

(1) *"There must be serious question to be tried on the facts alleged, and a probability that the plaintiff will be entitled to the relief prayed.*

(2) *That the court's interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established, and*

(3) *That on the balance of convenience there will be greater hardship and mischief suffered by the plaintiff from the withholding of the injunction than will be suffered by the defendant from the granting of it."*

I will start with the first condition of serious question to be tried which sometimes is referred as a prima facie case. The court has found the position of the law as stated in several cases decided by our courts is

that, the court is not required to examine the material before it closely and come to a conclusion that the plaintiff has a case which is likely to succeed, as to do so would amount to prejudging the case on its merit. The stated position of the law was made clear in the case of the **CPC International Inc V. Zainabu Grain Millers Ltd**, Civil Appeal No. 49 of 1999, (unreported) where it was stated that, it will be premature to dwell in determining the applicant will win the main suit or will obtain a decree at this stage as the parties have not adduced any evidence to prove or disprove the reliefs the applicants are seeking from the court. The above view is also being bolstered by what was stated by Lord Diplock in the case of **American Cyanamid Co. V. Ethicon Ltd**, (1975) 1 All ER 504 which is a leading case in this aspect that: -

> *"It is not part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration. These are matters to be dealt at trial".*

While being guided by the position of the law stated in the above cited cases the court has found in determine if there is a serious question for determination in the present application it is required to use the facts as disclosed in the plaint and in the affidavit filed in the court by the

applicants and the counter affidavit filed in the court by the respondents together with facts deposed in the reply to the counter affidavit.

That being what the court is required to look, the court has found paragraphs 11, 12, 13, 14 and 15 of the affidavit supporting the application and paragraphs 13, 15, 16 and 17 of the plaint shows the applicants are challenging the validity of the agreement they entered with the second respondent for the Hire Purchase of the suit premises. The claim of the applicants is that the agreement they entered with the second defendant is tainted with fraud and misrepresentation and they want the court to determine the legality of the stated Hire Purchase Agreement.

The court has found the stated allegations are denied by the respondents as appearing at paragraphs 8, 9, 10, 11 and 12 of the respondents' counter affidavit and at paragraphs 4, 5 and 6 of the joint written statement of defence of the defendants which put the applicants into strict proof thereof. The court has found the stated allegations are neither vexatious nor frivolous which as stated in the case of **American Cyanamid Company V. Ethicon Ltd**, [1975] AC 396 would have caused the court to find the applicants have no serious triable issue need to be determined by the court.

The stated averments make the court to find there is a serious triable issue relating to the legality of the agreements entered by the

applicants and the second respondent requiring determination of the court. That being the position of the matter the court has found the applicants have managed to establish the first condition that there is a serious triable issue between the parties in the main suit which deserve to be considered and determined by the court after receiving the evidence from the parties.

Coming to the second condition of irreparable loss the court has found that, it is a settled position of the law that, 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 can be established. It was stated in the book of **Sohoni's Law of Injunction**, Second Edition, 2003 at page 93 that, as the injunction is granted during pendency of a suit, the court will interfere to protect the applicant from injuries which are irreparable. The expression "irreparable injury" means that, it must be material one which cannot be adequately compensated for in damages.

Under the guidance of the stated position of the law the court has found there is no dispute that the applicants entered into a Higher Purchase Agreement with the second respondent for buying the suit premises. The court has also found there is no dispute that it was a term and condition of the agreement that the applicants were required to

continue paying the agreed monthly instalments and after finishing paying the total price of purchasing the suit premises, they will be given full title over the suit premises. Before finishing to pay the full purchase price of buying the suit premises the applicants have come to this court to challenge the agreement on ground that it is void for being activated by fraud and misrepresentation.

The court has found that, as rightly argued by the counsel for the applicants, paragraphs 23, 24 and 25 of the affidavit supporting the application shows that, the second respondent has issued notices of evicting the applicants from the suit premises and repossessing the same. It is the view of this court that, if the applicants will be evicted from the suit premises before determination of the rights they are claiming in the main suit, they will suffer irreparable loss because as deposed in the mentioned paragraphs of the affidavit and submitted by their counsel they are using the suit premises as their dwelling houses.

The above stated view of this court is also getting support from the case of **Agnes Kosia & Others** (supra). In the cited case, the court was dealing with the application for an order of temporary injunction filed in the court by some of the applicants in the present application seeking for an order to maintain the status quo of the suit premises pending determination of the suit they had filed in the court to question the validity

of the terms and conditions of the Hire Purchase Agreement they entered with the second respondent. The court stated in the cited case that: -

> *"... what is plain for all to see is the fact that there are very serious triable issues in the main suit calling for determination by this court. .... While the above posed questions are yet to be considered and determined by the court, the respondents have initiated eviction process which if left unchecked, will definitely render the applicants homeless. I entertain no doubts whatsoever that if evicted: the applicants will lead difficult and unpleasant life-suffering from lack of shelter which is one of the basic needs of life."*

Since it is not disputed that the applicants are using the suit premises as their dwelling houses and it has not been stated anywhere that they have alternative accommodations the court has found if they will be evicted from the suit premises, they will definitely be rendered homeless and they will be subjected into serious and untold human suffering. To the view of this court that is an irreparable injury to the applicants which as submitted by the counsel for the applicants will not be capable of being replaced or atoned or compensated by money. In the premises the court has found the applicants have managed to satisfy the second condition for being granted the injunctive order they are seeking from this court which is irreparable loss or injury to be suffered if they will be evicted from the suit premises.

As for the third condition for granting the 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. The court has found each side has submitted extensively how they will be inconvenienced if the order of temporary injunction will be granted and if it will be withheld.

The court has found it is deposed at paragraph 24, 25 and 26 of the affidavit supporting the application and it has been argued by the counsel for the applicants the misery and hardship the applicants will suffer if the order of temporary injunction will not be granted. On the other side the court has found the learned Stated Attorney has argued extensively how the respondents will be inconvenienced if the order will be granted. He stated the second respondent will be more inconvenienced because it will fail to pay their members their legal entitlements.

After considering the stated submissions the court has found the order the applicants are seeking from this court is not an order to stop them from continuing to pay the monthly instalments, they are required to pay in the impugned Hire Purchase Agreement they entered with the second respondent. They are praying for an order that the *status quo ante* be maintained and be allowed to remain in the suit premises pending

hearing and determination of the suit pending in this court. As the applicants are not seeking for an order of stopping them to pay the agreed monthly instalments, the court has failed to see how the respondents will be inconvenienced if the order of temporary injunction the applicants are seeking from this court will be granted.

It is the view of this court that, even if the order the applicants are seeking from this is granted, the applicants are required to continue paying their monthly instalments as per their agreement until when it will be determined otherwise by the court or a competent body or authority. They have no justification whatsoever to stop continuing to pay the agreed monthly instalments which will enable the second respondent to pay the rights of their members. The stated view of this court is being fortified by the position stated by this court in the case of **Agnes Kosia & Others** (supra) that: -

> *"... so long as the applicants are desirous of remaining in occupation of the suit premises and ultimately owning them, they have a reciprocal legal duty to pay for the same and therefore they cannot be heard to stop paying at all and yet remain in occupation."*

Although it is true as argued by the counsel for the applicants that the suit upon which the afore quoted case was based has already been disposed of but the requirement for the applicants to continue paying their

respective monthly instalments has not collapsed as argued by the counsel for the applicants. In the premises the applicants are required to continue paying the monthly instalments agreed in their Hire Purchase Agreement until when it will be adjudged differently by the court or directed by other competent organs.

Having find the applicants are not seeking to be allowed to stop paying their monthly instalments which the counsel for the respondents has argued will cause inconvenience to them as they will fail to pay the entitlements of their members, the court has found the person to be more inconvenienced if the order of temporary injunction the applicants are seeking from this court is not granted are the applicants and not the respondents. That moves the court to the finding that the third condition for granting the order of temporary injunction the applicants are seeking from this court has been established in the present application.

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 **Atilio V. Mbowe** (supra) have been established in the application at hand to the required standard. Consequently, the order to maintain the status quo ante and allowing the applicants to remain in the suit premises pending hearing and determination of Land Case No. 118 of 2022 which

is pending in this court is granted. The court has also found proper to make no order as to costs in this application. It is so ordered.

Dated at Dar es Salaam this 01st day of June, 2023

I. Arufani

Judge

01/06/2023

Court:

Ruling delivered today 1st day of June, 2023 in the presence of Mr. Benitho Mandele, learned advocate for the applicants and in the presence of Mr. Safina Rwegarulira, learned State Attorney for the first and second respondents. Right of appeal to the Court of Appeal is fully explained.

I. Arufani

Judge

01/06/2023