

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND CASE APPLICATION NO. 20 OF 2023**

**ILONA LAWRENCE KADRI.....1<sup>ST</sup> APPLICANT**

**LAWRENCE PAUL KADRI.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**NATIONAL HOUSING CORPORATION (NHC)...1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

*Date of Last Order: 16/02/2023*

*Date of Ruling: 24/02/2023*

**A. MSAFIRI, J**

With respect to this application this Court is called upon to grant interim orders made under section 2(3) of the Judicature and Application of Laws Act [Cap 358 R.E 2019] read together with section 68(e) and 95 of the Civil Procedure Code [Cap 33 R.E 2019] and any other enabling provisions of law.

The present application is supported by the joint affidavit sworn by the applicants and opposed vide joint counter affidavit of the 1<sup>st</sup> and 2<sup>nd</sup> respondents sworn by Mr Aloyce D. Sekule, a Principal State Attorney employed by the 1<sup>st</sup> respondent and authorised by the 2<sup>nd</sup> respondent. *Alle*.

On 16/02/2023 when this matter was set for hearing, both counsels for the applicants and respondents proceed with it *viva voce*. Mr Fredinand Makore, appearing for the applicants, took the floor to make elaborations in support of the order sought. He urged this Court to adopt the applicant's joint affidavit to form part of his submissions.

He began his submissions by reproducing the three conditions which are mandatory to this kind of application and were set in the case of **Attilio vs. Mbowe** [1968] HCD, whereas the applicant has to meet those three conditions namely; existence of *prima facie* case, suffering of irreparable loss and balance of inconvenience.

He submitted that, paragraphs 10, 11, 12, 16 to 18 of the joint affidavits calls for issues or facts which will require this Court to investigate and decide on merit. He averred that the applicants are claiming on breach of the implied covenants which existed on the lease agreement and that, that breach of the agreement is sufficient to establish *prima facie* case.

He cited also section 88(1) (a) (b) (c) (d) of the Land Act, Cap 113 which establishes tenancy of the implied covenant. The counsel for the applicant, maintained that, the implied covenants which the respondents needed to abide with the provision of quite possession. That a wrongful actual eviction which the 1<sup>st</sup> respondent did, breached the covenant of *Attilio*.

quite enjoyment of the tenancy. He asserted that the applicants have established the first condition.

He referred this Court to the case of **Abdi Ally Salehe vs. Asac Care Unit Limited & 2 Others**, Civil Revision No. 3 of 2012 at page 8.

As to the second ground of irreparable loss, Mr Makore detailed that, if the Court will not grant the injunction sought, the applicants will be arrested and charged in criminal case for non-payment of arrears while themselves are challenging the said arrears. And, if the Court will grant the said injunction, there will be no loss on the part of respondents because the loss which the 1<sup>st</sup> respondent is claiming are of contractual nature as they arose from the lease agreement.

On the balance of convenience, the counsel for applicants, argued that, the injury that the applicants would suffer is greater than what the respondents will suffer if this application is not granted. To fortify his submissions, he cited the case of **Trustees of Anglican Church Diocese of Western Tanganyika vs. Bulimanyi Village Council & 2 Others**, Misc. Civil Application No. 01/ 2022 (Unreported) at page 7.

He concluded that this application has merit and prays that it should be granted. *Alle*

In reply thereto, the respondents vigorously opposed the application. Mr Aloyce Sekule for the respondents started by praying that, this application be dismissed with costs and further prays for the joint counter affidavit of the respondents to be adopted as part of their submissions. He stated that, *he who comes to equity must come with clean hands*. He went on submitting that, the eviction of the applicants from the suit premises is for rent arrears for about one year now.

Arguing on the three conditions mandatory before the application can be granted, the counsel for the respondents submitted that, the counsel for the applicants has totally failed to show if there is a *prima facie* case before the Court. That, the affidavit filed by the applicants does not disclose any fact that suggests that there is a serious triable issue. He said that, there is nowhere in the affidavit which shows that the applicants were permitted not to pay rent.

He further submitted that, even the cited case of **Abdi Ally Salehe(supra)**, is distinguishable as the cited case is not for breach of the agreement but for the application of *mareva* injunction.

On the second ground of irreparable loss, he asseverated that, the applicants have not established irreparable loss that cannot be compensated. To add more, the counsel for respondents submitted that, *Alle*

the 1<sup>st</sup> respondent has suffered extra than the applicants by their failure to pay rent of about Tshs. 30 million.

Lastly, as to the ground of balance of convenience, he maintained that, it is the 1<sup>st</sup> respondent who is going to suffer as she will lose the unpaid rent arrears of about 30 million shillings. He specified that, there is no any damages which have been established by the applicants.

He referred this Court to the case of **Christopher P. Chale vs. Commercial Bank of Africa**, Misc. Civil Application No. 635 of 2017 (Unreported) at pages 4, 5 and 6.

To conclude, he stated that, the 1<sup>st</sup> respondent is a public institution which by nature of its business depends on payment of rent arrears to run its business and operations whereby the majority of public depends on the rent payments and so he prayed that this application should not be granted.

In his brief rejoinder, the applicant's counsel reiterated his submissions in chief and prayers thereat with costs. Stressing on the concept of *prima facie* case, he informed the Court that, the affidavit establishes both points of law and fact that there is a *prima facie* case. He stated that, the question of validity of eviction, breach of agreement and outstanding arrears are all points to be determined in the subsequent case. *Alle*.



As I have observed earlier, this is a *mareva* injunction but since it is a specie of temporary injunctions, the principles in temporary injunction applications are also applicable to *mareva* injunctions. This means that the applicant has to establish all three conditions which are mandatory in the applications for injunctions.

Therefore, the pertinent issue here is whether the applicant has managed to meet all three conditions as set in the famous case of **Attilio vs. Mbowe(supra)**.

The three grounds are first; existence of prima facie case, second; that the applicants will suffer irreparable loss incapable of being atoned by damages, and third; the balance of convenience in the event the injunction is not granted.

It is also trite law that the conditions set out must all be met, hence, meeting one or two of them will not be sufficient for the purpose of the Court exercising its discretion to grant an injunction.

The applicants through their advocate has claimed that they have established a prima facie contest. They have averred that, the contents of paragraphs 10, 11, 12,16,17,18 of their joint affidavit establishes that there is a prima facie case. *Attilio*

As it was correctly submitted by the advocate for the applicants, in the said paragraphs the applicants are challenging the illegality of eviction which was done by the respondents particularly the 1<sup>st</sup> respondent. The applicants also are also claiming on breach of implied covenants which exists on lease agreement. Having read the contents of the joint affidavit of the applicants, I am satisfied that the applicants have managed to establish that there is an issue of breach of contract and I agree that this is sufficient to establish a prima facie case.

In the case of **Abdi Ally Salehe vs. Asac Care Unit (supra)**, it was ruled that in application for injunction, the Court is to see only a prima facie case which is one that it should appear on the record that there is a bonafide contest between the parties and serious question(s) to be tried.

Guided by the above rule, I find that there is a bonafide contest between the parties which is based on tenancy agreement between them. The first condition has been met.

The second condition is one of establishment of irreparable loss. Here the applicants have to establish in their pleadings supported by their submissions before the Court on the irreparable loss. However, their joint counter affidavit is not clear on how the applicants have suffered, are

*Ally*

suffering or will suffer irreparable damages if this application is not granted.

At paragraphs 19 and 20 of the applicants' joint counter affidavit, the applicants asserts that, following the unlawful eviction by the 1<sup>st</sup> respondent through her brokers, the applicants found themselves reallocating to a new landlord whom they are still and required to pay monthly rent tuned to USD 1200.

The applicants stated further that the 1<sup>st</sup> applicant is an employee of Sea Cliff Co. Ltd and thus part of her salary is now deducted to meet the rental obligations. That, this amount which is being recklessly deducted by the 1<sup>st</sup> applicant's employer would have been invested in other business for the benefit of the applicants herein.

Since the counter affidavit of the applicants does not clearly show whether and how the applicants have suffered the irreparable injury, the Court had to rely on paragraphs 19 and 20 of the joint counter affidavit that shows that the applicants have suffered by the acts of the respondents or will suffer if this Court will grant the application.

The question here is whether the loss which is asserted by the applicants at paragraphs 19 and 20 of the affidavit can be termed as irreparable loss. *Alls*



Again, in the case of the case of **Abdi Ally Salehe (supra)**, the Court of Appeal observed that, in deciding the application for injunction, once the Court finds that there is a prima facie case, it should then go on to investigate whether the applicant stands to suffer irreparable loss, not capable of being atoned by way of damages.

Furthermore, in the High Court case of **Mariam Christopher vs. Equity Bank of Tanzania Bank Limited & Another**, Misc. Land Application No, 1070 of 2017, HC DSM (unreported), this Court was of the view that;

*"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 by monetary terms".*

Having gone through the affidavit, I believe that the applicants have failed to establish how they have suffered or likely to suffer irreparable loss which is not capable of being compensated in monetary terms.

The facts deposed at paragraphs 19 and 20 of the affidavit that the applicants have been forced to reallocate to a new landlord and are required to pay monthly rent are not irreparable loss. The applicants can be compensated for the loss they have incurred in monetary terms. *Ally*

I find the submissions by the counsel for the applicants that the respondents are intimidating and harassing the applicants by threatening to arrest them and file a criminal case against them are mere allegations from the bar. These claims are not featured anywhere in the joint counter affidavit of the applicants, so I find the submission to be an afterthought.

In addition, I agree with the counsel for the respondent that the claims by the counsels for the applicants are mere allegations which have not been backed by any evidence. They are just mere statements of alleged threats without any proof.

I find that the applicants have failed to establish the irreparable loss, hence the second condition has not been met.

On balance of convenience, the applicants asserted that the injury that they would suffer is greater than what the respondents will suffer if this application will not be granted.

Again, the affidavit of the applicants is not clear on how the applicants will suffer if this application is not granted. In addition, if the suffering is capable of being compensated, the applicants are not under threat of suffering great mischief. The applicants have also failed to meet the third condition. *Alls.*

In the result, this Court finds that this application has failed to meet cumulatively, the three conditions necessary for granting the reliefs sought. Having found that, I hereby dismiss the application with costs.

Order accordingly.



A handwritten signature in black ink, appearing to read "A. Msafiri". The signature is written in a cursive style and is positioned above a horizontal dotted line.

**A. MSAFIRI**

**JUDGE**

**24/02/2023**