

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 26712 OF 2023

IMALASEKO INVESTMENT LIMITED APPLICANT

VERSUS

AMEIR MOHAMED MBARAK1ST RESPONDENT

CALEB SECURITY SERVICES LIMITED.....2ND RESPONDENT

RULING

05/03/2024 & 26/03/2024

A. MSAFIRI, J.

This Application is brought under Section 68(c), Section 95 and Order XXXVII Rules 1(a) and (b) and (2), of the Civil Procedure Code, Cap 33 R.E 2019, (herein the CPC). The applicant is seeking for temporary restraining orders against the respondents from trespassing or making any improvements in the estate of one Vitus Lyamkuyu Plots No.1, Kenyatta/Kaunda Drive, Oysterbay, Kinondoni Municipality, Dar es Salaam (herein the suit plot), pending the hearing and determination of the main suit.

The Application has been taken at the instance of Franklin Yuredi Chonjo and is supported by the affidavit of Jumanne Kibera Kishimba who deposed as an applicant. The Application was contested by the 1st respondent through a

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counter affidavit deposed by Bilal Amer Mbaraka who claimed to be a Principal Officer of the 1st respondent. While filing his counter affidavit, the 1st respondent also raised a preliminary objection to the effect that the application is incompetent for failure to join a necessary party one Vitus George Lyamkuyu, the registered owner of the suit plot. The objection was set for hearing, however, the 1st respondent failed to prosecute the same and eventually it was dismissed by the court.

The hearing of the application was exparte against the 2nd respondent after the same was duly served and failed to appear in court.

The hearing was by way of written submissions whereas the submission in chief by the applicant was drawn and filed by Mr. Franklin Yuredi Chonjo, learned advocate of the applicant. He prayed to adopt the contents of the applicant's affidavit and submitted that it is established by the law that for the applicant to be granted the sought temporary injunction, three conditions must be fulfilled as set in the famous case of **Attilio vs. Mbowe**, (1969) HCD 284.

He said that the first condition is that there must be a serious question to be tried on the facts alleged. That, that has been averred in paragraphs 1,2,3,and 4 of the affidavit in support of the application. That it is clearly shown that in 2009, the applicant entered into a joint venture agreement as the developer and co-owner in the land owned by Vitus Lyamkuyu. That it was agreed that the applicant shall construct 24 apartments on the suit plot. That on attempting to

implement the said joint venture agreement, the applicant has constructed eight (8) out of 24 apartment, but sometimes in 2023, the respondents without any justification and legal rights, invaded and trespassed on the suit plot and began making improvements by erecting various structures therein.

He averred that the applicant need to finish constructing the other remaining apartments but has failed to do so due to the respondents' acts of invading the suit plot while knowing that there is a joint venture agreement between the applicant and the owner which is still valid.

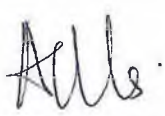
He submitted further that following the respondents' actions, the applicant has instituted a Land Case No. 26716 of 2023 in this Court for determination of the rightful owner of the suit plot. He argued that the applicant has a prima facie case against the respondents.

On the second condition, Mr Chonjo submitted that the applicant has established that he will suffer irreparable loss if the order sought will not be granted. He said that the respondents' acts have caused the applicant to fail to finish the remaining apartments as agreed upon by the applicant and the owner of the suit plot. That the development was meant for business investments and the applicant have suffered financial loss, and severe damages in terms of disruptions and time spent. That if the respondents are left to continue with the trespass of the suit plot, then the applicant's interest over the suit plot will be affected and the applicant will be deprived the legal right to develop the suit

plot.

To cement his points, the counsel cited the case of **Salimu Mbaruku Mohamed t/a Maarifa English Medium Pre Primary School vs. Registered Trustees of Islamic Culture School**, Misc. Application No. 186 of 2021 where it was held that the court is required to consider whether there is a need to protect either of the parties from irreparable injuries before the right of the parties is determined.

On the third condition on the balance of probability, Mr Chonjo submitted that it is stated in paragraphs 8,9,10,11 and 12 of the affidavit that the applicant stands to suffer more than the respondents. He prayed that the application be granted as prayed with costs.

The submissions by the 1st respondent was drawn and filed by Mr. Jovin M. Ndungi, learned advocate. He started his submission by adopting the contents of the counter affidavit affirmed by the 1st respondent. He raised a concern that the instant application is not supported by an affidavit of a competent person. That the applicant is a body corporate in terms of Order XXVIII, Rule 1 of the CPC. That the affidavit then has to be deposed by either the secretary, the director or any principal officer of the company. He pointed that the affidavit in this application was deposed by one Jumanne Kibera Kishimba who has identified himself as an applicant. That the applicant is intentionally misleading the court. 

On the three conditions which are mandatory in applications for injunction, the counsel for the 1st respondent argued that the applicant has failed to demonstrate the said conditions hence this application should be dismissed with costs.

Mr Ndungi stated that the applicant has not demonstrated that there is a serious question to be tried by the court and that in the main suit, the applicant/plaintiff is just seeking for declaratory orders to the effect that he is still a legal developer. That the applicant has failed to develop the suit plot as per the agreement between him and the owner.

On the second condition, Mr Ndungi stated that the applicant is still occupying the eight (8) apartments on the suit plot and he is still occupying them. That the applicant has not established that the injury is irreparable and cannot be atoned by the already agreed compensation which the 1st respondent is ready to pay.


On the third condition, the 1st respondent stated that he is the investor and leasehold owner of the suit property with the superior title to the applicant. That the 1st respondent is the one to suffer greater hardship than the applicant. He argued that the applicant has failed to meet the three mandatory conditions necessary for grant of injunction hence the application should be dismissed with costs.

There was no rejoinder.



Having gone through the affidavit and counter affidavit in support and contest of this application, I have noted some defects in the same which raise the question of competency of this application before this court. Partly, the 1st respondent has subtly pointed about the defectiveness of the affidavit but the applicant has not rejoined about that issue.

The applicant in this matter is Imalaseko Investment Limited. However, the person who has sworn the affidavit is one Jumanne Kibera Kishimba. At paragraph 1 of the affidavit he stated that he is the applicant in this matter. However, according to the application, the applicant is Imalaseko Investment Limited. The contents of the application does not reveal who is Jumanne Kibera Kishimba and what is his position in the applicant's company or whether he has mandate to depose on behalf of the applicant. As Mr Kishimba's position to the applicant who is a company is unknown, then this court finds that Mr Kibera Kishimba has no legal capacity to take oath on behalf of the applicant. This Court finds that the affidavit of the applicant contravenes the provisions of Order XXVIII Rule 1 of the CPC which provide thus;

1. In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case. 

In the instant application since the applicant is a body corporate then the person who has legal mandate to take oath on her behalf is an authorized officer of the said body. It is not known whether Jumanne Kibera Kishimba was authorized to take oath on behalf of the applicant.

Basing on that reason, I find the affidavit to be fatally defective and I hereby struck it out with costs.

It is so ordered.




A. MSAFIRI
JUDGE

26/3/2024