

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

MISC. LAND APPLICATION NO. 117 OF 2022

*(Originated from Land Case No.49 of 2022 in the High Court of the United republic
of Tanzania, in the District Registry of Arusha at Arusha)*

**BAHATI IBRAHIM (As Administratrix of the
estate of the late Hadija Mohamed)APPLICANT**

VERSUS

**NAFISA MOHAMED (As and Administratrix
of the estate of the late Jamila Mursal)1ST RESPONDENT
AMER NASSOR MOHAMED 2ND RESPONDENT**

RULING

06/09/2022 & 15/09/2022

KAMUZORA, J.

Under certificate of urgency the Applicant made an application before this court seeking for an order of temporary injunction to restrain the Respondents from evicting the Applicant and demolishing the disputed property located at Plot No. 24, Block H, Area F, Kikuyu Street, at Arusha, pending hearing and determination of the main case that is, Land case No. 49 of 2022 filed before this court. The application was

brought under section 68(e), Order XXXVII Rule 1(a) and Rule 4 of the Civil Procedure Code Cap. 33 R.E 2019 and Section 51(1) of the Land Disputes Courts Act, Cap 216 R.E 201. The application is supported by an affidavit deponed by the Applicant opposed by the Respondents through a joint counter affidavit deponed the Respondents.

When the matter was called for hearing, the Applicant was ably represented by Mr. Reginald Laswai while the Respondents enjoyed the service of Mr. Richard Manyota. The counsel for the parties argued the application orally.

Submitting in support of the application, Mr. Laswai adopted the chamber summons and the supporting affidavit to form part of his submission and argued that, it has been the principle of the law and the court's decision that where the Applicant request the court to issue an order of temporary injunction must observe three principles which may warrant the grant of an order for temporary injunction. He mentioned those principles; first, that, the Applicant must show that there is prima facie case to be determined by the Court, second, that, who will suffer most between the Applicant and the Respondent if the temporary injunction will not be granted and third, that, the overwhelming chances of the Applicant to succeed on his case. He contended that, those

principles were elaborated in the case of **Fantuzzi Investment Ltd Vs. Mwananchi Engineering and Construction Co Ltd**, HC Division at DSM in Misc. Land Application No 138 of 2002 pg. 3-4.

In elaborating the first principle on whether the Applicant has prima facie case before this court, the counsel for the Applicant stated that, the Applicant was a beneficiary to the disputed property which have been sold by the 1st Respondent to the 2nd Respondent without the consent of the Applicant. That, there was no proper procedure of sale by the 1st Respondent as no family meeting or consultation to all family members on the sell the family property which has more than 10 beneficiaries. That, such illegality needs the intervention of this court to ascertain the rights of the parties.

The Counsel further submitted that, the 1st Respondent decided to sell the disputed property acting as an administratrix of the estate of the late Jamila Mansoul while she has already discharged her duties as administratrix by filing inventory in form No. V and VII before the primary court on 22nd September 2014 thus, she had discharged her duty by distributing the properties to the lawful owners and beneficiaries. To buttress her argument, she cited the case of **Ahmed Mohamed Al-laamar Vs. Fatuma Bakari and Asha Bakari**, CAT in

Civil Appeal No 71 of 2012-page 17 paragraph 1. It is the claim by the counsel for the Applicant that, the applicant has a prima facie case before this court which needs the court's intervention to ascertain the rights of the parties.

Submitting for the second principle as to who will suffer most, the Applicant's counsel argued that, the Applicant is the one who is residing in the disputed property for more than 50 years. That, if the injunction will not be granted, the Applicant will lose her share as lawful beneficiary and will be evicted and lose her residential area. That, it will be difficult for the Applicant to recover the money lost and will create multiplicity of suits for the Applicant to recover her share to the property. That, an order for temporary injunction will protect the interest of the Applicant.

Regarding the last point on the likelihood of success by the Applicant it is the submission by the counsel for the Applicant that, there is a prima facie case which need court intervention and the Applicant has overwhelming chances of success if this court will intervene and check on powers of the administratrix to sell the property after discharging her administration duties. It is thus the prayer by the

Applicant that temporary injunction be granted so that the Applicant's rights can be protected.

Contesting the application, Mr. Manyota adopted the counter affidavit filed in opposition the application and urged this court that to dismiss the application with costs as it did not meet the legal requirement under Order XXXVII Rule 1 (a) of the CPC. That, the Applicant was unable to prove to this court how the disputed area is likely to be disposed of, being wasted or damaged by the Respondents. He added that, there is no any document attached to the affidavit showing that there is threat for eviction and if at all she is occupying the area in question. That, the Applicant's arguments that the 1st Respondent had discharged administration duties thus could not do anything regarding the estate are based on unsupported intuitions as even the Applicant sued the 1st Respondent in the administration capacity.

The Respondent added that, the Applicant did not inform this court if there is a main case in which this application emanates from hence, a good reason to reject the application. That, as per section 101 of the Probate and Administration cause Act Cap 352, even if the 1st Respondent was still the administrator of the estate, she was not barred

from selling the property as there is no legal requirement forcing the 1st Respondent as administrator to seek consent from the beneficiaries before selling the property in the estate. To cement on that, he cited the case of **Mohamed Hassan Vs. Mayasa Mzee and another**, TLR 1994 225.

The Respondent's counsel went further and stated that, the application is meritless because the Applicant admits that there are more than 10 beneficiaries who did not file any case meaning that, they have no dispute over what is happening in the disputed property. Regarding the claim that she has been residing in the disputed property for more than 50 years. The Respondent replied that, with such claim the Applicant intends to be the only one benefiting from the property apart from other beneficiaries. That, all other beneficiaries received their money and left except for the Applicant.

Responding to the claim that the Applicant will be affected if injunction is not granted the Respondent submitted that, the Applicant is the grandchild of the original owner of the disputed property one Jamila Mursal and the Applicant's mother was the initial beneficiary. That, the Applicant was appointed to administer the estate of her mother Hadija Mohamed and had received property from her deceased mother

including three houses in Arusha town at Kaloleni, Levolosi and Nduruma. That, there is nowhere in the affidavit the Applicant stated not to own those houses or not residing in those houses as the Applicant is the wife residing with her husband Ayubu Shabani Mkindi at Ungalimited Arusha. That, it is not true that she will be affected or she is affected in any way for failure to live in the disputed property.

It is also the submission by the Respondent's counsel that, the case of **Ahmend Mohamed** (supra) is distinguishable from this case as that case was based on the revocation of the letters of administration for the administrator who had closed the probate matter while the present matter is not founded on the revocation of letters of administration.

As for the case of **Fantuzzi Investment Ltd** the court insisted on the compliance of the principles drawn in the case of **Atilio Vs, Mbowe**, (1969) HCD 284 which set out the conditions for grant of temporary injunction. He insisted that, there must be serious question of facts to be tried on the fact alleged and probability that the plaintiff will be entitled to the relief prayed. It is the claim by the Respondent's counsel that, as per the decision in Atilio's case, 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. He insisted that, there is no evidence that the remained beneficiaries are still in occupation of the dispute area thus, the Applicant's laying on their back is intending to waste court's time. What is started as irreparable injury here is probably her right in the probate matter which infact all beneficiaries have already received their shares and she is the only one who refused to receive her share for her personal reason while she does not even reside in that area.

Regarding the second principle for the grant of an injunction, the Respondent's counsel while referring the case of Atilio submitted that, there must be proof that on the balance there will be a grater hardship and the mischief suffered from withholding of the injunction. He reiterated that, all the beneficiaries consented and that is why they did not file a case except for the Applicant's evil intention to stop the Respondent from benefiting from the estate after she had failed to buy shares of other beneficiaries. He added that, the Applicant filed similar application vide Land Case No. 40 of 2022 and Misc. Land Application No. 1 of 2022 and on 22/08/2022 and decided to withdraw the application after discovering that there was no any threat that made her to file the application and the Applicant was ordered to pay costs. Basing

on the decision in the case of **Anna Investment Co. Ltd and 3 others Vs. NMB and 2 others**, HC at DSMA in Misc. Land Application No 465 of 2021 (unreported) it is the Respondent's prayer that the application be dismissed with costs.

Upon a brief rejoinder submission, the Applicant added that, the plain interpretation of the word alienated by any party to the suit means transfer of ownership to another person. That, under paragraph 11 of the affidavit the Applicant stated that the disputed property has been sold to the 2nd Respondent and the Respondents admitted at paragraph 11 of the counter affidavit that the house was sold. That, paragraph 10 of the Applicant's affidavit it indicated that there is transfer of right of occupancy signed by the first Respondent who is the seller and the buyer who is the second Respondent and for that reason, it is clear that this provision is relevant to the application.

Regarding the issue of suing the Respondent as an administrator of the estate, it is the reply by the Applicant that, the transfer of the right of occupancy Form No. 35 was signed by the 1st Respondent as administratrix of the estate hence the Applicant had to sue her in that capacity. Regarding the contention that the application was filed while there is no main case, the Applicant replied that, the main case is

deponed under paragraph 4 of the affidavit and that is, Land case No. 49 of 2020 which is pending before this court.

Regarding the issue of consent of the beneficiaries, the Applicant stated that, the administrator had closed his duties hence it was important to obtain consent from the beneficiaries. That, the case of **Mohamed Hassan** is distinguishable to the present application as in that case the probate matter was yet to be closed.

As for the issue that all the beneficiaries have vacated from the disputed property, the Applicant stated that, the Respondent's conducts indicates that the Applicant is not needed there hence, the move for eviction. That, as the property is already sold and the transfer is on process, the Respondents are likely take possession of the property at any time. He added that, the principles in the case of **Fanctuzz Investment Limited** is similar to that in the case of **Atilio Vs. Mbowe**.

The counsel for the Applicant explained also that, the prior cases filed by the Applicant aimed at stopping the sale from being conducted but after the sale agreement was attached to the counter affidavit the Applicant discovered that the application was overtaken by event. That,

since the sale is done and the same could result to eviction, the Applicant's prayer is that, the application for injunction be granted.

After the summary of what was submitted by parties and in considering the pleadings in this application, it is apparently that, the instant application aims at obtaining an order for temporary injunction restraining the Respondents from evicting the Applicant and demolishing the disputed property till full determination of the main suit.

The position of law with regard to temporary injunction is clear. Order XXXV11 Rule 1 (a) of the Civil Procedure Code, to which this application was preferred enunciate the circumstances upon which temporary injunction may be granted. It includes; the existence of the suit and there must be proof by affidavit that any property in dispute is in danger of being wasted, damaged, or alienated by any party to the suit or suffering loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree. The requirement of the law has been embraced by court in a number of decisions and in a famous case of **Atilio Vs. Mbowe** it was well set out that, for the court to grant the order for temporary injunction, the Applicant must establish existence of a serious question to be tried by the court on the facts alleged of by the party and a probability that the Plaintiff will be entitled

to the relief prayed and that, if the order is not issued then the Applicant will suffer an irreparable loss compared to the Respondent.

In determining whether the current application is a fit one for the grant of a temporary injunction then all the three conditions set forth under the case of **Atilio Vs Mbowe** will be tested.

As for the first condition on existence of a prima facie case, it is not in dispute that there is a pending case before this court and that is Land Case No. 49 of 2022. The Applicant in his submission has pointed out that, in that case, this court is called to determine whether it was proper for the administratrix who had already discharge her administration duties by distributing the estate to the beneficiaries and closed the probate matter could to resume her position and sell the property as an administratrix.

The other issue pointed out by the counsel for the Applicant for the determination of the court in the main case is whether it was necessary for the 1st Respondent to obtain consent from the beneficiaries of the disputed property prior to the selling of the disputed house to the 2nd Respondent. The counsel for the Respondent on the other side has moved this court to rule out that there is no a prima facie

case filed by the Applicant much as the Applicant has failed to inform this court on the main case to which this application emanates.

In considering the submission by the parties and records, I am convinced with the submission by the Applicants' counsel that there is a pending suit before this court and what was pointed out by the counsel for the Applicant sufficiently establish serious issues to be determined by the court. There are serious matters to be determined by the court on the validity of transfer of the disputed property from the 1st Respondent to the 2nd Respondent and issue related to consent of the beneficiaries to the sale of property and the capacity of the 1st Respondent to dispose of the disputed property to the 2nd Respondent. I am therefore satisfied that the first condition is met.

Regarding the second condition on irreparable injury, it is the submission by the counsel for the Applicant that the Applicant is in occupation of the disputed property for more than 50 years and the act of the 1st Respondent selling the property without the consent of the Applicant will cause the Applicant to lose her residential house or her share. That, as applicant is the beneficiary to the disputed property, the eviction of the Applicant without any notice will cause multiplicity of cases before the court.

On the Respondents' side it was insisted that, there is no proof that the Applicant resides in the disputed area. That, this application was file to frustrate the sale for the applicant to continue benefiting from the disputed property as opposed to other beneficiaries.

I am persuaded with the submission by the counsel for Applicant that, much as the 1st Respondent has already sold the disputed property to the 2nd Respondent it is evident that the Applicants' rights are in jeopardy as the buyer may opt to evict the Applicant from the disputed property to have vacant possession of the same. Much as the rights of the parties are yet to be determined, to assume that the Applicant intend to be a sole beneficiary of the disputed property could be a premature conclusion. I therefore find that the second condition is also met.

On the last condition on a balance of convenience, the question here is who is going to suffer greater hardship and mischief if the temporary injunction is granted or not granted. There is no doubt that the Applicant is likely to suffer more than the Respondents. I say so because, it was admitted that the Applicant is among the beneficiaries of the disputed property and she has not yet received her share to the disputed property. Much as the disposition of the disputed property was

done by the 1st Respondent it is evident that, it is the Applicant who is likely to suffer more if the injunction is not granted than it will be for the Respondents. In my view, if injunction will not be issued then the transfer process is likely to deprive the Applicant from enjoying her inheritance share as opposed to the 1st Respondent who had nothing to lose as he had received his share and the 2nd Respondent who is buyer whom, if the decision will be made in his favour, he will still acquire possession of the same.

For reasons above, the three conditions set in the case of **Atilio Vs Mbowe** (supra) have been met by the Applicant, and I find that this application is of merit and is hereby granted. An order for temporary injunction is issued for a period of six months in respect of the disputed property located at Plot No. 24, Block H, Area F, Kikuyu Street within Arusha city in Arusha region. The Applicant should not be evicted from the said property and or the said property should not be demolished or tempered with in any how by the Respondents their agents, workmen or any other person related or not for the period mentioned. In the upshot, the application is granted with no order for costs.

It is so ordered.

DATED at **ARUSHA** this 15th September, 2022.



A handwritten signature in blue ink, appearing to read "D.C. Kamuzora", is written over the printed name.

D.C. KAMUZORA

JUDGE