

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

AT ARUSHA

MISC. LAND CASE APPLICATION NO. 01 OF 2022

(C/F LAND CASE NO 01 OF 2022)

WINFRIDA PATRICK KIBUTA1ST APPLICANT

JANETH PATRICK KIBUTA.....2ND APPLICANT

Versus

RHODICE SIMON MOSHI.....RESPONDENT

RULING

16th February & 18th March, 2022

MZUNA, J.:

This application is for temporary injunction which has been filed by the applicants, Winfrida Patrick Kibuta and Janeth Patrick Kibuta against one Rhodice Simon Moshi. There is a chamber summons supported by the joint affidavit of applicants in support of the application. There is also a counter affidavit deponed by Rhodice Simon Moshi, the respondent herein.

The application which was initially filed ex parte, proceeded inter parties. The orders sought are for grant of temporary injunction against the respondent restraining him, his agents, officers, workmen or any

other person whomsoever acting under or on their behalf from interfering with the applicants' exclusive ownership and possession of plots No. 10C & 10D located at Usa-River, Arumeru with title Numbers 2834 & 2833 respectively, pending hearing and determination of the main suit. Costs for the application and any other orders this Court deems fit and just to grant.

As a matter of fact, there is a pending suit between the parties herein. The applicants are beneficiaries of the deceased Patrick Ibrahim Kibuta who died intestate. Through administration cause No. 59 of 2020, Fredrick Ibrahim Kibuta was appointed as an administrator and consequently, as per the filed affidavit bequeathed the suit properties to the applicants herein. The same had ever since been registered under a certificate of title which they say has now been trespassed into by the respondent. The applicants claim that the suit premise had been leased to one Mr. John Michael Mkumbwa conducting businesses of bar and lodge

On his part, the respondent says the suit property was sold to him before death of Patrick Ibrahim Kibuta and is therefore not liable for distribution to the beneficiaries, the applicants. That he had been doing business there since 2012 without intervention and therefore sees this

application as meritless. The respondent claims that it had been leased to one Victor Hillary also doing the same business.

Before commencement of hearing of the application which proceeded orally, Mr. John Lundu, the learned counsel who represented the respondent raised two preliminary points of objections to this application, namely:- First, that the chamber summons is brought under two provisions which are the alternative applications. Second, that the Chamber Summons has cited provision asking the Court to invoke its inherent powers while there is a provision relevant to the application.

Ms. Yustawinnie Vitalis Mtui, the learned counsel strongly objected the raised preliminary objection. I decided to consolidate both the raised preliminary objection and the main application on temporary injunction.

For convenience sake, I propose to start with the raised preliminary objection. The main issue is whether the application has been brought under inapplicable provisions? Is the application tenable in law?

The relevant provisions under criticism are rule 1 (a) and (b) of Order XXXVII and Section 95 of the Civil Procedure Code [Cap. 33 R.E 2019] (CPC). In his submission, Mr. John Lundu contended that,

provisions of rule 1(a) and (b) Order XXXVII of the CPC applies under different situations not as they were applied together. He said, rule 1(a) applies in the circumstances where the property is in the danger of being wasted or sold in execution of a decree, while 1(b) deals with threatening and or intending to dispose the property with the intention to defraud creditors. Mr. Lundu further contended that, the said two provisions cannot be used together in different circumstances and therefore the oxygen principle should not be abused.

Further that by citing section 95 of the CPC presupposes inherent powers of the court which is a misconception since there is a specific provision governing the matter at hand.

In reply thereto, Ms. Yustawinne Vitalis Mtui, learned Advocate said that, citing two different paragraphs of the provisions of the law is not fatal since the correct provision which is Order XXVII rule (1) (a) of the CPC was correctly cited. To bolster her argument, she cited the case of **Advatech Office Supplies LTD vs Ms. Farhia Abdallah Noor & Another**, Civil Application No. 354 of 2016/16 of 2017, CAT at DSM (Unreported).

In his rejoinder, Mr. Lundu reiterated his submission in chief and further distinguished the above cited case by the applicant's counsel.

After reading closely the above submissions, the argument of Mr. Lundu is not that the provisions of the law cited are inapplicable, but rather that they cannot apply all at the same time. Only one of them is relevant and applicable and therefore it must be specifically applied for instead of mixing them up. The applicant's counsel says so long as there is no any prejudice, the mode adopted is proper as correct law had been cited. The relevant provisions reads:-

"Order XXXVII of the CPC provides;

1. *Where in any suit it is proved by affidavit or otherwise;*

(a) that any property in dispute in a suit 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; or

(b) that the defendant threatens, or intends to remove or dispose of his property with a view to defraud his creditors,

the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of the property as the court thinks fit, until the disposal of the suit or until further orders";

Section 95 of the CPC also provides that;

"95. Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be

necessary for the ends of justice or to prevent abuse of the process of the court."

I would agree with the applicant's counsel in view of what was held in the above cited case of **Advatech Office Supplies LTD vs Ms.**

Farhia Abdallah Noor & Another (Supra) that:-

"...a mere citation of inapplicable provision where the correct provision moving the court is cited, the application does not become incompetent."

On the basis of the above holding, citing rule 1(a) and (b) of Order XXXVII and section 95 of the CPC, "*the application does not become incompetent*" so long as the correct provision was cited. The raised preliminary objection is bound to fail and is hereby dismissed.

Now I go to the main application. Both counsels to this application adopted their affidavits during oral submissions. The main issue is whether the application for temporary injunction should be granted. *The question is, has the applicant established three conditions for grant of temporary injunction?*

To bolster her argument Yustawine, the learned counsel cited the landmark case of **Atilio vs Mbowe** (1965) H.C.D No. 284 on issuing of temporary injunction that three prerequisite conditions must be proved. She insisted they exist in this case. Mr. Lundu agree as well on the need

to prove such conditions which however he says had never been proved to exist in this case.

Arguing the first condition, Ms Yustawinne contended that there is Land case No. 1/2022 on the issue of ownership whereby the respondent filed the written statement of defence on it. She said, the filing of the case clearly shows that there is a *litis contestatio* which justifies that the prima facie case has been established.

On the second condition, she submitted that the applicant is likely to suffer more if this application is not granted. She made reference to the case of **T.A. Kaare V General Manager Mara Cooperative Union** (1984) LTD [1987] TLR 17 (HC) where the court defined "Irreparable Injury" to mean that "the injury will be material i.e one that could not be adequately remedied by damages."

That since the applicants are beneficiaries and therefore legal owners of the suit premise, if the temporary injunction is not granted, they will suffer more. That there is also a valid lease between the applicants and one John Michael who is currently in possession of the suit property (leasee). That, failure to award the injunction it may lead to series of litigation by the lessee against the applicants. More so, the likelihood of failure to secure tenants as other tenants may find it not ideal for

business. That the premise earns income to the applicant as well and therefore an irreparable loss may be suffered.

On the last condition of balance of inconvenience, she submitted that the applicants are likely to suffer more than the respondent because they have invested more on the premise unlike the respondent. For the reasons above stated she prayed for the court to grant this application. The respondent should be restrained from interfering on the suit premises.

On his part, Mr Lundu contended that the affidavit by the applicant does not show such condition of the danger of being wasted, alienated or being sold in the decree and therefore the provision cited in the application (Order XXXVII Rule (1) (a) of the CPC does not relate to the submission and affidavit.

That the applicants have failed to prove the probability to win in the pending suit. He also attacked the over reliance on the alleged title deed which he says was forged. That the alleged property had long been sold to the respondent since 2012 and had been in occupation since then until in Jan 2022 when the applicants forcefully entered there and possibly leased thereafter.

On *the second condition*, he said that the probate matter appointed the administrator in July 2021. That they can be adequately compensated in case the temporary injunction is not granted if they win the case.

That the alleged annexure Kibuta '3' was made after the case had been lodged in court. The lease agreement was made with the condition that first deposit was on 25th January, 2022. That was after the first adjournment of the case. On the *third condition* he said that the respondent is likely to suffer most than the applicants because the respondent had been in possession since 2012 after buying all the premise in the bar in 2018. That they have failed to prove it and therefore the application should be dismissed.

In rejoinder, Ms. Yustawinne maintained that the title was not forged otherwise they ought to have filed a caveat, worse still they did not apply for certificate of title since 2012 as alleged. They never paid for taxes as well unlike the applicants who did so and therefore the alleged sale/purchase is questionable.

That the respondent is a trespasser not currently in possession or even benefiting therefrom. She reiterated her submission in chief.

In dealing with the main application, I will restrict myself on the existence and proof of the three conditions. The Court of Appeal in **National Housing Corporation vs Peter Kassidi & Others, Civil Application No. 243 of 2016 (Unreported)**, while quoting the commentary of the learned authors V.S. Sohoni and S.V. Sohoni *in Sohoni's Law of Injunctions*, 4th Edition, Premier Publishing Company, Allahabad, India 2013, at page 738 the following was said;

*"The principle is also well-settled that before an order [of injunction] in exercise of inherent powers is passed, the Court must be satisfied (1) that the applicant has a prima facie case in his favour, (2) that irreparable injury would be caused to the applicant if the order sought by him is not granted during the pendency of the legal proceedings or (3) that the balance of convenience lies in favour of the applicant. But it appears from the perusal of the decision in **Surinder Singh v. Lal Sheoraj [AIR 1975 MP 85]**, that since a party in whose determination of a suit..."*

Let me start with condition No. 1 and No.2 on existence of prima facie case and likelihood of irreparable injury if the order sought is not granted. I rule out the allegation by Mr. Lundu that the application has no connection with what had been submitted in court. I say so because paragraph 8 of the joint affidavit provides for the circumstance of the property being in danger of being wasted, damaged and alienated, that the applicants earn income from the suit land. Further under paragraph

6 of the said affidavit it is averred that respondent has been entering into the suit properties unauthorised and illegally and thereby interfere with the applicant's assignee's quiet and peaceful enjoyment of the suit properties. Similarly, they do not dispute the existence of Land case No1 of 2022, which as a matter of fact they have filed the written statement of defence.

All these facts clearly show and proves existence of conditions No.1 and 2 as well stated in the above cases of **Attilio vs. Mbowe**, (supra) and **National Housing Corporation vs Peter Kassidi & Others** (supra); First, existence of a serious question to be tried on the facts alleged, and a probability that the plaintiff will be entitled to the relief prayed; Second, 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 because the applicants says their lessee is currently in active occupation of the suit premise. Whether the entry was lawful or not, it will be subject to proof in the main suit.

I turn on the third condition, if the order of injunction will not be granted, are the applicants likely to surfer hardship more than what the respondent will suffer otherwise known as degree of convenience. The three conditions, it should also be understood, must exist conjunctively.

To buttress on this argument Ms Yustawinne submitted that the applicants have invested much unlike the respondent and therefore they are likely to suffer more than the respondent. Mr. Lundu completely dismissed this argument as the respondent was the first to occupy it through purchase from the original owner.

The sole purpose of the temporary injunctive order is to maintain the status quo, see the case of **Abdi Ally Salehe vs Isac Care Unit Limited**, Civil Revision No. 3 of 2012 (unreported) CAT at DSM (unreported). The third condition has been proved as well on degree of convenience, that it cannot be remedied by compensation if temporary injunction is not granted.

Ms. Yustawinne has successfully moved this court to exercise its discretion in granting the temporary injunction order sought. That said, the application is hereby allowed with no order for costs.

Order accordingly.




M. G. MZUNA,
JUDGE.
18/03/2022.