

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISCELLANEOUS LAND APPLICATION NO. 633 OF 2021

(Arising from Land Case No. 186 of 2021)

**SALIMU MBARUKU MOHAMEDI T/A
MAARIFA ENGLISH MEDIUM PRE &
PRIMARY SCHOOL.....APPLICANT**

VERSUS

**REGISTERED TRUSTEES OF ISLAMIC CULTURE
SCHOOL..... RESPONDENT**

Date of last hearing: 10/03/2022

Date of Ruling: 02/05/2022

RULING.

I. ARUFANI, J

This is an application for temporary injunction filed in this court by the applicant under section 68 (c) and order XXXVII Rule 1 (a) of the Civil Procedure Code Cap 33 [R.E 2019]. The applicant is seeking for an order to restrain the respondent, their assignee, employees, agents or associates from evicting the applicant from the building hosting the school or disrupting the operation and management of the school by the applicant and they should stop any plan of impeding the smooth operation of the school pending determination of Land Case No.186 of 2021.

The application is supported by an affidavit affirmed by the applicant and is opposed by a counter affidavit affirmed by Mariam Suleiman Kelemile, the respondent's Secretary. When the application came for hearing the applicant was represented by Mr. Benard Massimba and Dr. Chacha Murungu, learned advocates and the respondent was represented by Mr. Juma Nassoro, learned advocate who was assisted by the team of Mr. Franco Mahena, Mr. Omary Ngatanda and Ms. Fauzia Ajoki, learned advocates. The application was heard orally.

Mr. Bernard Massimba prayed to adopt the affidavit supporting the application to form part of his submission and stated that, it is a settled law that for an order of temporary injunction to be granted the court must be satisfied that; (i) there is a prima facie case serious enough to be tried on facts alleged and with a probability of a decree to be issued in favour of the applicant, (ii) the award of damages to the plaintiff or the applicant will not provide an adequate remedy for the loss sustained as a result of the respondent or defendant infringement and (iii) the applicant stand to suffer greater hardship from the withholding of the injunction than that will be suffered by the defendant if injunction is granted.

He argued that, the applicant in the present application has filed in this court land case No.186 of 2021 which is still pending in the court. He stated that, in the said case the applicant is suing the respondent for

breach of tenancy agreement. He argued that, the applicant is running the school which accommodates pupils from disadvantages background who do not pay school fees. He argued that, if the injunction order will not be granted and the applicant is evicted from the premises the pupils will be put in a hardship condition of continuing with their education. He argued further that, the court intervention is also required to protect the applicant as he has massively invested in the operation of the school. He argued further more that, if the injunctive order will not be granted the applicant's Land Case No. 186 of 2021 will be rendered nugatory.

The counsel for the applicant submitted that, as averred at paragraph 13 of the affidavit there are triable issues in land case No 186 of 2021 relating to the respondent's failure to honour the tenancy agreement despite the fact that the applicant has been paying rental fees as per their agreement. He stated that, the applicant received the information from one Aluta that he is required to vacate from the suit premises and handover all the documents concerning **Maarifa Islamic Culture school** without taking into consideration that the school is on progress.

He stated that will interrupt the running of the school and if the order sought in the application will not be granted the respondent will proceed with its intention of evicting the applicant from the suit premises.

He submitted that, what he has stated is deposed in the affidavit supporting the application and to support his submission he referred the court to the case of **Easter Joseph Ogutu V. Equity Bank & Another**, Misc. Land Application No. 523 of 2021, HC Land Division at DSM (unreported) where the court granted temporary injunction for the purpose of protecting the interest of the applicant. At the end he prayed the court to grant the order sought in the chamber summons.

To counter the application, Mr Juma Nassoro prayed the court to adopt the content of their counter affidavit and argued that, injunctive order cannot be issued unless the applicant satisfy the court that the condition for granting temporary injunction has been met. The conditions for granting an injunctive order have been stated by our courts in various judicial pronouncement which one of them is the famous case of **Attitlio V. Mbowe** (1969) HCD No. 284.

He argued that, after going through the affidavit supporting the application and hearing the submission from the counsel for the applicant, they have found the application at hand does not show any prima facie case, irreparable loss and any balance of convenience required to be established before the injunctive order is granted. He stated that, the applicant has not shown anywhere in his affidavit that he is the owner of the school. He stated the applicant introduced himself in the application

as **Salum Mbaruku Mohamed t/a Maarifa English Medium Pre-Primary and Primary School** which presuppose he is introducing himself as the owner of the school.

He argued that the applicant has not pleaded in the main suit or deposed in the affidavit that he is the owner of the school. He stated that, if you read paragraph 4 of the counter affidavit you will find it is deposed therein that the respondent is the owner of the school. He stated that, the said deposition is supported by annexure ICS1 which is a certificate of registration of the school which categorically shows the owner of the school is the respondent. He went on arguing that, in reply to the contents of paragraph 4 of the counter affidavit the applicant did not state is the owner of the school but he stated he is the one processed registration of the school.

He argued that, if the applicant is not the owner of the school how does the owner of the school entered into tenancy agreement with the applicant to run his own school. He submitted that, if you read the pleadings in the main suit and the pleadings in the present application you will get an impression that ownership of the school is not in dispute or at issue. He went on arguing that, if you read paragraph 6 of the counter affidavit of the respondent you will find the deponent states the respondent entered into a special arrangement with the school to be paid

12% of the annual school fees as a rent for the school premises termed as "malipo ya pango".

He stated there is no any document showing the applicant is a respondent's tenant. He stated the only document available is annexure ICS 2 to the counter affidavit signed by the respondent to acknowledge receipt of the rental fees from the applicant as the Manager of the school. He stated that, all the documents available referred the applicant as the Manager of the school. He submitted that, being Manager of the school owned by the respondent and paying 12% of the annual school fees to the respondent does not make the applicant owner of the school. He submitted that, jurisdiction of this court is to adjudicate on land disputes and stated as the applicant has no land dispute with the respondent there is no triable issue between the parties which is before the court.

He argued in relation to the second condition for granting temporary injunction that, if you read the whole of the applicant's affidavit you will not see any paragraph of the affidavit showing any kind of irreparable loss which will be suffered by the applicant if temporary injunction order will not be issued. He submitted that, irreparable loss is required to be shown in the affidavit and not to be shown in the submission made by an advocate from the bar. He countered the argument by the counsel for the applicant that if the temporary injunction will not be issued the applicant's

suit will be rendered meaningless by stating that, apart from the relief of declaratory order the applicant is seeking from the court but he is also seeking for remedy for breach of tenancy agreement which can safely be compensated in monetary form.

He argued that, it is not stated anywhere in the affidavit as to how the pupils will suffer if the injunctive order will not be issued. He stated that, as the applicant has already been terminated by the respondent from his managerial position, the school will go back to the new Manager who will be appointed by the respondent. He stated further that, the applicant is using the order he obtained from this court to continue to collect fees while he is not responsible with the school. He submitted that, under that circumstances the respondent is the one who is continuing to suffer irreparable loss as the fees which the applicant is collecting will not be recovered.

He argued in relation to the third condition for granting temporary injunction that, the applicant will not be inconvenienced in any way if the temporary injunctive order will not be granted but rather the respondent is the one to be much more inconvenienced as the owner of the school by being taken out of control of the school. He stated that, although the applicant said he invested massively in the school but he has already been paid that is why he is not claiming for refund of the said investment. At

the end he prayed the court to desist to grant the injunctive order the applicant is seeking from the court.

Mr. Franco Mahena added that, the applicant has deposed in the affidavit supporting the application that, there is oral tenancy agreement of ten years. He argued that, the law is very clear that a lease should not be enforceable unless it is in writing and supported his argument with section 64 (1) (a) and (b) of the Land Act, Cap 113 R.E 2019. He submitted that, as the said oral agreement was not put in writing it has not been established there is a triable issue in the main suit. He submitted further that, the respondent being a trusteeship organization it cannot enter into oral lease agreement of such a long period of time. He added that, termination of managerial position of the applicant cannot stop the school to continue and stated in order for the order of temporary injunction to be granted all conditions provided in the case of **Attitlio V. Mbowe** (supra) must co-exist. He contended that, failure to establish any of the condition will make the order of temporary injunction to be denied.

In his rejoinder the counsel for the applicant argued that, the counsel for the respondent challenged jurisdiction of the court to entertain the application by arguing there is no dispute over ownership of the property in dispute. He argued that the main suit and the application is premised on breach of tenancy agreement and not on the ownership of

the school. He stated that, to argue the land before the court is not a land case is a preliminary objection which was required to be initiated by way of notice. He submitted the court has jurisdiction to entertain the matter in terms of section 67 (1) (a) and (b) of the Land Act read together with section 37 (1) (e) of the Land Disputes Courts Act because the suit is based on tenancy agreement which the applicant want to enforce.

He submitted that, all what he has argued are deposed at paragraph 3 of the affidavit and stated in annexure MES 1, 2 and 3 read together with paragraphs 5 and 6 of the plaint and paragraph 8 of the reply to the counter affidavit. He went on arguing that, as the respondent has admitted at paragraph 6 of the counter affidavit that there is an oral tenancy agreement then there is a triable issue in the main suit. He stated that can also be seeing at paragraph 13 of the affidavit supporting the application.

With regards to the condition of irreparable loss he stated that, it is well stated at paragraphs 7, 8 and 9 of the affidavit supporting the application the loss the applicant will suffer if the injunctive order will not be granted. As for the condition of balance of convenience the counsel for the applicant stated it is deposed at paragraph 12 of the affidavit how the applicant will be inconvenienced if the order of temporary injunction will not be granted. He submitted that, as Land Case No. 186 of 2021 is still

pending in the court, interest of justice demands temporary injunction be granted in the case at hand.

He submitted that, the question of ownership of the school and management of the school will be proved in the trial of the main suit. He finalized his rejoinder by stating that, they are praying the order the applicant is seeking before this court of temporary injunction be granted as all conditions laid in the case of **Attitlio V. Mbowe** have been established in the present application.

After considering the submissions from the counsel for the parties the court has found the issue to determine in this matter is whether the application deserve to be granted. The court has found that, as rightly argued by both counsel for the parties the conditions governing grant of temporary injunction in our jurisdiction were well laid in the famous case of **Attitlio V. Mbowe** (supra) where it was stated as follows:-

- (i) *There must be a serious question to be tried on the facts alleged, and the probability that the plaintiff will be entitled to the relief prayed.*
- (ii) *The applicant stands to suffer irreparable loss requiring the courts intervention before the applicant's legal right is established.*
- (iii) *On the balance of convenience, there will be greater hardship and mischief suffered by the plaintiff from*

withholding of the injunction than will be suffered by the defendant from granting of it

Starting with the first condition of existence of triable issue or a prima facie case the court has found it is required to be satisfied there is a triable issue or in other words the applicant has a cause of action against the respondent. As stated in the case of **American Cyanamid V. Ethicon** [1975] 1 ALL ER 504 the suit against the respondent is required to be not frivolous or vexatious. The court has found it is deposed at paragraph 3 of the applicant's affidavit and it is averred at paragraph 3 of the plaint that, sometimes in 2019 the applicant entered into an oral tenancy agreement with the respondent to carry on education activities in the respondent's premises for a period of 10 years at a rental fee of 12% of the school fees of each student per annum.

The applicant deposed further at paragraph 4 of his affidavit and averred at paragraph 10 of the plaint that on 23rd August 2021 he was informed by the respondent to vacate the said premise by 1st November 2021 which he stated is a breach of their tenancy agreement. On the other hand, it is deposed at paragraph 4 of the respondent's counter affidavit that, the applicant was just a school manager who was employed by the respondent to manage and administer the activities of the school which is owned by the respondent.

From the above stated facts, the court has found there is no way it can be said there is no triable issue in the Land Case No. 186 of 2021. The court has found there is an issue of whether the applicant was a tenant of the respondent or he was employed by the respondent to manage and administer the activities of the school. The court has found that, if it will be established the applicant was a tenant of the respondent the next issue will be whether the respondent has breached the alleged tenancy agreement.

The court has carefully considered the long and detailed submission made by the counsel for the respondent to establish the applicant is not the owner of the school but he was employed by the respondent and the argument that there was no tenancy agreement between the applicant and the respondent. With due respect to the counsel for the respondent, the court has found the submission by the counsel for the respondent has not managed to counter what is stated in the affidavit of the applicant and averred in the plaint used to initiate Land Case No. 186 of 2021.

The court has arrived to the above finding after seeing that, there is no way the stated contested facts and the rival arguments from both sides can be determined at this stage before going to the trial of the case and receive the evidence from the parties. The above finding of this court is getting support from the case of **Surya Kant D. Ramji V. Saving and**

Finance Ltd & Three Others, Civil Case No. 30 of 2000, HC Com. Div. at DSM (unreported) where it was stated that, in proving whether there is a serious question for determination by the court, it is not conclusive evidence which is required but rather the facts as disclosed in the plaint and the affidavit.

From the above stated position of the law the court has found that, all concerns raised by the counsel for the respondent that; the applicant is not the owner of the school but he was employed by the respondent to manage and administer the school, that there was no oral tenancy agreement between the parties and the concern raised by the counsel for the respondent that, if there is oral lease agreement the same is not enforceable under the law are the concerns which cannot be determined without requiring evidence from the parties.

To the view of this court the said issues can only be properly determined after receiving evidence from the parties in the full trial of the case and cannot be determined in the application at hand where the applicant is just seeking for an injunctive order. In the premises the court has found the first condition for granting temporary injunction which is establishment of existence of prima facie case or triable issue in a case has been established in the applicant's application.

Coming to the second condition for granting temporary injunctive order which is irreparable loss to be suffered if the order is not granted the court has found that, as stated in the case of **T. A. Kaare V. General Manager Mara Cooperative Union**, [1987] TLR 17, the 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 is determined. It was also stated in the book of **Sohoni's Law of Injunction**, Second Edition, 2003 at page 93 that:-

"As the injunction is granted during the pendency of the suit the court will interfere to protect the plaintiff from injuries which are irreparable. The expression "irreparable injury" means that, it must be material one which cannot be adequately compensated for in damages. The injury need not be actual but may be apprehended."

Under the guidance of the position of the law stated in the above referred cases the court has found that, the argument by the counsel for the respondent that the applicant has not demonstrated any claim of irreparable loss is not supported by the pleadings filed in the matter at hand. The court has found that, as rightly argued by the counsel for the applicant, the applicant has demonstrated categorically at paragraphs 7, 8, 9 and 10 of the affidavit the loss he will suffer if the order of temporary injunction will not be granted.

The court has found that, although the applicant has demonstrated at paragraphs 15 to 21 of the plaint the loss he will suffer if the order of temporary injunction will not be granted but the court has found that is not sufficient enough to say there is no irreparable loss which will be suffered by the applicant. The court has found if temporary injunction will not be granted and the applicant is evicted from the premises there is a great possibility of suffering irreparable loss because as argued by the counsel for the applicant the suit will be rendered nugatory.

The court has also found the applicant has alleged he has massively invested in renovating the school premises on believes that he would have continued with the alleged tenancy agreement for ten years but the alleged agreement has now been breached. Those circumstances make the court to find the second condition for granting an order of temporary injunction has been established in the matter at hand that, if the order of temporary injunction will not be granted the applicant will suffer irreparable loss.

As for the third condition for granting an 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. After considering all what is

deposed in the affidavit supporting the application and in the counter affidavit together with what is stated in the pleadings filed in the Land Case No. 186 of 2021 the court has found the applicant is the one stand to be more inconvenienced than the respondent if the injunction will not be granted.

The court has found that, as the subject matter of the suit touches the affairs of the pupils who the applicant states are getting education in the said school, if the order of temporary injunction is not granted and the applicant is evicted from the premises before his claims are determined by the court it will also cause inconvenience to the pupils. The court has found the respondent will not be subjected into any inconvenience as they will continue to get the rental fees from the applicant for the period the applicant will continue using the premises while awaiting his rights to be determined by the court.

The court has considered the argument by the counsel for the respondent that the applicant has already been terminated from his position of being the manager of the school but find that, after the applicant being given a letter of handing over the school properties by November, 2021 as stated in annexure MES5 he challenged the said letter and filed the Land case mentioned hereinabove in this court. That means the applicant has not vacated from the suit premises and to desist to grant

the order of temporary injunction will give chance to the respondent to evict the applicant from the premises before his claims are determined by the court.

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 **Attitlio V. Mbowe** (supra) have been established in the application at hand. Consequently, the application is granted and the order of temporary injunction to restrain the respondent, their assignee, employees, agents or associates from evicting the applicant from the building hosting the school or disrupting the operation and management of the school by the applicant. The respondent should also stop any plan of impeding the smooth operation of the school pending determination of Land Case No. 186 of 2021. As prayed by the applicant costs of the application to be in the cause. It is so ordered.

Dated at Dar es Salaam this 2nd day of May, 2022



I. Arufani

JUDGE

02/05/2022

Court:

Ruling delivered today 2nd day of May, 2022 in the presence of Dr. Chacha Murungu, learned advocate for the applicant and in the presence of Mr. Geoffrey Lugomo, Ms. Ganjatu Kelemile and Mr. Juma Nassoro, learned advocates for the respondent. Right of appeal to the Court of Appeal is fully explained.



I. Arufani

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JUDGE

02/05/2022