

TANZANIA / JUDGMENT

20161104 TZHC Dar es Salaam

COURT
TZHCDECIDED
4 November 2016

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IN THE HIGH COURT OF TANZANIA DAR ES SALAAM DISTRICT REGISTRY AT DAR ES SALAAM
MISC. LAND APPLICATION NO. 51 OF 2015 CENTER POINT LIMITED APPLICANT
VERSUS

1. NATIONAL HOUSING CORPORATION 1ST RESPONDENT \ I 2. KIMBEMBE AUCTION
MART LTD 2No RESPONDENT

RULING

MKASIMONGWA, J. The Applicant, CENTRE POINT LIMITED, applies for among others, an order restraining the NATIONAL HOUSING CORPORATION and KIMBEMBE AUCTION MART LTD (Respondent), their assignee(s), workmen, agent(s) employee(s), Servant(s) or any other person(s) from reallocating, disposing off or evicting the Applicant and or his employees from the suit premises situated at Plot No. 2008/93 Appt. No. 001, India Gandhi Street in the City of Dar es Salaam pending determination of Land Case No. 43 of 2015 which is still pending this court. The Application is made by way of Chamber Summons filed under Order XXXVII Rule 2 (1) Section 68 (e) and Order XLIII Rule 2 of the Civil Procedure Code, [Cap.33 R.E 2002] and it is supported by the Affidavit and Supplementary Affidavit sworn by MUSTAFA FIDAHUSSIN ESMAIL which were countered by the Respondents by their joint counter affidavits sworn ., by JACKSON MAAGI and that to the supplementary Affidavit sworn by ELIAS MSESE. This matter came up for hearing on 11/10/2016 at 7.30 am on which date and time though were aware of the Respondents did not appear in court. The court was not informed as to why they could not appear. It was therefore ordered by the court that hearing of the application proceeds ex- parte. At the hearing the applicant was represented by Mr. John Nyange

- learned advocate. Mr:-Nya.nge submitted to the-effect that-he adopts the contents of the Affidavit and the Supplementary Affidavit filed in support of the Chamber summons. He added that on 8/6/2016 the court ordered for maintenance of status quo pending determination of this application. Despite of the order on 8/9/2016 the Respondents invaded the suit premises possessed by the applicant. They effected eviction and took with them all valuable properties save for the permanent fixtures. This act renders part of the Applicant's prayers being overtaken by events. This necessitated the applicant to seek for leave to file a supplementary affidavit which was granted and the Applicant consequently filed the Supplementary Affidavit on 3/10/2016. In the Supplementary Affidavit the Deponent avers/

narrates the scenario. Mr. Nyange also submitted that upon other prayer being overtaken by events, they are remained with part of the prayer that is the Respondent should be restrained from reallocating and disposing off the suit premises till when the Land Case No. 43 of 2015 pending in court is determined. To date the Land Case is yet to be determined. In granting or not an application for restraint order Mr. Nyange submitted the court has to consider three conditions as were narrated by the Court of Appeal of Tanzania in the case of GODFREY SAYI V/S MARY MNDOLWA, CIVIL APPLICATION NO 116 OF 2007 (Unreported). He mentioned the conditions to be: One: whether the matter has a prima facie likelihood of success; Two: whether the refusal of staying is likely to cause substantial and irreparable injury to the applicant; and Three: balance of convenience. Mr. Nyange stated that the Respondents who are the Defendants in the Land Case have not filed their Written Statement of Defence and that they do not appear in court. Under such circumstances the Applicant/plaintiff stands a chance to succeed in the suit. These conditions were also stated in the case of ATILIO V /S MBOWE (1969) HCD 284. Secondly, the learned advocate for the applicant contended that, if this application is not granted the Respondents will sell all the seized properties which valued at Tshs. 3,400,000,000/= and the Applicant will suffer loss which will be irreparable. In any case the Respondents will not suffer to that extent if they will be restrained from selling the properties since they are still in possession of the same. The seized goods are also a subject matter of the Land Case for they were acquired for premise's renovation purposes. The renovation has not been valued and therefore if the premises will be reallocated, the person to whom it will be reallocated will continue with the renovation in which case the Applicant will not be recognized at all. Mr. Nyange prays the court that it grants this application with costs. In considering the matter it is clear that the Applicant applies for restraint orders to issue to the Respondent; restraining them or any person acting in their behalf from:

- (a) Reallocating the suit premise
 - (b) Disposing of the suit premise and/or
 - (c) Evicting the Applicant and/or his employees from the suit premises. It is true as submitted by the applicant's learned advocate that on -- 8_/6/2016 th is c_0_u rt_ordered_ for-mainter:ianGS-of-sta-t1,;1s-EJ t10-13ending-hearing-
- and determination of this-application. It is reported that on--8/9/2016 the Respondents invaded the premises, evicted the applicant and took away into their possession the properties belonging to the applicant. As such Mr. Nyange contends that the third prayer above has been overtaken by events, and that the applicant is remained with the first and second prayers. In his submission Mr. Nyange shows that the Respondents should be restrained from selling the properties they had seized from the suit premises. This in my view does not get its root in the pleadings (Chambers Summons), hence not considered. According to the case of ITILIO V/S MBOWE (Supra) there are three conditions which must be satisfied before an injunction can be issued. The conditions are that: "(i) There must be a serious question to be tried on the facts alleged -and a probability that the plaintiff will be

entitled to the relief prayed. (ii) That 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, and (iii) On the balance 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" As to whether there are serious questions to be tried in the suit, I find it material worth to show the prayers in the suit that is Land case No. 43 of 2015. In the case the Applicant (Plaintiff) prays for declaratory order to the effect that is the lawful tenant of the 1st Defendant and the 14 days' ---- __, __ -- ---noticer serve-d-bythe-1 ?t-Defenda Rt- is-- nuJLand v_oid._1t -~_OQ~ld be therefore -- ----- -- -- -- -- st vacated. The prayers are also to the effect that the 1 Defendant should be ordered or directed to renew the lease agreement with the plaintiff unconditionally. The plaintiff also prays for payment of a total sum of Tshs. 500,000,000/= being refund of the costs for renovations of the suit premises. The defendants have not filed their defences. In any case the plaintiff has the duty to prove the claims. I will hold therefore that yes in this matter there are serious questions to be tried on the facts alleged. Is the interference by this court necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal rights are established is another question to be answered. In answering this I have considered the nature of the claim. In do not think if the declaration that touches the Landlord - Tenant relationship which is not inclined to any loss . can bear an irreparable loss. Secondly the plaintiff claims for a sum of Tshs. 500,000,000/= being refund of costs for renovations. This is in my opinion contrary to the submission by the applicant that the renovation has not been valued and that if the premises are reallocated to another person, r IW I . t the later will do the renovation and therefore what the Applicants did in renovating the premises will not be recognized-. Since the renovation value is well known by the plaintiff and since the plaintiff has commenced a claim for the value of the renovation he cannot be heard now stating that, the renovation he has done will not be recognized. He has the duty to prove the claim which if fully done he will be entitled to payment of the sum claimed regardless, the fact that the premises have been re-allocated or sold to another person. __, On the balance of convenience consideration is on the capability of the defendant_ to pay what is decreed by the Court-in case th-e:-plaintiff-- succeeds in the suit. Nothing has been stated by the applicant in his submission showing that the Respondent cannot pay for the sum decreed. All in all, although there are serious triable issues in Land Case No. 43 of 2015, I find nothing that necessitates for the court's interference by way of granting injunctive orders sought by the applicant. In that premise, this application fails and the same is dismissed with costs. Dated at Dar es Salaam this 4th day of-November, 2016 JUDGE 4/11/2016 ..

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