

TANZANIA / JUDGMENT

hashim rungwe vs zubeda ahmed lakha 2023 tzhc 19607 15 may 2023

COURT
TZHCDECIDED
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (IN THE DISTRICT REGISTRY OF KIGOMA) AT KIGOMA MISC. LAND APPLICATION NO. 17 OF 2023 (Arising from Land Case No. 24 of 2022) HASHIM RUNGWE APPLICANT VERSUS ZUBEDA AHMED LAKHA..... 1ST respondent ALBERT SITTA T/A MEMO AUCTION MART 2ND respondent

RULING

12/5/2023 & 15/5/2023 MlachaJ. The applicant, Hashimu Rungwe is the plaintiff in Land Case No. 24 of 2022 now pending before this court. The respondents, Zubeda Ahmed Lakha and Albert Sitta T/a Memo Auction Mart (hereinafter referred to as first and second respondents) are defendants in the case. Moving the court under a certificate of urgency, the applicant is asking the court to issue an order for permanent injunction restraining the first and second respondents, their agents, assignees or any other person working on their behalf, from trespassing, interfering or evicting the applicant or any other person from the property on plot No. 153/B at Lumumba Road, Kigoma Ujiji Municipal, at Kigoma town center, pending hearing and final determination of the suit pending between the parties. The application is supported by an affidavit of Mr. Hashimu Rungwe which has several annexures. The respondents are resisting the application and have filed a counter affidavit sworn by Mr. Revocatus Mugaya Kaitila Mtaki who is also their defence counsel. The applicant is represented by Mr. Msafiri Mabera. The proceedings were conducted on line; I was at Lumumba district court and Mr. Mabera was in Dar es Salaam. Mr. Mtaki was in Tabora. Hearing was done while adopting the contents of the affidavit supporting by oral submissions. Mr. Mabera told the court the application and its annexures. Mr. Mabera told the court that the applicant is the owner of plot No. 153/B, Lumumba Road, Kigoma Ujiji Municipal. He bought the plot from Bera Karumba through a sale agreement dated 10/3/1994 from E. Agreem. vii. He annexed the affidavit. That, the seller gave him an offer of a plot of land which was in the name of the former owner, f. IZ "Zk f 7". Mr. Mohamedaffir ZLadhi Zaffer. Mohamedaffir Bera had bought it from Mr. Mohamedaffir. He was, as the copy of the map showing boundaries of the plot. Counsel submitted adding that he enjoyed a peaceful occupation of the Land from 10/3/1994 up to 5/7/2022 when he received a 14 days' notice to vacate from the suit land. The second respondent

was executing the decision of the Court of Appeal made in Zubeda Ahmed Lakha vs. Hajibai Kara Ibrahim, Civil 2 Appeal No. 238/2018. The applicant was not a party but the first respondent and his brother who had a dispute over plot No. 153/A, Lumumba Road, Kigoma Ujiji Municipal. Counsel went on to say that, this plot was revoked by the president in 1985 to create plots Nos. 153/1, 153/2 and 153/2 leading to the case which has declared the revocation illegal. He said that these plots are different from plot No. 153/B which is owned by the applicant. Counsel submitted that the decision of the Court of Appeal affected plots Nos. 153/1, 153/2 and 153/3 which came from plot No. 153/A and not plot No. 153/B owned by his client. Counsel proceeded to submit that the applicant lodged an application at the registry of this court at Tabora to object the attachment of plot No. 153/B but it was dismissed because of defects in names, that is, instead of reading Hashimu Rungwe it was written Hassan Rungwe. Counsel went on to submit that there is an issue to be determined by this court in the pending land case, that is, whether plot No. 153/A is the same as plot No. 153/B. He added that the applicant has never been a party in the cases involving plot No. 153/A which are the subject of execution proceedings now pending at the registry of this court at Tabora. Counsel referred the court to principles governing injunctions contained in the case of Atilio v. Mbowe (1969) HCD 268 and argued the court to be guided by them. Making reference to the case, he said that, there is a pending civil suit between the parties making it important to have an injunction to protect the property. He added that if the order will not be issued, his client will suffer more irreparable loss than the respondents. He referred the court to Talifit Mini super market v. BP Ltd [1992] TLR 189 as his authority on the element of irreparable loss. The submission of Mr. Mabera was resisted strongly by Mr. Mtaki. While adopting the contents of his counter affidavit and its annexures, Mr. Mtaki named the application as baseless and argued the court to dismiss it. He said that the judgment of the Court of Appeal, annexure HR - 4 collectively, now under execution, is clear, making the suit baseless with no probability of success. Giving details, counsel submitted that, the suit is seeking to challenge the decision of the Court of Appeal something which is impossible. He referred the court to Sakar, Law of Civil Procedure, Vol. 11, page 1417 where it is written that, 'an injunction should not be issued lightly'. Further reference was made to page 1421 of the book where it is written that, 'where a decree for possession has been passed by a court, the decree holder should not be deprived of the fruits of his decree on account of an Independent suit relating to the property or by an injunction restraining the execution of the decree.' He said that, this is what the applicant wants to do. Counsel referred the court to Zubeda Ahmed Lakha v. Hajibai Kara Ibrahim (supra), certificate of title No. 4592 in the name of Hajibai Kara Ibrahim and a deed plan (annexture HR-2). He submitted that, the deed plan is signed by the Director of Land Survey and Mapping as required by section 17 (1) of the Land survey Act, Cap 324, R.E 2002 but that the deed plan annexed by the applicant is not signed by the Director of survey and Mapping. He invited the court to doubt the offer and attached deed plans. Counsel proceeded to tell the court that there is no plot known as plot No. 153/B Kigoma Ujiji Municipal, adding that, the search conducted by the applicant at Kigoma Ujiji Municipal was illegal because all searches of land title must be done at the land registry not at the council as he did. He challenged the processes used to change the name of Hassan Rungwe to Hashimu Rungwe. He called it a fishing expedition. Counsel went on to submit that, there is no evidence, other than hearsay, showing that Hashimu Rungwe bought the plot

because he did not attach 5 affidavits of the two people who had bought the plot earlier. He argued the court to expunge para 4 of the affidavit as containing hearsay. He went on to say that the Court of Appeal declared the revocation of plot 153/A to have been done illegally leaving the first applicant as lawful owner of the plot. He submitted that the applicant is not in a position to suffer irreparable loss adding that it is the first respondent who will suffer irreparable loss because he will fail to execute the decision of the Court of Appeal. Mr. Mabere made a rejoinder submission and reiterated his earlier position. Next is a consideration on the merits of the application. I will start with principles laid down in *Atilio v. Mbowe* (supra). The case set three principles which read as under;

1. Whether there is a main suit with serious triable issues on the facts prayed for;
2. Whether the court's interference is necessary in order to protect the applicant from the kind of injury which may be irreparable before his legal right is established; and
3. Whether on the balance of convenience there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction than would be suffered by the defendant from granting it. See also *American Cyanamid co. V. Ethicon Ltd* [1975] A.C.396 (HL), *Tanzania Cigarette Co. Ltd v. Mastermind Tobacco (T)Ltd*, Commercial case No.11 of 2005, *Kibo Match Group Ltd v. Mohamed Enterprises (T) Ltd*, Civil Application No.6 of 1999 and *Harsh Energy Tanzania Ltd v. Richo company and three others* Commercial Case No.52 of 2015. In *Harsh Energy*, Mwambegele J. (as he then was) had this to say: "In granting an order for injunction, the court should bear in mind that its origin is from an equitable jurisdiction and as such, before making such order, the claim must be tested on all principles of equity Apparently in addition to the said conventional three-tier test requirement, the property for which an order is sought to be protected must be in existence or at least its whereabouts must be certain." (Emphasis added) 7 Mwambegele J took the ball ahead. That in addition of the applicability of the three principles the applicant must pass two more tests; one, his case must be tested against principles of equity, the most common being, "he who comes to equity must come with clean hands" and two, that the property must be in existence or at least its whereabouts must be certain. I agree that there is a case pending before this court. I also agree that it has serious triable issues assuming the facts pleaded to be correct. That has put the first test in the affirmative. But looking through I have seen that the rest of the tests are not in favour of the applicant. The injury likely to be suffered does not appear to be irreparable because it can still be paid by way of damages if he wins the case. And he cannot be said to suffer more than the respondents because the first respondent has a judgment of the Court of Appeal which she will fail to execute in case the injunction is granted. The second respondent will also be affected more because he will miss his execution fees which might be highly needed in the running of his office as a court broker. Costs already incurred may also remain unpaid for a long time. The equitable principle test is even more serious. The applicant does not appear to have clean hands. He wants to use an injunction to circumvent -j-. 8 execution of a court decree. I see the application as being intended to block the decision of the Court of Appeal. That is not

allowed and I dont think is the best way of getting out of the problem. Further, the ownership of the applicant to the suit land is not certain. It calls for evidence to be ascertained. The deed plan has no approval of the director of Survey and Mapping and the offer is not in the name of the applicant. The applicant has no offer or title deed in his name so as to ascertain his ownership to plot 153/B. His title to the property ought to have be certain before asking the injunction. He is basing his title in a sale agreement which has remained without further action for 28 years. I agree that the court does not have powers to grant an injunction against an execution process. I think Mr. Mtaki was correct in his reference to sakar page 1421. With respect to efforts done by Mr. Mabera in defence of his client, the court cannot do that. And if it will grant the injunction on the facts before it, the order issued will lay a bad precedent and take the judiciary into serious confusions. It will take us to endless litigations for all executions will end up being blocked. Here is a situation where the first respondent has a decree in his favour and he courpias he has managed to move the court to grant execution orders. The 9 granted the execution and appointed a court broker to execute the decree. The court broker (second respondent) has already issued the 14 days' notice requiring the applicant and any person claiming title from him to vacate. The execution is at an advanced stage. Now, if the execution is affecting properties of third parties, as it is alleged, it is not a situation calling for an injunction but a situation compelling the affected person to lodge objection proceedings before the court which issued the execution order. And, if there was an earlier attempt which was not successful, the remedy was not come to this registry and file an application for injunction but to make a reference to a judge, if the execution order was an order issued by the deputy registrar or appeal to the Court of Appeal, if it was an order of a judge. That was not the case here. That said, the application is found to be misconceived and baseless. It is dismissed with costs. It is ordered so. Judge 15/5/2023 10 Court: Ruling delivered online through the virtual court services. Mr. Mabera and his client, applicant, were in Dae es salaam. Mr. Mtaki for the respondents was in Tabora. Right of Appeal Explained. Judge 15/5/2023 11

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