

TANZANIA / JUDGMENT

joelin john kataraiia vs gulam dewji

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES
SALAAM MISC. LAND CASE APPLICATION NO. 259339 OF 2023 JOELIN JOHN
KATARAIA..... APPLICANT VERSUS GULAM DEWJI..... 1st
RESPONDENT GREENLIGHT AUCTION MART..... 2nd RESPONDENT

RULING

27th November, 2023 & 0Jh January, 2024 L. HEMED, J, It is an application for injunctive orders made under Order XXXVII Rule 1 (a) and section 95 of the Civil Procedure Code, [Cap 33 RE 2019]. JOELIN JOHN KATARAIA, the Applicant herein is seeking for an order of this court to restrain the respondents, GULAM DEWJI and GREEN AUCTION MART from evicting her and selling the property comprised in Certificate of Title No.114765/2, Pot No.994, Mbezi, Kawe, area Kinondoni Municipality, Dares salaam, pending hearing of the main suit. The application has been supported by the affidavit of JOELIN JOHN KATARAIA, the Applicant. The 1st respondent challenged it through the i counter affidavit of one Gulamabbas Hassanali Fazal Dewji. The 2nd Applicant could not file counter affidavit despite being availed with opportunity to file it. Due to time constraint, the court directed the application to be argued by way of written submissions. Mr. Paul Elias, learned advocate acted for the applicant while the respondents enjoyed the service of Mr. Elisa Abel Msuya, learned counsel. Submissions were promptly filed as per the order of the court. I have gone through the affidavits that support and/or oppose the application together with the rival submissions, to find out if the application is worth to be granted. I am aware that granting temporary injunction like the one sought in the instant application is a matter of discretion of the court. This is a pursuant to what was held in Alloys Anthony Duwe vs Ally Juu ya Watu, [1969] HCD 268. However, such discretion has to be exercised judiciary by considering factual and legal parameters. It is well known that conditions under which the court has to consider when determining application for injunctive orders were laid down in the Land mark case of Atilio vs Mbowe [1969] HCD 284. Hon. Georges, the then, CJ. was of the view that before granting an injunctive order the court 2 must be satisfied that; -

- i. There is 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 court's intervention before the applicant's legal right is established. iii. That on the balance, there will be greater hardships and mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendant from granting of it. The above stated conditions have become a trite law in the determination of applications for injunction in Tanzania. Let me start with the first condition of existence of a serious question to be tried on the facts alleged (triable issue). In the instant matter, there is no dispute that there is a pending suit in the name of Land Case No. 392 of 2023 in which the applicant is challenging what she terms as "intended" sale of the suit land properly. The applicant claims to have interest over the same property as matrimonial residence. 3 I have taken time to read the counter affidavit and found that the 1st respondent also claims ownership of the suit piece of land. He has attached a copy of certificate of title to prove that he is the registered owner of Plot No.994 Mbezi Kawe Dar es Salaam city under Title No. 114765. In his argument against the application Mr. Elisa Msuya learned advocate asserted that the Applicant had failed to prove her claims contrary to sections 110 (1) & (2) 111 of the Evidence Act [Cap 6 RE 2019]. Relying on the decision of the Court of Appeal of Tanzania in Nacky Ester Nyange vs Mihayo Marijani Wilmore and Another, Civil Appeal No. 207 of 2019, he insisted that since the Applicant is not the registered owner of the disputed land property, she is not entitled for injunctive orders. I am of the firm view that what is needed at this stage of applying for injunctive orders, the applicant to demonstrate prima-facie case and not to prove the said case. The court is not required to examine the material before it closely and conclude that the claimant has a case because by doing so will amount to prejudging. I do subscribe to what the late Mapigano, J observed in Colgate- Palmolive Company vs Zakaria Proviso Store & others, Commercial Case No. 1 of 1997 that; 4 " I direct myself that in principle the prima facie case rule does not require that the court should examine the material before it closely and come to a conclusion that the plaintiff has a case which he is likely to succeed for to do so would amount to prejudging the case on its merits. All that the court has to be satisfied of is that on the face of it the plaintiff has a case which needs consideration and that there is a likelihood of the suit succeeding" Having considered the facts demonstrated in the rival affidavits, I find a prima-facie case. of ownership to have been established. I am aware that the applicant did not annex to her affidavit any document showing her interests over the suit piece of land, but I think it is premature to go to the detail of the question of ownership at this stage. I am not prepared to fall into the trap of prejudging the matter before the right time and forum. The 2nd condition for consideration is on if the applicant stands to suffer irreparable loss. According to Black's Law Dictionary, 9th Edition, "Irreparable damage" has been defined to mean " damage that cannot be easily ascertained because there is no fixed pecuniary standard of measurement of loss that cannot be compensated for with money" The aforesaid definition envisages that the forecasted loss must be of the nature that it cannot be atoned by way of damages in a monetary means. In the instant application the losses which the applicant is likely to suffer have been stated in paragraph 6 of the Affidavit of JOELIN JOHN KATARAIIA: -

"6. That, if an order of temporary injunction will not be ensued, the Respondents will proceed to effect the intended sale and eviction, thus adversely and irreparably affecting my interest in the property" In the course of reading the counter affidavit of GULAMABBAS HASSANALI FAZAL DEWJI, I found Annexure 'GD-1', a copy of the certificate of Title showing that the property has already been transferred to the Deponent. In the circumstance of this case, it appears there is no intended sale to be restrained. The Applicant claims interest over the suit land which in my view can be easily compensated in case she wins in the main case. The remedy will be for the applicant to be declared owner of the suit premises and to be restored to it in case she gets evicted from the said property. It is also my settled opinion that even if we refrain from issuing the 6 injunctive order the instant suit will not be rendered nugatory as it will never be affected. Above all, the Applicant in her affidavit has not stated the specific irreparable losses she will suffer in case the application is not granted. With regard to the 3rd condition on balance of convenience, it has been asserted by the applicant that an order of temporary injunction will in no way occasion injustice on the party of the respondents. On his part the counsel for the respondent was of the view that the 1st Respondent who is the registered owner of the suit property is the one who shall be inconvenienced most if the order is issued. I must state at the outset that balance of convenience depends mostly on proof of both existence of prima-facie case and irreparable loss. In the instant case, the Applicant has failed to prove the expected irreparable loss and thus making it impossible in ascertaining the balance of convenience. It should be noted that for the application of injunctive orders to be granted all three conditions laid down in *Atilio vs Mbowe* (supra) must be proved. This has not been done in the instant application. From the foregoing, I find the application to have no merits. I hereby dismiss in its entirety without costs. It is so ordered. 7 DATED at DAR ES SALAAM this 05th January, 2024. 8

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