

TANZANIA / JUDGMENT

mafia island diving limited vs marine park lodge limited another 2024 tzhclandd 73 29 february 2024

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29 February 2024

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM MISC. LAND
APPLICATION NO. 27273 OF 2023 (Arising from Land Case No. 27274 of 2023) MAFIA ISLAND
DIVING LIMITED..... APPLICANT VERSUS MARINE PARK LODGE
LIMITED..... JST RESPONDENT BASECAMP MAFIA
PROPERTIES.....2nd RESPONDENT 19/02/2024 & 29/02/2024

RULING

A. MSAFIRI, J The applicant have brought this Application under Order XXXVII Rules 1(a), Order XLIII Rule 2, Sections 68 (c) & (e) and 95, all of the Civil Procedure Code, Cap 33 R.E 2019, (herein the CPC). He is praying for the order of this Court to temporarily restrain the respondents from evicting, harassing or interfere to the applicant business and trespassing into the suit premises located at Pwani, Utende, in Kiegani Village in Mafia District, Coast Region, pending determination of the main suit. The application was supported by the affidavit of David Von Helldorff, the Principal Officer of the applicant company. The respondents vehemently opposed the application and filed their joint counter affidavit which was deponed by Victor Mwakimi, advocate for the respondents. i During the hearing which was orally, the applicant was represented by Mr Herman Kilenzi, assisted by Geoffrey Mushumbusi, learned advocates, while Mr. Denis Kahana, with Victor Mwakimi, and Makori Lucas, learned advocates appeared for the respondents. Mr. Kilenzi started his submissions by praying to adopt the contents of the chamber summons, affidavit and reply to the counter affidavit supporting this application. He said that the law is clear that in order for the injunction to be granted, three conditions must be met. These has been laid down in the famous case of Atillio vs. Mbowe (1969) HCD 284. He named the conditions which must be satisfied to be first, there must be a serious question to be tried on the facts alleged and the probability that the applicant will be entitled to the reliefs prayed. Second that the court interference is necessary to protect the applicant form the kind of injury which maybe irreparable before his legal right is established. And third, that on the balance of convenience there will be a greater hardship and mischief suffered by the plaintiff from withholding injunction than it will be for the 9 I respondent, ju I , 2 He referred the case of GAPCO TZ Ltd& others vs Barclays Bank PLC & others, Civil Case No. 177 of 2006 (Unreported)

whereby the three conditions were adopted. He submitted that going by the above said principle, the applicant has managed to establish all three conditions. On the first condition, Mr Kilenzi submitted that the allegations raised by the respondents that the suit area belonged to them are not true. This is from the contents of paragraph 10.1 of the counter affidavit. He said that looking at the Title of ownership attached by the respondents in the counter affidavit its map shows the area different from the one where the applicants business is located. That, the area specified in the lease agreement between Mafia Island Diving Lodge and Kiegeani Village Council, is different from the one shown in the Title of ownership of the respondents, specifically on the borders of the suit property. The demarcations are different as it shows they don't belong to the respondent. He argued that, from that fact, it is clear that there is triable issue between the parties hence the first condition has been met. On the second condition on the sufferance of irreparable injury, Mr Kilenzi submitted that, as stated in paragraphs 8 and 9 of the affidavit, the 3 interference of this court is necessary to prevent the kind of injury which may cause irreparable loss. That, under paragraph 9, the applicant has leased property and it is the backbone of the applicant's business hence disposing it will kill the business of the applicant while the matter is still in court. He averred that the applicant is in the possession of the suit property for a long time and if the court will not grant the application, the applicant will suffer as she will be forced to leave the business and she has paid her rent and the leased property is subjected to the pending suit. The applicant will not be able to recover the loss from the respondents if she will succeed in the main suit which is pending before this court. Also the applicant will lose potential clients as they will be threaten by the respondents' actions as they did on 28 November 2023 as stated in paragraphs 6 and 7 of the affidavit. On the 3rd condition, on balance of convenience, Mr Kilenzi submitted that the applicant stands to suffer more if this application will not be granted. This is because, the respondent has nothing to lose while the applicant is doing business on the disputed land. He said that the applicant has made many developments on the area owned by the Kiegeani Village Council including buildings. That if this application will not be granted, then it is the 4 applicants who stands to suffer more as the buildings will be demolished. The balance of convenience is tilted on the applicant's side. He argued that the respondents are incapable of repaying the applicant and restitute her to the position the suit property was if the applicant succeed in the main case. He prayed that the application be granted as the applicant has satisfied all the three conditions necessary in such applications. In addition, Mr. Mushumbusi submitted that if the injunction will not be granted, the applicant will lose the name of the business, trust to the society, will lose the long served customers. While, the only thing the respondent will suffer is the delay of the demolition of the building which can wait until determination of the matter. Hence, the applicant will suffer more than the respondent. Mr Kilenzi also raised a point of law that the joint counter affidavit is defective. That the verification clause of the said counter affidavit was deponed by Mr Mwakimi, advocate of the respondents. He had verified that what he has stated in all paragraphs is true to the best of his knowledge. This made the affidavit to contravene Order VI Rule 15(2) of the CPC. He invited the court to disregard the contents of the counter affidavit. In reply, Mr Mwakimi, advocate, for the respondents started his submissions by proving a brief background on the dispute. He submitted that Marine Park 5 Lodge (the 1st respondent) is a Limited Company which its core business is hotel tourism. He said that the

applicant does not contest the ownership of Marine Park Lodge as per the Title of ownership attached to the counter affidavit. He said further that Marine Park Lodge bought this property from the Treasury Registrar. That, the genesis of this dispute originates from exclusivity of the service agreement made between the applicant and the 1st respondent in 2013. The agreement is annexed as annexure P3 of the applicant's affidavit and reflected under paragraph 5. That, under this agreement, the applicant was to offer services to the customers of the 1st respondent. The premises of the 1st respondent covers the area where the applicant was given an opportunity to offer her services under the exclusivity service agreement. In clause 7 of the attached agreement, as annexure P6 the parties agreed that the 1st respondent is the legal owner of the suit property. On the first condition, Mr Mwakimi submitted that the owner cannot trespass on his own property hence there is no serious question to be tried on this matter. On the claims of the applicant that he is a legal tenant following the agreement he made with Kiegan Village, the counsel for the respondents submitted that the alleged tenancy agreement was illegally procured as the Village has no capacity to lease a surveyed piece of land under the granted right of occupancy which was issued to the 1st respondent. He averred further that the reliefs prayed by the applicant/plaintiff in the plaint are unmaintainable since the Kiegan Village is not party to this suit. He pointed that under Section 18(l)(g) of the Village Land Act, the village council have no power to dispose the land property to the foreigner. The applicant is a body corporate whose majority of the shareholders are the foreigners. On the second condition, Mr Mwakimi submitted that the applicant has failed to establish that there is necessity for the court's interference as the applicant is not suffering and will suffer nothing as he has no legal right on the property. The purported leased building belongs to the respondent. The applicant has no any place of business but she was only extended the right to use 1st respondent premises to exclusively entertain the 1st respondent's customers. He averred that it is the respondents who are suffering irreparable loss and financial injuries which are arising from loss of expected profit as the investors failed to continue with construction of intended investment. The respondent is suffering the loss of income for failure to continue the project as the project area is occupied by the trespasser, the applicant who occupies the area which does not belong to him. *Jw L . 7* He said that the respondents own 13,000 acres and they have fixed immovable property contrary to the applicant who owns nothing. The respondents are therefore capable of giving any compensations. On third condition, the counsel for the respondents submitted that the applicant will suffer nothing as she had nothing to lose. The applicant is benefitting from the use of the respondents premises since it is the high season for the tourists. That the applicant is a trespasser, does not own the land or any building hence she suffers nothing. He argued that the applicant has not met all three conditions to warrant the grant of injunction sought. He prayed for the application to be dismissed with costs. Mr Mwakimi also submitted on the point of law raised by the counsel of the applicant about the defectiveness of the verification clause. He stated that he is the advocate of the respondents hence conversant with all the facts which he had deposed in the counter affidavit. In addition, he prayed for the court to invoke the provisions of Section 3A of the CPC and disregard the legal technicalities. In rejoinder, the counsels for the applicant reiterated their submissions in chief. They added that, the background given by the respondent counsel is irrelevant as it was not pleaded in their affidavit. They submitted further that the exclusivity

agreement has expired for a long time ago and the applicant has been leased the suit property by the Village Council. Hence since the said agreement has already expired, the respondents' have no any legal right over the applicant. They added that this exclusivity agreement is clear that it was for a term of eight years which was to lapse in 2021. They maintained that the disputed area is outside the area occupied by the 1st respondent. Before I embark on the determination of the application on merit, I am first obliged to tackle a point of law raised by counsel for the applicant that the joint counter affidavit is defective. Order VI Rule 15(2) of the CPC provides that the person verifying a pleading shall specify what he verifies of his own knowledge and what he verified upon information received and believed to be true. Contending the counsel for the applicant's objection, Mr Mwakimi has told the court that he is an advocate of the respondents, he is conversant with the whole matter in dispute and he is the Company Secretary of the 1st respondent. In that regard, I find that the defectiveness pointed out by the counsel for the applicant is not fatal but it is curable under the provisions of Section 3A of the CPC. 9 Having heard the submissions from the parties and read the contents of the pleadings thereto, my major task is to determine whether this application is meritorious. It is trite law that the Court's power to grant injunction is predicated upon the applicant meeting the three conditions set out in the celebrated case of Atilio vs. Mbowe (supra). This principle is not disputed by the parties in this application. They agree that a party seeking an order for a temporary injunction must meet all the said conditions before the court exercises its discretion to grant a temporary injunction. The three conditions as pointed out by the counsel for the applicant are briefly that first; there must be a prima facie case/serious questions to be tried, second, the court interference is of necessity to prevent irreparable injury befalling the applicant and third, the balance of convenience. I will start the determination of the application by analyzing on whether the first condition on establishment of a serious issues (s) to be determined by this Court has been met. Doing that, I have to be careful not to dig deep into the merit of the case. At this stage, the Court's only obligation is to see whether there is a bonafide contest between the parties and serious question to be tried. It was held in the Court of Appeal's case of Abdi Ally Salehe vs. Asac Care Unit Limited & 2 others, Civil Revision no. 3 of 2021, CAT at Dar es Salaam (unreported), that at this stage, the Court cannot prejudge the case of either party. Holding to the above principle, in the present matter, having looked at the contents of the plaint and the affidavit, the major claim of the applicant is that she is the lawful tenant of Kiegani Village Council on the suit premises namely Pwani Utende located in Kiegani Village in Mafia District, Coast Region. That the tenancy is for a period of 12 years and it was entered on 01 November 2022 according to the attached photocopy of the purported tenancy agreement, which has been attached to the affidavit. The applicant claims that on 26 October 2023 the 1st respondent issued the applicant the eviction notice claiming that she, the 1st respondent is the owner of the suit premises. The applicant contest the 1st respondent's claims and avers that the real owner of the suit premises is Kiegani Village Council. On the other side, the respondents have vehemently denied the applicants claims. They responded that, the 1st respondent is the real owner of the suit premises and that he has been granted the right of occupancy on the suit premises. The respondents have attached to their counter affidavit a photocopy of the Certificate of Occupancy with Tile No. 13811 which shows that the 1st li respondent is the rightful owner of 13.8 acres of land at lltende, Mafia District. The

Title shows it was issued in December, 1991. By this Title, the respondents claims to be the owner of the suit premises and the applicant, a trespasser. The respondents' claims further that Kiegani Village has no authority to lease the land to the applicant because first the village is not the owner of the premises and second that the applicant is a foreign company. There is another issue of exclusivity agreement between the applicant and the 1st respondent which was purportedly entered in 29 March 2013 and expired on March 2021. The respondents' claims that the agreement was on services to provide by the applicant to the clients of the 1st respondent and has since been expired. That the area claimed to have been leased by the applicant by Kiegani Village is the property of the 1st respondent. At the same time, the applicant admitted the existence of the exclusivity agreement between her and the 1st applicant but contends that the agreement was outside the area legally owned by Kiegani Village and leased to the applicant. By the above analysis I find that the whole matter is surrounded by serious contentions which cannot be determined at this stage and can only be resolved 12 by the trial Court. Among the contentious issues is who is the real owner of the disputed premises and whether the purported 40mx40m piece of land which is claimed to be owned by Kiegani Village is part of 13.8 acres of land claimed to be owned by the 1st respondent by the right of occupancy. In that position, I find that the first condition has been met by the applicant. The second condition is on whether the applicant will suffer irreparable injury if the prayers sought are not granted. It is an established rule that an injury capable of being compensated by money is not an irreparable one. In considering the question of irreparable loss, the court has to look at the injury which is one of irreparable loss which cannot be compensated in monetary terms. In the case of Abdi Ally Salehe vs. Asac Care Unit Limited & 2 others (supra), the Court of Appeal held that; "There, the applicant is expected to show that, unless the Court intervenes by way of injunction, his position will somehow be changed for the worse; that he will suffer damage as a consequence of the plaintiffs action or omission, provided that the threatened damage is serious, not trivial or minor, illusory, insignificant or technical only. The risk must be in respect of a future damage". I / 13 I have read the contents of the affidavit of the applicant. She averred that, on 26 October 2023, the 1st respondent issued eviction notice to the applicant. On 28 November 2023, the respondents came with excavators and threaten to demolish the long standing commercial buildings and other development which has been done by the applicant. That the respondent's actions instilled fear to the applicant's potential clients who vacated the suit premises and never came back. That the action of the respondents have caused the applicant to suffer huge losses and it amounts to harassment to the applicant. The applicant added that she has leased a property where her company is located and it is a backbone of her business. If the premises will be disposed, it will mean killing of the applicant's business while there is a pending case in court. In their counter affidavit, the respondents have vehemently denied the applicant's claims stating that the 1st respondent cannot trespass in their own lawful acquired property and the applicant is the one who is trespassing. In paragraph 4 of the counter affidavit, the respondents have stated that the entire land property has been sold to the 2nd respondent and the two are in 14 the stage of finalizing the transfer process. This shows that the respondents already have development plans on the suit premises. The purpose of the temporary injunctions is not to defeat the rights of the parties but to ensure that the interest of each party is protected while their legal right is yet to be

determined by the court of law. It is my finding that in the circumstance where the court has not decided on who is the trespasser and who is the legal owner of the suit premises, the applicant stand to suffer irreparable loss if the respondents are left to proceed with their plans on the suit premises. It is my view that the loss of business is irreparable loss which cannot be atoned because the sufferer cannot be easily restituted to her former state if she will succeed in the main case. I therefore find that the applicant has established the second condition. On the third condition, the applicant avers that the balance of convenience tilts to the applicant as she is the one who will suffer more than the applicant. On their part, the respondents contend that the applicant stands to suffer nothing as she owns nothing on the suit premises. That it is the respondents who will suffer more as they are the owners of the property and they have already set plans for investment which are now being delayed by the applicant. Mb- 15 Having found that the applicant stands to suffer irreparably if the sought temporary injunction is not granted, it is obvious that she is the one who stands to suffer more than the respondents. The respondents' claims to be the legal owners and the applicant claims to be a tenant of Kiegeni Village. If the suit premises will be demolished as intended by the respondents, the applicant will suffer more as she claim to have developed the area. The right of any party being the two rival parties and or Kiegeni Village Council on the suit premises is yet to be determined and decided upon. Basing on that position, I find that the applicant has also managed to meet the third condition. Having established that, I grant the application and hereby enter an order of temporary injunction on the suit premises located at Pwani Utende, in Kiegeni Village in Mafia District, Coast Region. The injunction is for a period of six months to be counted from the date of this Ruling. Costs shall be in the cause. 16

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