

TANZANIA / JUDGMENT

mished chunilal kotak vs omary shabani

2023 tzhclandd 17010 5 october 2023

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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. 389 OF 2023 BETWEEN MISHED CHUNILAL KOTAK APPLICANT VERSUS OMARY SHABANI RESPONDENT Date of last Order: 29/09/2023 Date of ruling: 05/10/2023

RULING

I. ARUFANI, J The applicant, Mished Chunilal Kotak filed in this court the instant application seeking the court to be pleased to order the respondent, Omary Shabani to appear in the court to show cause why he should not be committed to prison for disobeying a lawful order of the court dated 8th June, 2023. It is stated the court ordered the respondent to maintain status quo to the effect that he should not enter into possession of the property situated at Plot No. 13 Block 75 Kariakoo Dar es Salaam with Certificate of Title No. 98750 (henceforth; the suit property). The application is made under section 68 (c) of the Civil Procedure Code Cap 33, R.E 2019 and any other enabling provisions of the laws and it is supported by the affidavit of the applicant. The application was resisted by the respondent who filed in the court his counter affidavit to i oppose the application. When the application came for hearing the applicant was represented by Mr. Roman Selesine Lamwai, learned advocate and the respondent was represented by Mr. Adinan Chitale, learned advocate. The counsel for the applicant prayed to adopt what is stated in the chamber summons, affidavit and in the reply to the counter affidavit as part of his submission. He stated the issues to be determined in this application are two which are whether there is an order date 8th June, 2023 which was disobeyed by the respondent and if the answer is in affirmative what reliefs are the parties entitled. He argued the court issued the order of maintenance of the status quo of the suit property pending hearing and determination of Land case No. 137 of 2021 pending in this court. He argued the court stated at page 16 of the ruling upon which the order was issued that, the applicant is in actual possession of the suit property and if the order to maintain the status quo should not be granted he would have been rendered homeless person. He argued the status quo which was ordered to be maintained is shown in annexure OS-2 annexed at paragraph 4 of the respondents counter affidavit which shows the suit property was in possession of the applicant from 24th September, 2014. 2 ■■■ He said there is no any transfer of ownership of the suit property which has ever been made in respect of the suit

property. He argued that, disobedience of the order of the court is shown at paragraphs 4 and 5 of the affidavit supporting the application where it is stated the respondent issued several notices to the tenants occupying the suit property demanding them to recognize him as the lawful owner of the suit property. He said the respondent threatened the people occupying the suit property that, if they will fail to recognize his ownership to the suit property, they would have suffered the consequences. He said the stated notices were issued on 13th June, 2023 which was five days after the court issued the order for maintenance of the status quo of the suit property. He submitted that any action taken by the respondent after the order of the court being issued has the effect of disobeying the order of the court. He said the prime object of having the offence of contempt of the court order is to preserve the proceedings of the court. To support his submission, he referred the court to the case of Tanzania Bundu Safari Ltd V. Director of Wildlife & Another, [1996] TLR 246 where it was stated disobedience of the court order is equal as disobedience of the law. He prayed the court to find the respondent has disobeyed the order of ■ 3 the court which is a law order made by the court and prayed the application be granted with costs. In his reply the counsel for the respondent argued the application is misconceived and stated the respondent has not contempt any order issued by the court. He said he is in agreement with the counsel for the applicant that there is an order issued by the court on 8th June, 2023 but said the crux of the matter is what was ordered in the stated order. He argued the court stated in the order that the status quo of the suit property be maintained pending hearing and determination of the suit pending in this court. He submitted that to his understanding it is an absurd to say the court prohibited the respondent from taking possession of the suit property or communicating with the tenants living in the suit property. He stated there is nowhere in the application filed in the court by the applicant or in the order of the court stated the respondent was restrained to enter into the suit property. He argued the respondent cannot be committed to go to prison for doing what was not prohibited by the order of the court. He stated the essence of the order issued by the court was to ensure the respondent is not being registered as the owner of the suit property and said that can be seeing in the certificate of extreme urgency filed in the court by the applicant. He said the 4 applicant filed the stated application in the court to ensure the respondent is not being registered as the owner of the suit property, He argued that, even before the order to maintain the status quo being issued the respondent had already been issued with certificate of title over the suit property. He said as the respondent is the owner of the suit property it cannot be said he has disobeyed the order of the court by writing notices to the tenants occupying the suit property. He stated the order was directed to the applicant's property and not to the ownership of the suit property that is why he has filed in the court the case pending in this court to claim for ownership of the suit property. He stated the ruling of the court upon which the order was issued contain many things but what matters is the final order of the court. He said the case of Tanzania Bundu Safari Ltd (supra) cited by the counsel for the applicant was cited out of context and it is the decision of this court which is not binding the court. He said the court may come out with its own decision basing on the circumstances of the case. He submitted that a decision to incarcerate a free person is a very serious decision as it takes the liberty of an individual. He stated the decision of that nature requires sufficient evidence to show a person has clearly violated the order of the court. 5 .'> He submitted that there is no way it can

be said the notices issued by the respondent to the tenants in the suit property amounts to contempt of the court order. He said the stated notices were a mere communication or mere papers which has not changed anything. He said it was communication to the tenants who are not parties to the suit before the court to make them to recognize the respondent as the lawful owner of the suit property. He said there is no eviction notice given to the tenants. He contended that, even if the order was meant to prohibit the respondent from taking possession of the suit property but it cannot be said the respondent has done anything amounting to the contempt of the court order. He cited in his submission the case of Nacky Esther Nyange V. Mihayo Marijani Wilmore & Another, Civil Appeal No. 207 of 2019, CAT at DSM (unreported) where it was stated that, as the respondent was a registered owner of the suit land, he is the owner of the land in dispute. He also cited in his submission the case of Tanzania National Road Agency & Another V. Abdallah Megabe Sindoma & Another, Civil Appeal No. 307 of 2021, CAT at Musoma (unreported) where it was stated certificate of title is conclusive evidence that the person bearing the certificate is the lawful owner of the land in question. He prayed the court to find the application is bankrupt of merit and prayed the court to dismiss the same with costs. In his rejoinder the counsel for the applicant stated that, the issue in the present application is not who is the owner of the suit property but whether there was an order of the court which has been violated by the respondent. He said it is not disputed that there was an order of the court dated 8th June, 2023 but despite the existence of the stated order the respondent wrote notices to the tenants in the suit property threatening them that they will face the consequences if they will not recognize the respondent as the lawful owner of the suit property. He said the order sought in Misc. Land Application No. 722 of 2022 annexed in the counter affidavit of the respondent as annexure OS-1 was for maintenance of the status quo and not restraining transfer of ownership of the suit property. He stated other grounds were analysed by the court at page 16 and 17 of the ruling of the court which is subject matter in the present application which has the effect of evicting the applicant from the suit property. He stated the drawn order is extracted from the ruling which is very clear that no interference should be done in respect of the suit property. He stated the argument that the notices were not issued to the applicant but to the tenants is misleading because the order was issued in respect of the suit property and the notices affected the applicant who is in possession of the suit property. He said the notices issued by the respondent prohibited the tenants to pay rent to the applicant and stated any tenant who will continue to pay rent to the applicant he will face the consequences. He stated the notices affected the applicant and what was done by the respondent is what was prohibited by the court. He contended the argument that the applicant has acknowledged in his reply to the counter affidavit that the respondent is the registered owner of the suit property. He stated that is poor analysis of what is stated in the applicants reply to the counter affidavit. He said the issue of registration of ownership of the suit property stated in the cases of Nacky Esther Nyange (supra) and Tanzania National Road Agency (supra) are matters to be considered in the main suit and not in this application. Finally, he reiterated what he stated in his submission in chief and prayed the court to find the respondent has made a contempt of the order of the court and prayed the respondent to be committed to prison as a civil prisoner. Having keenly considered the rival submissions fronted to the court by the counsel for the parties and after going through the

chamber summons, affidavit, counter affidavit and reply to the counter affidavit filed in the present application by the parties, the court has found there is no dispute that on 8th June, 2023 the court granted the application of the applicant that the status quo of the suit property be maintained pending hearing and determination of the Land Case No. 137 of 2021 pending in this court. The court has also found there is no dispute that on 13th June, 2023 the respondent issued notices to the tenants occupying the suit premises requiring them to recognize him as the lawful owner of the suit premises and pay their rent to him. The court has found the dispute is whether the respondent has disobeyed the order issued by the court. The court has found the order the applicant is alleging has been disobeyed by the respondent, is an order to maintain status quo of the suit property which was sought and granted by the court in Misc. Land Application No. 722 of 2022. In order to be able to say the respondent has disobeyed the order issued by the court and is liable for being committed to prison as a civil prisoner for contempt of the court order is to the view of this court pertinent to start by having a look on what is the meaning of the order issued by the court of maintaining the status quo of the suit property. The term "status quo" is a Latin maxim which means "the current state of being". The stated term is well defined in the Black's Law Dictionary, Eighth Edition at page 1470 to mean "the situation that currently exists." ⁹ Therefore, the order issued by the court was for maintaining the situation that was in existence at the time when the order was issued by the court. The question is what situation was in existence which was ordered to be maintained by the order issued by the court on 8th June, 2023. The court has found as rightly argued by the counsel for the respondent the said order can be appreciated by having a look on what was intended to be covered by the order sought and granted by the court. The court has found as rightly argued by the counsel for the respondent the certificate of extreme urgency, chamber summons and affidavit filed in Misc. Land Application No. 722 of 2022 annexed in the counter affidavit of the respondent shows the situation which was in existence in respect of the suit property which was sought by the applicant to be maintained. The court has found the documents filed in the application mentioned hereinabove which are annexed in the counter affidavit and reply to the counter affidavit filed in this application by the parties shows the applicant was alleging the respondent was in a move of causing certificate of title in respect of the suit property to be transmitted in his favour without regarding pendency of Land Case No. 137 of 2021 in the court. The chamber summons and its supporting affidavit shows the applicant prayed the court to issue the order to maintain the status quo of the suit property pending hearing and determination of the foregoing mentioned land case and the court granted the stated application in its ruling dated 8th June, 2023. Although the court is in agreement with the counsel for the respondent that the prayer of the applicant in Misc. Land Application No. 722 of 2022 was to restrain the move of the respondent to cause the ownership of the suit property to be transmitted into his name but the order of maintaining the status quo sought and granted by the court required the current situation which was in existence in respect of the suit property at the time when the order was granted to continue to be maintained until when the suit pending in the court will be disposed of. The court has gone through the notices issued by the respondent to the tenants in occupation of the suit property which their copies are annexed in the affidavit of the applicant and find they require the tenants in the suit property to recognize the respondent as the lawful owner of the suit property as he

was issued with certificate of title in respect of the suit property from 24th April, 2022. He also demanded the tenants to stop paying rent to anybody else than him as he is the owner of the suit premises. The respondent warned the tenants who were served with the said notices that if they will fail to abide to his directives, legal action will be taken against them as trespassers in the suit property and they will be evicted from the suit property. ii To the view of this court the stated notices which were issued on 13th June, 2023, and as rightly argued by the counsel for the applicant was five days after the order of maintaining the status quo of the suit property being granted by the court on 8th June, 2023 were not mere communication or papers as argued by the counsel for the respondent. The stated notices have the effect of violating the order of the court which ordered the status quo of the suit property be maintained pending hearing and determination of the suit pending in the court. The court has come to the above stated view after seeing the directives given by the respondent to the tenants occupying the suit property that they should recognize him as the owner of the suit property; that they should pay to him the rent of the suit property and not to anybody else and the threats that failure to do so legal action will be taken against them as trespassers of the suit property was clear violation of the order granted by the court which requires the status quo of the suit property be maintained pending hearing and determination of the suit pending in this court. The court has considered the argument by the counsel for the respondent that the respondent has not disobeyed the order of the court because he was issued with the certificate of title of the suit property before the court granted the order alleged has been disobeyed but find 12 that, even if it is true that the respondent had been issued with the certificate of title in respect of the suit property but for the purpose of maintaining the status quo of the suit property he was not justified to issue the notices he issued to the people occupying the suit property The court has come to the stated finding after seeing that, as rightly argued by the counsel for the applicant the issue of the respondent to be owner of the suit property or not is the issue in dispute in the main suit. As the stated issue of ownership of the suit land between the applicant and the respondent has not been determined, it cannot be right to say the respondent had justification of issuing the notices he issued to the tenants occupying the suit premises. To the view of this court the respondent was required to wait determination of the court in respect of the said issue and not to issue notices of threatening the persons in occupation of the suit property while the court has already ordered the status quo of the suit property be maintained. It is because of the above stated reasons the court has found as rightly argued by the counsel for the applicant, the cases of Nacky Esther Nyange (supra) and Tanzania National Road Agency (supra) cited by the counsel for the respondent in support of his arguments that the respondent is the lawful owner of the suit land as he was issued with the certificate of title in respect of the suit property before the court 13 granted the order stated has been disobeyed are not applicable in the present application. The court has come to the stated finding after seeing the application before the court is not intended to determine who is the owner of the suit property but whether the respondent has disobeyed the order of the court issued on 8th June, 2023. The court has found it is stated in the Halsbury's Law of England that it is a civil contempt to disobey a judgment or order requiring a person to abstain from doing a specific act. The Court of Appeal of Uganda stated in the case of Nassanga Jane and Rwamutembani Desire & Antoher, Civil Application No 714 of 2022 which cited with approval the case of Court of Appeal of Lukenge

Hakeem V. Hajati Ajiri Namagembe & Others, Civil Appeal No. 0290/2020 where it was stated that, civil contempt consists of the intentional doing of an act which infact it is prohibited by the order of the court. The foregoing cited cases stated the elements required to be proved before finding a person has committed civil contempt are as follows:-

1. Existence of a lawful order that is dear and unambiguous.
2. Party alleged to have breached the order must have had actual knowledge of the order
3. Party alleged to have breached the court order must have intentionally done the act that order prohibits and intentionally failed to do the act that the order compels." 14 The court has found the above stated elements are well established in the present application because the order alleged was disobeyed by the respondent is very clear and without any ambiguity and the respondent was well aware of the order as he was present in the court when it was issued. The court has also found the respondent also intentionally failed to respect the order by issuing notices to the tenants in the suit premises requiring them to recognize him as the lawful owner of the suit premises while he was aware the issue of ownership of the suit property is in dispute in the suit pending in this court. To the view of this court all of the above stated elements of committing civil contempt have been established in the application at hand. The above finding caused the court to come to the settled view that, the first issue framed by the counsel for the applicant which states whether there is an order of the court date 8th June, 2023 disobeyed by the respondent is supposed to be answered in affirmative. Having arrived to the stated finding the next issue for determination as framed by the counsel for the applicant is to what reliefs are the parties entitled. The court has found the counsel for the applicant prayed the court to commit the respondent to go to prison as a civil prisoner and costs of the application. 15 The court has found that, although it has been satisfied it has been established the respondent disobeyed the order of the court dated 8th June, 2023 which ordered the status quo of the suit property be maintained and it amounts to contempt of the court order but as held in the case of Tanzania Bundu Safari Ltd (supra), civil contempt does not require immediate imprisonment, for it is also punishable by the imposition of fine. The court has found the position of the law stated in the foregoing cited case is still the correct position of the law and it has no any reason to make it to depart from the stated position of the law. The court has considered the nature of the contempt of the order of the court committed by the respondent. It has also considered the injury which might have been caused by the stated contempt to the applicant and the tenants occupying the suit property. After seeing the object of punishment for the contempt of the order of the court as stated in the case of Tanzania Bundu Safari Ltd (supra) is to make sure the proceedings and order of the court should not be despised or slighted for the interest of the parties and the public the court has found it is proper for the punishment of fine to be imposed to the respondent in lieu of being committed to prison as prayed by the applicant and his counsel. In the premises the respondent is hereby ordered to pay fine of Tshs. 300,000/- for disobeying the order of the court and the stated fine 16 to be paid within thirty days from the date of this ruling. Costs of the application to follow the event. It is so ordered.

Dated at Dar es Salaam this 05th day of October, 2023 -CM ;; I. Arufani JUDGE 05/10/2023
Court: Ruling delivered today 05th day of October, 2023 in the presence of Mr. Emmanuel Hayuka, learned advocate holding brief for Mr. Roman Selasine Lamwai, learned advocate for the applicant and in the presence of Mr. Adinan Chitale, learned advocate for the respondent. Right of appeal to the Court of Appeal is fully explained I. Arufani JUDGE 05/10/2023 17

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