

TANZANIA / JUDGMENT

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THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT
ARUSHA MISCELLANEOUS LAND APPLICATION NO. 000006115 OF 2024 PHILEMON OLAIS
MOLLEL..... COMPLAINANT / APPELLANT / APPLICANT I PLAINTIFF VERSUS
EVA GRACE AMINIEL & OTHERS..... RESPONDENT / DEFENDANT

RULING

A. Z. BADE, J, I he above-named Applicant filed an Application by way of Chamber Summons supported by an affidavit moving this court to order a temporary injunction to restrain the 1st and 2nd Respondents, their agents and/or workmen from evicting him from the suit property, a registered farm with CT No 16557 LO No 178587, Farm No 1252 located in Olkeria Village, Arumcru, Arusha Municipality within Arusha Region pending hearing and determination of the main suit. The Application is brought under the provisions of Order XXXVII Rule 1(a), (b) Section 68 (c) and Section 95 of the Civil Procedure Code, Cap 33 R.E 2019. It is also supported by a sworn affidavit of the Applicant and the Counsel for the Applicant adopted the contents of the affidavit as part and parcel of his submission in support of the Application. The Applicant is represented by a learned counsel Kennedy Mapima. Learned Counsel George Mnzava entered appearance and defended the interests of the 1st Respondent, The 2nd Respondent's interests were ably defended by learned Advocates Mworira Dennis and Ms. Kerr Mra, while learned State Attorney Christabella Madcmbwc well defended the interests of the 4th and 5th Respondents. For obvious reasons, the 3rd Respondents did not enter appearance either by person or agent. To understand the basis of the sought out temporary injunction, it is apt to examine the context which gave rise to the present Application. There is filed a main suit i.e. Land Case No 6114 of 2024 where the Applicant herein has sued the Respondents claiming the sale of the suit property was illegal, so while this pending issue is yet to be determined by the court, then a temporary injunction should issue to restrain his eviction from for the suit property. The counsel for the Applicant argued in a submission in support of the order that in his view, the Applicant has met the pre-conditions as spelled out in the case of Ramla Aziz Msuya (which quoted with approval the famous case of Atilio vs Mbowe 1968 HCD (per page 4 and 5 of the case supplied in court) Expounding, he argued that the first two conditions i.e. serious issue to be tried and the probability that the Plaintiff will be entitled to the relief sought arc both met since the sale done by the Respondents is illegal. He argues further that the illegality ol the sale stems from the fact that it was effected while there was a pending C ivil Case no 03 of 2019 in which the Applicant challenged the conduct of the 1st

Respondent in so far as the rights over the mortgage arc concerned, where the court ordered the suit property to not be illegible for sale, unless and until the properties of the principal debtor arc first pursued in satisfaction of the debt. The counsel for the Applicant insists that the sale of the land establishes a prima facie case as disclosed in the plaint. Arguing the remaining pre-conditions, he contends that his client will suffer irreparable loss if the eviction from the suit premises is allowed to take place pointing to paragraph 12 of the sworn affidavit, contending that the Applicant depends on the land for their farming activities. Again, as per the affidavit, he argues that on the balance of convenience, greater hardship will be suffered by the Applicant if the order of temporary injunction is withheld. He argues his client stands to suffer more if the order is withheld than what the Respondents will suffer if the order is granted, urging the court to exercise its discretionary power to grant the order of temporary injunction. Opposing the Application, Mr. George Mnzava dynamically argued for the 1st Respondent as he adopted his client's counter Affidavit. While conceding to the conditions to be fulfilled for an order of temporary injunction to grant, he refutes that the Applicant has met any of them. In his view, a prima facie case has not been made, since the plaint does not even disclose a cause of action against the 1st Respondent, as the main agenda in the plaint is the default notice, which he has not denied. Referring to the decision in the case of Cosmos Properties vs Exim Bank (p 11) he expounded that if a temporary injunction is granted against the Respondent while the Applicant is not only admitting to be indebted but also the properties against which the injunction is sought have valid legal charges over them, then the Respondent stands to suffer injustice. He argues that by now the Applicant is aware that the property is legally owned by the 1st Respondent who has a valid title; correspondingly, refusing the 1st Respondent the enjoyment of her property is sure to cause injustice. On another note, he argues that as a bonafide purchaser, the 1st Respondent should be protected at all costs. In any case, he contends that the basis of the Applicant's claim is on Civil Case No 03 of 2019, which the 1st Respondent has never been a party to, and thus she could not be bound by any of the orders emanating from such a case. Attacking the argument by the Applicant's counsel on the suffering of irreparable injury, he argues that none will be suffered by the Applicant, as the affidavit is mute as to how it will be so suffered. He notably states that the land in dispute is vacant and neither the Applicant nor his family live in it or farm it. There is only a small building designated for security purposes, so the fact stated by the Applicant as being dependable on it is untrue and a fabrication. In the same vein, he conceded that the Applicant stands to suffer damages, but again he contends that these are not irreparable damages. In a fuithei claim of right, he argues that the Applicant will be able to be atoned by damages as his claims are based on a contractual relationship between himself and the rest of the Respondents, in his view, he could pursue his right to sue for damages against the bank, and it being a financial institution, it is well equipped to redress him. He insists that as it stands in common law, if damages are recoverable, and the defendant will be in a position to pay the same, no interlocutory order of injunction should issue as articulated by the court in the case of Cosmos Properties Ltd (supra at p 8), as well as the decision in Richard William Matibu (supplied, at pp 6,9) Submitting on the issue of balance of convenience as another condition, Mr. Mnzava was steadfast that the 1st Respondent will suffer more as she is placed to be denied her right of possession of the land which she legally acquired in a public auction at a consideration of TZS

400,000,000. He insists that his client bought the land for investment purposes, and as it happens, the said land is vacant, therefore, if the order of temporary injunction issues, it will cause her to suffer more as she will be restricted from investing in it as a vacant land, urging the court to refuse the Application and award costs to them as the Application is without any merits. Responding on behalf of the 2nd Respondents, Mr. Mworio led the submission for his team. Adopting first to their filed counter affidavit, he concurred with the submission by the 1st Respondent and fully subscribed to the position as they stated it. He prefaced his argument with the fact that Affidavits are evidence, while the submissions made by counsels are only meant to amplify what has been stated in the affidavit. Further, the grounds for granting the order being sought are set in Atilio Mbowe's case, insisting that the conditions set therein should all be met in unison. The affidavits being the means of bringing to the court's attention facts regarding the issues around the set conditions for granting the order, they should highlight to the court all of the 3 conditions that are in terms of facts as deposed in the affidavit. He maintains that the affidavit in court does not reveal any of the conditions stated, other than merely mentioning them, as there are no facts deposed that amplify those stated conditions, referring to the case of Cosmos Properties Developers vs Azania Bank, in which this court has established what needs to be stated to lay down a prima facie case. Expounding, he contends that in paragraph 4 of the affidavit of the Applicant, it is merely stated that they took a loan, that they had time to repay, and that the property was later on sold as the loan was not repaid as contractually agreed. The fact is this loan remains unpaid, while now the Applicant is seeking an order to not sell the properties put as security. In that regard, he moved the court to find that the Applicant has failed to satisfy the 1st condition, i.e. the presence of a prima facie case. Arguing on the condition concerning irreparable loss, he maintains that this condition largely remains unsupported by facts disclosed in the affidavit, and thus the same was also not met. On the condition regarding the balance of convenience, he is resolute that the affidavit supporting the Application and the submissions done by counsel for the Applicant have not disclosed any tilt to the balance of convenience for or against the Applicant, joining hands with the 1st Respondent counsel submission that the conditions have not been met, and urging in consequence, that the application is not worth granting the order it sought, and moving for dismissal of the same with costs. Responding on behalf of the 4th & 5th Respondents, Ms. Madcumbwe was in concession to the position as earlier expounded by her learned friends while she adopted the affidavit as sworn by Mr. Mauya, Assistant Registrar of Titles. In a further submission, she explains that the transfer of the suit property is a fait accompli under power of sale which happened sometime back in 20 Dec 2021, and the procedure we legally followed. The applicant was notified of such transfer through his postal address No 11809, Arusha on 17 Jan 2022. She also maintains that the Applicant has not given the court sufficient reason to warrant this court granting the order, urging that the said Application should be dismissed with costs. In a short rejoinder, the counsel for the Applicant retorted against the proposition that the main agenda is the default notice, which is wrong since the main issue is on the challenging of the sale by the 1st Respondent to the 2nd Respondent. He maintains that the 1st Respondent as supposedly the bona fide purchaser, is to be pronounced by the court when it determines if the 1st Respondent is a bona fide purchaser or not, which fact should be determined in the main suit. About paragraph 4 of the Affidavit in support of the

Application, the Respondents have also noted that the Applicant herein was a guarantor, and the 2nd Respondent issued a notice which was the subject of challenge in Civil Case No 03 of 2019, where the court ordered the 2nd Respondent to sell the properties of the mortgagor's first. The counsel thrust that the said case was not appealed against, so the issue is whether it was right to sell such properties of the mortgagor, referring back to Ramla Aziz Msuya's case (supra). In his view, the transfer was not legal since it was unlawful, and this court should determine such a matter first. In insistence, the counsel urged that the Applicant has manifestly shown the said conditions to warrant a grant of the order on the one hand and that evicting the Applicant from the suit property will cause irreparable loss on the other. On those bases, he urged that the court should grant the injunction sought. Having heard the submission from all the counsel in this Application, I think the issue before me is whether the Application before me is maintainable under the circumstances. Reflecting further, the pertinent question is whether the Applicant brought to the fore enough material for the three sine quo non-conditions on the strength of which the court can exercise its discretion to grant an order for Temporary Injunction. As I have noted the granting of a temporary injunction is an exercise of judicial discretion, and the purpose of granting it is to preserve matters in the status quo until the question to be investigated in the main suit is finally disposed of. The laid down conditions for the grant of the said reliefs in an interlocutory injunction are tritely reiterated firstly, the Applicant must show prima facie, a case exists; secondly, if an injunction will not be granted, the Applicant might otherwise suffer an irreparable injury which will not adequately be compensated by an award of damages; and thirdly if the court is in doubt, it would decide the Application on the balance of convenience determining at whose side the same lies. I his Court in *Charles D. Msumari & 83 Others vs The Director of Tanzania Harbours Authority*, HC-Civil Appeal No. 18 of 1997 (unreported) emphasized the proper application of the Court's discretion, in the following words: "Courts cannot grant injunctions simply because they think it is convenient to do so. Convenience is not our business. Our business is doing justice to the parties. They only exercise this discretion sparingly and only to protect rights or prevent injury according to the above-stated principles, the court should not be overwhelmed by sentiments however lofty or mere highly driving allegations of the applicants such as the denial of the relief will be ruinous and or cause hardship to them and their families without substantiating the same. They have to show they have a right in the main suit which ought to be protected or there is an injury (real or threatened) that ought to be prevented by an interim injunction and that if that was not done, they would suffer irreparable injury and not one which can possibly be repaired." In any case, I think it has been indisputably established that there is a prima facie case as to the issue contested particularly whether the 2nd Respondent had acted in violation of the court order that directed them to pursue securities of the debtor and if they are not enough to satisfy the debt, then they can come to the guarantor's properties. That means that the first condition for the exercise of judicial discretion has been met. Looking at the second condition, concerning irreparable injury, the law requires that the Applicant should be able to demonstrate that the loss to be suffered would not be capable of being atoned by way of monetary compensation. This has also been underscored in a multitude of cases on this subject. In *Abdi Ally Salehe vs Asac Care Unit Ltd & 2 Others*, Civil Revision No. 3 of 2012. The Court of Appeal held in part as follows: "Once the court finds that

there is a prima facie case, it should then go on to investigate whether the Applicant stands to suffer irreparable loss, not capable of being atoned for by way of damages. There, the Applicant is expected to show that, unless the court intervenes by way of the injunction, his position will in some way be changed for the worse; that he will suffer damage as a consequence of the plaintiff's action or omission, provided that the threatened damage is serious, not trivial, minor, illusory, insignificant, or technical only. The risk must be in respect of future damage as well (See also Richard Kuloba Principles of Injunctions (OUP) 1981)...." [emphasis mine] In my view, the Applicant in this application has not singularly pointed out the existence of the conditions that align with this principle in their submission. The deponed affidavit only gives an indication that there is a loss and that they are likely to suffer significantly, and shall be incapable of being recompensed. This I take is through eviction to make room for the purchaser of the property, I shall come to discuss the fate of the bonafide purchaser in a bit. Theie certainly has not been shown any wastage of the said property but rather as deponed by the 1st Respondent, the property is vacant with only a guard house. So the question then is has it been demonstrated that there arc instances cited to justify the irreparable loss? In my considered view, this test has not been met. I hold the view that there is not established a threat that is serious and not trivial, minor, illusory, insignificant, or technical as put in the lest. Except that it is a threat that has a future bearing on the rights of the Applicant to enjoying the rights over the property. This point is well demonstrated in the case of Ramla Aziz Msuya (supra) which is supplied by the Applicant's counsel, when this court held while quoting the apex Court of the land that tiaty not be irrelevant to state in this matter that the weight of the affidavit in law has been underscored bi the case of Registered Trustees of Archdioceses of Dar Es Salaam v.s The Chairman Bunju Village Government and Others, Civil Appeal NO 147 of 2006) that, an Affidavit is evidence, in absence of the reasons pegged in the affidavit, there is no material evidence upon which the Court can determine on merit of the Application before it. It goes without saying that the three conditions for Temporary Injunction must be cumulatively reflected in the Affidavit in support of the Application. In T.A. Kaare vs General Manager Mara Cooperative Union (1984) Ltd [1987] TLR 17, this Court (Mapigano, J) held "..... the court should consider on which side, in the event of the plaintiffs success, will be the balance of inconvenience if the injunction does not issue, bearing in mind the principle of retaining immovable properly in status quo the court should consider whether there is an occasion to protect either of the parties from the species of injury known as "irreparable" before their right can be established, keeping in mind that by "irreparable injury" it is not meant that there must be no physical possibility of repairing the injury but merely that the injury would be material, i.e., one that could not be adequately remedied by damages. I am persuaded that this principle is dcmonstratable, just as well, on the balance of convenience. My lake is that, since the balance of convenience is all about putting on a scale comparative losses to be suffered by either of the parties in case of issuance or non-issuance of the injunctive orders, on the present case, such loss is bound to be higher if the order of temporary injunction is granted. I mean the Applicants have not demonstrated the existence of this factor in their favor. Again in my view, there has not been shown on the strength of the sworn affidavit, any dissipation of value of the property nor has it been demonstrated that there is an irreparable injury that shall be caused if the injunction does not issue. On the contrary, the

property is not farmed nor lived in. In that case then, I do not hold the view that granting of the injunction shall alter the status of the Applicant or help in any way if the property is preserved in status quo. I have to agree with Mr. Mnzava that the relationship between the Applicant and the 2nd Respondent is contractual, and if it is found out that they acted in breach of their contractual obligations, the Applicant should be able to be recompensed. In any case, there is a bonafide purchaser for value, who deserves to be protected. These facts are deponed in defence by the 1st Respondent. It is noteworthy that a bona fide purchaser who is a stranger should not lose the title to the property because there was fraud, misrepresentation, irregularities, or subsequent reversal or modification of the decree. Instead, their right over a suit property is protected. The rationale behind the protection of a bona fide purchaser for value was aptly stated by the Court of Appeal in the case of Peter Adam Mboweto vs Abdallah Kulala and Mohamed Mvveke [1981] TLR 335 where it was held: "If a reversal of decree would invalidate the sale, there would be less inducement in any intending purchaser to buy at an auction sale thus depreciating sale prices and there will also be no degree of certainty as a purchaser cannot be expected to go behind a judgment to inquire into irregularities in the suit". In essence, I am not saying that this court has now determined the rights of the parties including the bonafide purchaser since the same would eventually form some of the contentious issues on the main suit; just that I see no basis in issuing any restraint order as prayed by the Applicant. In that regard, I refuse to grant the reliefs prayed in the chamber summons. It is so ordered. Dated at ARUSHA ZONE this 27th of September 2024.

A. Z. BADE, J JUDGE OF THE HIGH COURT

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