

TANZANIA / JUDGMENT

the registered trustees of the kituo cha elimu na maendeleo matemanga kiumma trust fund vs the registered trustees of kanisa la upendo wa kristo masihi kiuma and 2 oth

COURT
TZHCDECIDED
1 January 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF SONGEA AT SONGEA MISCELANEOUS CIVIL APPLICATION NO. 3 OF 2023 THE REGISTERED TRUSTEES OF THE KITUO CHA ELIMU NA MAENDELEO MATEMANGA (KIUMMA) TRUST FUND APPLICANT VERSUS THE REGISTERED TRUSTEES OF KANISA LA UPENDO WA KRISTO MASIHI (KIUMA) 1ST RESPONDENT BISHOP NOEL J. MBAWALA 2ND RESPONDENT ASSISTANT BISHOP ALPHONCE MANJONDA 3RD RESPONDENT (Arising from Civil Case No 5 of 2022)

RULING

26th July and 16th August, 2023 KISANYA, J.: This application has been made under the provisions of sections 68(c)(e), 95 and Order XXXVII Rules 1(a)(b), 6, 8(a) of the Civil Procedure Code [Cap 33, R.E. 2019] (the CPC). The applicant seeks to move the Court to grant an injunctive order to restrain “the 1st, 2nd and 3rd respondents herein, their agents, associates, assignees, employees or any person claiming under them from selling, disposing off, alienating, leasing, or dealing in any manner whatsoever with the properties, investments and projects of the applicant situated at KIUMA and dealing with employees of the applicant including employing and terminating employment, 1 withdrawing money from bank accounts of the applicant pending the hearing and determination of the Civil Case No 5 of 2022” Supporting the application is an affidavit of Dr. Matomora K. S. Matomora, the applicant’s founder, Trustee and Chairman of the Board of Trustees. The grounds on which the prayer for the injunctive order is based are set out in the supporting affidavit. It is stated in the supporting affidavit that, the applicant through the deponent acquired Farm No. 253 comprising 579.82 hectares commonly known as KIUMA and that she developed the following investments, properties and projects thereon; KIUMA Vocational Training College (KIUMA VCT) and its centres, KIUMMA Community Hospital, KIUMA Secondary School and Matemanga Airstrip (henceforth “the investments, properties and projects”). According to the deponent, the respondents are using the applicant’s buildings as offices and the 1st respondent owns KIUMA Teachers College and KIUMA Nursing School which

was later converted into KIUMA College of Health and Allied Sciences on the applicant's land. Other applicant's properties are listed in paragraph 6 of the supporting affidavit. It is further deposed that, in May 2020, the deponent, Ann Jemima Matomora and Mr. Joseph Mtuma were chased away and forcefully removed from KIUMA and that the respondents took over the possession, custody and management of all properties, projects and investments owned by the applicant. The applicant avers further that the respondent disposed of some of the properties and disbanded and stopped all nurseries school and kindergarten and other projects. It is also stated that the respondents are in the process to give the management of Vocation training college, Vocation training centres, Hospital, Hostels and airstrip to a third party, outsourcing catering service for the student, patients and security guards. According to the deponent, the said actions were done after the institution of Civil Case No. 5 of 2022 in which the applicant is praying for the respondents to be ordered to hand over possession, custody and management of all properties, project and investment to the applicant. The deponent further states that the respondents' actions will lead to the collapse of the applicant's properties, project and investment. It is also deposed that the respondents' actions will be detrimental to the applicant's claim and render the main suit nugatory. The respondents opposed the application by filing the counter affidavit which was sworn by the 2nd respondent, Bishop Noel J. Mbawala on his and the 3rd respondent behalf and as an authorized officer of the 1st respondent. It was stated among others that, KIUMMA is a non-existing 3 entity and that the investments, properties and projects belong to the 1st respondent and not the applicant. When the matter came up for orders on 30th June, 2023, this Court ordered for the hearing to proceed by way of written submissions. Parties were given a schedule within which to file their respective written submissions. Unfortunately, only Mr. Vicent Kassale and Mr. Daimu Halfan, learned advocates for the applicant filed the submissions in support of the application. The respondent defaulted to file their reply submissions. Consequently, this Court ordered that the ruling would be delivered basing on the applicant's submission. The applicant's counsel prefaced their submissions by adopting the affidavit in support of the application to form part of their submission. They argued that, an order of temporary injunction will protect the suit from being rendered nugatory or from being overtaken by event. The learned counsel pointed out the investments, properties and projects described in paragraphs 3, 4, 6 and 7 of the affidavit are subject to the main suit (Civil Case No. 5 of 2022). It was their contention that if the injunction order will not be granted there will be nothing to determine and hand over in case the suit succeeds. The counsel for the applicant reiterated the position of law that the purpose of a temporary injunction is to maintain status quo pending the determination of the suit. To reinforce their argument, the 4 learned counsel cited the cases of Abdi Ally Salehe v. ASAC Care Unit Limited and Others, Civil Revision No. 3 of 2012 Court of Appeal of Tanzania (unreported), Ndema Emanzi Rukandema v. Mubiru [2014] UGHCFD 26 and Ally Saleh v. Executie Officer, Registration, Insolvency and Trusteeship Agency and Others, Civil application No. 51 of 2017 (unreported). It was further submitted that the affidavit, reply to the counter affidavit and plaint have disclosed a prima facie case with the probability of the entitlement to the relief sought. According to the learned counsel, the respondents acknowledged the existence of the investments, properties and projects as described in paragraphs 3, 4, 6 and 7 of the affidavit only that they disputed on the ownership of the same. The learned counsel were

of the firm view that the applicant successfully demonstrated the irreparable injury or loss which cannot be adequately remedied by way of damages if the temporary injunction is not granted. They relied on the cases of Hon. Ally Saleh v. Executive Officer of Registration (supra), Abdi Ally Salehe v. ASAC Care (supra). On the condition of balance of convenience or comparative mischief, the learned counsel submitted that the evidence available in the instant application tilts in the applicant's favour as she is the one who will suffer the greater inconvenience in the event the injunction is not granted. It was contended that if the injunction order is granted the investments, properties and projects will remain as they are so that if the respondent will be successful in the suit they will be intact. However, if not granted the investments, properties and projects will be lost and it will not be possible to retrieve them. To buttress their argument, they cited the case of Abdi ally Salehe (supra). From the pleadings and submission made by the applicant's counsel, the main question for my determination is whether this application is meritorious. According to Black's Law Dictionary, 8th Edition, page 800, a temporary or preliminary injunction defined as an equitable relief issued before or during trial to prevent an irreparable loss or injury from occurring before the court has a chance to decide the case. It follows that injunction is a restraint order that is intended to maintain the current state of affairs as the parties fight on the substantive matter that is pending in court. It is settled position that for the order of temporary injunction to be granted, three conditions stated in the landmark case of Attilio v. Mbowe [1969] H.C.D No. 284 must be met. The said conditions are to the effect that; one, there must be serious questions to be tried on the facts alleged, and a probability that the plaintiff will be entitled to the relief prayed; two, that the court interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established; and three, that on the balance there will be greater hardship and mischief suffered by the plaintiff if the injunctive order is not granted. The said principles have been underlined the decisions of this Court and the Court of Appeal, including the case of Abdi Ally Salehe (supra) in which the Court of Appeal held that: "The object of this equitable remedy is to preserve the pre-dispute state until the trial or until a named day or further order. In deciding such applications, the Court is only to see a prima facie case, which is one such that it should appear on the record that there is a bonafide contest between the parties and serious questions to be tried. So, at this stage the court cannot prejudice the case of either party. It cannot record a finding on the main controversy involved in the suit; nor can genuineness of a document be gone into at this stage. 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 injunction, his position will in some way be changed for 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 a future damage (see Richard Kuloba Principles of Injunctions (OUP) 1981). And on the question of balance of convenience, what it means is that, before granting or refusing the injunction, the court may have to decide whether the plaintiff will suffer greater injury if the injunction is refused than the defendant will suffer if it granted." Being guided by the foregoing, the issue for consideration is whether the above conditions have been met in the application before this Court. Starting with

the first condition, it is not disputed that there is a pending suit in this Court. The said suit is based on who is the lawful owner of the investments, properties and projects listed in paragraphs 3 to 7 of the supporting affidavit. The applicant claims to be the lawful owner of the said investments, properties and projects. As rightly submitted by the applicant's counsel, the respondents do not dispute the existence of the said properties. They contend that the said properties belong to the 1st respondent. This implies that there is a fair question that will be determined by this Court in the pending case. In the circumstances, this Court holds the view that the applicant has managed to establish that there are triable issues or serious questions to be tried in the main case. At this stage, the applicant need not demonstrate any probability of success in the 8 pending case. [See also the case of Kibo Match Group Ltd v. H.S. Impex Ltd [2001] TLR 152]. As for the second condition on irreparable loss, it is settled position and I need not cite any authority that the loss to be prevented must be irreparable as evidenced by an applicant of the injunctive orders. In addition, the loss must be serious, not trivial, minor, illusory, insignificant or technical. In our case, the applicant deposed that the respondents took over and disposed of some of the applicant's properties including, the containers and items therein and large machine for generating either electricity or water. It is further stated that the respondents have disbanded and stopped all nurseries and kindergartens and that they are in a process of giving the management of the vocations to third parties. Given that the crux of the matter is on ownership of the said properties, I agree with the applicant's counsel that the applicant stands to suffer irreparable loss and render the main case nugatory if the respondents are not restrained from disposing or selling the said properties. Last for consideration is the condition of balance of convenience. It is upon the court to consider if it is the applicant who stands to suffer more than the respondents if the order of temporary injunction will not be granted. The learned counsel were of the view that, the investments, 9 properties and projects will be lost and it will not be possible to retrieve them of the injunctive order is not granted. I find merit in this argument but in relation to disposal or sale of the investments, properties and projects named herein above. As for the second limb of the prayer for an injunctive order, I have considered that the applicant admits in paragraph 8 of the supporting affidavit, the properties, projects and investments are in possession, custody and management of the respondents from 2020. In that regard, nothing to suggest that, the applicant stands to suffer more than respondents if this Court does not restrain the respondents from dealing in any manner whatsoever with the properties, investments and dealing with employees of the applicant including employing and terminating employment. As for injunctive order of the restraining the respondents from withdrawing money from bank accounts of the applicants pending the hearing and determination of the Civil Case No 5 of 2022, the applicant was not able to mention the bank account subject to this application and whether it is not related to the management of the said properties, investments and projects. Thus, the second limb of prayer for injunctive cannot be granted. In fine and for the foregoing reasons, the application is partly allowed and partly dismissed to the extent shown herein. For avoidance of doubt, the Court hereby grants an injunctive order to restrain the 10 respondents, their agents, associates, assignees, employees or any person claiming under them from selling, disposing of, alienating and leasing KIUMA Vocational Training College (KIUMA VCT) and its centre; KIUMMA Community Hospital, KIUMA Secondary School; Matemanga Airstrip and containers and items

therein, pending hearing and determination of Civil Case No. 5 of 2022. Costs to follow the event in the main case. It is so ordered. DATED at SONGEA this 16th day of August, 2023. S.E. KISANYA JUDGE 16/08/2023 Ruling delivered this 16th day of August, 2023 in the presence of Mr. Vicent Kassale, learned advocate for the applicant and in the absence of the respondents. . S.E. KISANYA JUDGE 16/08/2023 11

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CASE PAGE	https://chat.esheria.ai/case-law/tanzania/the-registered-trustees-of-the-kituo-cha-elimu-na-maendeleo-matemanga-kiumma-trust-fund-TemporaryInjunction-tzhc-2023--6a3ea52d3b1caa9129825ff9

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