

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA

MISC. CIVIL APPLICATION NO. 159 OF 2019

*Arising from the order of the Mwanza District Land and Housing Tribunal
dated 12th June 2019 in Misc. Application No. 201B of 2005*

PRUKERIA P. BALILEMWA APPLICANT

VERSUS

RIZIKI MBISE 1ST RESPONDENT

**S.L ISANGI AUCTION MART &
COURT BROKER 2ND RESPONDENT**

RULING

8th November, 2019 & 13th December, 2019

HON. M.M. SIYANI, J.

In this application, Prukeria Balilemwa is seeking temporary injunction restraining the respondents and their agents from evicting her from a suit property located on plot No. 95 Block "G" Nyamanoro and that way stay execution of the courts orders pending hearing and determination of the Misc. Civil Application No. 40 of 2019. The application was preferred under Order XXXVII Rule 1 (a) and section 95 of the Civil

Procedure Code Cap 33 RE 2002, has been supported by an affidavit deposed by the applicant herself.

When the matter came for hearing on 8th November, 2019, Mr Kisyeri Marwa, through a power of attorney appeared for the applicant and the respondents were represented by counsel Faustine Malongo. Having been given a chance to address the court on the merits of the application, Mr. Kisyeri submitted that the applicant is seeking temporary injunction because there is an ongoing execution process at the District Land and Housing Tribunal in Land Application No. 201B of 2006, despite there being a pending matter in this court through Misc. Civil Application No. 40 of 2019. Mr. Kisyeri contended what is going on at the District Land and Housing Tribunal is tainted with illegalities and therefore if temporary injunction orders are not granted and the respondents are not restrained, the applicant will suffer irreparable loss.

As to the powers of this court to issue temporary injunction, Mr. Kisyeri argued that it has been the practise of this court to issue temporary injunction for the purpose of protecting the subject matter of the case pending conclusion of certain proceedings. In support of his arguments, Mr. Kisyeri referred the cases of **Rehema John Vs District Executive**

Director Magu and Two Others, Misc. Land Application No. 66 of 2012.

In his further submission, Mr. Kisyeri moved the court to invoke its inherent powers under section 95 of the Civil Procedure Code Cap 33 RE 2002 by making necessary orders for maintaining justice as it deems fit. He contended that the issues of fraud and illegality noted by the applicant deserves interference of this court by restraining the parties from abusing of the court process in Land Application No. 201B of 2006.

In response to the above submission, it was contended by counsel Malongo that the facts in the instant application does not justify granting of temporary injunction nor is the application supported by the law. He argued that since there is a pending execution at the District Land and Housing Tribunal, this court cannot issue a temporary injunction restraining the said tribunal from executing its own decision. According to the learned counsel, Order XXXVII Rule 2 can only be applicable where there is a pending suit to restrain the defendant from further committing the breach of contract but both in this court and the trial tribunal, there is no suit pending in respect of breach of contract. Counsel Malongo invited this court to take a leaf from its own decision in

Prukeria P. Balilemwa Vs Riziki Mbise and Another, Misc Land Case No. 22 of 2009 which involved the same parties with the present matter, where an application for temporary injunction under order XXXVII Rule (1) and (2) of the Civil Procedure Code was held to be untenable in respect of the execution proceedings. As to the prayer to have temporary injunction issued under section 95 of the Civil Procedure Code, counsel Malongo argued that the said provision does not confer the court with power to issue temporary injunction because such relief has specific provision.

The learned counsel went on to submit that facts in the instant application has not met the conditions set in the case of **Atilio Vs Mbowe** (1969) HCD 284 for granting of temporary injunction which included the following:

- i. That there must be in existence of a serious question to be tried on the facts alleged of and a probability that the Plaintiff will entitled to the relief prayed.*
- ii. That the Court interference is necessary to protect the Plaintiff from the kind of injury which may be irreparable before his legal rights is established.*

iii. That on the balance there will be greater hardship and mischief suffered by the Plaintiff from the withholding of the injunction than will be suffered by the defendant from the granting of it.

Clarifying the above conditions, it was argued that since there is no suit pending, there is no serious issue which this court has been called upon to determine as the rights of the parties has already been determined, a principle which was adopted by the Court of Appeal in **General Tyre East Africa Ltd Vs HSBC Bank PLC** (2006) TLR 60. Counsel Malongo was firm that even if Misc. Land Application No. 40 is determined, this court cannot rule on the ownership of the disputed house hence there is no serious question for determination by a court of law.

As to the necessity of the court interference to protect the plaintiff from injury which may be irreparable before his legal rights is established, the learned counsel submitted that nothing has been shown by the applicant as far as suffering irreparable loss is concerned. In view of counsel Malongo the term irreparable loss, means a loss which cannot be compensated in terms of money. The learned counsel believed, even if the applicant is evicted and later the eviction turns to be improper, the applicant can be compensated.

Finally on the third condition, regarding the balance of hardship and mischief that will be suffered by the Plaintiff from the withholding of the injunction than the suffering of the defendant from the granting the injunction, it was argued that the first respondent purchased the disputed house from Bank when the later was enforcing the mortgaged contract. In such circumstance, courts of law should not interfere to obstruct the execution unless there are irregularities on the party of the defendant. It was contended that the 1st respondent being the purchaser, is protected under section 134 (1) (a) of the Land Act Cap 113 RE 2002 even where the seller has committed some irregularities which is the applicant's complaint in this matter.

Through his rejoinder, Mr Kisyeri argued that despite failure by counsel Malongo to name a bank which sold the applicant's house, the records shows it was NBC Ltd which was restructured in 1997 into three corporations and Consolidated Holding Corporation which were given mandate to collect assets and liabilities of the defunct NBC Ltd. Mr. Kisyeri argued that there were some irregularities in the sale process as noted by this court in **Prukeria P. Balilemwa Vs Riziki Mbise and Another** (supra) a case cited by counsel Malongo. Regarding the loss

that the applicant will get in case orders for injunction are not granted, Mr. Kisyeri submitted that the applicant has been residing in the said house for over 40 years and so the court should use its inherent powers to protect her rights from interference of the respondents. Mr. Kisyeri believed that the 1st respondent was not an innocent purchaser and sale involved irregularities which included selling the same below the market value.

The above being the summary of what was submitted by parties, it is apparently that the instant application aims at restraining the respondents from interfering with the suit property which is a subject of execution proceedings in Misc. Application No. 201B of 2006 pending at the District Land and Housing Tribunal and second;. In my view, where there is some pending execution proceedings, the proper way is to have the same stayed and not to apply for temporary injunction because while in temporary injunctions, it is parties who are restrained from doing a certain act, stay proceedings are basically moving the court not to proceed with execution process.

The position of law with regard to temporary injunction is settled that is for a court to grant the same, the applicant must established existence

of a serious question to be tried on the facts alleged of and a probability that the Plaintiff will be entitled to the relief prayed. As correctly argued by counsel Malongo, Misc. Civil Application No. 40 of 2019 being for extension of time to file a notice of appeal to the Court of Appeal of Tanzania, cannot be said to contain serious points of law envisaged in the case of **Atilio Vs Mbowe** (supra) which was referred to me by counsel Malongo.

Indeed the object of a temporary injunction is to maintain the status quo pending the determination of the issues which in my considered view, were determined both by the trial land tribunal and this court. Mr. Kisyeri invited this court to follow its own decision in **Rehema John Vs District Executive Director Magu and Two Others** (supra) where an ex-parte temporary injunction order was issued to restrain the respondents from demolishing the applicant's property. With due respect the two cases are distinguishable. While in **Rehema John's** case the court was dealing with an appeal, in the instant matter, the appeal has already been determined and what remain is an application for extension of time to lodge a notice of appeal of which all what the applicant is supposed to do is show that she was prevented by sufficient reasons from lodging her notice in time.

The applicant also ought to have established that in case, the sought order for temporary injunctions are declined, she would suffer irreparably. Mr. Kisyeri believed the fact that the applicant has been residing in the disputed house for over 40 years means, she would suffer irreparably if execution process is left to proceed. In the case of **Ignazio Messina & National Shipping Agencies Vs Willow Investment & Costa Shinganya**, Civil Reference No. 8 of 1999 (unreported), the Court of Appeal of Tanzania observed that temporary injunction can be granted in the circumstances among others where the applicant can show that refusal to do so would cause substantial irreparable loss to him which cannot be atoned by any award of damage. In my view and borrowing a leaf from the above decision, the fact that the applicant has been living in the disputed house for over 40 years, does not in itself means she will suffer irreparably loss in case temporary injunction is declined.

In my conclusion, the circumstances in the instant matter, does not call for granting of temporary injunctions. Since the applicant has initiated appeal process by filing an application for extension of time, she could have applied for stay of execution in a proper court rather than

temporary injunctions against the ongoing execution proceedings at the District Land and Housing Tribunal.

For reasons above, the three conditions set in **Atilio Vs Mbowe** and approved by the Court of Appeal of Tanzania in **Ignazio Messina & National Shipping Agencies Vs Willow Investment & Costa Shinganya** have not been met for granting of temporary injunction. As such I decline to grant the relief sought in the chamber summons and I will now proceed to dismiss the application. The circumstance of this case are that each party shall however bear its own costs. Order accordingly.

DATED at **MWANZA** this 13th day of December, 2019.



M.M. SIYANI
JUDGE