

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. LAND APPLICATION NO. 719 OF 2020

MIKALI ABDUEL MSUYA1ST APPLICANT
YOSEA ABDUEL MSUYA2ND APPLICANT
VERSUS

KBM-SONS & COMPANY LIMITED1ST RESPONDENT
ELIZABETH DORIS MASSI2ND RESPONDENT
GEEM ATTORNEYS3RD RESPONDENT
MAENDELEO BANK TANZANIA PLC4TH RESPONDENT

(Arising from Misc. Land Application No. 572 of 2020)

RULING

I. MAIGE, J

This is application has been preferred under section 95 of the Civil Procedure Code, Cap. 33, R.E., 2019 and section 2(1) of the Judicature and Application of Laws Act, Cap. 358, R.E., 2019. In essence, it is for temporary injunction to restrain the respondents from evicting the applicants from the suit property pending hearing and determination of Miscellaneous Land Application No. 572 of 2020. In the pending application, the applicant is praying for extension of time to appeal against the decision of the **trial tribunal** dismissing a suit by the applicants for want of jurisdiction.

In their joint affidavit in support of the application, the applicants blame the respondents for threatening to evict them from the **suit property** while aware that the legality of the sale is still *sub-judice*. They have attached as annexure "B" a copy of a notice of eviction issued by the first respondent at the instance of the second respondent on 26th November 2020. It is deposed further that, the **suit property** is used as a residential home for the applicants and their families and therefore if they are evicted therefrom they will suffer irreparably and the pending application will be meaningless.

In her counter affidavit, the second respondent denies knowledge of the existence of the pending application. Equally so for the dismissed application. She further makes plea of the defense of bonafide purchaser for value without notice.

The fourth respondent deposed a counter affidavit through her principal officer one George Kihongosi. She denies being involved in the eviction in question. She deposes however that, she is not aware of any notice prohibiting eviction of the applicants from the **suit property**.

The third respondents did not appear. Therefore, the application proceeded *ex parte* against him.

In his submissions in support of the application, Mr. Mbamba, learned advocate, adopted the facts in the affidavit and urged the Court to hold that, the three conditions for grant of temporary injunction set out in the famous case of **AtilioMbowe** have been established. He submitted further that, since the notice of eviction was made in the pendency of the application for extension of time to appeal against the decision of the **trial tribunal** of which the respondents were aware, the same was a serious abuse of the court process, which would by itself amount to sufficient ground for the grant of temporary injunction. Reference was made in the decision of this Court in **AMINA AMRI VS. AHMED MABROUK AND ANOTHER, PC CIVIL APPEAL NO. 85 OF 1990, HIGH COURT, DSM DISTRICT REGISTRY, UNREPORTED** where His Lordship Msumi, J, as he then was held:

"At the time of the alleged sale the vendors were aware that the demised house was a subject matter of pending court litigation. Hence the purported sale agreement cannot be said to be bonafide as it has the effect of frustrating the court process. The controversy over the ownership of the suit house is still to be determined by the court. Any act which interferes with due process of law is illegal".

In the final result, the counsel urged the Court to grant the application with costs.

In his submissions in rebuttal, Mr. Kitua, learned advocate for the second respondent adopted the counter affidavit of the second respondent and submitted that, the conditions in **Attilo Mbowe** have not been demonstrated. He submitted further that, the cited cases are irrelevant in as much as the second respondent was not a party to the alleged proceeding. Neither was she aware of the same. He prays therefore that, the application be dismissed with costs.

Submitting for the fourth respondent, Mr. Emmanuel, learned advocate, argued more or less similarly with his learned friend advocate Kitua. He emphasized however that; the first and second respondents being not parties in the proceedings at the **trial tribunal**, a *prima facie* case cannot be made out. He added that, the notice of eviction was made by the first respondent at the instance of the second respondent who were not parties to the pending proceeding. He submitted further that, if the sale agreement was improper, the applicants should have pursued the relevant action. He added that, there is nothing in the affidavit to the effect that the sale under discussion was illegal. After all, he

further submitted, the **suit property** has already been registered in the name of the second respondent and therefore, the applicants cannot be allowed to occupy it freely. He urged the Court therefore to dismiss the application with costs.

Having made exposition of the cases of each part, it is desirable to consider who is right and who is not. There appears to be a common understanding between the parties counsel on the conditions precedent for the grant of temporary injunction set out in the famous case of **Attilio vs. Mbowe, HCD, 1969**. The contention, it seems to me, is on whether or not the said conditions have been met.

Obviously therefore, the duty that I am bound to discharge is to find out if the three conditions set out in the said case has been satisfied. Briefly stated, the three conditions are as follows: First, existence of a *prima facie* case. Two, establishment of the necessity of the grant in preventing irreparable loss. Three, balance of convenience. It may perhaps be worthy to observe that, temporary injunctive orders are equitable and the trial court enjoys a wide discretion to grant or not provided that the discretion is exercised reasonably, judiciously and on sound legal principles.

Let me start with the first condition as to existence of a *prima facie* case. The temporary injunction under discussion is sought to maintain the *status quo* pending determination of the application for extension of time to appeal. The dismissed application much as it is the pending application, is between the applicants and the fourth respondent along with another person who is not privy to this application.

The order at hand has been sought against the fourth respondent along with the first three respondents who were irrefutably not parties to the proceedings at the trial tribunal. Nor to the pending application. The action culminating to the application is a notice of eviction served on the applicants. It has been attached in the affidavit and marked "B". As correctly submitted for the respondents, the said notice was issued by the first respondent at the instance of the second respondent as the purchaser of the same. There is nothing in the said document to suggest that the fourth respondent was involved.

In his submissions, Mr. Mbamba has submitted that, the attempt to evict the applicants from the **suit property** while the legality of the sale is sub-judice is an abuse of the court process. He submitted therefore that, in terms of the authority in **AMINA CASE**, the said abuse is by itself a sufficient ground for grant of temporary injunction.

From the rival submissions, it would appear to me that, the principle in the **Amina case** has never been doubted. On my part, I fully subscribe to the principle. My doubt however is whether the said authority is relevant in the fact in issue. I think it is not. I will explain.

In the first place, unlike in the instant case, in the said case both the vendor and the purchaser executed the sale agreement while aware of pendency of an appeal against the legality of the sale. The sale was as well made while there was in place a temporary injunction restraining the vendor and his agents from selling the property pending determination of the appeal. His Lordship was saying that, such an action would not be tolerated as it had "the effect of frustrating the court process".

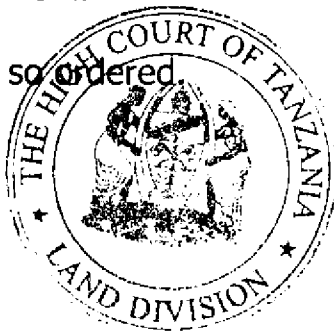
In this case, although the applicants claim that, the first and second respondents were aware of the proceedings, they have not, in the joint affidavits, adduced any evidence to the effect that, the said respondents were aware of the dismissed proceeding and the pending one. More to the point, the pending proceeding is not a proceeding to fault the decision of the trial tribunal. Instead, it is a mere application for extension of time therefor.

That aside, although the dismissed application seeks to challenge the sale of the **suit property**; in paragraph 11 of the affidavit, the applicants claim that, they have not filed a suit because *"it is not clearly forthcoming if really she is the purchaser of the suit property as there is no certificate of sale"*.

That would sound highly improbable. Just as it was in the dismissed proceeding, the intended suit against the fourth respondent along with the purchaser would obviously be premised on legality of the sale of the **suit property**. Thus the fact in paragraph 11 of the affidavit obviously renders the whole affidavit doubtful. As the order sought is purely equitable, the applicants were supposed to come to the Court of equity with clean hands. For, it is the rule in equity that; he who comes to equity must come with clean hands.

In view of the foregoing discussion therefore, it cannot be said that a *prima facie* case necessary for the grant of temporary injunction has been made out. In the absence of a *prima facie* case and considering that the second respondent who initiated the notice is not a party to the pending proceeding, I entertain no doubt that, determination of the last two conditions is unnecessary. I have also considered the fact that the three conditions precedent apply cumulatively and not in the alternative. In the final result and for the foregoing reasons therefore, I find the application devoid of any merit. It is accordingly dismissed with costs.

It is so ordered.



**I. MAIGE
JUDGE
19/02/2021**

Date 19/ 2/2021

Coram: Hon. A. Chugulu - DR.

Applicant: Ms. Aziza Msangi, Advocate

1st Respondent: Absent

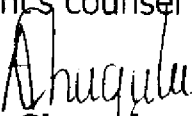
2nd Respondent: Mr. Elinasi Kitua, Advocate

3rd Respondent: Absent

4th Respondent: Mr. James Bwana, advocate.

RMA: Bukuku

COURT: Ruling delivered this 19th day of February, 2021 in the chamber Court in the Presence of Ms. Aziza Msangi learned counsel for applicant and Mr. Elinasi Kitua, learned counsel for 2nd respondent and 4th respondent's counsel Mr. James Bwana.


A. Chugulu,
DR
19/2/2021