IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

MISC. LAND APPLICATION No. 03 OF 2020

(Arising from the Land Case No. 01/2020)

TOTAL TANZANIA LIMITED ---------- APPLICANT

VERSUS

RIVER OIL PETROLEUM (T) LIMITED ----------1ST RESPONDENT

SALIM ALI SAID ---------- 2ND RESPONDENT

RULING

22nd June & 14th August 2020

TIGANGA, J

The applicant in this application is a company dully incorporated and operating under the laws of Tanzania, carrying on business of petroleum based products.

The 1st respondent is also a company dully incorporated in Tanzania, carrying its business in Tanzania. The 2nd respondent is a natural person and a resident of Mwanza Tanzania.

The applicant, through the service of Mr. Makarious J. Tairo, Advocate of Locus Attorney, moved this court by a chamber summons filed under certificate of urgency under section 68 (c) and (e) and Order XXXVII, Rule 1 (a) and 2 (1) of the Civil Procedure Code [Cap 33 R.E 2019] and any other enabling provision of the law.

This application was filed subsequent to the main suit Land Case No. 01 of 2020 in which the plaintiff is asking for a number of reliefs all emanating from the lease agreement on plot No. 171/1 and 171/2 Block Q Nyerere Road in Mwanza City by acting contrary to the terms, conditions and covenants of the lease agreement.

In this application, two orders were sought one being sought exparte, which was sought as an interim injunction restraining the 1st respondent, its agents, servants, workmen, assignees whomever will be acting through the 1st respondent in any way or manner whatsoever, from implementing the seven days statutory demand notice issued to the applicant requiring the applicants to vacate and handover the land located on plot No. 171/1 and 171/2 Block Q Nyerere Road, in Mwanza City which the applicant has been occupying and using pursuant to the lease agreement executed between the applicant and 2nd respondent on 24th October 2014 in order to maintain the status quo of the said land pending hearing and disposal of the temporary injunction, inter partes and any other relief as this court may deem fair and just to grant.

On the *inter partes* part, the applicant asked the court to issue an order for temporary injunction restraining the 1st respondent, its agents, servants, workmen, assignees or whosever will be acting through the 1st respondent in any way or manner whatsoever, from implementing the seven (7) days statutory demand notice issued to the applicant requiring the applicant to vacate and handover the land located on plot No. 171/1 and 171/2 Block Q Nyerere Road in Mwanza City which the applicant has been occupying and using pursuant to the lease agreement executed

between the applicant and the 2nd respondent on 24th October 2014 pending the hearing and final determination of the land case filed in this court.

He also asked for the costs of this application and any other relief or order as this honourable court may deem fair and just to grant. The application was supported by an affidavit of Marsha Msuya, who introduced himself as the head of legal and corporate affairs, of the applicant, thus the principal officer of the applicant dully authorised to swear this affidavit, on behalf of the applicant.

From the affidavit, it is deposed that, on 24/10/2014 the applicant executed a lease agreement with the second respondent in which plot 171/1 and 171/2 Block Q Nyerere Road in Mwanza City was leased to the applicant by the 2nd respondent and both parties to the contract/agreement agreed to be bound by the terms and conditions of the agreement.

That the applicant has been observing and complying with the terms, conditions and covenants of the lease agreement which allowed him to occupy and use the leased premises.

On 15th July 2019 the 2nd respondent through his lawyers, Mvungi & Company Law Attorneys served the applicant with a letter introducing to the applicant one M/s River Oil Petroleum (T) Limited, the 1st respondent, as a new land lord of the leased property following the decision of 2nd respondent to dispose of the demised property to the said new land lord on 31st December 2017 which also informed her that all rights and liabilities

emanated from the tenancy agreement between the 2nd respondent and the applicant shall be transferred to the purchaser, the 1st respondent.

Further to that, on 17th July 2019, the applicant received letter from the 1st respondent's lawyers notifying the applicant of change of land lord in respect of the demised property which was the subject matter of the lease agreement between the applicant and the 2nd respondent. In that letter the 1st respondent proposed a live dialogue between the applicant and the 1st respondent on mutual perception of observance of the terms and conditions of the lease agreement by each party.

That the 2nd respondent did not bother to inform the applicant before disposing the demised premises as part of the lease agreement, which omission was done deliberately, unfairly and was an illegal plan to circumvent the applicant's right and interest on the demised property with the ultimate goal of unfairly and unjustly removing the applicant from the demised premises regardless of huge investments and costs the applicant incurred to bring the leased premises into a proper standard for the operation of a service station and other ancillary business as agreed in the lease agreement.

That the applicant responded to the letter by the 2nd respondent, informing the 1st and 2nd respondent, what was supposed to be done before disposition and informed them that the lease agreement was for 15 years beginning from January 2015 to January 2030

That the respondents did not take any action pursuant to the letter mentioned above, instead on 31st December, 2019, the applicant received

what is purported to be a seven (7) days statutory notice for vacating and handover the land located on plot No. 171/1 and 171/2 Block Q Nyerere Road in Mwanza City from the lawyers of the 1st respondent requiring the applicant to vacate from the mentioned plot and hand over the same to the 1st respondent as the 1st respondent is intending to use the land for her own activities not for lease.

That while aware of the existence of the lease agreement, but decided to flout the same, and that the respondent should not be allowed to act in the manner contrary to the said lease agreement which they admit and acknowledge its existence. Also that in consonance to what has been said above; the respondent should be prevented from doing anything prejudicial to the terms, conditions and covenants of the aforesaid lease agreement.

According to the applicant, the legality and validity as well as the justification of the 7 days statutory notice will be determined in the Land Case No. 01/2020.

Also that she stands to suffer huge irreparable loss of Tshs. 6,000,000,000/= (says six billions) arising from the costs incurred in the construction and investment done on the demised premises for enabling it to operate as a service station and conduct other ancillary businesses, for the remaining ten years.

That on the balance of convenience, there will be greater hardship and mischief suffered by the applicant from withholding the injunction than

will be suffered by the respondent from granting it, in that while the applicant has a lot to suffer as stated above.

It was deposed that the interest of justice calls for the issuance of the interim restraint orders stated in the chamber summons, restraining the respondents here in from unreasonably, illegal and unjustifiably disobeying the terms, conditions and covenants of the existing lease agreement dated 24/10/2014 on plot No. 171/1 and 171/2 Block Q Nyerere Road in Mwanza City.

The Application was countered by the two counter affidavit one by Gabriel Mugini Kenene, who introduced himself as the Managing Director of the 1st Respondent, the other one by Mr. Bruno Mvungi the advocate who represents the 2nd respondent.

The Counter Affidavit by Mr. Gabriel Mugini Kenene, admit the facts that, the 1st respondent purchased the demised premises from the 2nd respondent, and that after such a purchase, he wrote a letter introducing himself to the applicant and asked for dialogue in respect of the restrictions, but the applicant did not show up.

It is also the deposed facts that, the property in transaction was free from any incumbrances and no need of the consent is required, and no core of the lease agreement was ever interfered with. That the lease agreement demanded the parties to make necessary steps before knocking the door of the court, but the disposition agreement considered the validity and legality of lease agreement.

That the letter made to the applicant does not raise any triable issue, and that given the set of facts, no irreparable loss will be occasioned. Last, is that the first respondent brought among others plot No. 171/1 and 171/2 Block Q Nyerere Road in Mwanza City from the 2nd respondent after all procedures have been adhered to.

The rest of the facts in the Affidavit in support of the application have been disputed. The counter affidavit by Mr. Bruno Mvungi, was also that, the contents of paragraphs 1-7 of the Affidavits were noted, and the 2nd respondent states that the lease agreement left the 2nd respondent with all the rights under the lease agreement to dispose of the landed property which is subject of this application.

Also that by disposition the 2nd respondent transferred all rights and obligations under the lease agreement to the 1st respondent, which facts were communicated to the applicant. Further to that, he submitted that the disposition did not in any way cause any injustice to the applicant in respect of the relevant existing tenancy agreement.

Furthermore, the deponent in that counter affidavit stated that the alleged loss of Tshs. 6,000,000,000/= stands unsubstantiated for lack of particulars. Also that the disposition of the leased properties to the 1st respondent was lawful for all intents and purposes. In the end, he deposed that the application is devoid of merits.

By the leave of the court, the Application was argued by way of written submissions. The submissions were filed as ordered. In the submission in chief, the applicant started by pointing out and correcting the

typing errors on the lease, and asked the court that the correct number is Plot No. 171/1 and 171/2 as opposed to No. 171/1 and 172/2.

Secondly, he submitted that the provision of the law upon which this application has been preferred, is Order XXXVII Rule 1 (a) of Cap 33 as the proper law up on which this application is supposed to be filed. In support of that contention, he cited the authority in the case of **The National Bank of Commerce Vs Dar es Salaam Education and Office Stationary** [1995] TLR 272 (CAT) at page 277 in which the purpose of Order 37 Rule 1, which aims at providing an order which would maintain and preserve the status quo until the determination of the suit. He submitted the case of **Atilio vs Mbowe** [1969] HCD 284 and submitted that the applicant has fulfilled the conditions;

i. There must be serious question to be tried on the fact alleged, and the probability that the plaintiff will be 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 right is established and
iii. That on the balance, there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendant from granting it.

He also cited the authorities in **Hans Wolfgang Golcher Vs General Manager of Morogoro Canvas Mill Limited** (1987) TLR 78, **Giella Vs Cassman Brown & Company Limited** (1973) 1. EA 358, Court of

Appeal at Kampala and **T.A. Kaare vs General Manager Mara Cooperative Union** (1984) Limited [1987] T.L.R 17.

Mr. Tairo submitted that in this matter there is a serious question to be tried on the fact alleged and a probability that the plaintiff will be entitled the relief prayed. He said the lease in question is for 15 years commencing from the date of handing over the premises which is in 2015.

He submitted that paragraph 1 (h) which provides that no termination in the first 15 years. That the seven days notice is a signification of the breach of the contract, this means there is a serious question to be tried.

On the second condition, on the necessity of the court intervention to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established. He submitted that if the injury will not be remedied will be likely to result into irreparable loss.

Last he submitted that on the balance of probability there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendants from granting it.

He submitted that the Respondents are not disputing the existence, validity of the lease agreement as pointed out earlier, the breach of which will cause suffering and there will be the probability of success.

Mr. Bruno Mvungi, learned counsel for the 2nd respondent; submitted that he joined issues to the authority in the case of **Atilio Vs Mbowe (1969)** HCD 284.

He however submitted that, the lease agreement did not in any way prevent the 2nd respondent to dispose the said property as he did. He submitted that the existing rights and obligations were transferred to the 1st respondent, but upon request by the 1st respondent to the applicant to come on the table of discussion as portrayed, the applicant disregarded such an invitation.

It was his view that, the first condition has not been fulfilled, as there is no way the applicant can benefit from his own wrong. Regarding the second condition the necessity of the court interference to protect the applicant from the kind of injury, which may be irreparable before the legal right is established. According to him, that condition can only be fulfilled once the applicant has shown in her affidavit that the damages to be suffered will be such that mere money compensation will not be adequate.

The submitted that since in paragraph 20 of affidavit the applicant has managed to identify the loss likely to be suffered that is Tshs. 6,000,000,000/= (say six billions) arising from the costs incurred in construction and engagement, which the defendant will be ordered to pay should the applicant win the case. That being the case on his opinion the condition has not been met.

Regarding the 3rd condition which needs to prove 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 granting of it. On that he reiterated what was submitted in the 2nd ground. He in the end asked for the application to be dismissed with costs.

The 1st Respondent submitted, in countering the submission in chief filed by the applicant, that the same is lacking and non meritorious. As he agree with the submission in relation to the authorities contained in the case of **Atilio vs Mbowe** (supra), but he strongly disagrees with the applicant that it has fulfilled the condition precedent as set in the case of **Atilio vs Mbowe** (supra).

He submitted that, to be granted temporary injunction, the applicant must conjunctively fulfill the three conditions which are;

i. A serious question to be tried by the court,
ii. The necessity of the court inference to protect the plaintiff from the injury, which are irreparable, and
iii. That the balance of convenience as to who will suffer should the same be withheld or granted.

Now, the issue is whether, the notice issued with regard to termination was proper. He submitted that before purchasing the suit premises, he conducted search and found no any registered incumbrances. He submitted that after concluding the contract, the applicant was invited for discussion but disregarded the invitation.

He submitted that, the lease agreement regardless its expiration time is between the applicant and the 2nd respondent, the 1st respondent is not a party to that agreement and provided that he is now the owner of the disputed premises, he stands to be seriously affected for failure to utilize the disputed premises which he legally purchased.

He further submitted that since the applicant did not register his mortgage, it is therefore his opinion that the first condition has not been established for the injunction to issue.

He furthermore argued that the relief sought in the main case is mostly against the 2nd respondent, and are in the nature that he was duty bound to consult before selling, he submitted further that the lease agreement in any landed property cannot be used to restrict the owner from selling, what is important is that the should follow the law.

Regarding the second point, he submitted that given the nature of the matter at hand, the applicant does not need any protection as the damages which the applicant is likely to suffer cannot be irreparable as it is just monetary which the applicant has not established that the respondents are unable to pay if ordered by the court to do so.

He submitted that irreparable loss and injury means that, one which cannot be repaired, which actually threatening for violation of human right, the imminent one, real and at least grave. To strengthen his arguments, he cited the authority in the case of **Giella Vs Cassman Brown and Company Limited** (1973) EA 358. He in the end submitted that the second condition has not been established.

Coming to the third requirement, which is a balance of convenience, as to who will suffer great hardship from the withholding or granting the injunction. In granting the injunctive order, the court must consider that there must be greater convenience in granting than in refusing the injunction and equally efficacious relief must not be obtainable by any other usual mode of proceedings. He cited the case of **NBC Vs DSM**

Education and Office supplies Limited (1995) TLR 273 CA. he submitted the 2nd respondent was not prevented by any law or the lease agreement between applicant from selling, and looking at the purchase price, it is safe to conclude that the granting will seriously cause hardship to the 1st respondent than will be suffered by the applicant if the same is refused.

In rejoinder the applicant submitted that, he reiterates what he submitted in chief. He further submitted that from the submission in reply it has been established that the time frame for termination of the lease contract is a serious issue to be tried by this court in the main case.

He submitted that the lease is not a normal lease, but an arrangement for investment, that is why the contractual term was fixed for 15 years. It was therefore not a normal mortgage to be registered. Also that although the 1st respondent was not a party to the lease agreement but his contract with 2nd respondent made him a party.

He also submitted that the ability of the respondents to pay monetary compensation is unfounded, as it is not the aim of the applicant to be compensated; he invested in order to do business. In the event, he asked the application to be granted as prayed as the same has managed to meet three conditions established in **Atilio Vs Mbowe** (supra)

Now, having summarized at length, the contents of the affidavits in support and opposition of the application, the submission filed by counsels for the parties, which includes the authorities cited, before starting to consider the merit of the application I feel indebted to say a word by way of commending the counsel for both parties for extensive and well

researched submissions filed in support of each parties case. I hasten to agree with the legal position highlighted by the counsel for the parties, as propounded by the authority in **Atilio Vs Mbowe** (supra) on the conditions to be fulfilled for the temporary injunction to issue, that position is also made clear in the case of **NBC vs Dar es salaam Education and office stationary** (1995) 272, **Augustine L. Mrema and Others vs Abdallah Majengo & others** CAT, Civil Appeal No. 41/1999 DSM CAT (unreported).

Without much repeating, a historical background of this matter *albeit* in brief, will suffice to bring home the nature of the dispute between the parties.

In the year 2015, the applicant entered into the lease agreement with the 2nd respondent in which the applicant became a tenant of the Petrol Station, owned by the 2nd respondent. The lease agreement was for 15 years and renewable.

Some times in 2017, the 2nd respondent sold that petrol station to the 1st respondent and informed the applicant of the new land lord, and informed her that the rights and obligations under the contract, were also transferred to the new owner who would be bound by the said condition under the lease agreement.

Having been so introduced the 1st respondent wrote a letter to the applicant inviting him to the round table so that they could discuss the status of the lease agreement, the invitation which was not honoured by the applicant.

Following that dishonoring of the said invitation, the 1st respondent issued a seven days notice to the applicant to vacate the premises as the 1st respondent was intending as the new owner, to use the premises herself.

It is that notice which prompted this application and the main suit, asking the court to issue a number of declaratory orders, including the one declaring the illegality and a nullity of the seven days notice to vacate and hand over the premises, and that the defendants are in breach of lease agreement, as well as that the 1st respondent unlawfully and deliberately interfered with the lease agreement between the applicant the 2nd respondent.

As earlier on pointed out, the principle in the case of **Atilio Vs Mbowe** (supra) gives three conditions for the temporary injunction to issue. Starting with the first condition which is that; it must be established that, there is a serious question to be tried on the facts alleged and the probability that the plaintiff will be entitled to the relief prayed;

From the record as summarized above, it has been established that there is an existing lease agreement between the applicant and 2nd respondent, entered in the year 2015, which was to end after 15 years, up to the year 2030. It is also evident that, while this lease agreement was still subsisting, the 2nd respondent sold his said disputed premises to the 1st respondent together with the rights and liabilities or obligations under the lease agreement.

It is further evident that the 1st respondent asked the applicant to join the discussion aver the status of the lease agreement, which request

was not honoured consequence of which the seven days notice was issued for the applicant to vacate and hand over the premises to the 1st respondent as the current land lord.

The 1st respondent while defending her act said there are no any encumbrances or registered interest of the applicant with land registry. It is particularized in the submission in chief that paragraph 1 (h) of the lease agreement provides that the lessor may not terminate lease within first 15 years of the first term.

It is obvious that the notice for the applicant to vacate, and handover the premises to the new owner, who according to the affidavit and submission of the 2nd respondent the rights and obligations under the lease agree transferred to him, is an indication of the intention to terminate the contract which raises a serious triable issue by the court in the main suit.

It is obvious, in the circumstances of the case that, the interference of the court is necessary to protect the plaintiff/applicant from the injury likely to result. It is also a fact that on the balance of convinience, there will be a great hardship and mischief likely to be suffered by the plaintiff/applicant from withholding of the injunction than will be suffered by the defendant from granting of it.

That being the case, I find this, on the balance of probability to be a fit case in which the temporary injunction should be issued. That said, the application is therefore granted as prayed, the 1st respondent is hereby restrained from evicting or forcing the applicant to vacate and handover the suit premise to her, pending hearing and determination of the main case Land Case No. 01/2020 filed before this court, but subject to law.

Cost to be in the main suit.

It is so ordered.

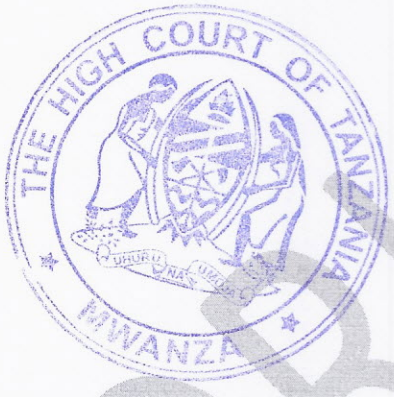
DATED at **MWANZA**, this 14th August 2020

J. C. Tiganga

Judge

14/08/2020

Ruling delivered in the presence of the counsel representing the parties.



J. C. Tiganga

Judge

14/08/2020