IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 116 OF 2023

(Originating from Commercial Case No. 86 OF 2023)

NESHI MWINJUMA KITOGO ..... APPLICANT

VERSUS

BANK OF AFRICA (T) LIMITED ..... 1ST RESPONDENT
ADILI AUCTION MART CO. LTD..... 2ND RESPONDENT
MOHAMED ABDALLAH MOHAMED..... 3RD RESPONDENT
SELEMAN MAOUD MKIRITI..... 4TH RESPONDENT
AMINA MOHAMED MKIRITI..... 5TH RESPONDENT
BILO STAR DEBT COLLECTORS CO. LTD..... 6TH RESPONDENT
NAMPULA AUCTION MART CO. LTD..... 7TH RESPONDENT
SEIF OMAR MADOTO..... 8TH RESPONDENT

RULING

November 16th, 2023 & March 1st, 2024

Morris, J

In this application, Neshi Mwinjuma Kitogo pursues the order of this Court for her and her family to be restored back into the house from which she alleges that she was wrongly evicted at the respondents' instance. The house is on Plot No. 306 Block 'B' Mbweni Malindi, Kinondoni-Dar es salaam (elsewhere, *the house*). The applicant's affidavit supports the certificate-of-urgency-accompanied application. It is

apparent from her affidavit that, the applicant was evicted from the house by the 7th respondent on June 22nd, 2019.

A few lines of the genesis of this application will give this ruling a straight reading. On record, the applicant and her husband (3rd respondent) allege that they purchased the house from the 4th and 5th respondents around 2009. Her affidavit has it the deposition that later her spouse and the previous owners (3rd respondent and 4th –5th respondents respectively) deceitfully mortgaged the house to the 1st respondent. She also claims that the mortgagor defaulted thereby causing the house to be wrongly sold to the 8th respondent.

Consequently, the applicant mounted various efforts to challenge the foregoing disposition. Commercial case no 86/2023, pending in this court; is one of such efforts. By this application, thus, the applicant seeks restoration in the house until final determination of the subject case. Her application is opposed by counter-affidavits of Elizabeth Muro (in favour of 1st, 2nd, 6th, 7th and 8th respondents); Selamani Mosoud Mkiriti and Amina Mohamed Mkiriti (for 4th and 5th respondents respectively); and Mohamed Abdallah Mohamed (3rd respondent).

The Court ordered the application to be argued by written submissions. The scheduling order was complied with. I commend the respective teams of counsel. Mr. Robert Charles Oteyo, learned advocate represented the applicant. The 1st, 2nd, 6th, 7th and 8th respondents enjoyed legal services of advocate Mbuga Emmanuel. The 3rd respondent engaged Mr. Deogratias Mahinyila, learned counsel. The 4th and 5th respondents did not file submissions. Undeniably, except for the submissions filed by Mr. Emmanuel; submissions of the other parties were blatant replication of the affidavital depositions. This observation notwithstanding, I set myself to consider the parties' submissions in the course of answering whether or not the application is meritorious.

Apart from adopting and repeating the contents of the affidavit, the applicant's counsel literally argued that the eviction subject of this matter was illegal. To him, both the transactions which led to eviction of the applicant; and the eviction itself were without justification and thus bad in law. He made reference to the case of ***Canara Bank (T) Ltd v Tanzaland Textile Ltd***, Commercial Case No. 138 of 2021 (unreported) to buttress his argument. He contended that, in the absence of a lawful disposition, the title to house must be bestowed back to the original owner

- applicant. Consequently, he reiterated the prayer that the applicant should be restored in the house with immediate effect.

In reply, it was hastily submitted by advocate Mbuga for the 1st, 2nd, 6th, 7th and 8th respondents that; the present is an interlocutory application which should be granted to maintain *status quo* or injunct parties from dealing with the contentious rights pending in the suit. To him, the application herein should not be sustained lest rights of the parties herein will be determined prematurely. Reference was made to ***Mohamed Said Kulwa v Kiluwa Free Processing Zone Ltd & 2 Others***, Misc. Comm.Appl. No. 114 of 2022; and ***Car Truck Distributors Ltd v MKB Security Co. Ltd & Another***, Misc. Land Appl. No. 688 of 2021 (both unreported). Further, the said counsel argued that, according to ***Amana Bank Ltd v Omar Mohamed Omar & 4 Others***, Misc. Comm.Appl.No.70 of 2020; ***Amina Maulid Ambali & 2 Others v Ramadhani Juma***, Civil App. No. 35 of 2019; ***Abualy Alibhai Aziz v Bhatia Brothers Ltd*** [2000]TLR 288; interlocutory orders may be granted if the applicant establishes his/her rights over the property. Divergently, to him, the applicant's title alleged herein is a mere wish which cannot warrant her restoration in the house.

Further, it was the counsel's argument that the applicant failed to prove that, unless the present application is determined in her favour; she will suffer an irreparable loss not capable of being compensated by money. The subject counsel also challenged reliance on ***Canara Bank case*** (*supra*) cited by the applicant for want of relevance hereof. Therefore, he prayed that this application should be denied to avoid abuse of court process.

The 3rd respondent's advocate Mahinyila replied the submissions in chief by adopting the counter affidavit of Mohamed Abdallah Mohamed. Further, he submitted that the applicant's allegations on eviction are a pack of information best known to her. Ironically, he did not make and meaningful prayer other than stating that the subject respondent awaits the order of the Court.

In rejoinder, the applicant maintained that the impugned auction and eviction were illegal and amounted to contempt of this Court. According to him, contempt is fused in the respondents' actions were taken without the Court's order meriting sale of the house. Finally, he contended that the respondents cited precedents that are inconsonant with facts of the matter at hand.

I have keenly considered the submissions of parties. To streamline this ruling, the Court is, in my view, not misplaced to commence by discussing the objective of interim/interlocutory orders. Commonly, a party seeking an interim order in pendency of the main suit/trial seeks to protect ascertainable interests **temporarily**. It is an intermediate order. In other words, such party aims at preserving the pre-dispute state of affairs while further orders in the trial are yet to be made by the court. For the court to allow such provisionary strategy, nonetheless, there are various factors to be considered. I will allude to some of them here.

One, the timeliness of the prayer. For the application of this nature to succeed, the applicant must exhibit satisfactorily that, indeed, the order of the court ultimately salvages the envisaged interest. For example, if the would-be prohibited action or undertaking has wholly or partially been carried out; the sought court's reversal intervention becomes ineffectual. *Two*, it is usually important for the court to grant an interim order to the applicant if the other party is not to be subjected to more or relatively higher inconveniences.

It follows, therefore, that if the order sought is likely to cause more harm to the latter, the the court should refrain from granting the

application. In ***Abdi Ally Salehe v Asac Care Unit Limited & 2 Others***; CoA Civil Revision No. 3 of 2012 (unreported); it was set a rule that courts, while exercising their discretion hereof, need to consider the "balance of convenience in favour of the party who will suffer the greater inconvenience." *Three*, the applicant should be under circumstances in which the absence of the sought order renders his/her claim in the main suit completely irremediable by way of monetary compensation or material restitution.

Four, it is a principle of law and common logic that the application seeking the subject interim remedy should not have the effect of skirting the objective of the trial in the main suit. That is, parties to the main suit should not be made to get the reliefs otherwise obtainable in the main suit through mischievous interim measures. Doing so is to undermine the essence of civil suits. Hence, the Court should give life to germane procedural compliances under the law. I state so because if, for instance, the applicant gets the reliefs otherwise attainable in a successful suit through an application; homogeneously or by analogy, the Court will be condoning commencement of suits by way of applications. This will be, in my view, an unhealthy approach to litigation.

In the present matter, the following aspects are incontestable. *Firstly*, the applicant's suit seeks to challenge legality of the disposition which culminated into her impugned alleged-eviction. She, thus, intends to prove total and incumbrance-free ownership of the house. That is, at present, her right to own the subject house or not is yet to be finally determined. *Secondly*, the applicant is not currently in occupation of the house. For some years, to be precise. Arguably, the actual resident in the house is unascertained.

Nonetheless, in the applicant's submissions and those of the 1st, 2nd, 6th, 7th and 8th respondents; it is purported that the house is now being occupied by the 8th respondent. However, this fact is not deposed by the said parties in their respective affidavits. I am now inclined to pose here and remind both counsel that, in law, submissions from the bar are not evidence. That is the law. I accordingly seek reliance to ***the Registered Trustees of Archdiocese of Dar es Salaam v The Chairman, Bunju village Government***, Civil Appeal No.147 of 2006; and ***Ison BPO Tanzania Limited v Mohamed Aslant***, Civil Application No. 367/18 of 2021 (both unreported).

Thirdly, the house has already been sold/transferred to and registered in favour of the 8th respondent. *Fourthly*, the outcome of this Court's Commercial Case No. 139 of 2014 has never been challenged by parties therein howsoever. *Fifthly*, none of the parties to the said case has ever initiated or resisted execution of the decree therefrom.

However, the parties' headlock in both the suit and this application is the legality of the respondents' transactions which led to the claimed applicant's eviction from the house. From the outset, therefore, the applicant mounts a double-edged litigation sword to acquire almost similar major reliefs. Temporarily, she is putting to test the legality and/or justification of the eviction (in this application) and permanently, the lawfulness of the disposition which led to the subject eviction (in the suit).

Technically, to justly conclude on the question whether the eviction was lawful; the genesis of the whole exercise must be analyzed. In so doing, the Court will delve into determining the rights of the parties which form the kernel of the suit. Without over-stretching the mind, the effect of the Court's conclusion on the legality of the eviction hereof is to undermine the trial of the suit significantly. In the wise words of the Court of Appeal in ***Abdi Ally Salehe's case (supra)***:

"So, at this stage the court cannot prejudge 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 (See SARKAR ON CODE OF CIVIL PROCEDURE (10th ed. Vol. 2 pp 2009- 2015)."

Moreover, as elucidated above, the applicant in the precautionary reliefs on temporal basis; should be sought at the earliest. The philosophy behind this aspect is to, *inter alia*; *one*, mitigate the magnitude of applicant's loss and/or inconveniences [see, ***Giella V Cassman Brown and Co. Limited*** (1973) EA 358]; *two*, to act as a latent caveat against the opposite party's actions over the subject matter of the application such as demolition, disposition or transfer of the property; and *three*, to assist the court to measure the immediate existing circumstance and gauge the timely counteractive intervention.

In the matter at hand, it is on record (paragraphs 6, 12 and 13 of her affidavit) that, the applicant became aware of the potential of eviction; and was actually evicted, about a half a decade ago. That is, way back in 2019. In precision, she was arguably evicted on June 22nd, 2019. It is partly deposed, under paragraph 13 of her affidavit, thus:

"That, on 22/6/2019 in the evening the 7th Respondent came with the Police Officer and started to execute the eviction without the order of from this Court to the house in issue without proper arrangements and procedure which led to the lost (sic) of many of the Applicant's properties which were in the house."

From the applicant's unequivocal averment quoted above, it is vivid that not only she has condoned the plight she claims to be in; but also, the time of her irresponsiveness herein has significantly paved way for carrying out of critical possessory and conveyancing transactions over the house. In all fairness, therefore, such condonation beats logic of having parties to resolve their eminent disputes timely. In this matter, like the adage runs, much water has flowed under the bridge. Thus, in my view, it is unsafe for this Court to disturb the *status quo* which the applicant has actively nurtured to fruition over time.

Be that as it may, parties to this matter, who have been in an undisturbed *status quo* for over four years; are expected to endeavor to achieve a permanent solution to the dispute than otherwise. It has to be resealed to the litigants, a spirit that commercial cases in our jurisdiction require expeditious determination. Accordingly, rule 32(2) of the ***High***

Court (Commercial Division) Procedure Rules, 2012 makes it mandatory for all such cases to be finalized in not more than twelve months. Thus, given the circumstances of this matter; to task the Court for interim measures which will last for less than a year before the suit is adjudged is, in my thoughtful opinion, tantamount to being justice-inconsiderate.

In addition to that, as correctly argued by the 1st, 2nd, 6th, 7th and 8th respondents' counsel, to which argument I also subscribe; for the applicant to legitimately benefit from interim reliefs in pendency of the suit, it must be proved that the sought reliefs are far beyond atonement by monetary compensation or material restitution. In this matter, the applicant alleges that she is living in the guest house with her family thereby "incurring a lot of expenses". Obviously, this claim is about financial expenditures. Clearly, those expenses can be specifically pleaded, proved and remedied in the trial. Too, related inconveniences are capable of being settled as general damages in the suit.

In law, when the applicant is also pursuing a decree which would entitle him/her recovery of the alleged loss; the court has to decline the interim reliefs in the same connection. Reference is made to the case of

Valence S. Matunda (Power of Attorney) v Sadala P. Ndosi & 2 others, Misc. land Application No. 55/2019 (unreported). That is, it is a cardinal law that the applicant's loss must be manifestly irreparable. See, also ***America Cyanamid v Ethicon Limited*** [1975] AC 396. I will not, thus, purport to re-invent the wheel but maintain this triteness.

Principally, the present application fails to meet the requisite conditions for this Court to exercise its discretion to grant the reliefs sought in the chamber summons. Henceforth, it is barren of merit. I accordingly dismiss it without costs. It is so ordered.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
COMMERCIAL DIVISION

C.K.K. Morris

Judge

March 1st, 2024

Ruling delivered this 1st day of March 2024 in the presence of Advocates Robert Oteyo for the applicant; Mbuga Emmanuel representing the 1st, 2nd, 6th, 7th and 8th respondents; and Deogratias Mahinyila for the 3rd respondent.

THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION
UHURU NA UMOJA

C.K.K. Morris

Judge

March 1st, 2024