**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**MISC. CIVIL APPLICATION NO. 133 OF 2022**

(B/U High Court Arusha Civil Case No. 19/2022)

**ANNA PASCAL NADE.....1ST APPLICANT**

**ESTHER PASCAL NADE .....2ND APPLICANT**

**VERSUS**

**JOHN PASCAL NADE..... RESPONDENT**

**RULING**

14/03/2023 & 28/03/2023

**MWASEBA, J.**

The applicants are seeking for an interim order to restrain the respondent, his agents, and servants from collecting rent from all premises and depositing it into his account at NMB Bank Account No. 41002500666 or in any other account. Instead, the said rent be deposited in a joint account opened by both parties at Equity Bank Account No. 300111334086 in which all parties are signatories for the interest of the justice, pending final disposal of the main suit.

Briefly, the dispute at hand concerns the collection of rent from the properties left by their deceased father whereby in 2017 they were both appointed as the administrators of the estate of the late Pascal Nade. As for the properties left by the deceased, particularly houses, they both agreed to open a joint account where all the administrators would be the signatories and the tenants were depositing rent via the said accounts. However, recently, the respondent decided to order the tenants to deposit the rent to his personal account for the reason that he was not benefited from the said rent in five years ago. The said act of the respondent moved the applicants to file a civil case No. 19 of 2022 for the court to declare that all the properties are owned jointly. Thus, as Civil Case No. 19 of 2022 is still going on they preferred the present application to restrain the respondent from receiving rent to his personal account.

During the hearing of the application, the applicants were represented by Mrs. Christina Kimale whilst the respondent was represented by Mr. Joshua A. Mkumbwa, both learned counsels. With the leave of the court, the application was argued by way of Witten submission.

Supporting the application, Mrs. Kimale after narrating the history of the dispute between the parties, she prayed for the affidavit supporting the

application to be adopted and form part of their submission. It was her further submission that, the applicant misled the tenants who rented the premises located at Levolosi Arusha that he is the administrator and legal owner of the premise in plot No. 5 Block "W" located at Levolosi, Arusha. She argued further that, the respondent did not dispute that he is receiving the rent but his sole reason is that the applicants have been enjoying the said rent for five years in exclusion of the respondent. However, on contrary, the said rent has been used by the applicants to maintain the respondent's family after he abandoned them.

She submitted further that the applicants preferred this application as they will suffer irrepealable loss if the respondent will be collecting rent while the main suit is still pending in court. Another reason given by the applicant's counsel was that there are chances for their suit to succeed. She supported her argument with the case of **Atilio vs Mbowe**, (1969) HCD No. 284. She argued further that the respondents will suffer nothing if the application will be granted, they prayed for the application to be granted.

Opposing the application, Mr. Joshua first of all prayed for their counter affidavit to be part of his submission. He argued further that, although this kind of application is granted at the discretion of the court, some

conditions need to be taken into consideration as it was elaborated in the case of **Atilio vs Mbowe** (Supra).

Starting with the first criteria of whether there is a prima facie case/ serious question with a probability of success, he told the court that, the pendency of the suit is not disputable, but it has to be a serious question and the probability of being granted the relief prayed. It was his further submission that, the applicants herein have no probability of being granted the claimed relief.

Coming to the second criteria, Mr. Joshua submitted that the applicants did not demonstrate the loss they are going to face if the application will not be granted. It was his further submission that the loss has to be something that cannot be compensated with money. He supported his argument with the case of **Kaare vs General Manager Mara Cooperation Union [1924] Ltd** [1987] TLR 17 and **Hoffman La Roche & Co. Industry vs Secretary of State for Trade and Industry** [1957] AC 295 at 355 (H.L).

As for the third condition, the counsel for the respondent argued that on the balance of inconvenience, it is the respondent who will suffer more if the application will be granted than the applicants. The respondent also admitted that he opened a new account after being deprived of his

rights to his share for more than five years. In the end, he prayed for the application to be dismissed for lack of merit and costs to follow the event.

In her rejoinder, Mrs. Kimale replied that the respondent has no document supporting his claim that the applicants have been receiving rent for five years as alleged. Further to that, all the cited cases by the respondent supported the applicant's claim as they have prima facie case which need consideration by this court and there are likely hood chances of success. She distinguished the cited case of **Colgate Palmolive Company** (supra) as the applicants have established their case through statements of facts and pleadings. On the remaining argument she reiterated what had been submitted in her submission in chief.

Having soundly considered the rival submissions by the counsels for the parties, the issue for determination is whether the application has merit.

For this application, I am alive of the position of the law laid down by a number of authorities on conditions to grant an application for a temporary injunction to mention a few **Atilio vs Mbowe** (Supra), **Giela vs Cassman Brown & Co. Ltd** (1973) E.A 358 and **Gazelle Trucker**

**Ltd vs Tanzania Petroleum Development Corporation,** Civil Application No. 15 of 2006, CAT (unreported).

The famous case of **Atilio** (supra) laid down three guiding principles which complement **Order XXXVII Rule 1 (a) of the Civil Procedure Code** R.E 2019 in granting applications for temporary injunction. The three principles are as hereunder:

> *i. That, there must be a serious question to be tried on the facts alleged and a probability that the plaintiff will be entitled to the relief sought.*
>
> *ii. That, the court's interference must be necessary to protect the plaintiff/Applicant from the kind of injury which may be irrepealable before his legal right is established.*
>
> *iii. Is on the balance of convenience, where the court should examine who stands to suffer more if the application for an injunction is not granted.*

It has to be noted that, granting an order for a temporary injunction the above conditions must co-exist. See the case of **Tanzania Breweries Ltd. vs Kibo Breweries Ltd. And another** [1998] EA 341.

In determining this principle my learned sister Mgonya, J in the case of **Harold Sekiete Levira & another vs African Banking Cooperation Tanzania Ltd (Banc ABC) & another**, Misc. Civil Appl.

No. 886 of 2016 stated that the Applicant cannot escape from showing two things:

i. *The relief sought in the main suit is one that which court is capable of awarding; and*

ii. *The Applicant should at the very minimum show in the pleading that in the absence of any rebuttal evidence he/she is entitled to said relief.*

With the above principle in mind, I had time to go through the main suit filed by the applicants together with the reliefs sought. I am convinced that there is a triable case which is worth to be determined by the court. Thus, the first element has been established.

As for the second element, this court is of the firm view that if the applicants will not be granted this application, they will suffer loss for the reason that if the money will be deposited to the respondent's account and the applicants win the case then they will have to file another case to claim that money which will be expensive. Thus, the second element has been established too.

On the last element which is based on the balance of convenience, this court is aware that, it is necessary to ensure the *status quo* is maintained before the rights of the applicant and the respondent over the suit premises are determined. Thus, being guided by the said

principle and taking into consideration the circumstances of this case, this court is of the firm view that there is a need to restrain the respondent from receiving rent to his personal account until the main suit is determined on merit.

For that reason, this application has merit, and it is hereby granted as prayed pending final disposal of the main suit.

It is so ordered.

**DATED** at **ARUSHA** this 28th day of March, 2023.

**N.R. MWASEBA**

**JUDGE**