IN THE HIGH COURT OF TANZANIA

DODOMA SUB- REGISTRY

AT DODOMA

MISC. LAND APPLICATION NO. 14 OF 2023

ALNOOR KASSAM VISRA (Holding Special Power
of Fatehali Mohamed Jivraj Bhojani) .....1ST APPLICANT
JONH JOEL IKWABE (holding special power of:
ISMAIL ABDALLAH DAWOOD .....2ND APPLICANT
KAMAL SURESH LAAD .....3RD APPLICANT
PARAMJEET SINGH SEMBI .....4TH APPLICANT

VERSUS

THE CITY COUNCIL OF DODOMA .....1ST RESPONDENT
THE ATTORNEY GENERAL .....2ND RESPONDENT

RULING

5th July, 2023

HASSAN, J.:

The applicants, Alnoor Kassam Visram and 3 others have moved this court under a certificate of urgency seeking for declaratory order against the 1st respondent in respect of the applicant's status over their the property titled 1809, situated at Kondoa Irangi Road in the township of Dodoma, pending final determination of the land case No. 6 of 2023 instituted before this honourable court.

The application is by way of chamber summons made under Order XXXVII Rule 1 and 2, section 68 (e) and section 95 of the civil procedure code, [Cap 33 R. E 2019], accompanied by an affidavit deponed by **ALNOOR KASSAM VISRA** who is holding a Special Power of the one **Fatehali Mohamed Jivraj Bhojani)**. The 1st applicant is a manager of Dodoma central school, who has been authorised to depone on behalf of other applicants.

The gist of the matter is land dispute. That is, property titled 1809, situated at Kondoa Irangi Road in the township of Dodoma which is co-owned by the applicants. The scuffle arose following the action of the applicants to build a fence and a wall in the suit premises. Seeing that, the 1st respondent demolished part of the wall and fence, claiming that the same was built without adhering the legal procedure. More so, the 1st respondent accused the applicants to have extended the area covered in the building permit in their construction.

During the hearing of the application, Mr. Hussein Mandari, learned counsel entered presence for all four Applicants, whereas the respondents enjoyed the service of Mr. Camilius Ruhinda, learned Senior State Attorney in assistance of Ms. Agnes Makuba, learned State Attorney.

Submitting in support of the application, Mr. Hussein adopted the 1st applicant's affidavit and proceeded to submit that, this application was filed under certificate of urgency in terms of Order XXXVII Rule 1 and 2, section 68 (e) and section 95 of the Civil Procedure Code, [Cap 33 R. E 2019].

Mr. Hussein adds that, the application aimed to seek for declaratory order to abstain the 1st respondent and his staffs, agents and any other persons who works under his authority from demolishing the building or interfere in any way the property found in the site No. 1809, situated at Kondoa Iranga Road in the township of Dodoma pending final determination of the civil suit No. 6 of 2023 before this honourable court. He argued that, this case No. 6 of 2023 was filed to prevent demolition of those buildings upon claim that the 1st respondent had initially started to demolish those buildings in violation of the law after claiming that the applicants had not possessed a valid building permit.

The learned counsel stated further that, since they have demonstrated the purpose of the main case that they have filed (case No. 6 of 2023), it is their submission that, if the court will allow the 1st respondent to continue with demolition of those buildings before the main case is finally determined or if this court fail to issue the sought declaratory order, the main case as filed will become futile.

He stressed that, it is clear that the purpose of declaratory order is to prevent the loss to occur until matter is finally determined. He referred the court to **Overseas Infrastructure Alliance (India) PVT Ltd and Pratibha Industries Ltd Consortium v. Dar es Salaam Water and Sewerage Authority (Dawasa), Misc. Civil Application No. 237 of 2020 HC** (unreported), where in page 4 of its ruling the court held that:

> *"Thus, the basis of the said two application, interim order of temporary injunction and maintenance of status quo is the same. that is to prevent a property from being destroyed, transferred and so forth, before determination of the case involving the subject matter in dispute".*

Again, he submitted that at page 3 of the same case of **Overseas** (supra), while referring to the case of **Acaste Corporation Ltd v. Maryflorent S. Mtetemela and 2 Others, Land Case No. 24 of 2012 HC** (unreported), court held that:

> *"..... in law, such an order is not granted upon proof of rights. The proof of right is demonstrated during the hearing of the case where both sides may bring*

evidence ..... if not granted under the circumstance the application may be rendered nugatory".

Mr. Hussein submitted further that, what they are applying for, that is, declaratory order, is one of an interim order and as other interim order, it is governed by principles. He referred the court to the case of **Aticio v. Mbowe (1969) HCD 284**, where three principles have been established, such as:

1. There is a serious question to be tried on the facts allaged and the probability that the plaintiff will be entitled to the relief prayed;
2. The applicants stand to suffer irreparable loss requiring the court intervention before the applicant's legal right is established;
3. 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 of it.

He proceeded to describe each principle. Starting with the first principle that the plaintiff is entitled to the relief prayed. As it appears in the affidavit which support this application from paragraph 8 to 16. Those

paragraphs show the course of action where demolition of the building is addressed. Also, para 1 indicates that the applicants had received a demolition letter on 28th day of June, 2022, annexed in the application which provide that, the applicants are building shops without having a building permit.

Mr. Hussein described more that, the said letter affords 30 days as notice, and it directs to demolish the buildings and to acquire the building permit. However, as it is provided under para 6 of the applicants' affidavit, on the 6th day from the date, which is on 4th day of July, 2022 the demolition started. To cement his submission that demolition has started before 30 days of notice has lapsed, learned counsel Hussein attached a picture which show the actual demolition together with a letter of 21 day of July, 2022, which was directed to the Township Director to protest about the said demolition and to request for correction if there was any error noted on their part. Thus, he submitted, from 28th day of June, 2022 to 21 day of July, 2022, it is obvious that 30 days of notice was not completed. He pressed more that even in the counter affidavit of the 1st respondent as in para 7, he did not refute that demolition of the building has commenced.

In furtherance, to prove that the matter was triable or not Mr. Hussein referred the case of **Leonilah Kishebuka v. Dunstun Novat**

Rutageruka & 2 others, Land application No. 70 of 2022 HC (unreported), where it was held that:

> *"The issue whether there was non-compliance of the permit or not is a triable issue".*

That said, the leaned counsel hard-pressed that, his application fall within the principle mentioned in **Leonilah Kishebuka** (supra).

Moving into the 2nd principle, that the application stand to suffer an irreparable loss requiring court intervention. Mr. Hussein submitted that, as in the 5th para of the applicants' affidavit that the purpose of the said building is for schooling, that is, Dodoma Central school which was established since 1935 to date. He adds that in para 6 up to 10 it shows that there was a great destruction and environmental pollution which led to serious inconvenience to the students and other educational stakeholders. That is why the applicants have requested the 1st respondent to issue a building permit so that they can build a fence to the site upon the letter issued on 8th day of October, 2018 and a reminder letter dated on 2nd day of October, 2020. He further submitted that, all these letters are annexed in the affidavit, and the same were answered by respondent on 4th day of January, 2021, where applicants were allowed to build a fence.

well as to make the surrounding environment conducive for students. However, as a result, that demolition has caused disturbance for staffs, scarcity of materials for students and salary for employees.

Moreover, he revealed that this demolition has caused a great loss to the applicants which cannot be reparable as it was discussed in **Overseas case** (supra) at page 4, where the court maintained that the denial to grant it (an interim order) may lead to irreparable loss and subsequent filing of the intended suit became nugatory. He also referred the case of **Leonilah Kishebuka case** (supra) at page 6 where it was provided:

> *"It needs no angel to descend from heaven in order to know that if the application is not granted the applicants will suffer a very serious loss, and if granted, the respondent will not be prejudiced".*

Cementing his argument, he submitted that if the sought order will not be granted, it may allow gangs during night time and also deposition of unwanted materials at the site. Generally, that will lead to unfriendly

environment and difficulties to maintain security of their students. He argued more that, because of the surrounding circumstances, court should see that there is a need to preserve status quo pending determination of the main suit, therwise the applicants shall suffer a greater loss. Mr. Hussein referred the case of **T. A. Kaare v. General Manager Mara Cooperative Union (1987) TLR. 17**, where it was held that:

> *"There is requirement to consider whether there is a need to protect either of the parties from the species of injury known as irreparable injury before right of the parties is determined".*

In conclusion of this point, the learned counsel submitted that the applicants were able to show suffering which they may incurred, hence he prayed for the status quo to be maintained pending hearing and final determination of the main suit.

On the 3rd principle, which is about the balance of convenience, learned counsel Hussein submitted that the applicants have suffered because of demolition and the respondent has not suffered any loss compared to the applicants suffering. In addition, he presented that school was there since 1935 as it is shown under para 5 of the applicants' affidavit. This indicate that, the applicants have occupied the site for long

period. Therefore, if the declaratory order will not be granted, it is the applicants who will suffer. Basically, he adds, it is a common knowledge that, one who is in the site will probably incur a loss. That is a position in **Cira Kimoka v. Surumbu Ax Wesu [2002] TLR. 255**.

Finally, Mr. Hussein concluded his submission that, this application fall under those principles propounded in **Atilio case** (supra). Hence, he prayed for the sought declaratory order to be granted pending determination of the land case No. 6 of 2023 which is before this court. In addition, he prayed for any other relief which court may deem fit to award.

In response, the learned Senior State Attorney, Mr. Camilius Ruhinda kickstarted by requesting the court to adopt the counter affidavit filed by respondents to form part of his submission.

He then argued that, the application is for declaratory order, but the applicants have failed to show in the affidavit and chamber summons as to which order specifically, they are applying for?

Mr. Camilius contended that, looking at para 3 of the 1st applicant's affidavit, he attached the case No. 6 of 2023 which was filed before this court. He argued that this case was signed by all plaintiffs, but to the contrary, the affidavit in support of chamber summons is only signed by the 1st applicant (Alnoor Kassam). Because of this, the learned counsel

averred that, since an affidavit was signed by one applicant, then, all paragraphs which were verified by the 1st applicant contain a hearsay evidence. That is, an information from other applicants including the 2nd, 3rd, and 4th applicants who were not deponed. Thus, the deponed facts from para one (1) to para nineteen (19) of an affidavit in support of chamber summons contains a hearsay evidence which does not have any legal effect. That means, an affidavit is not supporting the application for its being defective.

Likewise, Mr. camilius submitted further that, without prejudice to what he has presented earlier on, in the chamber summons, the applicants prayed for declaratory order against the 1st respondent, while in para 19 of the applicant's affidavit he prayed for status quo. He therefore described that, according to Order xxxiv Rule 1 and 2 in the proviso of the Civil Procedure Code, it is provided that an order granting a temporary injunction shall not be made against the government but the court may in lieu thereof make a declaratory order for the right of the parties.

He pressed further that, looking at the applicant's submission and the case law that he has referred, they talk about temporary injunction and *mareva* injunction which does not have any connection with the case

at hand. For that reason, he prayed to the court to disregard the same as an authority in its decision.

More so, the learned Senior State Attorney argued that, the applicants were supposed to specify which declaratory order they are applying for, or otherwise the court is knotted to grant such order. closing the point, he prayed that facts which was not verified should be disregarded except those which are directed on the point of law.

In addition to what he has argued above, Mr. Camilius submitted further that, assuming that the applicant was proper. An affidavit of the applicants failed to show nature of an irreparable loss which they may incur. They also failed to establish a sufficient course in the sense that, since they have admitted that school is operating in the disputed site as shown in para 5 of applicants' affidavit, then, that shows that the schooling activities are ongoing and it has never been stopped.

Thus, based on the facts that the applicants' advocate has failed to indicate specifically what he is praying to be maintained as he mentioned in para 19 that he prayed for status quo to be maintained. Here, one can question as to which status quo he is intending while school activities are in operation.

Therefore, based on the paragraph 2 and 4 of the applicants' affidavit, it was his submission that, without prejudice to what he has

submitted earlier on, the application should be struck out with costs for being supported by defective affidavit.

Re-joining his earlier submission, learned advocate Hussein in response to the claim that the applicants' affidavit has been deponed by single applicant. Also, the contention that the same affidavit contained a hearsay evidence. He echoed that; such arguments have no legal base. In his view, it was a mere assertion which ought to be disregarded. Adding to that, he reiterated that what the respondents' advocate is trying to oppose should have been submitted through preliminary objection at the earliest time before hearing of application in merit was commenced.

Furthermore, he contended that the respondents' advocate failed to show that the applicants does not have a triable case. Therefore, he insisted that the applicants have demonstrated that they have irreparable loss and that there is a balance of convenience which fall to the applicants.

On the point that the applicants have failed to pray for proper order. Mr. Hussein argued that, this application was filed under applicable law and on that, the applicants prayed to be granted with declaratory order against the 1st respondent. He also adds that, in para 19 of the applicants' affidavit, they have prayed for status quo to be maintained pending final determination of the main suit.

In conclusion therefore, he reiterated that, if at all, there was any irregularity in their application, the respondent should have filed a preliminary objection against the application.

Now, moving on the arguments by the gentlemen, the basic question touching my mind is whether or not the applicants have outstretched a good course for the court to grant an order for *maintenance of status quo* as it has been sought out?

To answer this question, I am moved to start by re-calling the guiding principles leading to the determination of an application of this nature. To begin with, this application was made in terms of Order XXXVII Rule 1 and 2, section 68 (e) and section 95 of the Civil Procedure Code, [Cap 33 R. E 2019], of which, in my view, a fit key to open the gate for application of this nature.

The court, under Section 68 (e) of the Civil Procedure Code Cap 33 [R. E 2002] is vested with statutory powers to make an order to prevent the end of justice from being defeated. In my opinion such an order may including making an order for maintenance of status quo. The court is also empowered under Section 95 of same Code, Cap 33 [R. E 2002] where it provides:

> *"nothing in this code shall be deemed to limit or otherwise affect the inherent powers of the court to*

make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

[emphases is mine].

Now, going through the application, it is the submission of the applicants 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; and that the applicants stand to suffer irreparable loss requiring the court intervention before the applicant's legal right is established; the applicants also claimed 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 of it. In his submission, the applicants' counsel contended that the 1st respondent had started to demolish a suit structure before a 30 days' notice has lapsed. On the disputed land, the applicants claimed to have utilized their expenses to build the said building.

However, resisting on the applicants' application, learned Senior State Attorney averred that the applicants failed to show the nature of an order sought. He also faulted the applicants' affidavit that it is defective for containing hearsay evidence. Additionally, he contended that under Order xxxiv Rule 1 and 2 in the proviso of CPC, it is provided that, an order granting a temporary injunction shall not be made against the

government. Moreover, learned Senior State Attorney pressed that applicants have failed to establish a sufficient course, in the sense that, they have admitted that school is operating in the disputed site and it has never been stopped.

Generally, my considered view upon these contested grounds is that, it is clear from the outset that there is a land case No. 2 of 2023 which was filed by the applicants herein contesting for ownership of this disputed land. On top of that, it is also clear that there are number of annexures to this application depicting on the matter. For instance, letters of correspondence attached to the application themselves reveals the extent of misunderstanding between the parties.

With these facts, it is obvious that looking on the counsel's submissions, it does not leave any shred of doubt that, the applicants have grievances against the respondent's act of demolishing the disputed building. Thus, in any way, if the disputed properties is disposed off before this dispute is resolved, the applicants are likely to suffer an irreparable loss.

Prudency and justice always demand the parties to maintain their "Status Quo" until their differences are cleared out through the main case which is also pending before this court. That is the spirit which our law under Section 95 (supra) is always in demand.

In passing perhaps, I should touch two issues raised by the respondent. The counsel for respondents had taken an issue with, ***one***, affidavit that it is defective for yielding hearsay evidence. In my view, this is an afterthought. In the circumstance, if he was aggrieved by it, he should have raised a preliminary objection in advance. He let the chance go, and he cannot back bit on the same. ***Two***, that an order sought by applicants cannot be issued against the government as per Order XXXVII Rule 1 (b) of the CPC. However, it should be noted here that, under the same provision, the court can make a declaration order regarding the rights of the parties. Essentially, I agree with the learned Senior State Attorney to this legal position. In this application, it is crystal clear that the 1st and 2nd respondents are Government Institutions as per Section 16 of the Government Proceedings Act, Cap 5 R.E 2019 as amended by Section 26 of Act No. 1 of 2020.

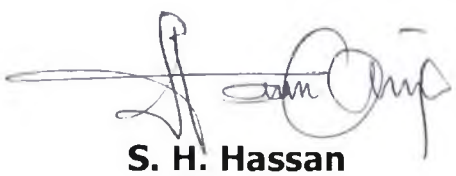
However, even if the respondents are Government Institutions, under Order XXXVII Rule 1 (b) (supra) the court is allowed to make a declaratory order regarding the rights of the parties. In my view, what is striped in terms of this proviso, is for the court to grant a temporary injunction against the government. To subscribe Order XXXVII Rule 1 (b) (supra), it provides.

"...provided that, an order granting a temporary injunction shall not be made against the government, but the court may in lieu thereof make an order declaratory of the rights of the parties".

That being the case, as there is no application for order of temporary injunction, then I see no harm to make an order declaratory to the rights of the parties, that they both have just and equitable right to be accorded with an opportunity to have fair determination of their case. Therefore, knowing that, there is a case filed in court for determination of ownership in the suit land, I hereby allow the application, and order the parties to maintain "Status Quo" pending determination of the Civil Case No. 2 of 2023. Costs to follow the events.

It is ordered.

DATED at **DODOMA** this 5th day of July, 2023.



S. H. Hassan

JUDGE