

IN THE HIGH COURT OF ZANZIBAR

HOLDEN AT VUGA

CIVIL CASE NO. 21 OF 2013

SLEYUM MBARAK SALIM

PLAINTIFF

VERSUS.

1. MANAGING DIRECTOR

THE PEOPLE'S BANK OF ZANZIBAR

2. SHERALI MOHAMEDALI CHAMPSI

3. MANAGING DIRECTOR

MAJEMBE AUCTION MART

DEFENDANTS

R U L I N G.

Abraham Mwampashi, J.

This is an application for Temporary Injunction Orders, made under S. 70 (1) (c) and (e) of the Civil Procedure Decree, Cap. 8 and Order XLIV Rules 1 and 2 of the Civil Procedure Rules, Cap. 8 both of the Laws of Zanzibar. The Applicant is Mr. SLEYUM MBARAK SALIM while the Respondents are the Managing Director of the People's Bank of Zanzibar, Mr. SHERALI MOHAMMEDALI CHAMPSI and the Managing Director Majembe Auction Mart Ltd., who are hereinafter to be referred to as the 1st, 2nd and 3rd Respondents respectively.

According to the Chamber Application the orders sought by the Applicant are in the following terms:-

- 1 That this Honourable Court be pleased to issue an order of Temporary Injunction to maintain the status quo ante bellum relation to the house situated at Kiembesamaki bounded on North by the House of Bi. MOZA, South by the House of Mr. RAMADHANI MAZIKU, East by the House of Mr. YUSSUF MWARABU and West by the House of Mr. JUMA AME, until the final determination of the Main Suit herein.
- 2 That this Honourable Court be pleased to issue an order of Temporary Injunction restraining the Respondents and/or their workmen and agents from wasting, damaging, alienating, selling, removing or disposing of the House situated at Kiembesamaki bounded on North by the House of Bi. MOZA, South by the House of Mr. RAMADHANI MAZIKU, East by the House of Mr. YUSSUF MWARABU and West by the House of Mr. JUMA AME, until the final determination of the Main Suit.

- 3 That this Honourable Court be pleased to issue an order expressly restraining the Respondents/or their workmen and agents from continuing with trespass and causing injury of any kind to the Applicant's House situated at Kiembesamaki bounded on North by the House of Bi. MOZA, South by the House of Mr. RAMADHANI MAZIKU, East by the House of Mr. YUSSUF MWARABU and West by the House of Mr. JUMA AME, until the final determination of the Main Suit herein.
- 4 Costs of this application be provided for.
- 5 Any other order(s) that the Honourable Court may deem fit.

The application is supported by the Affidavit of the Applicant while the Respondents resisted the application by filing two Counter Affidavits one of Mr. JUMA A. MOHAMMED, the Managing Director of the 1st Respondent and the other of Mr. AJAR PATEL, learned Advocate for the 2nd Respondent.

At the hearing of this application the Applicant was represented by Mr. OMAR SAID SHAABAN, Learned Advocate while the 1st Respondent was represented by Ms. SAADIYE HAMID, Learned Advocate who was assisted by Mr.

ABDULRAHMAN ADINAN and Mr. MAREMBA, Legal Officers. Mr. AJAR PATEL, Learned Advocate, represented the 2nd Respondent. One Mr. MWADINI IMRAN ALI, and Accountant with the 3rd Respondent was present for the 3rd Respondent but was not given audience for lack of locus and also for the reason that the 3rd Respondent had filed no Counter Affidavit in opposing the application.

In his submission in support of the application Mr. OMAR SAID SHAABAN, the Learned Advocate for the Applicant adopted the supporting affidavit as part of his submission and asked this court to grant the application because the 1st Respondent has illegally transferred the house which belongs to the Applicant to the 2nd Respondent and that the 2nd Respondent is damaging and alienating the house claiming that it belong to him the acts which are intended to permanently deprive the Applicant the ownership of his house. Mr. SHAABAN insisted that the Respondent have to be restrained and stopped from alienating and damaging the house in dispute until the Main Suit pending in this court is final determined. He further argued that if the application is not granted the Applicant will suffer irreparable damages. He lastly submitted that the Applicant has a strong case against the Respondents and that the balance of inconveniences titles on his side.

Mr. Patel the learned advocate for the 2nd Respondent started by attacking the supporting affidavit that it is argumentative, it contains statements of law and

hear say and therefore Contrary to Order XXII rule 3 (1) of the Civil Procedure Rules, Cap. 8. As to the merits of the application it was Mr. Patel's argument that the application cannot be granted because the four principles for such an application to be granted as formulated in the case of **Tantalia Lts. Vs. Mawa Handels Ansalt**, Civil Case No. 32/1956, (1951-1956) ZLR are not in the Applicant's favour. He singled out the four principles being the applicant's Main Suit must have reasonable probabilities of success, the balance of inconvenience, irreparable damages and the question of laches. Explaining further Mr. PATEL submitted that the Applicant's Main Suit is hopelessly time barred the limitation period for invalidating a mortgage created by force is three years. He added that looking at the plaint it is the Respondents who will encounter more inconveniences than the Applicant if the application is granted and that the Applicant has failed to quantify the loss he is likely to suffer if the application is not granted. He lastly submitted that there has been unreasonable delay by the Applicant to come to the court. For these reasons Mr. Patel asked the court to dismiss the application with costs.

Ms. SAADIYE HAMID, supported Mr. Patel's submission. She however added that the supporting affidavit is fatally defective because the verification clause is very confusing as it is not clear what in paragraph 7 of the Affidavit is believed by the Applicant on his own knowledge and what is not. As on the application itself Ms. SAADIYE submitted that the Applicant has not established that he has legal right

or title to the house in dispute. She submitted that the 1st Respondent did properly transfer the house to the 2nd Respondent and therefore that it is now belonging to the 2nd Respondent and not the Applicant. On the point that the Applicant cannot be granted the orders because he has no legal right or titled to the house of Ms. SAADIYE referred this court to the decision o this same court in **ZAHOR MBARAKA SALIM VS. PBZ,** H.C. Civil Case No. 18/2010 (unreported) where the court held that for Injunction Orders to issue the Applicant must establish that he has legal right to the property in question. She explained that the mortgage being an English mortgage the 1st Respondent had powers to sell it without court intervention under S. 69 (1) (a) of the Transfer of Property Decree, Cap. 150 of the Laws of Zanzibar. Ms. SAADIYE concluded by asking the court to dismiss the application because the Applicant has also failed to show what damages are likely to be suffered by him and that the damages are irreparable. Mr. ADINANI and MAREREMBA supported what was submitted by Mr. PATEL and Ms. SAADIYE and asked the court to dismiss the application.

In Rejoinder it was submitted by Mr. OMAR SAID SHAABAN, that the Suit is not time barred because the Applicant did not know that the mortgage deed was void till when he was so informed by his advocate. He further argued that the Applicant is the one who is going to suffer more inconveniences if the application is not granted and the injury likely to be suffered is irreparable as he will not be able to redeem his house in the same condition. He insisted that the main in the

suit pending is on the legality of the mortgage deed under which the 1st Respondent claim to have derived powers to sell the house to the 2nd Respondent. This alone, Mr. Shaaban has added, clearly show that the Applicant has a prima facie case. As on the argument that the supporting affidavit is defective it was argued by Mr. Shaaban that the affidavit is not defective and that even if there is any defect the same is not fatal.

The Respondents' arguments in regard to the supporting affidavit being defective should not detain me from deciding the application on its merits. It cannot be argued by the Respondents that the application be struck out because the supporting affidavit particularly paragraph 2 is full of arguments while the same applies to their own Counter Affidavit (see for instance paragraph 3 and 7 of the 1st and 2nd Respondent's Counter Affidavit respectively). This court also finds that the supporting affidavit verification clause is not fatally defective to warrant the instant death of the whole affidavit and hence the application as it is suggested by the Respondents.

The main purpose of Temporary Injunction Orders or relief is to preserve status quo of the matter or property in dispute while right over the matter or such property are being litigated and until the dispute is finally settled or determined. The process or the power of courts in deciding whether to grant Temporary Injunction Orders or not is discretionary which should however be exercised on

sound judicial principles. As it has been correctly submitted by Mr. Patel and supported by Ms. Saadiye and other two Respondents' representatives, in considering whether to grant or refuse an application for Temporary Injunction the court should look at mainly three principles namely whether there is a bona fide or a prima facie case on which the application is based, balance of inconvenience and irreparable harm.

The question to be decided by this court is whether considering the circumstances of the Applicant's Main Suit as shown in the plaint together with its annexures and from the affidavit and Counter Affidavit and also from the learned advocates' arguments it is justifiable for this court to exercise its discretion and grant the application as prayed by the Applicant.

The Applicant's argument through his advocate is that the Applicant is entitled to be granted the orders so as to maintain the status quo of his house which to him has been wrongly sold to the 2nd Respondent by the 1st Respondent the 3rd Respondent. On the other side it is being argued by the Respondents' advocates that the Applicant's application is baseless as it dependent on the Main Case which is bound to be dismissed for many reasons one being hopelessly time barred and that the balance of inconvenience is on the Respondents' favour. It is also argued that the Applicant has failed to show that if the application is not granted he is going to suffer irreparable loss or injury.

I have thoroughly gone through the Applicant's plaint and the supporting affidavit as well as the Respondent's two Counter Affidavits. I have also considered the parties arguments for and against the application and have come to a considered view that looking at the plaint the Applicant has a bona fide contention against the Respondents. There is a prima facie case and there are surely serious issues and arguable questions requiring the determination of this court. The Applicant's case in the Main Suit is that the mortgage between him and the 1st Respondent as evidenced by the mortgage deed and from which the 1st Respondent claim to have derived powers to sell the house in dispute to the 2nd Respondent is void for being obtained by coercion, undue influence, violation of laws and without consideration and consent. Without prejudice, the manner and circumstances leading to the execution of the said mortgage leaves a lot to be desired. A mortgage normally presupposes lending of money by the mortgagee to the mortgagor where the money lent and interests if any is secured in the mortgagor's property i.e. mortgage property. One of the questions in the Applicant's Main suit is whether there was lending of money. In paragraph 3 of the Counter Affidavit filed by the 1st Respondent it is stated that the Applicant himself agreed to sign the said Mortgage Deed as a Security for the loan security but there are facts which are to the contrary. In paragraph 11 (b) of the 1st Respondent Counter Affidavit it is put that the 1st Respondent had no option but to sell the house so as to recover the money stolen by the Applicant.

The same is repeated in sub- paragraph (c). It is also stated in paragraph 5 of the supporting affidavit that the Applicant is facing Criminal Charges in respect of the same money which is the subject of the mortgage in question. This has not been disputed by the Respondents and therefore raising other serious issues. In short am very much satisfied that there are many serious and arguable issues in the Main Suit concerning the legality of the purported mortgage on which the 1st Respondent's power to sell the house in dispute is derived. The Applicant's is not frivolous at all.

As to what is a prima facie case in regards to Temporary Injunction application it was observed in the Case of ***Walker Vs. Jones*** [1865] LR 1 by Turner LJ as follows:-

"The real point is, not how these questions ought to be decided at the hearing of the cause, but whether the nature and difficulty of the question is such that it was proper, that the injunction should be granted until the time for deciding them should arrive"

It was further held that:-

"To make out a prima facie case for Temporary Injunction it is not required that Plaintiff should establish his title, but it is enough if he can

show that the property in the meantime should be preserved in status quo”.

I would, at this juncture also consider the case of ZAHOR MBAROUK SALIM, cited by the 1st Respondent’s Advocate Ms. SAADIYE. I think the case can be clearly distinguished from the case at hand. In Zahor’s Case this court refused granting Temporary Injunction because it was established that the Applicant had no right or title to the property which was the subject of the Injunction Orders being sought. The house belonged to someone else and the Applicant did not show that he had any interests in the house. In the case at hand it is not disputed that the Applicant has interest to the house in dispute. It is not disputed that before the disputed mortgage was created the house belonged to the Applicant. The question whether the house is still his or whether the house has been properly and legally sold to the 2nd Respondent by the 1st Respondent is the very question calling for determination of this court in the Main Suit.

It was also contended by Mr. Patel that the application is baseless because the Main Suit is bound to be dismissed for being time barred. I think, with due respect, that this argument is of no merit at this stage. It should be borne in mind that the Appellant’s arguments is that he did not know that the mortgage was void for lack of free consent till when he consulted the service of his

advocate. Whether this is true or not is a question of further evidence and which cannot be decided at this stage.

Having held that the Applicant has a prima facie case or that there are serious issues calling for determination of this court in the Main Suit does not however automatically entitle the Applicant to the Injunction Orders sought by him. The next question to be considered are question of the balance of inconvenience and irreparable injury.

Bearing in mind that the house in dispute has been transferred to the 2nd Respondent though the transfer is being disputed by the Applicant in the main Suit and taking into consideration that the Respondents have not denied the allegation that the 2nd Respondent in possession of the house and is carrying on some maintenance or renovations upon the house and also bearing in mind that the 2nd Respondent might pass the house to a third party or even demolish it if the application is refused and therefore complicate the matter and unnecessarily cause multiplicity of suit if at the end the Applicant's Main Suit succeeds I think, under these circumstances, the balance of inconvenience tilts in the Applicants favour. I think if the application is refused and at the end the suit is decided for the Applicant it might be very difficult for the Applicant to restore his house. The house might be pulled down or damaged and even it might be sold to a third party. On the other hand I think if the application is granted, meaning that the

status quo as it is now is maintained, and if at the end the Applicant's Main Suit is dismissed the 2nd Respondent possession will be confirmed and he will easily claim for monetary damages against the Applicant for being stopped from carrying on with the renovations and for using the house.

As on the question of irreparable injury though I do agree with the Respondents that if at the end of the Main Case the Applicants fails the injury he is likely to suffer if the application is not granted is reparable I am, however, of the considered view that under the circumstances of this matter even the damages likely to be suffered by the Respondents if the application is granted cannot be said to be irreparable. In fact as demonstrated above the Applicant is the one who is likely to suffer more if the application is refused and in case the Main Suit is finally decided in his favour because the house might not be in the same condition or it might even be completely pulled down. It should also be reminded that in cases relating to immovable property any disturbance of status quo ante usually results in substantial loss to the owner.

Finally because the Applicant's Main Suit as amply demonstrated above raises serious issues and in consideration of on which side if the Main Suit is successful will be the balance of inconvenience if the application is not granted and bearing in mind the principle of retaining immovable property in status quo I hereby grant the application and made the following orders against the Respondents:-

1. The status quo in respect of the house in dispute which is at Kiembesamaki bounded in the North by the House of Bi. MOZA, South by the House of Mr. RAMADHANI MAZIKU, East by the House of Mr. YUSSUF MWARABU and in the West by the House of Mr. JUMA AME, be maintained i.e. the house should remain in the possession and care of the 2nd Respondent until the final determination of the Main Suit or until any other order of this court.
2. The Respondents particularly the 2nd Respondent and or their agents or workmen are hereby restrained from wasting, damaging, alienating, selling, removing or disposing in any way whatsoever the house in dispute which is situated at Kiembesamaki with boundaries as described above pending the final determination of the Main Suit or until any other order of the court.
3. Costs to follow the event.

It is so ordered.

Sgd: Abraham Mwampashi

Judge

15/07/2013.

Delivered in court this 15th day of July, 2013 in the presence of Mr. OMAR MMADI (Advocate) who holds briefs for Mr. SHAABAN, learned Advocate for the Applicant and in the presence of Mr. ABDULRAHMAN ADINAN (Legal Officer) for the 1st Respondent, Mr. Patel (Advocate) for the 2nd Respondent and Mr. MWADINI IMRAN ALI, for the 3rd Respondent.

Sgd: Abraham Mwampashi

Judge

15/07/2013.

I hereby certify that this is a true copy of the Original.

Sgd. **GEORGE J. KAZI**

REGISTRAR

HIGH COURT

ZANZIBAR.

