

IN THE HIGH COURT OF ZANZIBAR
HOLDEN AT TUNGUU
CIVIL APPLICATION No. 99 of 2022
(Arising from the Civil Case No. 71 of 2022)

MARYAM ATHANASIOU DIMITRIOU APPLICANT

versus

MARINA DIMITRIOU 1st RESPONDENT

MARYAM AWADH ALI 2nd RESPONDENT

RULING

19/08/2024 and 22/10/2024

Ibrahim, J.

The Applicant Maryam Athanasiou Dimitriou applied in this court for a temporary injunction to restrain the Respondents, their agents and their workmen from wasting, damaging, alienation, sale, removal or disposition of the property in dispute (the house at Plot No. 316 at Mazizini/Mbweni Zanzibar) pending the hearing and the determination of the main suit (Civil Case No. 71 of 2022). Moreover, she applied for temporary injunction to stop the Respondents from evicting the Applicant and her family from the house in dispute. Also, the Applicant applied in this application for an injunctive order to restrain the Respondents, their agents, their workmen and any other person acting under their instruction and authorization from committing any injury against the rights of the Applicant and others heirs of the late Athanasiou Dimitriou in relation to the said house.

The background of this application is that there is the Civil Case No. 71 of 2022 at the High Court of Zanzibar in which the Applicant Maryam Athanasiou Dimitriou is the plaintiff who sues Marina Dimitriou and Maryam Awadh Ali (the defendants in the main

suit and the Respondents in this application). In the Civil Case No. 71 of 2022, the plaintiff seeks a revocation of the Letters of Administration of the estate of the late Athanasiou Dimitriou which was granted to Maryam Ali Awadh as a representative of Marina Dimitriou; and also, the plaintiff in the suit seeks a nullification of the Deed of Beneficiary executed by the Administrator General in favour of Marina Dimitriou; as well, she sues for a nullification of any purported sale of the house at Plot No. 316. In addition, the plaintiff prayed for a declaration that the inheritance of the estate of the deceased Athanasiou Dimitriou was done illegally and unlawfully due to misrepresentation, fraudulent acts and a number of illegalities; furthermore, the plaintiff also prayed for general damages, costs and incidental to the suit.

While the main suit is pending, the Applicant came with this application for a temporary injunction under section 70 (1) (c) of the Civil Procedure Decree Cap. 8 of the laws of Zanzibar. The application was also brought and Order XLIV Rule 1 (a) and Rule 2 of the Civil Procedure Rules Cap. 8, Order XVIII Rule 3 of the same Rules and any other enabling provisions of the laws.

At the hearing of the application, the Applicant was represented by the learned advocate Mr. Abdulkhaliq Mohamed Aley whereas the 1st Respondent was represented by the learned advocate Ms. Mwanaidi Abdalla Moh'd. Also, the learned advocate Mr. Saleh Nassor Abdi appeared for the 2nd Respondent.

The application was supported by two affidavits. The first one was sworn by Khalid Hussein Maulid and the second affidavit was deposed by Salim Hassan Bakari Mnkonje.

Mr. Abdulkhaliq Mohamed Aley for the Applicant adopted those two affidavits to be part of his submissions in this application. He submitted that the Applicant managed to establish a *prima facie* case via paragraph 13 of the affidavit sworn by Khalid Hussein Maulid and managed to show the irreparable loss in paragraphs 15 and 21 of the same affidavit sworn by Khalid Hussein Maulid. In essence, paragraph 13 of the said affidavit is about the conspiracy of illegality, the claim of general damages and the request that the inheritance exercise should be re-done legally to include all heirs without any illegal

tactics. The paragraphs 15 and 21 of that affidavit state that the Applicant will lose permanently her right over her inheritance and she will be more inconvenienced with what is happening on the property in dispute and shall continue to suffer and be injured.

Finally, Mr. Abdulkhaliq Mohammed Aley also submitted that the paragraph 17 of the same affidavit shows where the balance of convenience lays. According to that paragraph, the Applicant will lose the lifetime investment and it is a greater hardship than the Respondents' who have no loss arising from the Applicant conduct.

Mr. Abdulkhaliq Mohamed Aley told the court that he has successfully shown all three criteria developed by the practice of the courts in determining the application for an injunctive order, namely a *prima facie case*, an irreparable loss and a balance of convenience. He humbly prayed that the court should be satisfied that the Applicant has proved the three criteria required by the law and that the application should be granted.

The learned advocate Ms. Mwanaidi Abdalla Moh'd for the 1st Respondent opposed the application and adopted the 1st Respondent's counter affidavit sworn by Marina Dimitriou in response to the affidavit sworn by Salim Hassan Bakari Mnkonje to be part of her submission. She also adopted the 1st Respondent's counter affidavit sworn by Marina Dimitriou in response to the affidavit sworn by Khalid Hussein Maulid to be part and parcel of her submission.

Ms. Mwanaidi Abdalla Moh'd for the 1st Respondent informed the court that paragraph 9 of the counter affidavit deponed by Marina Dimitriou provides the response to the contents of paragraph 13 of the affidavit sworn by Khalid Hussein Maulid. In addition, she stated that paragraph 11 of that counter affidavit gives an answer to paragraphs 25 and 11 of the affidavit sworn by the said Khalid Hussein Maulid.

In the paragraph 9 of the counter affidavit, it is stated that the Letters of Administration was granted legally; and the Beneficiary Deed which gave ownership right to the 1st Respondent was also obtained legally. Moreover, it was stated in that paragraph that the 1st Respondent did not authorize any person to reside in that house at Plot No. 316 and

that the Applicant is not entitled to any claim against the 1st Respondent because the 1st Respondent is not in violation of any right of the Applicant related to the said house. Those were the responses of Ms. Mwanaidi Abdalla Moh'd at the hearing of this application.

In the paragraph 11 of the counter affidavit, it is declared that the 1st Respondent has not been involved in any breach of law in Zanzibar or elsewhere and has not caused any person to suffer irreparable loss, said Ms. Mwanaidi Abdalla Moh'd. The learned advocate Ms. Mwanaidi Abdalla Moh'd emphasized that it is admitted that the Applicant will lose the said property permanently because the will excluded her. The learned advocate elaborated that the deponent asserted in paragraph 9 of the counter affidavit that the Applicant has no proof and the entire claim is an afterthought as the Applicant has got no right over the house in dispute. Ms. Mwanaidi Abdalla Moh'd for the 1st Respondent submitted therefore that the Applicant will not suffer irreparable loss nor was there any explanation of such loss.

It was stated by the learned advocate Ms. Mwanaidi that paragraph 10 of the counter affidavit provides an elaboration of a balance of convenience in response to the affidavit sworn by Khalid Hussein Maulid. Ms. Mwanaidi Abdalla Moh'd stated that the property in dispute is legally and solely owned by the 1st Respondent and it is the 1st Respondent who will be more inconvenienced if the application is granted. She insisted that the property is illegally occupied by the people who are neither owners of that house nor having any interest thereon. She pointed out that the deponent has been contradicting himself because on one hand he says that the house is residential but on the other hand he says it is a hotel. Ms. Mwanaidi stated that the deponent rented the said house illegally and the money accrued therefrom are used by him illegally. Ms. Mwanaidi Abdalla Moh'd reiterated that in reality the Applicant had been deprived of the said house permanently by the deceased himself via his own will. Thus, she was of the view that it is unfair to stop the 1st Respondent from evicting the people who are illegally residing in the said house.

The learned advocate Ms. Mwanaidi Abdalla Moh'd clarified that the three criteria for granting a temporary injunction have not been met by the Applicant because the Applicant has not explained what loss she would suffer and how she would be affected; and according to the learned advocate, the Applicant failed to show which party would be more affected if the injunction is not granted; after all, even a *prima facie* case has not been made out, it was opined by Ms. Mwanaidi.

The advocate for the 1st Respondent finally prayed that the court should not grant the injunction because the house is in the hands of the Applicant and she is the one who occupies the house and she benefits from it and not the Respondents. Alternatively, she submitted that if the court decides to grant the injunction the injunctive order should be on both sides. In other words, both sides should stay out of the house until the decision of the main case is made.

The learned advocate Mr. Saleh Nassor Abdi for the 2nd Respondent concurred with the submissions of the advocate for the 1st Respondent in opposing the application. He adopted the counter affidavit of his client and its attachments to be part of his submissions and they should be taken as the grounds for dismissing the application.

He stated that the principles of *prima facie* case, irreparable loss and balance of convenience require the Applicant to substantiate facts which establish those matters. He told the court that the paragraphs of the affidavit sworn by Khalid Hussein Maulid and cited by the learned advocate Abdulkhaliq Mohamed Aley (paragraphs 11, 13, 17 and 25) have not proved those facts.

The learned advocate Mr. Saleh Nassor Abdi pointed out that the deponent Khalid Hussen Maulid in paragraph 2 of the affidavit revealed the source of information, however, the paragraph has not been verified in that affidavit. Therefore, according to the learned advocate, the whole of the affidavit has collapsed.

On the affidavit sworn by Salim Hassan Bakari Mnkonje which had been adopted as a part of submissions of the advocate for the Applicant Mr. Abdulkhaliq Mohamed Aley, the learned advocate for the 2nd Respondent informed the court that the paragraph 12

of the said affidavit was never verified. He prayed that the application should be dismissed and that the 2nd Respondent does not want the costs.

Mr. Abdulkhaliq Mohamed Aley for the Applicant made a rejoinder. He expounded that the fact that the Applicant is living in the house in dispute is not an issue before the court. He stated that what is in issue before the court is whether an injunction should be granted or not; the issue is not whether the Applicant should be removed from the house or not; and therefore, the alternative submission of the learned advocate Ms. Mwanaidi Abdalla Moh'd for the 1st Respondent is misconceived.

In relation to the submission of Mr. Saleh Nassor Abdi on the paragraph 2 of the affidavit deponed by Khaiid Hussein Maulid, the learned advocate Mr. Abdulkhaliq Mohamed Aley rejoined that the paragraph was wrongly regarded by the other side to be the basis of all the remaining paragraphs of the affidavit. He stated that that is not true because the paragraph is self-reliant or self-sufficient and it is independent of other paragraphs which are also independent. He asserted that still the oath of Mr. Khalid Hussein Maulid stands valid without any problem.

The learned advocate for the Applicant criticized Mr. Saleh Nassor Abdi for trying to raise a preliminary objection within a submission on merit; that was unprocedural, he said. According to him, what was expected was the hearing of the application on merit but Mr. Saleh Nassor Abdi raised the preliminary objection which he was supposed, if any, to have raised it before. Mr. Abdulkhaliq Mohamed Aley for the Applicant lamented that they have been taken by surprise. He indicated that the same response would go to the comment on the paragraph 12 of the affidavit deponed by Mr. Salim Hassan Bakari Mnkonje; and therefore, he prayed that these arguments on the lack of verification should be disregarded and the court should focus on the purpose of the application which is to preserve the *status quo* of the property in dispute until the determination of the suit.

First of all, I must acknowledge that all three advocates from both sides who appeared at the hearing of this application were unanimously in agreement on the three criteria

that have to be taken into account by the court in determining an application for a temporary injunction. The court is aware that the criteria were formulated by the House of Lords in England in the leading case of **American Cyanamid Co. versus Ethicon Ltd** [1975] All ER 504. The case has been a landmark in the Commonwealth jurisdictions that in granting temporary injunction as discretionary remedy, courts must be satisfied that there are a *prima facie* case, an irreparable injury and a balance of convenience which is in favour of the applicant. The learned advocates' disagreement in this application was on whether those criteria were met or not by the Applicant.

In addition, the court takes note of the milestone decision of the High Court of Tanzania in **Atilio versus Mbowe** (1969) HCD 284 by Georges C.J. in which it was held that before granting the order of temporary injunction the court must be satisfied that: (i) 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; (ii) the applicant stands to suffer irreparable loss requiring the court's intervention before the applicant's legal right is established; (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 of it.

I am of the view that the two authorities cited hereinabove talk of the similar if not the same principles or criteria; the only difference is that the authority from the High Court of Tanzania requires something extra that the court has to look at the pleadings of the main suit and predict the probable result.

In applying the criteria to the case at hand, it is obvious that there is a claim on inheritance. The Applicant who is a daughter of the deceased Athanasiou Dimitriou claims that the inheritance processes were illegally, unlawfully and fraudulently done by the Respondents to exclude her and other heirs. On the other hand, the 1st Respondent who is also another daughter of the late Athanasiou Dimitriou claims that the Applicant has been excluded from the inheritance by the will of the deceased and that the 1st Respondent has inherited the property in dispute lawfully. From these contentions, it is clear in my mind that this is a *prima facie* case for litigation.

This is because the court has to ascertain a number of issues, among them, (a) whether the said will of the deceased Athanasiou Dimitriou was proved through the legally required petition in probate proceedings or not (b) was the said will found to be valid or not (c) whether the allegations of illegalities, unlawfulness and fraudulence in obtaining the Letters of Administration and the Deed of Beneficiary are true or not. All of these can be determined in the suit after being proved or disproved by the parties. Therefore, I hasten to say that the *prima facie* case has been made out by the Applicant; and I find it unnecessary to proceed in prejudging and predicting the probable outcome of the main suit.

Secondly, the kind of injury that will be suffered by the Applicant if the application is not granted is definitely an eviction from the house in dispute which she is now occupying. At this very moment, this is certain apprehension which is proved by the attached requests for eviction from the 1st Respondent and the public authority. The eviction will be an irreparable injury which cannot be adequately compensated through monetary value by way of damages. The court holds the view that the hardship which may be caused by the removal from the house is qualitatively and quantitatively difficult to evaluate in monetary terms.

On the contrary, if the court does grant the injunction, the *status quo* will be maintained. The Applicant will not be evicted from the house; and she will continue to remain with the possession of the house in dispute; nothing is going to change. The injury to the 1st Respondent is that she will be missing to use the property for a moment. However, if at the end of the main suit it is found that the Applicant has been in a wrongful possession of that property, she will pay damages and mesne profit to the 1st Respondent. The court will order the Applicant to vacate; and the 1st Respondent will be able to immediately occupy the house and even to dispose it if she wishes to do so.

Thirdly, it is obvious that a balance of convenience is in favor of the Applicant. If an order for injunction is not granted it will cause a great inconvenience for the Applicant and her relatives who are in the house. I reject the suggestion that was proposed by the learned advocate Ms. Mwanaidi Abdalla Moh'd for the 1st Respondent that this court

should quintessentially order that both sides in this application should stay out of the house in dispute. The suggestion is rejected because the purpose of this application under Order XLIV Rule 2 of the Civil Procedure Rules, Cap. 8 was to restrain the Respondents from committing an injury (eviction) to the Applicant until the disposal of the main suit. In other words, the purpose is to maintain *status quo* and I see neither a need nor a necessity to disturb it.

As to the arguments by the learned advocate Mr. Saleh Nassor Abdi for the 2nd Respondent on the omissions in verifications in the affidavits, I concur with the learned advocate Mr. Abdulkhaliq Mohamed Aley for the Applicant that those arguments are in the nature of preliminary objections but they came hopelessly late and they took the other side by surprise. What is not understandable by this court is that the same party (2nd Respondent) through the same advocate or firm (Mr. Saleh Nassor Abdi) did previously file the preliminary objections on the 4th April 2023 about conflict of interest and they were determined and overruled by this court (Lady Justice Aziza Suwedi) in the Ruling of the 28th June 2023 but in it the advocate had not included objections about verification of affidavits. Hence, the court is eager to achieve finality of litigations and it pays no attention to afterthoughts like these ones. Otherwise, suits will not be concluded forever.

Having said that, the temporary injunction is granted restraining the Respondents, their agents, their workmen and any one acting on their behalf from evicting the Applicant and her family from the house at Plot No. 316 at Mazizini/Mbweni. Also, the temporary injunction is granted for maintaining the *status quo* and restraining the Applicant and the Respondents from doing any injurious act to the property. The court makes no order as to cost. It is so ordered.

(Sgd) IBRAHIM M. IBRAHIM

JUDGE

22/10/2024

COURT

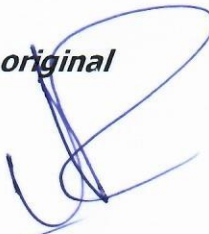
The ruling was delivered in court the presence of Mr. Abdulkhaliq Mohamed Aley for the Applicant, Mr. Rajab Abdalla Rajab for the 1st Respondent and Mr. Saleh Nassor Abdi for the 2nd Respondent.

(Sgd) IBRAHIM M. IBRAHIM

JUDGE

22/10/2024

I certify that this is a true copy of the original


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/REGISTRAR HIGH COURT

ZANZIBAR

