

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

MISCELLANEOUS LAND APPLICATION NO 10 of 2011

1. BEATUS ALFONCE MTUI

2. SHABANI S.H. MFINANGA

APPLICANTS

VS

1. DIRECTOR OF MAPPING & SURVEY

2. THE REGISTRAR OF TITLES

3. THE COMMISSIONER FOR LANDS

& HUMAN SETTLEMENT DEVELOPMENT

4. ATTORNEY GENERAL

RESPONDENTS

Ruling

Date of last Order: 29-07-2011

Date of Ruling: 22-08-2011

JUMA, J.:

The applicants, Beatus Alfonce Mtui and Shabani S.H. Mfinanga by Chamber Summons under a Certificate of Urgency, commenced their application on 29th May, 2011 for a temporary injunction without filing any suit. Their Application is supported by a fifteen

(15) paragraph joint affidavit sworn and affirmed to by the applicants setting out the grounds upon which the applicants rely to support their application seeking to restrain the respondents from tempering with plots No. 2167, 2168 and 2069-2107 comprising Block E at Kunduchi Salasala Dar es Salaam. Respondents against whom the restraining order is directed are the Director of Mapping and Survey (1st respondent), the Registrar of Titles (2nd respondent), the Commissioner for Lands and Human Settlement Development (3rd respondent), and the Attorney General (4th respondent).

In opposing this application, the respondents filed their counter affidavit filed on 15th July 2011 and sworn by Nicholas Mkapa, a learned State Attorney in the Attorney General's Chambers. Together with the counter affidavit, respondents in addition issued a Notice of Preliminary Objection asking this court to dismiss the application on the ground that,

- i) The Miscellaneous Land Application No 10 of 2011 before this court is incompetent for non citation of law.
- ii) The Application is incompetent as there is no pending suit.

On 29th July 2011 Mr. Masaka, learned Advocate for the Applicants; and Ms Punzi Juma, the learned State Attorney for respondents appeared before this court and were heard on the preliminary points of objection.

Submitting on non citation of law, Ms Punzi Juma contended that the provisions of section 2 (3) of the **Judicature and Application of Laws Act, Cap. 358 R.E. (JALA)** is not applicable to move this court to restrain the respondents. According to the learned State Attorney, section 2 (3) of the **JALA** requires conformity with written laws implying that courts are to be guided by existing laws governing applications for temporary injunctions. Ms Punzi Juma augmented her submission by referring to a restatement of the law by the Court of Appeal of Tanzania regarding the dire consequence visiting either the non-citation of proper laws or citation inapplicable provisions of the laws to move the courts. Rutakangwa, J.A. in **Edward Bachwa & 3 Others Vs. The Attorney General & Another, Civil Application No. 128 of 2006 DSM** restated the settled law on page 7 to the effect that wrong citation of the law, section, sub-sections and/or paragraphs of the law or non citation of the law will not move the court to do what it is asked and renders the application incompetent.

Further, the learned State Attorney invites this Court to make a finding that the present Miscellaneous Land Application No 10 of 2011 before this court is incompetent for non-citation of the law. The learned State Attorney volunteered a suggestion that the Applicants were supposed to have employed Order XXXVII Rule 1 (a) or (b) of the **Civil Procedure Code, Cap. 33 R.E. 2002**.

Submitting on the second point of objection regarding the pendency of a suit as a condition precedent before applying for temporary orders, Ms Punzi Juma submitted that an application for an injunction can only stand on the legs provided by a pending suit. Without a suit, an application for temporary injunction is incompetent for want of a suit to stand on, contended the learned State Attorney. Further, the learned State Attorney noted that even if the Applicants had a pending suit, the applicants could only cite Order XXXVII Rule 1 (a) or (b) of the CPC; but not section 2 (3) of the **JALA** to apply for a temporary injunction.

In his replying submissions, Mr. Masaka conceded that indeed the applicants have not as yet filed any suit together with their present application for temporary injunction to bring their

application within the requirements of Order XXXVII Rule 1 (a) or (b) of the CPC. The learned Advocate further explained that the applicants could not rely on Order XXXVII Rule 1 (a) or (b) of CPC because they are still waiting for their 90-day statutory notice before suing the Government to expire before they can legally file their suit against the Government (respondents). Mr. Masaka further submitted that the Respondents have expressed their wish to terminate their titles of occupancy and since the applicants cannot institute any suit before the 90-day statutory notice expires this Court can only be moved into granting the applicants' prayer for temporary injunction under section 2 (3) of the **JALA**.

In support of his submission that the time is not ripe for the applicants to file a suit; and hence they can only rely on section 2 (3) of JALA but not on Order XXXVII of CPC, the learned Advocate drew my attention to the restatement of the law that was made by Samatta, JA (as he then was) in the case of **Tanzania Electric Supply Company (TANESCO) v. Independent Power of Tanzania Ltd (IPTL) and Two Others**, [2000] T.L.R. 324 at **pages 242 and 243** with respect to power of the courts to fall back to section 2 (3) of JALA and grant a temporary injunction in circumstances not covered by the CPC:

*"The Code (the Civil Procedure Code) cannot be said to be exhaustive. It would be unrealistic to expect the legislature to contemplate all possible circumstances which may arise in litigation. It is legitimate, therefore, to apply, under the above quoted subsection of the ordinance [i.e. **equivalent of the current subsection 3 of section 2 of JALA**] relevant rules of Common Law and general statutes of application in force in England on the twenty-second of July, 1920, where the Code is silent. Applying that power, in **Nicholas Mere Lekule's** case (5) Kaji, J., held that the High Court has jurisdiction in a proper case to grant an 'interim injunction order' pending institution of a suit. About two years later, in **Tanganyika Game Fishing and Photographic Ltd. V. The Director of Wildlife, The Attorney General and Muanauta and Company (T) Ltd.**, (10) Katiti, J, invoked the power under the sub-section and held that the court has the inherent power to grant a temporary injunction order in circumstances not covered by Order XXXVII of the Code....."*

After hearing, I must say able submissions by the two learned counsel on the points of objection, one important issue remains for my determination is, which, between Order XXXVII of the **CPC**, and section 2 (3) of **JALA**; is the proper provision of the law which the applicants should have employed to move this court to grant them the temporary injunction. To determine this issue, I reflected

back on the facts which the applicants advanced in support of their Chamber Summons seeking to move this court under the provisions of section 2 (3) of the **Judicature and Application of Laws Act, Cap. 358 R.E. (JALA)**. Section 2-(3) of the **JALA** states,

(3) Subject to the provisions of this Act, the jurisdiction of the High Court shall be exercised in conformity with the written laws which are in force in Tanzania on the date on which this Act comes into operation (including the laws applied by this Act) or which may hereafter be applied or enacted and, subject thereto and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the twenty-second day of July, 1920, and with the powers vested in and according to the procedure and practice observed by and before Courts of Justice and justices of the Peace in England according to their respective jurisdictions and authorities at that date, save in so far as the said common law, doctrines of equity and statutes of general application and the said powers, procedure and practice may, at any time before the date on which this Act comes into operation, have been modified, amended or replaced by other provision in lieu thereof by or under the authority of any Order of Her Majesty in Council, or by any Proclamation issued, or any Act or Acts passed in and for Tanzania, or may hereafter be modified, amended

or replaced by other provision in lieu thereof by or under any such Act or Acts of the Parliament of Tanzania:

Provided always that the said common law, doctrines of equity and statutes of general application shall be in force in Tanzania only so far as the circumstances of Tanzania and its inhabitants permit, and subject to such qualifications as local circumstances may render necessary.

In my opinion, the **Judicature and Application of Laws Act, 1961 (JALA)** is a statute governing sources of laws which Courts in Tanzania are obliged to apply. Sub-section (3) of section 2 of **JALA** begins with poignant directive that Courts shall first resort to any written law that is in force which is applicable to the matter before it. The relevant provision states that:

...the jurisdiction of the High Court shall be exercised in conformity with the written laws which are in force in Tanzania..

These opening words in sub-section (3) of section 2 of **JALA** implies that where specific jurisdiction of this Court is clearly provided for in any written law, then it is that written law which this Court shall apply.

Similarly, **JALA** recognizes that there may be situations where there are gaps in written laws which need to be filled in the

interests of justice. Here, sub-section (3) of section 2 of **JALA** allows this Court to fall back to the common law through the phrase that: *subject thereto and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the twenty-second day of July, 1920.*

Before moving further, I must state that the applicant must show that their application is not covered by Order XXXVII Rule 1 of CPC governing when courts can issue temporary injunctions. After showing that gap, the applicants are entitled to benefit from the principle of law restated by Samatta, JA (as he then was) in the case of **Tanzania Electric Supply Company (TANESCO) v. Independent Power of Tanzania Ltd (IPTL) (supra)** to the effect that the resort can only be made to sub-section (3) of section 2 of **JALA** if the **Civil Procedure Code** is not exhaustive with respect to a matter at hand, and that High Court shall have the jurisdiction in a proper case to grant an 'interim injunction order' pending institution of a suit.

In their joint affidavit the Applicants stated that around 4th May 2011, the 3rd respondent wrote a letter demanding the applicants

to surrender their certificates of titles on the ground that the allocation was mistakenly made. The Applicants responded by expressing their intention to sue the Government and issued the mandatory 90-day notice. I am satisfied that the **CPC** has no specific provision governing the issuing of an order of temporary injunction where an applicant cannot file a suit before the expiry of the 90-day period of Statutory Notice before suing the Government as envisaged under the **Government Proceedings Act, Cap 5**.


In my opinion, the letter from the 3rd respondent demanding a surrender of certificates of occupancy *prima facie* indicate that respondents have threatened the applicants by expressing an intention to terminate their landed titles. The ownership over the parcels of land belonging to the applicants is not only in dispute, but is in danger of being terminated to the detriment of the applicants. The interlude between 4th May 2011 when the 3rd respondent directed the applicants to surrender their certificates of title for purposes of cancellation, and 21st August 2011 when the 90-day statutory notice expires, the applicants cannot rely on Order XXXVII Rule 1 (a) or (b) of **CPC**. To that extent, there is a statutory gap in the **CPC** because its Order XXXVII Rule 1 does not

cover where the time is not yet ripe for the applicants file any suit to contest the termination of their titles over land. It is my finding and holding that the applicants can during this interlude move this Court by employing section 2 (3) of the **JALA** to hear an application for an order of injunction.

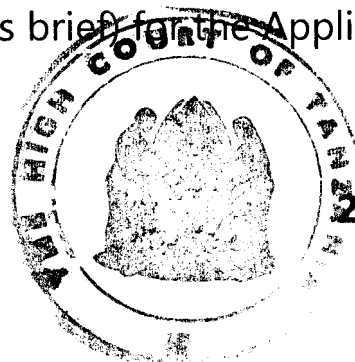
In the upshot, I find that the two preliminary points of objection to be without merit and are hereby dismissed with costs awarded to the applicants.


It is ordered accordingly.




I.H. Juma
JUDGE
22-08-2011

Delivered in presence of Mr. Byamungu, Adv. (holding Mr. Masaka's brief for the Applicants)




I.H. Juma
JUDGE
22-08-2011