

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF MWANZA
AT MWANZA

MISCELLANEOUS LAND APPLICATION No 9 OF 2012

(Arising from Land Case No. 3 of 2012)

SENOIL LIMITED.....APPLICANT

VERSUS

MWANZA CITY COUNCIL.....1st RESPONDENT

DOLPHIN TOURS AND SAFARIS LIMITED...2ND RESPONDENT

RULING

MRUMA, J.

Contemporaneous with institution of land case No. 9 of 2012, the Applicant **SENOIL LIMITED** through the service of Mawenzi Advocates Chambers preferred a Chamber Summons

under the provisions of Rules 1, 2, and 3 of Order XXXVII and *Section 95 of the Civil Procedure Code [Cap 33 RE 2002]* praying for following orders:

EXPARTE

- (a) That this honourable Court be pleased to issue an order of temporary injunction to restrain the Second defendant, its agents, servants or workmen from developing, altering or disposing of Plot No 3 Makuyuni New Industrial area Mwanza pending the determination of the application inter parties.

INTER PARTIES:

- (b) That this Honourable Court be pleased to issue an order of temporary injunction to restrain the second Defendant its agents, servant or workmen from developing, alienation or disposing of Plot No 3 Mkuyuni, New

Industrial area Mwanza pending the determination of the main suit.

(c) Costs of this application be provided for.

The Respondents are Mwanza City Counsel and Dolphin Tours and Safaris Limited.

The application as is the practice is supported by the affidavit of the applicant and the supporting affidavit in this matter is affirmed by Abdulkadir Ahmed Hussein who introduced himself as the Managing Director of the Applicant's company.

When the matter was placed before me for necessary orders on 19th March 2012, I declined to issue orders of ex-parte interim injunction as sought by Mr. Ngatunga, learned counsel for the Applicants and instead, I ordered parties to appear for inter-parties hearing of the Application on 29th March, 2012. I also directed that both Respondents be served as they may wish to resist the prayers in the Chamber Summons.

On 29th March, 2012 parties through their advocates appeared before me. The Applicants were represented by Mr. Ngatunga, learned counsel. The first Respondent were represented by Ms Savella, City solicitor while the second Respondent enjoyed legal service of Mr. Gallati Mwantembe, learned advocate.

After a few conversations parties agreed to have the application be disposed of by way of written submissions. A schedule for filing of each party's submission was dully proposed by the court and agreed to by the parties and the matter was set for mention with the view to fix a date for delivery of the ruling.

I thank the learned counsels for their prompt adherence to the filing scheduling order. Unfortunately, as I was in a criminal session at Tarime for the whole of June and substantial part of July 2012, which session wasn't in my diary in March, 2012 I

couldn't deliver the ruling as scheduled earlier. I sincerely apologize to the parties and their counsels for all and/or any inconveniences suffered. Now the following is my ruling on the matter.

As pointed out earlier, the applicants are praying for temporary injunction orders against the Respondents, their agents, servants, workmen and/or whoever may purport to act on their behalf from developing, alienating or disposing of or do anything in Plot No 3 Mkuyuni New Industrial area in Mwanza City pending the determination of Land Case No 3 of 2012 which is pending for determination in this very Court.

The Applicants' side of the story as could be gathered from the supporting affidavit, the plaint and written submissions are as follow; that they are the legal owner of Plot No 3 Makuyuni New Industrial area in Mwanza. That the Plot was allocated to them for a term of 33 years vide a letter of offer with reference

No MZM/1136/22/CKT dated 10th September 1998. It is their further contention that they took possession of that land and started to develop it by constructing a foundation on part of the suit Plot. Sometimes in May 2005, the Mwanza Urban Water and Sanitation Authority (MWAUWASA) approached the first Respondent, Mwanza City Council showing interest to be allocated and/or to acquire and use the suit land for their project subject to payment of compensation to the Applicants who were the owners of the suit land. The first Respondent (Mwanza City Council) communicated with the Applicants of their intention to acquire the suit plot on public interest. The Applicants agreed to the proposal. Thereafter between 27th May, 2005 and 9th September 2011 there were several communications between the first Respondent and the Commissioner for Lands regarding the suit Land but subsequently MWAUWASA didn't acquire and utilize the suit land and they requested the first Respondent to have the suit land handed back to the former

owner i.e. the Applicants. But to Applicants' surprise the 1st Respondent didn't notify them of the abandonment of the MAUWASA's plan to acquire the suit plot for public use and instead they allocated it to the Second Respondent Dolphin Tours and Safaris Limited.

It is the Applicants further contention that there was irregular and fraudulent transfer of the suit plot to the second Respondents by the officials of the first Respondents' authority, and on the basis of the said transfer the second Respondent has entered on the suit plot and has started the construction thereon.

The Applicants now want the second Respondent be restrained from continuing constructing on the suit plot pending the hearing and determination of land case No 3 of 2012 which is pending before this Court.

On the other hand the first Respondent's story is that; the suit land was first allocated to Metal Products Limited on 8th July,

1978 who legally owned it under a long term lease period of 99 years. The said Metal Products Limited failed to develop it within the time stipulated in the conditions of the Right of Occupancy as a result of which their right was revoked in 2006.

There is no explanation from the first Respondent of what happened to the suit in 1998 when the Applicants claim to have been allocated the same land by the same authority (i. e. the first Respondent).

On their side, the Second defendants' story is that the suit land was compulsory acquired by the President in 2006 in exercise of his powers under the law and it was given to the Mwanza Urban Water and Sanitation Authority (MWAUWASA). Thereafter MWAUWASA returned the suit land to the first Respondent, the Mwanza City Council and the first Respondent as the allocating authority in Mwanza allocated it to the second

Respondents Dolphin Tours & Safaris Ltd following their application letter dated 21st January, 2011.

The second Respondent, didn't produce the first Respondents' reply to their application letter but from the Certificate of the Right of Occupancy attached as **annex D1** to the counter affidavit, it would appear that by April, 2011 the suit land had already been allocated to them and they were granted building permit No 12142 on the land on 7th July, 2011.

Now the question before me is whether in the circumstances of this case, and given the facts narrated above the court can grant orders for temporary injunction as requested by the Applicants and strongly resisted by the Respondents.

It is now trite law in our jurisdiction that before court can invoke its discretion to grant orders of temporary injunction three conditions must be demonstrated to the satisfaction of the Court;

- (i) That there is a serious question to be tried by the Court on the facts alleged and probability that the plaintiff will be entitled to the reliefs prayed
- (ii) That the Court's interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established
- (iii) That on the balance of convenience 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 it [See **ATILIO Vs MBOWE (1969) HCD 284.**

Counsels have submitted heavily for and against these propositions of the law.

In my opinion in a case like this, where the applicants have approached the Court complaining against the Respondents alleging arbitrariness, bias and favouritism against his right by

the first Respondent a City Council which is a government authority, and trespass and encroachment into her plot by the second Respondent a private entity, Court being custodian of law, must examine the averments made in the application to form tentative opinion as to whether there is any substance in allegations of bias and breach of duty on the part of the government authority and trespass and encroachment of rights on the part of a private entity. Such a course is required to be followed while deciding an application of temporary injunction, and particularly so where a government authority is involved.

Thus, an interim injunction order in a case like this can be passed on the basis of prima facie findings which are tentative. It should be a temporary arrangement to preserve the status quo till the matter is decided finally, so as to ensure that the matter does not become either *infructuous* or *a fait accompli* before the final hearing and determination.

The object of temporary injunction order in a case where govt is involved is to protect the rights of plaintiff who is considered as a weaker party against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if finally the uncertainty would be resolved in his favour at the trial.

On the above observations, I would say, grant of interim injunction order in regard to the nature and extent thereof depends upon the facts and circumstances of each case as no strait-jacket formula can be laid down. For instance, in a case like this there may be a situation wherein the Defendant/Respondent may use the suit property in such a manner that the situation becomes irretrievable at the conclusion of the matter so that the government authority involved can attorney the situation by allocating an alternative block to the

Applicants. In such a situation grant of temporary injunction order may be inevitable.

But generally as widely accepted, grant of temporary injunction is governed by three basic principles, i. e. prima facie case; balance of convenience; and irreparable injury which are required to be considered in a proper perspective in facts and circumstances of a particular case.

Now having in mind the facts and circumstances of this case and applying those general principles in our case and starting with the first principle of a prima facie case; it is a trite law that in deciding whether the plaintiff's case establishes a prima facie case against the defendant or not the court has to examine only the facts as alleged in the plaint together with annexes (if any) to it, and see whether or not on those facts alone and if they are not disputed by the defendant, it could enter judgment for the plaintiff.

In the instance case the Applicants allege in paragraph 2 of the supporting affidavit that they are the legal owner of plot No 3 Makuyun new Industrial area in Mwanza which is now in dispute. They annexed a letter of offer (Annex A) to the said affidavit.

Under paragraph 7 of the said affidavit, there is an allegation that the first Respondents have fraudulently transferred the said right of offer legally granted to the Applicants to the second respondent and that the second Respondents have started construction on the said plot. To me if these allegations are not strictly contested by the Respondents the Applicant could be entitled to judgment. Thus, the facts as alleged by the Applicants constitute a prima facie case. Therefore the first test is met.

Before going to the second principle, for chronological and convenience purposes I wish to browse on the third principle; that is the principle of irreparable injury.

In the present case the subject matter of the suit is a plot of land and its alleged project carried on it construction by the Respondents. Thus, to get into the point in this case, I have to consider a bit of intricacy of the construction industry in this matter. Thus, before I grant or refuse to grant temporary injunction order I have to weigh what the parties will suffer or will not suffer in terms of architectural designs, construction plans and costs implications to either party. These are important factors because if the injunction order is granted, then construction works will have to stop pending the determination of the case. If the case ends in defendants' favour, then the plaintiff will have to prepare to pay the difference between the estimated initial costs of the project and the inflated costs at the time of the conclusion

of the case plus other consequential costs. But if injunction is refused then construction works will go on and at the end of the day, the new building will be in place. This new building may not necessarily be architecturally in a design similar to what the plaintiff had planned to have in site. If that is the case then, court will have to order for its demolition to give vacant possession to the Applicant/plaintiff should the case be finalized in his favour. Now the logical question is who then will suffer irreparably? Starting with the Applicant on whose favour the injunction is issued, if at the end of the day he loses the case, he may be ordered to pay on top of other remedies the difference between the old project estimated costs and the new costs based on change of prices of building materials, inflation and other factors. This, is in my view payable therefore the damages that may be caused to the defendants are retrievable.

On the other hand, if the building had been erected during the pendency of the suit and at the conclusion of the matter it is found that the suit plot belongs to the Applicants, this will have effect to both parties but to the Applicants/ plaintiffs the damages may be irreparable as the building which may not suit his purposes will be in place. Demolition order may not atone for the injuries inflicted on the plaintiff. On the other hand the defendants may not be able to bear costs of demolition and compensation to the plaintiffs.

Thus, in my view, common sense dictates that in a situation like this and where the defendant is aware of the institution of a suit and application for temporary injunction against his construction on the suit land, temporary injunction order should simply be issued stopping him from continuing with construction hoping that he may recover his costs and differences of prices of building

materials should the suit be finalized in his favour rather than risking demolition after completion of the building.

On the above conversed facts, it goes without saying that the test of balance of convenience lies towards granting the temporary injunction order than refusing it.

In the event therefore, the application for temporary injunction order is granted as prayed save that costs will be in the cause.



A.R. Mruma

JUDGE

At Mwanza

6th September, 2012

Date : 6th September, 2012

Coram : Hon. A.R. Mruma, J.

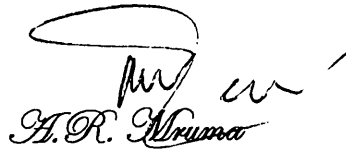
For Applicant : Ngatunga for the Applicant

1st Respondent: Mr. George Michael

2nd Respondent: Mr. Kange for the 2nd respondent

Court:-

Ruling is delivered.



A.R. Mwanza

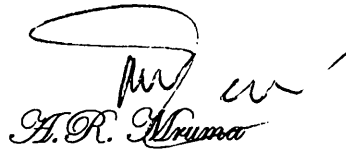
JUDGE

At Mwanza

6th September, 2012

Court:-

Ruling is delivered.



A.R. Mwanza

JUDGE

At Mwanza

6th September, 2012