

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**MISC. LAND APPLICATION NO. 20 OF 2020**

**(C/F LAND CASE NO. 08 OF 2020)**

**RAJUL MOTICHAND SHAH.....APPLICANT**

**VERSUS**

**JONAS PRATICE POTEA.....1<sup>ST</sup> RESPONDENT**

**NOLIC COMPANY LIMITED ACTIONERS.....2<sup>ND</sup> RESPONDENT**

**RULING**

**18/09/2020 & 22/12/2020**

**GWAE, J**

Under the services of the learned counsel **Andrew Akyoo** from Aymak Attorneys the applicant herein above has moved this court under Order XXXVII Rule 4 and section 68 (c) & (e) of the Civil Procedure Code, Cap 33 R.E 2018 for an order of temporary injunction to restrain the respondents, their agents and servants or whomsoever acting under their instructions, from evicting, disturbing or interfering with the applicant's peacefully occupation and or transferring the landed properties in dispute.

The Application is supported by an Affidavit, affirmed by the Applicant, while the Counter Affidavit is sworn by the 1<sup>st</sup> respondent admitting some of the contents while contesting some.

On the date fixed for hearing the applicant was represented by **Mr. S. Mushi**, learned counsel whereas the 1<sup>st</sup> respondent enjoyed legal services from the learned counsel **Mr. Hamisi Mayombo**. The application was disposed of by way of oral submission.

The applicant's counsel in his submission prayed for the grant of this application on three reasons; **Firstly**, there is a serious issue triable by this court in the main case concerning ownership of the disputed land between the applicant and the respondent. **Secondly**, if this application is not granted the applicant will suffer irreparable loss which may not be able to be recovered by way of damages as the applicant has developed some structures in the disputed land and more so there are tenants living in the said area and **thirdly**, the learned counsel argued that the applicant is in a greater chance to suffer more than the respondent if this application is not granted.

Mr. Mayombo counsel for the respondent strongly opposed the applicant's submission arguing that there is already a court order by Opio, J vide Land Review No. 06 of 2017 which is to the effect that the 1<sup>st</sup> respondent to be in possession of the disputed land therefore this court is functus official and if at all this

application is granted then eventually even the order of vacant possession will be affected. The counsel went on stating that the applicant developed structures and sold some of the plots at his own risk since he was aware of the court's order, it was the prayer of the counsel that this application be dismissed.

In rejoinder, Mr. Mushi stated that it is true that if this application is granted there will be two conflicting orders of this court however, he was of the view that this application should be granted as the applicant has made some developments in the said land even before the dispute arose.

Having considered the application brought by the applicant above together with the submissions by the parties' advocates I wish to start by expressing the principles governing the determination of applications for temporary injunctions, which have been laid down by law, authors and case laws. The famous case of **Atilio vs. Mbowe** (1969) HCD 284 has laid down three principles which basically accolade Order XXXVII Rule 1 (a) of the Civil Procedure Code R.E 2019 as hereunder;

1. There must be a serious a serious issue to be tried on the facts alleged and a probability that the plaintiff will be entitled to the relief prayed in the main suit.
2. 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.

3. On the balance there will be greater hardship and mischief that will be suffered by the plaintiff from the withholding of the injunction than will be suffered by the defendants from granting of it.

It has to be noted that for granting an order for temporary injunction the above conditions must co- exist. See the case of **Tanzania Breweries Ltd. Vs. Kibo Breweries Ltd. And another** [1998] EA 341.

Applying the above principles to the case at hand, starting with the first principle, Mr. Mushi in his submission stated that there is a serious issue on the ownership of the disputed land between the parties which is triable by the court in the main case. More so, the applicant through his affidavit in particular paragraph 9 has stated that he has instituted a land case against the respondents for illegal trespass and determination of ownership in respect of 12 plots named in the affidavit.

The question that follows is whether the applicant has established a prima facie case. In determining this principle my learned sister, **Mgonya, J** in the case of **Harold Sekiete Levira & another v. African Banking Cooperation Tanzania Ltd (Banc ABC) & another**, Misc. Civil Appl. No. 886 of 2016 stated that the Applicant cannot escape from showing two things:

- i. The relief sought in the main suit is one which court is capable of awarding; and

- ii. The Applicant should at the very minimum show in the pleading that in the absence of any rebuttal evidence he/she is entitled to said relief.

From the above question it follows that this court has to look at the applicant's reliefs sought in the main suit whether they raise a serious issue worthy to be determined by the court and the likely hood of the applicant to be awarded such reliefs. Mapigano, J as he then was in the case of **Colgate Palmolive vs. Zakaria Provision Stores and Others**, Civil case No. 1 of 1997 (unreported), had the following to say with regard to the prima facie rule;

*"I direct myself that in principle the prima facie case rule does not require that the court should examine the material before it closes it and come to a conclusion that the plaintiff has a case in which he is likely to succeed, for to do so would amount to prejudging the case on its merits, all that the court has to be satisfied of, is that on the face of it, the Plaintiff has a case which needs consideration and that there is likelihood of the suit succeeding."*

With the above principle in mind, I had time to go through the main suit filed by the applicant together with the reliefs sought, and of course, from the reliefs claimed by the applicant I am convinced that there is a triable case which justifies the grant of temporary injunction.

On the second principle of protecting the applicant from suffering any kind of injury which are irreparable, the applicant in justifying this principle has established through his affidavit that if this application is not granted, he will suffer irreparable loss as he is residing in some of the properties in dispute and he also conducts his businesses in some of the plots. Therefore, he will incur a lot of costs trying to recover the said properties while there is a main suit pending. I have also noted the contents of the respondent's counter affidavit where he claimed that the applicant intentionally developed and sold the disputed land while knowing that there is a pending matter before the court.

The purpose of this principle is basically to protect the applicant from suffering irreparable injury before his rights have been determined by the court. One may ask on what amounts to irreparable injury? Mapigano, J as he then was in the case of **Kaare vs. General manager Mara Cooperation Union** [1924] Ltd [1987] TLR 17 made a clarification as to what amounts to irreparable injury by stating that;

"By irreparable injury it is not meant that there must be no physical possibility but merely that the injury would be material, for example one that could not be adequately remedied by damages."

Basically, from the wording of my brother above, the irreparable injury referred in this principle is the one that cannot be recovered by damages, and

from the affidavit of the applicant I find that this application if not granted the applicant is likely to suffer irreparable injury in respect of the developments which he has so far made in the disputed land, taking into account that he also resides in the same place.

The last condition is on the balance of convenience whereby if this application is not granted the applicant will suffer greater hardship and mischief than will be suffered by the respondents if this application is granted.

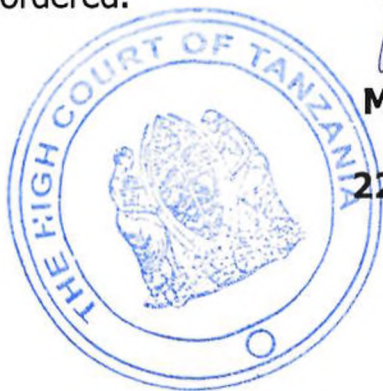
As already discussed above when elaborating the second principle, the applicant has disclosed that there are houses in the suit land, twelve plots and other persons had purchased plots and erected residential as opposed to the respondents. It is at this juncture that, I am of the firm view that if this application is refused not only the applicant will suffer more irreparable loss but also **other persons who are not parties** to these proceedings than will be suffered by the respondent if this application is granted.


Despite the fact that there was a decision of my learned sister, Opio, J dated 18<sup>th</sup> January 2018 with effect that the 1<sup>st</sup> respondent should be restored to the suit premises but considering new developments that have been made at the moment as averred and admitted by the applicant and the 1<sup>st</sup> respondent respectively and balance of convenience between the parties as well as need of maintaining peace and calmness between the parties and other persons who are

currently dwelling in the suit land. In view of the circumstances surrounding the dispute between the parties, this application is grantable provided that the main case is expeditiously disposed of to finally meet the justice of the parties' land dispute.

Basing on the above reasons, the applicant's application is found to have met all the conditions necessary for granting an application for temporary injunction. Thus, this application is accordingly granted. The respondents, their agents and servants or whosoever acting under their instructions are temporarily restrained from evicting, disturbing or interfering with the applicant's peacefully occupation as well as other occupiers in the disputed land pending determination of the applicant's main suit

It is ordered.



  
**M.R. GWAE**  
**JUDGE**  
**22/12/2020**