

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**MBEYA DISTRICT REGISTRY**

**AT MBEYA**

**MISCELLANEOUS LAND APPLICATION NO. 32 OF 2021**

*(Originating From Land Case No. 3 of 2021 before the High Court of Tanzania at Mbeya)*

**ROMUALD ANDREA ..... APPLICANT**

**VERSUS**

**MBEYA CITY COUNCIL & 18 OTHERS ..... RESPONDENTS**

**RULING**

*Date of last order: 19/07/2021*

*Date of Ruling: 26/07/2021*

**NGUNYALE, J.**

The applicant ROMUALD ANDREA @ ANDREA ROMUALD@R. A. L MATTERU @ ROMUALD A MATTERU filed this application against the respondents namely MBEYA CITY COUNCIL, SARAH GEORGE MWANDOLA, NSAJIGWA KYEJO @ BAMBO, USWEGE MWAMELO @ EPHRAIM, GILEARD LUVANDA @ KIBACHE, FANNY A. KALIATH @ DEBORA MWAMSOJO, FLORA MGINA, NTULI KIPUTA @ BABA BROWN, JOYCE JOSEPH MWASELELA, NEEMA MZENA, STEPHEN MFURUKI, ANITHA WELLAH @ MAMA IRENE, HADIJA R. MOHAMED, ISABELA

KAONGA, LILIAN KIMARIO, PILI ILUNDA DAUDI @ PILI D. ILUNDA MRS MWAIPAJA, EDITA JEREMIA, LAZARO GEORGE, HON.ATTORNEY GENERAL herein after referred to as the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> 5<sup>th</sup> 6<sup>th</sup> 7<sup>th</sup> 8<sup>th</sup> 9<sup>th</sup> 10<sup>th</sup> 11<sup>th</sup> 12<sup>th</sup> 13<sup>th</sup> 14<sup>th</sup> 15<sup>th</sup> 16<sup>th</sup> 17<sup>th</sup> 18<sup>th</sup> and 19<sup>th</sup> Respondents respectively seeking the following orders;-

- (a) That this Court be pleased to grant an order of temporary injunction to restrain the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, and 18<sup>th</sup> respondents, their assignees or agents from trespassing, committing waste and or alienating the disputed land, and granting a declaratory order on the rights of the parties against the 1<sup>st</sup> and 19<sup>th</sup> respondents pending the determination of the Land Case No. 3 of 2021 at the High Court of the United Republic of Tanzania at Mbeya, which is pending before this Court.
- (b) The costs in the course.
- (c) Any other order the Court may deem fit to grant.

The application is supported by an affidavit of the applicant ROMUALD ANDREA @ ANDREA ROUMUALD @ R. A. L. MATERU @ ROMUALD A. MATERU.

In the affidavit he deponed that he is the owner of forty (40) rooms (vibanda) located at Forest Maghorofani market @ Forest Market, in Forest Ward within Mbeya City. Rooms numbers A11/C4; C5; C8; B2; C48; C62; D70; D73; D75; D80; E19; E23; E24; E25; A15; B6; B15; B14; B18; B25; B26; B28 and B29; each business room is valued at Tshs 7,600,000/= times 40 is equal to 304,000,000/= the actual value for 40 rooms. That the forty rooms as named above are the properties of the applicant who acquired the same after buying/constructing on his own efforts. The applicant alleged that the respondents have trespassed to the rooms.

The applicant's submission was drawn and filed by Amani Simon Mwakolo Learned Advocate and the respondents, the 1<sup>st</sup> and 19<sup>th</sup> respondents their respective submission were drawn and filed by Bryson Ngulo learned State Attorney, the other respondents prepared the submissions by themselves.

The applicant submitted that the application has been filed under Order XXXVII Rule 1 (a) and proviso of paragraph (b) of the Civil Procedure Code Cap 33 R: E 2019, and has been supported by the affidavit of the applicant.

He submitted that it is an established principle that for the Court to grant an order of injunction there are conditions to be met by the applicant. The

preconditions were established in the land mark case of **Atilio Vs Mbowe (1969) HCD 284**. In regard to the first principle that there must be a serious issue to be determined, these principles are as follows;-

- (a) There is the serious question to be tried on the facts alleged and a probability that the plaintiff will be entitled to the relief prayed for.
- (b) 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.
- (c) That on the balance there will be greater hardship and mischief suffered by the plaintiff from the withholding of the injunction than will be suffered by the defendant from granting of it.

He submitted in regard to the 1<sup>st</sup> precondition that it is undisputed fact that there is the serious question to be determined based on the facts of the case as alleged between the applicant and the respondents. As there is the contention over the disputed rooms as explained above regarding the ownership of the same. Hence there is need of this Court to grant the temporary injunction against the 2<sup>nd</sup> to 18<sup>th</sup> respondents, and declaratory order on the rights of the parties, against the 1<sup>st</sup> and 19<sup>th</sup> respondents

pending the determination of the land case before this Court so as to maintain the prevailing status quo.

On further submission the applicant submitted in respect of the 2<sup>nd</sup> precondition that it is not in dispute that, if the Court will not use its discretionary power to interfere by issuing the order of injunction against the 2<sup>nd</sup> to 18<sup>th</sup> respondents, and declaratory order on the rights of the parties, against the 1<sup>st</sup> and 19<sup>th</sup> respondents, the applicant will definitely suffer an irreparable loss, as the subject matter of the suit which are rooms are destroyed by the respondents who can continue to change their structures, and the acts of continuing harassing the applicants tenants, and collecting rents by the 1<sup>st</sup> respondent from the suit premises cannot be compensated in either monetary manner or its original.

He said if the order of temporary injunction against the 2<sup>nd</sup> to 18<sup>th</sup> respondents, and declaratory order on the rights of the parties, against the 1<sup>st</sup> to 19<sup>th</sup> respondents is not granted it will cause the greater mischief and hardship to the applicant rather than to the respondents since the destruction done by the respondents cannot be remedied in neither way.

He referred the Court to the case of **AMERICAN CYNAMING CO. VS ETHICON LTD [1975]1 ALL ER 504** at pg 59 which states;-

*"The object of the temporary injunction is to protect the plaintiff against injury by violation of his right for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favour on the trial."*

The 1<sup>st</sup> and 19<sup>th</sup> respondents responded to the applicants submission by reiterating the Landmark case of **Atilio Vs. Mbowe (1969) HCD 284** whereby three principles were established for the Court to grant interim orders as follows;-

- i. There is a serious question to be tried on the facts alleged, and possibility that the applicant will be entitled to the relief prayed for.
- ii. The Courts interference is necessary to protect the applicant from the kind of injury which may be irreparable before his alleged right is established.
- iii. On balance of convenience, there will be greater hardship and mischief suffered by the applicant from withholding of the injunctive order than will be suffered by the respondent.

He submitted that granting temporary injunction is a Courts discretion however, it is a trite law that for an application of this nature to be granted, one must meet all the three tests adduced in **Atilio's Case**. The principles in **Atilio's case** applies cumulatively and not in alternative.

Unfortunately, in his submission, the applicant has totally failed to convince the Court basing on the principles of the Atilio's case.

He referred the Court to the case of **MWAKEYE INVESTMENT LTD vs. ACCESS BANK TANZANIA LIMITED, Misc Land Application No. 654 of 2016** High Court of Tanzania at DSM, the Court elaborated the principles laid down in the case of **ATILIO's case** and quoted the book of **SARKAR ON CODE OF CIVIL PROCEDURE, NINTH EDITION, 2000** at page 1997 the Court has this to say:

*"by irreparable injury it is not meant that there must be no physical possibility of repairing the injury all that is meant is that the injury would be a material one, and one which could not be adequately remedied by damages."*

On balance of convenience the learned author stated that:

*"where the plaintiffs are likely to suffer irreparable injury in case the injunction is refused and balance of convenient also lies in their favour they are entitle to grant an interim injunction."*

The respondent went on submitting that basing on the 2<sup>nd</sup> principle, the main case and in the affidavit supporting the application the applicant has also failed to establish on how he is going to suffer the purported irreparable loss. Good enough, in his plaint, in Land Case No. 3 of 2021 the applicant has *inter alia* prayed for relief (s) where at paragraph (c) he prayed for a compensation of Tshs 304,000,000/= as specific damages

being the value of the contested 40 claimed rooms. Therefore it appeals to the logic and a horizon of thinking that the applicant's purported injuries are not irreparable because in case the applicant will succeed in his main case, the purported loss is recoverable by compensation in lieu thereof. He backed up his argument by referring the case of **GWAMBO MWANSASU and 10 others vs. TANZANIA NATIONAL ROADS AGENCY and HONOURABLE AG, Misc Land Application No. 72 of 2020**, Utamwa, J (as he then was) stated at page 5 -6;-

*"... in fact, according to the reliefs sought in the main suit and listed above, the applicants are claiming for, among other things, the following reliefs: payment of fair compensation before reallocating or demolishing their properties in the suit land, a permanent order restraining the 1<sup>st</sup> defendant from interfering, with the plaintiffs land without prompt and fair compensation and payment of claimed amount to tune of Tshs. 350,000,000/= to plaintiffs.*

*Certainly, this particular reliefs suggest that, loss (if any) that may be incurred by the applicant in case the application is not granted, can be atoned by monetary compensation as rightly argued by the learned State Attorney. This shows that, this application did not meet the second condition set in the Atilio case (supra) and listed above ... this is because, according to the Atilio case (supra) the condition must be met cumulatively and not alternatively.*



*I therefore, answer the issue posed above negatively. I accordingly dismiss the application..."*

On the last principle he submitted that the applicant has failed to state what hardship is likely to encounter in case the application is not granted. On the part of the respondents herein he pointed out that the 1<sup>st</sup> and 19<sup>th</sup> respondents are at risk and will suffer hardship since all rooms including the 40 rooms the applicant purports to own have already been leased to the 1<sup>st</sup> up to 17<sup>th</sup> respondents who are bona fide businessmen and women at Maghorofani Market.

The 2<sup>nd</sup> to 18<sup>th</sup> respondents strongly opposed the application arguing that if the application will be granted they will suffer irreparable loss. They are tenants of the 1<sup>st</sup> respondent for more that 4 years. They are selling variety of goods which are perishable, if the sought order will be granted they will suffer irreparable loss while the applicant has nothing to lose. They have permanent customers in the market therefore, if the sought order will be granted, they are going to lose them and encounter a serious loss in their well-established business.

In rejoinder the applicant maintained his argument that there is a serious question to be tried on the facts alleged and probability that the applicant will be entitled to the relief prayed for.

I agree with the parties and the Court practice that for an application for injunction to stand it is predicated upon the applicant meeting the conditions set out in the case of **ATILIO vs. MBOWE (1969) HCD 284**.

Those principles or pre conditions as previously stated are;-'

- (a) Existence of serious question to be tried on the facts alleged with a probability of success in the suit.
- (b) Demonstration that the applicant stands to suffer irreparable loss requiring the Court's intervention before the applicant's legal right is established.
- (c) Proof of greater hardship and mischief suffered by the applicant if the injunction is not granted than the respondent will suffer if the order is granted.

The said pre conditions are also reflected in a number of cases prior to and after Atilio's case. As correctly argued by the 1<sup>st</sup> and 9<sup>th</sup> respondents the pre-conditions set out must all be met and so meeting one or two of the conditions will not be sufficient for the purpose of the Courts exercising its discretion to grant an injunction.

In his submission the applicant in establishing first condition he cited the land dispute on the rooms as the serious question to be determined basing on the facts alleged between the applicant and the respondent.

The first pre condition has nothing to detain long, it has properly been made by the applicant.

On the second pre condition he said that if injunction order will not be granted, the applicant will definitely suffer an irreparable loss, as the subject matter of the suit are rooms are destroyed by the respondents who can continue to change their structures, and the acts of continuing harassing the applicants tenants, and collecting rents by the 1<sup>st</sup> respondents from the suit premises cannot be compensated in either monetary manner or its original.

The applicant as he stated above, he said that if injunction order will not be granted he will suffer on the premises which cannot be compensated in either monetary manner or its original. In their part the 1<sup>st</sup> and 19<sup>th</sup> respondents submitted that nature of the case and the value of the disputed properties as stated by the applicant establish that the second precondition for granting injunction order cannot stand. The applicant has failed to establish that he will suffer the purported irreparable loss. What he will suffer can be compensated in monetary form as it was held in **GWAMBO MWANSASU & 10 OTHERS VS. TANZANIA NATIONAL ROADS AGENCY and HON. ATTORNEY GENERAL, Misc. Land Application NO. 72 of 2020.**

In the other hand the 2<sup>nd</sup> to 17<sup>th</sup> respondents were of the view that granting of an injunction they will suffer irreparably than the applicant himself.



It is the view of this Court that nature of the case at hand and the relief sought in the main Land Case No. 3 of 2021 suggests that if the application is not granted still for any loss which might occur against the applicant in case the application is not granted, can be atoned through monetary compensation as rightly submitted by the 1<sup>st</sup> and 19<sup>th</sup> respondents. Granting this application means other respondents other than 1<sup>st</sup> and 19<sup>th</sup> respondents will be forced to stop business in the circumstance where there is a dispute as to who is a lawful owner of the disputed premises between the applicant and the 1<sup>st</sup> respondent.

In view of the premises of argument above the Court is satisfied that the second pre condition has not been met. As already stated, once one condition is not met the Court cannot exercise its discretion to grant an order for injunction. In the case of **CHRISTOPHER P. CHALE VS. COMMERCIAL BANK OF AFRICA, Misc. Civil Application No. 635 of 2017** my brother Mwandambo, J (as he then was) stated that;-



*"It is also the law that the conditions set out must all be met and so meeting one or two of the conditions will not be sufficient for the purpose of the court exercising its discretion to grant an injunction."*

The Court has been satisfied that the application does not meet all the preconditions for granting the prayed temporary injunction as laid in the case of **ATILIO VS MBOWE** supra.

The application is accordingly dismissed with costs. It is so ordered.

  
  
**D. P. Ngunyale**  
**Judge**  
**26/07/2021**

Ruling delivered this 26<sup>th</sup> day of July 2021 in presence of Mr. Amani Mwakolo Learned Advocate for the applicant also holding brief for advocate Bryson Ngulo for 1<sup>st</sup> and 19<sup>th</sup> respondents. 7<sup>th</sup>, 8<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> respondents were present in person.

  
  
**D. P. Ngunyale**  
**Judge**  
**26/07/2021**