

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

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**MISC. LAND APPLICATION NO. 72 OF 2021**

*(Bases on Land case No. 13 of 2021)*

**ALAKAAI ALAUNONI LAIZER ..... APPLICANT**

**VERSUS**

**ZEPHANIA CHAULA ..... 1<sup>ST</sup> RESPONDENT**

**ROSEMARY DISCKSON ..... 2<sup>ND</sup> RESPONDENT**

**TUMAINI LUKUMAY ..... 3<sup>RD</sup> RESPONDENT**

**ISAYA KIMAI ..... 4<sup>TH</sup> RESPONDENT**

**AGNESS GABRIEL ..... 5<sup>TH</sup> RESPONDENT**

**WILLIAM NJIKE ..... 6<sup>TH</sup> RESPONDENT**

**LOTA SARIWAKI NJOKE ..... 7<sup>TH</sup> RESPONDENT**

**RULING**

29/11/2021 & 13/12/2021

**KAMUZORA, J.**

In this application, Alakaai Alaunoni Laizer, the applicant is moving this court to issue a temporary injunction order, restraining the respondents, their workers, servants and or any other person from interfering from the quite enjoyment of the suit land by entering and or damaging the environment by cutting trees, grazing, cultivating or doing

any activity in the suit land pending the hearing and the determination of the main application that is Land Case No. 13 of 2021. The application was preferred under Order XXXVII Rule 1(a) Of the Civil Procedure Code Cap 33 RE 2019 and supported by an affidavit deposed by the applicant himself.

When the matter came for hearing the applicant was represented by Mr John Lundu an advocate while the 1<sup>st</sup> to 5<sup>th</sup> respondents did not enter appearance despite summons being issued to them and the 6<sup>th</sup> and 7<sup>th</sup> respondents enjoyed the service of Mr. Deogratius Njau a learned Advocate.

Having been given a chance to address the court on the merit of the application, Mr. Lundu submitted that, the applicant is the legal owner of the land measuring 100 acres situated at Namalulu village within Simanjiro District that was allocated to him by the village council on 26/03/1994 as evidenced by the handover documents (annexure AAL1). That, the applicant has been owning the land without any problem until when he received a letter from the District Commissioner of Simanjiro directing the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents to hand over 20 acres for each for the 6<sup>th</sup> and 7<sup>th</sup> respondents. That, the applicant issued a notice to the 1<sup>st</sup> respondent requesting him to cancel the said directives but the

same was not responded to hence Land case No. 13 of 2021 was filled in this court.

Mr. Lundu further submitted that, when the summons to appear in court reached the respondents, the 6<sup>th</sup> and 7<sup>th</sup> respondents invaded the land and started to cut trees on account that they were rightful owners of the land. That, due to the damages caused, the applicant brought the application under certificate of urgency claiming that the respondents are damaging the land to which they had trespassed specifically the 6<sup>th</sup> and 7<sup>th</sup> respondents. The applicant therefore prays for this court to issue injunctive order against the respondents and specifically those who are physically in the disputed land pending determination of Land Case No. 13 of 2021 which is pending before Hon. Gwae J.

In response to the above submission, counsel for the respondent Mr. Njau submitted that, the application for temporary injunction is governed by the case of **Atilio Vs Mbowe, (1969) HCD 284** to where the court set three conditions to be met by the applicant for the grant of temporary injunction that is,

1. There must be serious question to be tried on those facts alleged and the probability that the plaintiff will be entitled to the relief prayed.

2. That, court's interference is necessary to protect the plaintiff from the kind of injuries which may be irreparable before his right is established.
3. That, on the balance there will be greater hardship and mischief suffered by the plaintiff from the holding of the injunction than will be suffered by the defendant from granting of it.

Mr. Njau referred the case of **Christopher P Chale Vs Commercial Bank of Africa**, Misc. Application No. 635 of 2017 and in the case of **Elias Nkinda and another Vs Martine Mwipagi Kalumbete**, Misc. Land Application, No. 49 of 2019 in which the court while granting temporary injunction was guided by the decision of **Atilio vs. Mbowe**.

As for the first condition set under the case of **Atilio Vs Mbowe** (Supra) he stated that, the applicant did not meet this condition for the reasons that, as per annexure AAL1 of the applicant's affidavit, the applicant deponed to have been allocated land by a letter instead of customary right of occupancy and thus he had no title over the land in dispute. That, under Regulation 76.1 of the Village Land Regulation of 2001, the village counsel has powers to issue/allocate 20 hectors of land only and if 100 acres is converted to hectors it means that, the applicant

was allocated 41.7 hectors. He was of the view that the allocation of land to the applicant was illegal. Mr. Njau added that, the 6<sup>th</sup> and 7<sup>th</sup> respondents filed a preliminary objection in the main case that is Land Case No.13/2021 concerning the pecuniary jurisdiction of the High Court and thus he was of the view that, there is no legal right capable of being protected by law and entitlement to the reliefs sought by the applicant.

On the second condition the respondents counsel submitted that, there is no legal right awaiting to be established. That, if the trees were cut then they can be valuated and if the case is ruled in favour of the applicant he can be awarded with general or specific damages.

On the last condition of a balance of convenience he submitted that, there is no evidence attached to the affidavit or submission by the senior counsel showing that the applicant will suffer if the order for temporary injunction is not issued. That, since the applicant admitted possessing 100 acres of land, the order for injunction if not granted he will still have a place to cultivate unlike the 6<sup>th</sup> and 7<sup>th</sup> respondents who will not have a place to cultivate. He insisted that, the respondents are likely to suffer hunger if the order prohibiting them to cultivate the farm will be granted and that injury cannot be compensated even when the decision will be in favour of the respondents.

In his rejoinder, Mr. Lundu stated that the applicant has proved all three conditions set in the case of **Atilio Vs. Mbowe** as shown in his affidavit. He prayed that this court to regard that and allow the application.

Having thoroughly gone through the submissions advanced by both learned counsels on the argument for and against the application, the main issue is 'whether the order for temporary injunction should be issued'. Principles governing issuance of temporary injunction have aptly been laid down by law and amplified by courts. The famous case that drew condition for grant of temporary injunction is the case of **Atilio Vs. Mbowe** (Supra) cited and referred to by the parties.

Starting with the first condition set out in that case on whether there is a triable issue, there is no dispute that there is a pending case before Hon. Gwae J, Land case No. 13/2021. The main issue alleged in that case is the legality of allocation to the 6<sup>th</sup> and 7<sup>th</sup> respondent of the 40 acres of land alleged to belong to the applicant. Mr. Njau has not opposed this issue but stated that, in the main case they have raised a preliminary objection on point of law concerning the pecuniary jurisdiction of the High Court in dealing with the matter before it. Legally it is not only enough to establish that there is a pending case before the court, but it must be

shown that under that case there is a triable issue warranting the determination of the court. Whether there is an objection regarding the court's jurisdiction is not a determinant factor much as the same is not yet decided it does not oust the court jurisdiction. Basing on facts deponed in the affidavit, there is triable issues in that case as there is dispute over ownership of the land. Thus, this condition is well satisfied.

As regards to the second condition of suffering irreparable injury if the prayer for injunction is refused, the law is clear that, the injury which is capable of being compensated by money is not an irreparable one. Under paragraph 14 of the applicant's affidavit, he has deponed that,

*"If the 5<sup>th</sup> and 6<sup>th</sup> respondents are not restrained from entering and cutting trees in the suit land, I stand to suffer damages and I will suffer more inconvenience than the respondents if the order of injunction is not granted."*

Correction was made for the above paragraph to reflect the 6<sup>th</sup> and 7<sup>th</sup> respondents instead of the 5<sup>th</sup> and 6<sup>th</sup> respondents and I see nothing fatal to that. From the extract above, it appears that the Applicant is claiming injury for the respondents' act of entering and cutting trees in the suit land. The learned counsel for the applicant has not stated how the injury is not capable of being adequately compensated by money. I proceed to find that the second condition has not been met.

The last condition is balance of convenience. The question here is who is going to suffer greater hardship and mischief if the temporary injunction is not granted. There is no doubt that the respondents are likely to suffer more than the applicant. The submission by Mr. Lundu as well as paragraph 2 of the applicant's affidavit shows that, the applicant owns 100 acres of land to which he cleared 80 acres for agriculture activities. Out of 80 acres of cleared land, 40 acres have been invaded and occupied by the respondents. With that fact in mind it is obvious that if injunction is not granted, the applicant will only not be able to cultivate the 40 acres of land occupied by the respondents until the rights for the parties are determined by the court. That does not show how his personal life will be affected to the extent of not being compensated. Unlike what was submitted by the respondent's counsel that the 6<sup>th</sup> and 7<sup>th</sup> respondents' survival depend much on that land allocated to them. They use the land to cultivate food crops for feeding their families thus, if restrained from cultivating the same, hunger will be obvious and monetary value cannot later remedy the situation. As the applicant has clearly admitted remaining with 40 acres of land to which he can conduct his agricultural activities unlike the respondents, I find that the grant of injunction order is likely to affect more the respondents than it could affect the applicant.



Having said so, I find that although there is a prima facie case to be determined in the main suit, granting of temporary injunction in this matter is likely to affect the respondents more than it could affect the applicant. Reading through Order XXXVII Rule 1(a) of the CPC Cap 33 RE 2019 to which this application was preferred, I see no danger of the land being wasted or alienated to warrant this court interference by granting temporary injunction. The said provision provides: -

*"Where in any suit it is proved by affidavit or otherwise—*

*(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit or suffering loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree or*

*(b) N/A*

*the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of the property as the court thinks fit, until the disposal of the suit or until further orders: Provided that, an order granting a temporary injunction shall not be made against the Government, but the court may in lieu thereof make an order declaratory of the rights of the parties."*

The applicant's claim is that the respondents are damaging the land by cutting trees. As prior pointed out, such kind of injury can be compensated

by the award of damage if the suit is decided in favour of the applicant. I therefore hesitate from granting the order prayed for. The application is therefore dismissed with costs.

**DATED** at **ARUSHA** this 13<sup>th</sup> December 2021



A handwritten signature in blue ink, appearing to read "D.C. Kamuzora", is written over a faint circular stamp.

D.C. KAMUZORA

JUDGE