THE UNITED REPUBLIC OF TANZANIA
JUDICIARY

IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA

MISC. LAND APPLICATION NO. 89 OF 2021
(From the High Court of Tanzania at Mbeya in Land Case No. 17 of 2021.)

WAKULIMA TEA COMPANY LIMITED.....APPLICANT

VERSUS

JOSEPH LUPUNGU.....1ST RESPONDENT
MIKAELI MWANDEMBO.....2ND RESPONDENT
ELICK MWAKASUMBULE.....3RD RESPONDENT
LONGINO MFAUME.....4TH RESPONDENT
MALAIKA GRINI.....5TH RESPONDENT
ISRAEL MSIANI.....6TH RESPONDENT
VOSTA PANJENGA @ NJABO.....7TH RESPONDENT
FEDELIKO DICKSON.....8TH RESPONDENT
JAPHET MWAKIHABA.....9TH RESPONDENT
ERICK DAUDI.....10TH RESPONDENT

RULING

Date of Last Order: 23/02/2022
Date of Ruling : 31/03/2022

MONGELLA, J.

In this application, the applicant is seeking for an order for temporary injunction restraining the respondents, their agents, officers, and any other person working on their behalves from, making bricks, disposing, invading, developing, entering or doing any activities in Farm No. 1336 located at

Bugoba Village, Rungwe district, Mbeya region, with Title No. 23785-MBYLR, Land Office No. 17491, L.D/RG/L/26267, pending determination of the main case in Land Case No. 17 of 2021. The application is brought under Order XXXVII Rule 1 (a) and Section 68 (e) of the Civil Procedure Code, Cap 33 R.E. 2019. It is supported by the affidavit of one Hendrik Andries De Klerk, principal officer of the applicant.

Both parties were represented. The applicant was represented by Mr. Essau Sengo and Mr. Peter Kiranga; and the respondents were represented by Ms. Mary Mgaya, and Mr. Barnaba Pomboma; all learned advocates. It was argued by written submissions filed in this Court in adherence to the scheduled orders.

Mr. Sengo submitted on the application in line with the principles settled in the case of ***Atilio vs. Mbowe*** [1969] HCD No. 284. He stated the principles to be that:

> *(i) There has to be a serious question to be tried on the facts alleged, and the probability that the plaintiff will be entitled to the relief(s) prayed;*
> *(ii) The applicant stands to suffer irreparable loss requiring the court's intervention before the applicant's legal rights are established.*
> *(iii) That on the balance, 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 of it.*

With regard to the first principle, he referred to the main suit, that is, Land Case No. 17 of 2021, in which there is a claim of ownership over the disputed land and that the respondents are trespassers conducting brick making activities on the land. He contended that the applicant stands a high chance to be granted the reliefs sought in the main suit. He argued so banking on the legal position that the person with certificate of title is deemed to be the owner of the landed property, unless otherwise proved. To that effect he referred the case of ***Amina Maulid Ambali & 2 Others vs. Ramadhani Juma***, Civil Appeal No. 35 of 2019 (CAT at Mwanza, unreported). Arguing on the applicant's entitlement to the land in dispute, he further submitted that the applicant holds a title to the disputed land, which is Farm No. 1336, Bugoba village, Rungwe district, Mbeya region with Title No. 23785-MBYLR, L.O. No. 174971, L.D./RG/L/26267.

On the question of irreparable loss, which is the second principle under ***Atilio vs. Mbowe*** (supra), Mr. Sengo argued that the respondents are making bricks which leads to environmental destruction. That, they are digging soil in the land for brick making without any rehabilitation plan. That the respondents' activities are in contravention of the condition set under item 2 of the Title Deed on land use, which is for farming and forest. He added that under item 3 of the Title Deed, the applicant is charged with the duty to preserve the environment, protect the soil and prevent soil erosion.

Mr. Sengo further argued that if the respondents are allowed to continue with their activities the applicant shall suffer irreparable loss as the soil on the disputed land shall be destroyed and cannot be rehabilitated. He

added that the respondent on their part shall not suffer any loss as the land does not belong to them and they are not responsible to the government to protect the land in dispute. That, this is unlike the applicant who shall also lose his title to the land as the government shall revoke the title for failure to honour the conditions by protecting the environment.

On the issue of balance of suffering of hardship between the parties, Mr. Sengo argued that the applicant as a lessee of the government shall suffer hardship compared to the respondents. He reiterated his argument that the respondents are damaging the environment by digging the soil whereby the applicant has a duty under the Title Deed over the land to protect the environment. In the premises he had a stance that all the conditions settled in ***Atilio vs. Mbowe*** (supra) have been met. He urged to Court to grant the injunction order applied for.

In reply to the application, the respondents' counsels first advanced two legal issues. The first concerns requirement of board resolution to institute the proceedings at hand. They argued that the applicant being a registered company is required under the law to establish expressly in the contents of the application that she obtained a sanction to institute the proceedings and authorising their advocates in form of a board resolution.

They further argued that the fact that there is no such mandate amounts to flouting one of the fundamental procedures rendering the application lame. In support of their argument they referred to a Court of Appeal decision in ***Ursino Palms Estate Ltd vs. Kyela Valley Food Ltd & 2 Others***,

Civil Application No. 28 of 2014 (CAT at DSM, unreported), which quoted in approval the decision in ***Bugerere Coffee Growers Ltd. vs. Sebadduka & Another*** (1970) EA 147. She as well referred to this Court's decision in the case of ***Giant Machine and Equipment Ltd. vs. Gilbert R. Mlaki & Another***, Civil Case No. 05 of 2019 (HC at Mbeya, unreported). They argued that the proceedings referred to in the cases cited include applications like the one at hand.

The second point is on joinder of a necessary party. The counsels argued that the applicant has sued wrong parties as the land belongs to Bugoba Village Authority. That, the respondents in the matter at hand, are mere licensees who pay dues to the Village Authority for using the land in dispute which was allocated to them by the Authority. In their view therefore, Bugoba Village Authority ought to be sued and not the respondents. They found the suit defective. In support of their argument they referred to the case of ***Suryakant D. Ramji vs. Savings and Finance Ltd and Others*** [2002] TLR 121.

Without prejudice to the legal points raised, the learned counsels addressed the main issue in the application. They challenged the application and Mr. Sengo's arguments on the ground that the application does not meet the criteria settled in the case of ***Atilio vs. Mbowe*** (supra). They argued so on the ground that there is no any serious triable or legal question arising between the parties calling for court determination. They argued further that the applicant has dwelled on substantive issues which ought to be dealt with in the main suit, thus premature.

They challenged the applicant's assertion that there is a likelihood that he succeeds in his reliefs in the main suit. On this, they contended that the same is extraneous as it amounts into determining the rights of the parties in the main suit at this stage. That, it is in the powers of this Court to decide the fate of the parties' rights, and not the applicant. They referred the case of ***Suryakant D. Ramji*** (supra) to support the argument. Referring further to the case of ***American Cynamid vs. Ethicon*** [1975] AC 396, they argued that the underline issue in the application at hand should be as to whether there is existence of a serious triable issue. However, they argued that since the respondents are mere licensees on the land the existence of any triable issue is diminished as the respondents do not claim ownership over the land.

With regard to the magnitude of the loss to be sustained by the applicant, the respondents' counsels found the same to be speculative. They argued that the respondents commenced utilizing the village land area as licensees before 1960 and no environmental degradation has been occasioned. That the respondents are more conscious with the natural habitation compared to any other individual as the said land is their life and the activities carried out by the respondents are environmental friendly.

They added that the land is used by the respondents in a very sustainable manner for the sake of their future generation and therefore they are the ones to be directly affected if the environment is damaged. The counsels further submitted that the respondents' activities are governed by rules and regulations which are implemented by their landlord, Bugoba Village

Authority, thus the applicant's claims are mere speculations not backed up by any scientific findings.

The counsels further contended that the question of loss needs to be established with sufficient particulars material to enable the court and the opposite party to grasp with certainty. That, it should not be too remote. Referring to the applicant's affidavit and submission they argued that is it difficult to realise any imminent loss sustained by the applicant to warrant grant of temporary injunction. In the same line, they responded to the third issue whereby they contended that it is the respondents who are to suffer the mischief as they are lawful licensees paying levy to the village authority. That, halting their activities shall paralyze not only them, but their families as well.

After considering the rival arguments by the learned counsels from both sides, I wish to briefly address first the legal issues raised by the respondents' counsels. As I pointed out earlier, the issues regard lack of board resolution by the plaintiff company to institute the suit and authorising the advocates to represent her in Court. Second, regards non-joinder of a necessary party.

It is undisputed that the application at hand is an interlocutory one pending the determination of the main case in Land Case No. 17 of 2021 in this same Court. The application is geared at protecting the subject matter of the suit before the main suit is determined. The issues raised are therefore subject of the main suit and ought to be raised and dealt with in

the main suit. On those bases I refrain from deliberating on them at this stage.

Coming back to the gist of the application at hand, the application is brought under **Order XXXVII Rule 1 (a) and section 68 (e) of the Civil Procedure Code, Cap 33 R.E. 2019** which allow temporary injunction to be granted to prevent waste, damage, alienation, sale, loss in value, removal or disposition of a property which is subject matter of the suit. The granting of temporary injunction is within the Court's discretion which is exercised upon the party seeking to be granted the injunction showing sufficient ground upon which the Court can exercise its discretion. See: ***Gazelle Tracker Limited vs. Tanzania Petroleum Development Corporation***, Civil Application No. 15 of 2006 (CAT at DSM, unreported).

The courts have further settled the principles or conditions that have to be met for a party to be granted temporary injunction. As submitted by the applicant's counsel, three principles were settled in the case of ***Atilio vs. Mbowe*** (supra), which are: (i) ***there has to be a serious question to be tried on the facts alleged, and the probability that the plaintiff will be entitled to the relief(s) prayed***; (ii) ***the applicant stands to suffer irreparable loss requiring the court's intervention before the applicant's legal rights are established***; and (iii) ***that on the balance, 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 of it***. These three principles have to be collectively considered. See also: ***Giela vs. Cassman Brown & Co. Ltd.*** (1973) E.A. 358.

With regard to the first principle to be considered, Mr. Sengo argued that the applicant claims ownership of the suit property and the respondents are trespassers. He saw that the applicant stands overwhelming chances of succeeding in the reliefs sought in the main suit as he holds a title deed to the land. In the applicant's supporting affidavit, which was adopted as part of his submission, it is stated under paragraph 6 that the Certificate of Occupancy was issued on 28th September 2012.

On the other hand, the respondents, through their counsels' submission argued that they were allocated the land as licensees by Bugoga Village Authority and have been using the land since 1960s. The applicant opted not to file rejoinder to counter such arguments. In the premises, I do not find the applicant's argument that he has overwhelming chances of succeeding in the reliefs sought in the main suit. As matters stand, both parties stand at 50/50 percent chance in succeeding in the main suit as both of them have to prove legality of their authorities to occupy the land in dispute in the capacities they claim to occupy from the relevant authorities. The application therefore fails on this test.

With regard to the second and third principles which I find interrelated, both parties have claimed to be allocated the land by relevant authorities. The respondents, as stated earlier, that they have been in the land in dispute since 1960s, they pay levy to the village authority and are charged with the duty to preserve the environment whereby the village authority supervises that. This claim, as I stated, was never disputed by the appellant as no rejoinder was filed. In the premises, it is my settled finding that the appellant has not substantiated his claim that he shall suffer

irreparable loss and that he shall suffer greater loss compared to the respondents if the application is not granted.

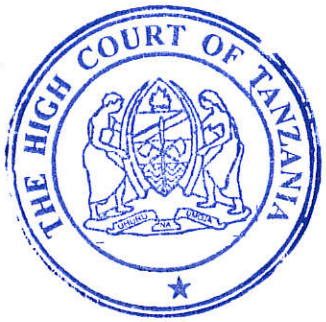
All said, the application is found to lack merit and is hereby dismissed. Since the respondents did not pray for costs of the application, I award no cost.

Dated at Mbeya on this 31st day of March 2022.

L. M. MONGELLA

JUDGE

Court: Ruling delivered in Mbeya in Chambers on this 31st day of March 2022 in the presence of the applicant's counsel, Mr. Peter Kiranga, and the respondents' counsel Ms. Rehema Mgeni.



L. M. MONGELLA

JUDGE