

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY**

AT MOSHI

MISC. LAND CASE APPLICATION NO. 5 OF 2022

*(Originating from Application No.60 of 2021 and Misc. Application
No.293 of 2021)*

YUSUFU ELITETERA LEMA..... 1ST APPLICANT

EMMANUEL LEMA..... 2ND APPLICANT

VERSUS

MARIA ELITETERA NKYA..... RESPONDENT

RULING

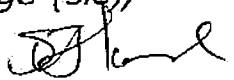
25/4/2022 & 21/6/2022

SIMFUKWE, J.

The applicant under certificate of urgency is seeking for ex parte and inter parties' orders under **Order XXXVII Rule 1 (a), 2 and 4, and section 95 and section 68 (e) of the Civil Procedure Code, CAP 33 R.E 2019** (CPC) as follows:

EXPARTE

- (a) This Honourable Court may be pleased to issue an order of temporary injunction restraining Respondents, their agents, servants, assigns (sic) or whosoever will be acting through them, from vacating or demolishing Applicants residential buildings or doing anything in the suit land located Ngumbaru village (sic),*


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Songu ward within Siha District with the following boundaries West- Emanuel Lema, East-Yohana Kingu, South- Martin Yohana Kingu, North-Asha Mssanja pending the hearing and final determinations of the application for temporary injunction inter parties.

(b) Any other relief(s) the honorable tribunal may deem fit and just to grant.

INTER-PARTES

(a) This Honourable Court may be pleased to issue an order of temporary injunction restraining Respondents, their agents, servants, assigns (sic) or whosoever will be acting through them, from vacating or demolishing Applicants residential buildings or doing anything in the suit land located Ngumbaru village, Songu ward within Siha District with the following boundaries West- Emanuel Lema, East-Yohana Kingu, South- Martin Yohana Kingu, North-Asha Mssanja pending the hearing and final determinations of the application for extension of time to file revision out of time filed at this Court.

(b) Cost of this Miscellaneous Application be in the due cause.

(c) Any other relief(s) the Honorable Court may deem fit and just to grant.

The application was supported by the affidavit of Mr. Elia Johnson Kiwia, learned counsel for the applicants. It was contested by the counter affidavit of the respondent.

The matter proceeded through written submissions. The Applicants were represented by Mr. Elia J. Kiwia, learned counsel, while the respondent

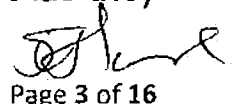
was represented by Mr. Joseph Moses Oleshangay, learned advocate from Legal and Human Rights Centre.

Submitting in support of the application, Mr. Kiwia prayed to adopt the prayers in the chamber summons together with the Affidavit of the Applicants Advocate and all documents annexed therein to form part of his submission.

He started by giving the brief background of the dispute to the effect that as provided at paragraph 2 of the affidavit that, the applicants are lawful owners of the suit land which was given to them by their grandfather way back in 2004 where they live with their family from that time to date.

That, as per paragraph 3 of the affidavit, in the month of May 2021, the applicants found execution notice from Moshi District Land and Housing Tribunal arising from Application No. 160 of 2014 between the respondent who was the Applicant by then against Boniface Kingu and Wilfred Elitetera. The applicants then simultaneously filed Application No. 60 of 2021 and Misc. Application No. 293 of 2021, claiming the ownership of the suit land and craving interim order for temporary injunction challenging the execution which the applicants were not party to the Suit. That, the application was illegally dismissed by the Hon. Tribunal Chairman for being res judicata.

That, when the Applicants were in the process of filing an application for extension of time for revising the above dismissal order, surprisingly on 2/02/2022, they received an order from Siha District Commissioner via Ngumbaru Village Chairman, that on 4/2/2022 the Applicants should remain at home waiting for the demolishing of their residential buildings and handover the suit land to the respondent. That, knowing that they



will suffer irreparable loss of losing their residential building and the suit land, if the intended demolishing and handing over will be executed in favor of the respondent and trying to rescue the situation, they immediately filed this application.

Mr. Kiwia argued that the principles warranting interim order for temporary injunction are provided in the case of **Attilio v. Mbowe, H.C.D 1969/284**, where three established conditions must be satisfied before such an injunction order can be issued. That: -

- i. There must be serious question to be tried on the fact alleged and probability that the plaintiff will be entitled to the relief prayed,*
- ii. 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 and*
- iii. 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.*

Basing on the cited case above, the learned advocate did not hesitate to state that, the available facts available satisfy all the prerequisite conditions provided therein above. That, as per paragraphs 8 and 9 of the affidavit, there is a serious triable issue on whether it was proper for the Tribunal's Chairman to dismiss the application on the basis that it was res judicata while the parties in the former suit were not the same parties in subsequent suit.

Another serious issue to be tried is on whether it was proper for the trial Chairman to dismiss the application basing on assumption that the

applicants had improperly filed Application No. 60 of 2021 instead of filing objection proceedings.

It was further argued that, what is prayed in the chamber summons is of outmost importance for the reasons that court interference is necessary so as to protect applicants alleged ownership of the suit land, residential legal right and the right to be heard in Application No. 60 of 2021 which was dismissed without according the applicant right to be heard, as enshrined under **Article 13 (6) (a) of the United Republic of Tanzania Constitution.**

Also, Mr. Kiwia claimed that, provided that the applicants and their families are living in the suit land, if the residential buildings therein will be demolished and the suit land will be handled over to the respondent before final determination of applications before the Court, the Applicants herein and their families will have nowhere to live while the respondent will suffer nothing on the reason that the respondent had never enjoyed the suit land before. Therefore, the Applicants will suffer irreparable loss as compared with the respondent.

In addition to the restraining order prayed in the chamber summons, it was Mr. Kiwia's prayer that provided that the applicants are residing in the suit land and using the same for their sustenance with families through farming and grazing of the livestock, as provided in the chamber summons, he implored the court to grant any other relief which deem fit and just. Also, through the discretion of the court as provided under **section 95 of Civil Procedure Code**, (supra) which give Courts discretionary power to grant any order for the interest of justice, he



prayed for the status quo to be maintained till the final determination of application pending in the court.

Basing on what has been submitted, the learned counsel stated that the application at hand deserves serious consideration. He prayed for the same to be allowed on merit.

In reply, Mr. Joseph started by giving the background of the case. He submitted to the effect that back in 2014, the respondent filed Application No. 160 of 2014 before the Tribunal between Maria Elitetera, Boniface Kinga and Wilfred Elitetera in respect of ownership of land. The Tribunal decided in favor of the respondent through its judgment which was delivered on 5/11/2020. That, no appeal has been preferred to date. The applicant then applied for execution through Misc. Application No. 16 of 2021 before the Tribunal and the same was granted.

That, to their surprise, instead of challenging Application No. 160 of 2014 by way of appeal or otherwise the applicants decided to lodge a fresh Application No. 60 of 2021 to determine ownership of the suit land which was the subject matter in Application No. 160. of 2014. While Application No. 60 of 2021 was pending, the applicants also filed Misc. Application No. 293 of 2021 seeking an order for temporary injunction of execution No. 16 of 2021. The Respondent raised objection on the point of law to the effect that Application No.60 of 2021 is Res judicata to Application No. 160 of 2014 and the tribunal dismissed the case hence, this application.

Turning to the application at hand, the learned advocate submitted to the effect that the cited case of **ATTILIO v. MBOWE** (supra) is distinguishable to the case at hand. That, three tests established in that case for the court to satisfy itself before granting injunction order cannot

apply in this case. Thus, the Application is baseless, meritless and unfounded for the reasons that:

First, the learned advocate submitted that there is no any serious question to be tried as the matter was settled to finality by the Tribunal where through Application No. 160 of 2014 the respondent was declared the rightful owner of the suit land which is also the subject in Applicants' application. That, the Applicants being the sons of Wilfred Elitetera who were parties to a previous suit with the same subject matter and same cause of action, renders the instant case *res judicata*.

It was further contended that it is just the Applicants' deliberate delaying tactics to restrain the respondent from peaceful enjoyment of the landed property. Mr. Joseph added that the subject matter in Application No. 160 of 2014 was ownership of the land measuring three acres situated at Kideco Ngumbaro village within Siha District. The Respondent was declared the owner of the suit land. Being sons of Wilfred Elitetera, the 2nd Respondent in Application No. 160 of 2014, could be in a better position to know the status of the case which their father was handling.

However, for obvious reasons, after being out of time to challenge Application No. 160 of 2014, the Applicants appeared using back door and lodged a fresh application and they are litigating in a representative capacity of WILFRED ELITETERA who was the party in the previous case with the same subject matter which was determined to its finality. The learned counsel for the respondent cited the case of **MIJA MAGANGA v. MOHAMED MR1SHO MLANGA, Land Appeal No. 225 of 2021**, HC (Land Division) at Dar es Salaam, (unreported) in which the court held that:

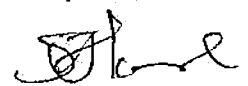


The main complaint by Mija Maganga is that she was not a party and is not privy to the proceedings in Land Application No. 97 of 2016. It is my view that even though Mija Maganga was not a party in Land Application No. 97 of 2016, the doctrine of res judicata is still intact since the subject matter and cause of action were the same and the matter was determined to its finality. Consequently, the Land Application No.97 of 2016 and Land Complaint No.07 of 2019 are the same to the extent explained above that the subject matter and cause of action are the same and the matter was determined conclusively by the District Land and Housing Tribunal. Therefore, in my respectful view, Land Case No. 7 of 2018 at Ward Tribunal for Kiwangwa was Res judicata.

The learned counsel also referred to the cases of **FELICIAN CREDO SIMWELA vs QUAMARA MASSOD BATTEZY AND ANOTHER, Civil Appeal No. 10 of 2020**, HC at Sumbawanga (unreported) where the court established all the elements of res judicata. Also, he cited the case of **PENIEL LOTTA V. GABRIEL TANAKI AND OTHERS [2003] TLR 312** in which the Court of Appeal held that:

"...the object of the Doctrine of res judicata is to bar the multiplicity of suits and guarantee finality to litigation. It makes a conclusive and final judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit."

He argued further that the instant application is purely res judicata and if the applicants are allowed to initiate another application regardless of the previous one which was decided to its finality by the competent



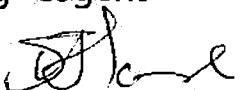
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adjudicating forum, it will defeat the real essence of res judicata. That, the logic behind of having the same is to bring finality of cases otherwise the sky will be limited. Also, the principle is there for the sake of promoting the fair administration of justice and honesty and to prevent the law from abuse. He made reference to the case of **FELICIAN CREDO SIMWELA** (supra) to substantiate the point.

It was Mr. Joseph's opinion that the applicants filed a new application as a camouflage of a party who lost in a previous case and outran by time to challenge it. That, they are privies suing in a representative capacity to WILFRED ELITETERA, their father. That, this trick of multiplicity in litigation in our jurisdiction is barred by both statutory and case law jurisprudence. Thus, there is no serious question which attract court's intervention.

Submitting in respect of the second test that the Applicants will suffer irreparable loss, the learned advocate argued the same to be not a reality. That, the applicants have nothing to lose because the disputed land was decided to belong to the Respondent through Application No.160 of 2014 of the District Land and Housing Tribunal for Moshi at Moshi. That, until to date neither WILFRED ELITETERA nor the Applicants challenged such decision. Instead, the applicants in their application are challenging dismissal of Misc. Application No. 293 of 2021 and refrain the respondent to peaceful enjoyment of the suit land. In other words, the applicants have nothing to lose since the suit land was the Respondent's property.

Mr. Joseph submitted further that; it is a general principle in civil litigation that he who asserts existence of certain facts must prove on a balance of probabilities on the existence of material facts by adducing cogent



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evidence to the satisfaction of the court. That, it was the respondent who managed to prove ownership as provided under **Section 110 (1) of the Evidence Act, Cap 6 R.E 2019** and the Tribunal decided in her favor.

In that respect, the respondent's counsel concluded that, the applicant has nothing to lose and that the same dispose the third test that on the balance of convenient the respondent is the one who will suffer due to delaying tactics by the applicants. He said that the Applicants preferred wrong way by filing a fresh application that rendered the case res judicata. That, the Applicants could use other means of challenging Application No. 160 of 2014 than instituting a fresh suit. He referred to the case of **Mija Maganga vs Mohamed Mrisho Mlangi** (supra)

The learned advocate concluded that the Applicants Application for temporary injunction of execution of Application No. 160 of 2014 is unmerited, and the same is delaying tactics to bar the respondent from enjoying her landed property peacefully. Thus, he prayed for the same to be dismissed with costs.

In his rejoinder, Mr. Kiwia faulted the respondent for failure to oppose the prayers of temporary injunction filed before the court. He emphasized that the applicant will suffer irreparable loss if the order thought will not be granted.

Rejoining on the point that there is serious triable issue, it was insisted that it is apparent on the face of the records that, parties in the former suit were not the same parties in subsequent one so as to sustain the doctrine of res judicata.

Mr. Kiwia added that, the applicants wanted court's intervention on the issue regarding as to whether it was proper for tribunal Chairman to

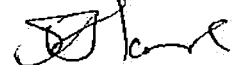
dismiss the suit in allegations that the applicants were not properly before the tribunal by filing fresh suit and that in the alternative, they had to file objection proceedings.

Also, the learned counsel submitted that all what has been submitted therein above are the test required to be answered to ascertain whether the applicants failed to reach the already provided test in the case of **Attilio v, Mbowe** (supra). He thus condemned the respondent for failure to challenge what was submitted by the applicants basing on the test found in the said case. That, the respondent's submission mostly focused on baseless propaganda and scandalous issues which were neither part of the court record, applicant's affidavit nor her own counter affidavit.

Further to that, it was submitted that, in exception of the decree granted to the respondent through Application No.160 of 2014 where the applicants were not party to the suit, the respondent has nothing else to say on how she will suffer loss to the land in which it had never been into her possession. Also, the respondent is not disputing that the applicants are living in the suit land and depending on it for sustenance for themselves and their families whereby if the execution will proceed, they will suffer irreparable loss.

Mr. Kiwia insisted that, if applicants' residential buildings in the suit land will be demolished and the Applicants be vacated, the respondent has to show how that loss will be recovered.

It was Mr. Kiwia's suggestion that if the respondent had any claim against the Applicants, she had to sue them personally or as necessary parties provided that the respondent knew that the applicants were living in the suit land since 2004, but for the reasons known to her she did not sue the



them in Application No. 160 of 2014. Instead, she sued person of her own choice. Basing on that respect, it was argued that the allegations that the applicants filed the suit by back door in order to prejudice the respondent right is baseless and an afterthought. That, those allegations have no legal basis at this moment and they ought to be proved through evidence to be produced in the competent court by parties, that is dismissed Application No. 60 of 2021.


The learned advocate for the applicants forms an opinion that there was no need of arguing the remaining part of the respondent's submission on the reason that the same are not of legal significance importance in this application as the same will be argued and expounded in Application No. 4 of 2022 which is application for extension of time filed along with this application.

Mr. Kiwia was of the opinion that the respondent failed to oppose applicants' submission in chief. He thus prayed for their prayers be granted.

Having the summarized submissions of the learned counsels of both parties, and having considered the affidavit of the learned counsel for the applicants and the counter affidavit of the respondent, the issue for determination is ***whether the Applicants have established sufficient grounds for the temporary injunction to be granted.***

The Applicant has moved this court under **Order XXXVII Rule 1 (a), 2 and 4** and **sections 68(e) and 95 of the CPC.**

For ease reference I wish to quote the above provisions hereunder. **Order XXXVII rule 1(a)** provides that:



1. *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;”

Order XXXVII Rule 2(1) of the CPC provides that:

“In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right: ...”

Section 68(e) of CPC provides that:

“In order to prevent the ends of justice from being defeated the court may, subject to any rule in that behalf—

(e) makes such other interlocutory orders as may appear to the court to be just and convenient.”

Frankly speaking, all the above provisions have not established the factors which the court will have to consider in granting the application for injunction. However, as rightly submitted by the learned counsels, the landmark case which provides for the same is the case of **ATILIO VS MBOWE** (supra). This case has been elaborated and rationalized in

several occasions. One of the cases is the case of **Abdi Ally Salehe vs ASAC Care Unit Ltd and Others, Civil Revision No. 3 of 2012** (unreported).

Therefore, in determining this application, I will be guided by the principles pronounced in the case of **ATILIO** (supra) which are:

1. *Whether there is a serious issue to be tried*
2. *Whether the court's interference is necessary to protect the Applicant from irreparable loss*
3. *Whether on balance of convenience, there will be greater hardship and mischief that will be suffered by the Applicant from withholding the injunction than will be suffered by the Respondent from granting it.*

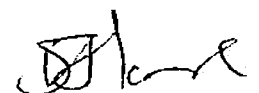
Starting with the first question, it is undisputed that there is a pending case in respect of the suit property which is yet to be determined by the court, thus, Misc. Application No.4 of 2022 which emanates from Application No. 60 of 2021 of the District Land and Housing Tribunal for Moshi at Moshi which was dismissed with costs for being res judicata. This suffice to say that there is a serious and arguable issue to be tried by the court. The respondent's counsel had tried hardly to submit in respect of the issue of *res judicata*. With due respect, his submission however strong was misplaced since this application is based only on an application for temporary injunction. Thus, the court will not scrutinize the main case. This was also stated in the case of **Abdi Ally Salehe** (supra) at page 8 of the Ruling where the Court of Appeal had this to say:



*"...In deciding such applications, the court is to see only a prima facie case, which is one such that it should appear on the record that there is a bona fide contest between the parties and serious questions to be tried. So, at this stage the court cannot prejudge the case of either party. It cannot record a finding on the main controversy involved in the suit; nor can genuineness of a document be gone into at this stage (See **SARKAR ON CODE OF CIVIL PROCEDURE** (10th ed. Vol.2 pp2009-2015))"*

As to the second principle whether there will be irreparable loss, it has been submitted and not disputed by the respondent that, the applicants are the one who resides at the disputed property which is subject of execution. In that respect, it is my considered view that if the respondent is not restrained from evicting the Applicants herein, then the applicants will suffer irreparable loss. Therefore, execution should wait for final determination of the pending application which I have already mentioned.

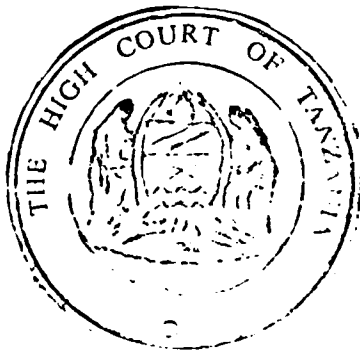
On the last question as to whether there will be greater hardship to be suffered by the applicants by withholding the injunction than will be suffered by the respondent from granting it; I am of the considered view that the applicants will suffer hardship if this application won't be granted. The respondent advocate has not established how the respondent will suffer if the injunctive order is granted to the applicants as per the third requirement established in the case of **Atilio vs Mbowe** (supra). It is my considered opinion that to let the applicants be evicted and demolishing their houses, it will be like pre-empting the ongoing cases.



For the foregoing reasons therefore, I hereby grant temporary injunction restraining Respondent herein, their agents, servants, assignees or whosoever will be acting through them, from vacating or demolishing applicants residential buildings or doing anything in the suit land located at Ngumbaru village, Songu Ward within Siha District with the following boundaries West- Emanuel Lema, East-Yohana Kingu, South- Martin Yohana Kingu, North-Asha Mssanja; pending the hearing and final determinations of the application for extension of time to file revision out of time. No order as to costs.

It is so ordered.

Dated and delivered at Moshi this 21st day of June, 2022.




S.H. SIMFUKWE
JUDGE
21/6/2022