

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

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**MISC. LAND APPLIATION No. 109 OF 2021**

*(C/F land case number 42 of 2021)*

**EVA NICOLAO MOSHI..... APPLICANT**

**VERSUS**

**LUCY MOSES SHAYO.....RESPONDENT**

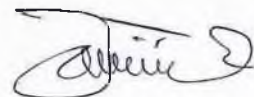
**RULING**

30<sup>th</sup> June&22<sup>nd</sup> July 2022

**TIGANGA J**

In this application, Eva Nicolao Moshi, hereinafter referred to as the applicant, moved this court under section 68(c) and (e) and Order XXXVII Rule 1(a) and 4 of the Civil Procedure Code [Cap. 33 R: E 2019]. The application was filed under certificate of urgency asking for the following orders:

- a) Temporary injunction to restrain Lucy Moses Shayo, herein after referred to as the respondent, her agents and whomsoever acting under her instructions from interfering, encroaching or alienating the

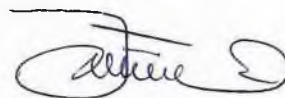


applicant's suit property, pending hearing of Land Case No. 42 of 2021 between the parties herein.

- b) Any other relief which this court will deem just to grant.
- c) Costs of this application be in the main case.

The brief background of this application is that, an applicant was appointed as an Administratrix of the estate of the late James Ndesario Mtei. Following that appointment, the respondent emerged claiming to be the lawful owner of some properties which were on the list of the deceased's estate. In her claim, the respondent stated that she was given those properties by the Late James Ndesario Mtei when the two were in concubinage relationship. It is on record that, in the course of the respondent's claim for such properties, she reported the deceased's family to the police for criminal trespass accusations. However, before the police advised the parties to deal with the matter in probate cause.

Both parties argued the application by way of written submissions in which they both prayed for the adoption of their affidavits to form part of their submissions.

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The Counsel for the applicant relied on the principle in the case of **Atilio vs Mbowe** (1969) HCD 284 which established the conditions to be considered before the grant of an order for temporary injunction. According to him, the following three conditions must be met. *Firstly*, there must be a serious question to be tried on the facts alleged and a probability that the plaintiff will be entitled to the relief prayed. *Secondly*, that the court's interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his alleged right is established. *Thirdly*, that on the balance of convenience, 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 the granting of it.

He further submitted in support of the first conditions that, there is existing serious question to be tried on the facts alleged. With regards to this first condition, the learned Counsel submitted that parties herein have a serious dispute over the ownership of the suit land. He further stated that, the cause of action in the main suit as stated under paragraphs 3,4,6,7 and 8 of the plaint categorically establishes that, the applicant and her late husband are the lawful owners of the suit properties in exclusion of any other

person. Such facts are strongly disputed by the respondent who put the applicant under strict proof.

He also stated that, under para 3 to para 6 of the applicant's affidavit also establish clearly how the applicant and her late husband are lawful owners. He further submitted that, the respondent was just a concubine to the late James Ndesario Mtei therefore, deserves nothing in the deceased's estate. The respondent is just intervening the administration of the estate carried out by the applicant who is not only a duly married wife of the deceased but also an administratrix of the deceased's estate.

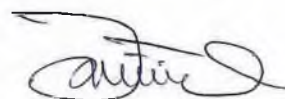
It was further submitted by the applicant's counsel that, with regards to the second condition for the temporary injunction to be granted, the applicant being a legally married wife to the deceased, will suffer irreparable loss because the whole family depends on her and the suit land since she wholly depends on the suit land together with the family for survival. The loss that might be occasioned is that, the appellant will fail to get necessities for the family and herself resulting into irreparable injuries for which the court's interference by granting the temporary injunction restraining the respondent from interfering, encroaching or alienating disputed lands is

necessary. The respondent's threats are dangerous to the applicant including the one stated under paragraph 4 of an affidavit.

With regard to the last condition of balance of convenience, the counsel submitted that, there will be greater hardship and mischief to be suffered by the applicant from withholding of the injunction than will be suffered by the respondent from granting it.

In reply submission, the respondent's counsel submitted with regards to the first condition that, in applying for temporary injunction the applicant must prove the presence of prima facie case which establish the existence of facts with a serious question to be tried. He further submitted that, an applicant's pleadings should reflect her ownership of the property in dispute. He submitted that, his affidavit as well as the submissions do not substantiate on how he jointly owned the particular pieces of land with the deceased. He further stated that, on the presence of rebuttable presumption of private ownership of property by the spouse, a mere certificate of marriage is not proof of ownership.

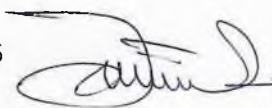
With regard to the second condition of suffering an irreparable loss, he submitted that, the respondent has submitted documents proving her

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ownership in the pieces of land in dispute. It is clearly shown in those documents marked "DR" that, the deceased transferred the said land before his demise. It goes without saying that the respondent being a rightful owner of the land in dispute, she has been using it to cultivate food crops for her issues she got with the deceased during their concubinage relationship, she even sold a part of the land in dispute.

With regard to the third condition that, there should be proof that, the applicant will suffer greater hardship and mischief than the respondent if the temporary injunction will not be granted, he submitted that, the applicant have failed to establish such greater sufferings which she will face than what the respondent will suffer. The suffering which the applicant alleges are unjustifiable, failure to cultivate food crops in the lands which one do not own holds no water, since there is no proof that the applicant have been using the said pieces lands.

From the pleadings, and the submissions made in support and against the application, I find only one issue for determination, that is, whether given the materials available, temporary injunction can be granted.

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In deliberating on this issue, I find it necessary to refer the dictionary meaning of the term temporary injunction. According to **Black's Law Dictionary 8<sup>th</sup> edition at page 800**

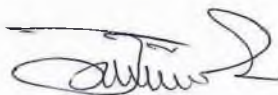
*"A temporary injunction is issued before or during trial to prevent an irreparable injury from accruing before the court has a chance to decide a case".*

Temporary injunctions are among others regulated by **section 68 (e) of the Civil Procedure Code, [cap 33 R:E 2019]** which categorically provides that:

*" In order to prevent the ends of justice from being defeated the court may;*

*(e) make such other interlocutory orders as may appear to the court to be just and convenient."*

In line with the above definition and the legal position under section 68(e) of the Civil Procedure Code (**supra**), the case of **Atilio vs Mbowe (1969)** HCD 284, has gone further by establishing the conditions which should mandatorily be fulfilled before the court granting an order for temporary injunction. For purposes of clarity, and easy reference I find it important to reproduce that part of the decision in **Atilio vs Mbowe** (**supra**)

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*“For an order of temporary injunction to stand, it should be established that; there is existence of serious question to be tried on the facts alleged with the probability of success in the suit, demonstration that the Applicant stands to suffer irreparable loss requiring the courts intervention before the Applicants legal right is established and 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.”*

According to the authority in the case of **Christopher P. Chale, vs Commercila Bank of Africa**, Misc. Civil Application No. 635 of 2017, all conditions under the authority of the case of **Atilio vs Mbowe** (supra) must as a matter of law, be met. This means, meeting one or two of the conditions will not be sufficient for purpose of the court exercising its discretion to grant an injunction.

The question which arises is whether, the applicant has managed to meet and establish all three condition elaborated above? On scanning of the affidavit filed in support of the application and the submission filed in that regard, I find nothing in these two documents explaining the existence of a serious question to be tried on the facts alleged. There are also no facts showing that, there is a probability of success in the main suit. Further to that, the applicant has not demonstrated that the she stands to suffer



irreparable loss requiring the court's intervention before the applicant's legal right is established in the main suit. Finally, I see no facts, proving the great hardship and mischief likely to be suffered by the applicant if the injunction is not granted, than the respondent will suffer if the order is granted.

In this case, the applicant seeks for temporary injunction on the use of land, but she has not said what is currently going on over the said land so as to convince the court on how she will be affected for not issuing of an injunctive order.

Turning to the last condition of balance of convenience, I find from the authority cited above as that, in the case of **Charles D. Msumari and 83 Others vs The Director General of Tanzania Harbours Authority**, Civil Appeal No. 18 of 1997 (unreported) where the Court held that:

*"Courts cannot grant injunctions simply because they think it is convenient to do so. Convenience is not our business. Our business is doing justice to the parties. They only exercise this discretion sparingly and only protect rights or prevent injury according to the above stated principles. The courts should not be overwhelmed by sentiments, however lofty or mere high driving allegations of them and their families without substantiating the same. They have to show that they have a*

*right in the main suit which ought to be protected or there is an injury (real or threatened) which ought to be prevented.”*

It is a settled principle that, there should also be balance of convenience in the sense that, the applicant should have proved that she will suffer greater hardship and mischief compared to the one the respondent will suffer. It is my strong view that, the last principle also fails as the adduced evidence by the applicant lacks merit to substantiate it.

That said, I find the applicant has failed to meet and establish the conditions as propounded in the case of **Atilio vs Mbowe** (Supra). On that base, the application for the temporary injunction lacks merit. Its is consequently dismissed with no order as to costs.

It is accordingly ordered.

**DATED** at **ARUSHA** on this 22<sup>nd</sup> day of July 2022.

The seal of the High Court of Tanzania, featuring a central emblem with a scale of justice and a book, surrounded by the text "THE HIGH COURT OF TANZANIA" and a small circle at the bottom.

A handwritten signature in blue ink, appearing to read "J.C. Tiganga".

**J.C. TIGANGA**

**JUDGE.**