

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

**BUKOBA DISTRICT REGISTRY**

**AT BUKOBA**

**LAND APPLICATION NO. 70 OF 2022**

**LEONILAH KISHEBUKA.....APPLICANT**

**VERSUS**

**1. DUNSTAN NOVAT RUTAGERUKA.....1<sup>ST</sup> RESPONDENT**

**2. BUKOBA MUNICIPAL COUNCIL.....2<sup>ND</sup> RESPONDENT**

**3. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

01.07.2022

**E. L. NGIGWANA, J.**

The Applicant Leonilah Kishebuka through the legal services Mr. Alli Chamani, Learned Advocate has moved this court under Certificate of Urgency, and by way of chamber summons made under section 2 (3) of the Judicature and Application of Laws Cap. 358 R:E 2019.

The main prayer in his application is for a "*mareva injunction*" restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents from demolishing the house built in Plot 163 "X", Miembeni Ward within Bukoba Municipal in Kagera Region pending the institution of a suit after the expiry of the period of demand notice issued to the respondents, and that the court be pleased to order that the covers the period after filing the main suit until determination of the same.

The application is supported by an affidavit sworn by Mr. Alli Chamani, learned Advocate for the applicant. The 1<sup>st</sup> respondent filed counter affidavit sworn by himself, while the 2<sup>nd</sup> and third respondents filed a counter affidavit sworn by Mr. Michael Boniphace Paul, Principal Officer of the 2<sup>nd</sup> respondent.

During the hearing of the application, Mr. Fahad Rwamayanga and Alli Chamani, both Advocates appeared for the applicant, Mr. Ibrahim Mswadick, learned advocate appeared for the 1<sup>st</sup> respondent while the 2<sup>nd</sup> and 3<sup>rd</sup> respondents enjoyed the service of Mr. Lameck Buntuntu and Athumani Msosole, both learned State Attorneys.

Submitting in support of the application, Mr. Fahad Rwamayanga adopted the affidavit supporting the application and proceed to submit that, the application seeks to restrain the respondents from demolishing a disputed house built in plot 163 "X" located at Miembeni within Bukoba Municipality. That this application had been filed pending the expiration of 90 days notice to sue the Government. That the notice which is a mandatory legal requirement has been issued to the respondents on 06/05/2022. He further submitted that the application is within the jurisdiction of this court and he cited the case of **Ugumba Igembe and Another versus The Trustees of the National Parks and Another**, Misc. Civil application No. 1 of 20201 where it was held that this court has jurisdiction to entertain and grant mareva injunction. He added that if the application is not granted, the applicant will suffer irreparable loss because the 2<sup>nd</sup> defendant has issued a 30 days notice requiring the applicant to demolish his structure and the notice is due for expiration on 02/07/2022 but if it is granted, the respondents will not be prejudiced.

Mr. Ibrahim resisted the application. He adopted the counter affidavit deponed by the 1<sup>st</sup> respondent and proceeded to argue that it is not clear whether the erected building was aimed for business or residential purposes. He added the decision in the case of Ugamba Igembe (supra) is persuasive and therefore, he urged the court to depart from that decision. He added that the applicant has not demonstrated as to what extent he will suffer irreparable loss in case the application is not granted. Ibrahim went on submitting that indeed, the one who

is likely to suffer irreparable loss is the 1<sup>st</sup> respondent because he need to develop his plot.

On his side Mr. Lameck Buntutu, learned State Attorney for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents admitted that the 90 days notice has been issued to the respondents. He also admitted that the 2<sup>nd</sup> accused had issued a 30 days notice to the applicant requiring him to remove his structure owing to the reason that it was constructed contrary to the building permit. He also said, indeed, if the application is granted, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents will suffer no any irreparable loss. He however, urged the court not to give an order which will prohibit the 2<sup>nd</sup> applicant from executing his day to day activities according to law.

In his rejoinder, Mr. Fahad argued that the High Court in the case of Ugumba (supra) arrived at that decision after being guided by the Court of Appeal decision in the case of **Tanzania Electric Supply Company (TANESCO) versus Independent Power Tanzania Ltd (IPL) and 2 Others** [2002] TLR 324 thus a binding decision. He added that, since the 30 days notice has required the applicant to demolish the building built in the plot 163 'X' which he believes to be his own property, it goes without saying that if the application is not granted he will suffer irreparable loss. He ended his rejoinder stating that the 2<sup>nd</sup> respondent has the right to discharge its duties, but must do so within the ambits of the law.

I have carefully and dispassionately considered the contents of the application and the prayers thereto, the affidavit filed in support of the application and the counter affidavits filed by the respondents and their respective annextures. Reading all the documents, it is apparent that the interim injunction is sought prior the institution of the suit.

Now, the issue for determination is whether the application for interim injunction in such a situation can be issued?

It should be noted that an interim injunction order preceding the institution of a suit "mareva injunction" is a common law remedy developed by the courts of England, and it derives its name from the case of **Mareva Compania Naviera SA versus International Bukkcarries SA** [1980] 1 ALL ER 213.

Applying this principle the Supreme Court of Canada in **Aetna Financial Services versus Feigelman** (1985) 1 SCR 2 stated that, in granting Mareva injunction, two conditions must be established **firstly**, that the applicant must demonstrate a strong prima facie case or a good and arguable case, and **secondly**, having regard all the circumstances of the case, it appears that granting the injunction is just and justifiable.

In Tanzania, it is a settled principle that this court has jurisdiction to grant such injunction under section 2 (3) of the Judicature and Application of Laws Act Cap. 358 R:E 2019 which braces the application of common law and equity in our jurisdiction.

There are many cases which have discussed mareva injunction. Apart from The Trustees of Tanzania National Parks (supra) and **Ugumbee Igemba** (supra) see also **Abdak M. Malik & 545 Others versus AG**, Misc. Land Application No. 119 of 2017, HC LD (unreported), **Jitesh Ladwa versus Yono Auction Mart and Co. Ltd & Others**, Misc. Civil Land Application No. 26 of 2020 HC DSM (unreported) and **Leopard Net Logistics Company Ltd versus Tanzania Commencial Bank Ltd & 3 Others**, Misc. Civil Application No. 585 of 2021.

As I have said earlier, mareva injunction may be issued where the applicant cannot institute a case in a court of law because of an existing legal impediment,

and since, this application at hand has been made pending the expiration of the 90 days notice to sue the Government which impends the institution of a suit by the applicant, it goes without saying that this application falls within the realm of "mareva injunction" and can be issued if the conditions for grant of injunction are demonstrated.

In the instant case, the applicant has demonstrated that he has erected a building on Plot No. 163 "X" Miembeni, but prior to that, he obtained a building permit from the 2<sup>nd</sup> respondent, the fact which was admitted by the 2<sup>nd</sup> respondent vide Mr. Lameck Buntutu, learned State attorney, however, he alleged that there was non-compliance of the conditions stated in the said permit. The issue whether there was non-compliance of the permit or not is a triable issue. There is also a question of ownership of the plot, thus whether the applicant building had over stepped into another plot to wit; Plot 164 "X" or encroached thereto is also a triable issue.

There is also no dispute that a 30 days notice was issued to the applicant on 02/06/2022. Part of the same read;

***YAH: NOTISI YA KUONDOA SEHEMU ILIYOJENGWA KINYUME CHA KIBALI CHA UJENZI.***

*"Imebainika kuwa jengo lililojengwa limeingia sehemu ya kiwanja Na. 164 "X" Miembeni kinyume na ramani ulizowasilisha kwa ajili ya kupata kibali cha ujenzi. Jengo lako linapaswa kuenea kiwanja Na. 163 "X" Miembeni---*

*Umepewa siku 30 kutekeleza maagizo ya ilani hii. Baada ya muda huo, Halmashauri ya Manispaa ya Bukoba na/au Mmiliki wa kiwanja kilichoingiliwa atachukua hatua stahiki za kuondoa maelekezo yaliyo kinyume cha kibali cha ujenzi".*

The 30 days notice was attached to the affidavit as **annexture "C"** while the 90 days notice to sue the Government was attached as **annexture "D"**.

Reading the 30 days notice which is due to expiry on 02/07/2022, it needs no angel to descend from Heaven in order to know that if the application is not granted the applicant will suffer a very serious loss, and if granted, the respondents will not be prejudiced

In the fore going, I find the application meritorious, therefore I proceed to grant it accordingly.

In the event, the 1<sup>st</sup> and 2<sup>nd</sup> respondents are restrained from demolishing the house built on Plot 163 'X' Miembeni Ward within Bukoba Municipality pending the institution of a suit after the expiry 90 days demand notice issued to the respondents on 06/05/2022. Considering the dictates of "**Mareva injunction**", this interim injunction order will not cover the period after filing the main suit until determination of the same.

It is so ordered.

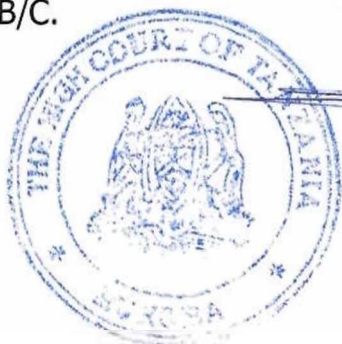


  
E.L. NGIGWANA

JUDGE

01/07/2022

Ruling delivered this 1<sup>st</sup> day of July, 2022 in the presence of the Applicant, Mr. Fahad Rwamayanga, learned advocate for the Applicant, 1<sup>st</sup> respondent, Mr. Ibrahim Mswadick, learned advocate for the 1<sup>st</sup> respondent, Mr. Athumani Msoole, learned State Attorney for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and Ms. Tumaini Hamidu, B/C.



  
E.L. NGIGWANA

JUDGE

01/07/2022