IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA – SUB REGISTRY

AT MUSOMA

MISC. LAND APPLICATION NO 28 OF 2022

KURINDO BUNYIRIKO..... APPLICANT

VERSUS

TANZANIA FOREST SERVICES AGENCY ..... 1ST RESPONDENT
ATTORNEY GENERAL .....2ND RESPONDENT

RULING

9th June & 28th June, 2022

F. H. MAHIMBALI, J.

By way of chamber application made under section 2(3) of the Judicature and Application of Laws Act, Cap 358 R.E 2019 the applicant has preferred this application against the respondents suing for an order of maintaining status quo in respect of the applicant's land pending filing and determination of the application for temporary injunction to be filed after the expiry of the 90 days statutory notice of intention to sue the 1st respondent and joined the Attorney General as per requirement of the law. The application is supported by an affidavit of the applicant.

The applicant claims to be the owner of $3^1/_2$ acres of land situated at Nyamagembe Hamlet within Butiama Village since 1993. That the said

farm originally belonged to his father (since 1999) who during his life time bequeathed it to the applicant who is his son and that has been using it since 2004 till now peacefully. That in the said farm, there are various permanent crops such as coffee, timber, banana and other related crops planted seasonally in each year. Surprisingly, on 25th February 2022, the applicant was surprised to receive a letter from Butiama District Forest Manager with reference No. AB 3/130/01/08 that he should stop carrying on farming activities in his land otherwise legal action would be taken against him as the said farm is within Kyarano Forest Reserve. The applicant resists the move by the first respondent of stopping him from using the said land unreasonably as the alleged Kyarano Forest Reserve if it is in existence, then it is located in Rwamkoma Village while the applicant's 3 $^{1}/_{2}$ acres of land is situated at Nyamagembe Hamlet within Butiama Village. Should this order not be granted, the applicant avers that is likely to suffer irreparable loss in terms land and income emanating therefrom for the permanent crops grown there such as coffee, timber and bananas. For balance of convenience, the applicant is likely to suffer more loss should this Court refrain from granting the sought orders.

On the other hand, the application is contested by the respondent on the basis that part of the area in which the applicant is using forms

part of the forest reserve and thus forms part of Kyarano Swamp which has been used as source of water by three villages namely Butiama, Rwamukoma and Bisare. In balance of convenience therefore, the Respondent avers that the public will suffer more gross loss than the applicant as all the communities around depends solely on the said forest as source of its water.

During the hearing of the application, Mr. Cosmas Tuthuru represented the applicant whereas Mr. Kitia Toroke learned state attorney represented the respondents.

While adopting the affidavit of the applicant in support of the application, Mr. Tuthuru learned advocate for the applicant submitted that, the applicant has been aggrieved by the intention of the first respondent to evict him from continuing use of his land in which he depends solely for earning his living. That he has been using it since 2004 after being bequeathed by his deceased father and that prior to that, his father had been using the same from 1999. That the use of the said land was originally granted to his father by the village authority by then. Taking it now as intended by the first respondent is to deny him of his constitutional right to own property. In support of his claim of ownership of the said land, he urged this Court to be inspired by the decision in Clara **Kimoka Vs. Xavery,** (2002) TLR 255 where the Court

of Appeal held that where there are claims of rights in ownership, the determination of the same will be dealt with in the main case. As the applicant intends to sue the respondents as per notice dully attached with the applicant's affidavit in support of the application, he is of the view that this Court be pleased to grant the application as prayed.

Mr. Tuthuru further submitted that in view of the respondents' joint affidavit especially at paragraph 4 should not be amplified by this Court to deny the applicant's right of enjoying the said land. Relying on section 22(1) and section 38(3) of the Forest Act, as there is no proof of the establishment and gazettement of the said Kyarakano Forest, it is hard to believe the said establishment as averred. In essence, Mr. Tuthuru criticises the respondent's counter affidavit on the basis that what is alleged in paragraphs 4, 7 and 9 are not established in the joint affidavit.

In reply to the submission of Mr. Tuthuru for the applicant, Mr. Kitia Toroke learned state attorney while adopting the respondents' joint affidavit submitted that they oppose the application because the establishment of the said Kyarano Forest is since 1983. The existence of the said Kyarano Forest assures life living of three neighbour villages which solely depend their water source from Kyarano Swamp which gets its genesis from the said Kyarano Forest. Continuing use of the said area

by the applicant is giving threat of life to the communities which solely depend water from the said source.

Considering the basis of the current application centres on the legal requirement that the applicant intends to sue the respondents in terms of section 6(2) of the Government Proceedings Act, there is no proof of the said service by post as alleged. Considering the legal principles developed in the case of **Atilio V. Mbowe** (1969) HCD 264, Mr. Kitia Toroke submitted that in balance of convenience, the villagers are more likely to suffer than the applicant. For public interest while relying the decision of this Court (Kakolaki, J) in **Omari Kilalu and 4 Others V. Temeke Municipal Council and Attorney General**, Misc Civil Application No. 458 of 2021, he prayed that this Court to dismiss this application with costs as the public affairs/ rights supersede those of the applicant.

I have considered the prayers in chamber application, the affidavit in support thereof, counter affidavit and the parties' submissions, the question that I am called upon to consider is whether the application is meritorious to grant. As a matter of law, for the Court to grant injunction reliefs/orders there must exist conditions warranting the said grant as per law. As per the case of **Atilio v. Mbowe,** (supra), the known principles or conditions are three:

1. *That, on the facts alleged, there must be a serious question to be tried by the Court and a probability that the plaintiff will be entitled to the reliefs prayed for (in the main suit)*
2. *That the temporary injunction sought is necessary in order to prevent some irreparable injury befalling the plaintiff while the main case is still pending.*
3. *That on the balance of convenience greater hardship and mischief is likely to be suffered by the plaintiff if temporary injunction is withheld than may be suffered by the defendant if the order is granted.*

In consideration of this case, so far there is no existence of any case by the applicant but an intended suit against the respondents as per 90 days' notice alleged to be served by the applicant by post office. Thus, the citation of section of 2(3) of JALA as a statutory link is sufficient to move the Court for temporary injunction in the absence of the suit. The contention here is based on the proposition that, as the major part of the English law is unwritten, citation of the relevant substances of the English law cannot be possible. It is contended that, just as that, just as one cannot cite the case of **Atilio Mbowe** as an enabling law for temporary injunction, he cannot cite the case of **Mareva** as an enabling provision. Therefore, in **Auto Mech Limited v. TIB Development Bank Limited and Others**, Misc. Land Application No. 73 of 2020, High Court, Land Division, the High Court (Maige, J as

he then was) clarified well why mareva application is preferred under section of 2(3) of JALA as a statutory link is sufficient to move the Court for temporary injunction in the absence of the suit in a situation like one at hand. One of issues in contest in the said intended suit will be ownership of the said land whether the applicant has the right of it. Whereas the applicant alleges that he was legally given by the relevant authority by then, the respondents contend that he was not given as the area is a Forest Reserve and has a swamp as source of water for the three villages around. What has to be decided here is not that the applicant will have a good or bad case but whether there are serious or genuine questions in the pending suit. On what is embodied into the affidavit of the applicant and what has been responded by the respondents both in counter affidavits and submissions, I am satisfied that there will be serious issues of law and facts for the Court's deliberation.

Whether there will be irreparable loss/injury by the plaintiff in the event the application is not granted. In law, irreparable loss is nothing but a situation which cannot be compensated by monetary terms. In the case of **Mariam Christopher vs Equrty Bank Tanzania Ltd Christopher Malandi Edward** at page 8 it defined that:

"... irreparable loss is one that looking at the reliefs sought in the plaint if the same will be proved, the respondent is not in a position to redress the by way of damages"

A similar position was stated in the case of **Elvis Beda Kyara vs Mohamed Mdege,** Misc. Land Application No 55 of 2017.

Lastly, is the test that on balance of convenience, greater hardship and mischief is likely to be suffered by the plaintiff if temporary injunction is withheld than may be suffered by the defendant if the order is granted. I have digested the submissions by the applicant and that of the respondents' attorney, I am persuaded that since the applicant has established using the said land since 1999 and that there has been no counter evidence that the continued use of the said land from 1999 to date has led to what negative environmental impacts to the survival of the said around communities should the applicant continue using the same for the next few months to come or more time. In that absence, I find merit in the application.

In essence, I am aware that the three conditions set in the case of **Atilio vs Mbowe** must co-exist (i.e conjunctively and not disjointedly). See the cases of **Rornuald Andrea vs Mbeya City Council and 18 others**, Misc. Civil Application No 32 of 2021, citing the case of **Christopher P. Chala vs Commercial Bank of Africa,** Misc. Civil

Application No. 635 of 2017. In the current case, I am satisfied that the applicant has considerably argued his application well. Not only has the applicant established the "triple test" set out in **Attilio Mbowe** supra, but has also established that the irreparable injury sought to be protected is of immediate effect (**Tai Five Hotel Limited & Another v. CRDB Bank PLC and Another**, Misc. Land Application No. 151).

That said, the application is granted as prayed. The restraint order is hereby issued against the respondents or their agents not to evict, interfere or deal with the alleged applicant's land in dispute pending the expiration of the alleged 90 days' notice in which an appropriate suit and application will be preferred by the applicant as the case may be.

In the circumstances of this application, each party shall bear its own costs.

It is so ordered.

DATED at MUSOMA this 28th day of June, 2022.

THE HIGH COURT OF TANZANIA MUSOMA

F.H. Mahimbali

Judge

Court: Ruling read by me E. R. Marley - Ag, Deputy Registrar in the presence of advocate Toroke for the 2nd respondent today the 28th day of June, 2022 at 14:30 hours.

E. R. Marley

Ag- Deputy Registrar

28/06/2022