

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA**

MISC. LAND APPLICATION NO. 41 OF 2022

*(Arising from Land Case No 5 of 2022 before the High Court of Tanzania
Mwanza at Mwanza)*

JACKSON CHARLES NDETTO-----APPLICANT

VERSUS

MAFON (T) LTD-----1st RESPONDENT
MATHIAS CHARLES NDETTO -----2nd RESPONDENT
SIMON CHARLES NDETTO-----3rd RESPONDENT
NASIBU GUNZO T/A GUNZO ELECTRONICS-----4th RESPONDENT
BUSHIA RICHARD -----5th RESPONDENT
MUKHSIN MOHAMOHAMED -----6th RESPONDENT
THOMAS KASANDUKU -----7th RESPONDENT
ALEX GIDION CHUBWA -----8th RESPONDENT
GODFREY MSANGI -----9th RESPONDENT
FELISTER MATHEW -----10th RESPONDENT
NIONZERA MANASE -----11th RESPONDENT
MHONGORO MBISSO -----12th RESPONDENT
AMIDEUS OTTARU t/o HARNAD GENERAL SUPPLY-----13TH RESPONDENT
MARTINE MAHEHE AKSAID t/a (MASPARE)----- 14TH RESPONDENT
FRED MALAKI LUPONDIJE (FM TANZANIA) -----15TH RESPONDENT
CALIST MHANDA -----16TH RESPONDENT

RULING

Last Order: 06.07.2022

Ruling Date: 10.08.2022

M. MNYUKWA, J.

The applicant, Jackson Charles Ndetto, has filed the present application for an order of injunction pending the determination of the

main suit. An order for injunction sought by the applicant is against all respondents restraining them from conducting business activities in the disputed commercial premises pending the final determination of the main suit and restraining the 2nd and 3rd respondents from further entering into any contract relating with disputed commercial premises until the final determination of the main suit.

The application has been brought under certificate of urgency and it is made under section 68 (c) and (e) of the Civil Procedure Code, [Cap. 33 R.E 2019] and Order XXXVII Rule 1(a) of the Civil Procedure Code, [Cap. 33 R. E 2019].

During the hearing of the application, the applicant was represented by the learned counsel Mr. William Muyumbu and Mr. Dennis Kahangwa while the respondents enjoyed the legal services of Mr. John Edward, the learned counsel too.

The facts ascertainable from the affidavit of the applicant goes that, that the applicant claimed to be a lawful owner of the disputed land on which a commercial premises, which is one underground and ground floor, is built. He claims he owns the disputed plot after he had been given the same by the administrator of the deceased's estate as his share of inheritance on 24/04/2020. That the other heirs including



the 2nd and 3rd respondents consented for him to be given the disputed plot as they signed a letter addressed to the court where the probate case was filed. The affidavit further deponed that when the applicant was in the process of transferring ownership of the disputed land to his name, he had already developed the underground floor using his own money. He did the construction under the supervision of the 2nd and 3rd respondents and one Esther Charles Ndetto who were given power by the family to procure building materials and to sign all documents in relation to the construction project. The affidavit further deponed that money for the construction of the underground floor in the disputed plot was borrowed from Azania Bank and his friends as loan and that he deposited money to Ester Charles Ndetto from his personal account and some of the money emanated from his business account called Ndetto Hardware, registered in his name, Jackson Charles Ndetto.

It was also deponed that, without his consent, the 2nd and 3rd respondents entered into an agreement dated 20/09/2020 with the 1st respondent to develop the ground floor after the underground floor was completed. That to demand his right, he filed the Land Case before the District Land and Housing Tribunal (DLHT) but withdrew the same after it was found to be incompetent



He added that, the 2nd and 3rd respondents rented the underground floor, so did the 4th to 16th respondents and they further entered into a contract with the 1st respondent. Due to the act of the 2nd and 3rd respondents, the applicant is suffering loss as they are collecting rents from the 4th to 16th respondents which denied him right to use and enjoy the disputed plot as the lawful owner.

In a counter affidavit deposed by all respondents, they strongly disputed some averments contained in the applicant's affidavit. It was deposed that, on 21st July 2018, the family of Ms. Ruth Ndetto who is the administrator of the deceased estate including the 2nd and 3rd respondents held a meeting led by Ms. Ruth Ndetto that discussed on how they can get money to develop the disputed plot. That, it was resolved in that meeting that the transfer of the disputed property be done to one of the family members who is younger in age and who had the chances to secure loan from the bank so as to pledge the disputed plot as a security for loan and that after repayment of the said loan, the transfer can return back to the administrator of the deceased estate. That in the course of the deliberation in that meeting, the applicant assured the family members that he had good customer relationship with the bank and that he had chances to secure loan. That the family



members consented to the transfer of the disputed plot to be done in favour of the applicant. Then, they engaged the family lawyer to initiate the transfer process. That unfortunately, in the course of transfer, the dispute over the ownership of the said plot arose between Ruth Charles Ndetto against Simon Joshua Ndetto and the case is still pending before the District Land and Housing Tribunal. The dispute resulting into this court to give an order to stop the transfer processes until the determination of the said dispute by the justice machineries.

The affidavit in reply further states that since the transfer process to has failed, the 2nd and 3rd respondents who were appointed by the family members to supervise the project on the disputed land, entered into contract with the 1st respondent as an investor to develop the commercial premises by using his own money and who, later on can be a tenant so as to get refund of his money used in investment.

The respondents further deponed that the underground floor was not built by the applicant alone as it was built by other family members and that the ground floor was built by the investor, the 1st respondent, after the 2nd and 3rd respondents to have entered into a contract with him on behalf of the family. It was deponed that, if at all the applicant secured loan from the bank and to his friends it was for his own purpose

and the same had no any connection whatsoever to the project on the disputed commercial premises, That, the applicant had the ill motive as he once filed the Land Case in the DLHT and he withdraws it after the Ruling on Misc. Application No. 440B of 2020 to be delivered which dismissed the Application.

The affidavit further stated that the applicant is not the supervisor of the commercial premises in the disputed land and that the 4th to 16th respondents are legally occupying the rooms in the disputed place and if the court will restraint them from conducting business, they will suffer loss as most of them are selling perishable goods which had specific time of expiry and it is inconvenient for them to find the alternative place. That is what can be gathered from the affidavits of both parties.

Arguing in support of the application, the applicant's counsel prayed to adopt the affidavit sworn by the applicant and in totality prayed the court to grant the application as prayed. He referred this court to the case of **Atilio v Mbowe** (1969) HCD 284. He enlightened the principles laid down in that case that need to be considered by court in issuing injunction. He submitted on the first principle that the applicant had prima facie case as he had the interest on the disputed plot which was registered in the name of Joshua Shija Kisendi and that



the applicant got interest which is a protectable interest after he had been given it as part of his share of inheritance by the administrator of the deceased estate, Ruth Charles Ndetto and the other heirs consented and he is now in the process of transferring it which is blocked by the pending case before the DHLT and the parties to this application are not parties of the pending case . He referred to the case of **Nairobi Mamba Village v National Bank of Kenya** [2000] Vol 1 EALR 197.

He further added that the applicant had prima facie case as he developed the suit premises from 2018 to 2020 using his money under the supervision of the 2nd and 3rd respondents who later on rented it to tenants without his consent. That the applicant is going to suffer irreparable loss and therefore court interference is important. To cement his argument on prima facie case he cited the case of **Kibo Match Group Limited v H.S Impex Ltd** [2001] TLR 152.

In reply thereto, Mr. John Edward, the learned counsel for the respondents prayed to adopt the joint counter affidavit deponed by the respondents to form part of his submission and prayed the application to be dismissed with costs. He submitted that, the disputed land is surveyed and it is not in the name of the applicant. He referred to section 2 of the Land Registration Act, [Cap. 334 R. E. 2019] to define



the owner of the land as the one whose name is registered. He referred also to the affidavit of the administrator of the estate of the deceased who deponed the purpose of the transfer of the disputed land to the applicant. He went on that the 2nd and 3rd respondents were given mandate by the family to enter into agreement on their behalf and to supervise the development of the disputed plot. That the transfer process was interrupted following the order of the High Court which compelled the 2nd and 3rd respondent to search for the investor to develop the suit premises and ultimately the 1st respondent was available. He insisted that there is no prima facie case entitling the applicant to be granted reliefs prayed because the exhibits attached shows why the 2nd and 3rd respondents supervised the construction and show the contribution of each member and how each member earned from the project.

On the issue of irreparable loss, the counsel for the respondents submitted that if the injunction will be granted, the 1st respondent will incur irreparable loss because he developed the suit premises and the family members collect rents while other respondents have rented the suit premises and have perishable goods which had expiry date. He finalized insisting that if the application will be granted other

respondents, two of them who are not part of the main case, will suffer loss and the means to compensate them will be difficult. He added that the application did not join the administrator of the estate who is said to give the suit plot to the applicant and who also signed the agreement entered between the 1st respondents and the 2nd and 3rd respondents. The suit also did not join one Ester Charles Ndetto who received money from the applicant.

Re-joining, the counsel for the applicant mainly reiterated what they have submitted in chief and insisted that the applicant had protectable interest from 2020 and that the administrator does not revoke what she gave the applicant and that the Order of the court was given in 2021.

After carefully scrutinizing the affidavits deposed by both parties to the case and their annexures as well as upon hearing the submission from both parties, the only issue for consideration and determination is, whether the application meet the conditions for granting injunction pending the determination of the suit.

It is a settled position of law that granting injunction pending the determination of the main suit is the discretionary power of the presiding Judge or Magistrate. Order XXXVII Rule 1(a) and 2(1) o the



Civil Procedure Code, Cap 33 R.E 2019 to which this application is made, given the circumstances upon which the order can be granted. The same circumstances has been well articulated in the case of **Atilio v Mbowe** (supra) which are **first**, there must be a serious question to be tried and the plaintiff had a probability to succeed, in other words there must be existence of the suit and the likelihood of the plaintiff to won in the suit, **second**, the court interference is necessary to prevent the applicant from suffering irreparable loss, this means that the court has to restraint the respondents from continuing on what they are doing so as to eliminate the chances for the applicant to continue suffering it and the **third** condition is on the balance of convenience that there will be greater hardship if the injunction will not be granted.

Upon revisiting the affidavits filed by both parties, it is my duty now to examine if an order of injunction can be granted or not, based on the above criteria stated in the **Atilio v Mbowe** (supra).

Starting with the first criteria, it is undisputed that there is a pending case before this court which is the Land Case No 5 of 2022. The affidavit filed in this court shows that the disputed land is registered in the name of Joshua Shija Kisendi who is now a deceased and that Ruth Charles Ndetto is the administrator of the estate of the late Joshua Shija



Kisendi who was also known as Charles M. Ndetto. It is also not disputed by the parties that the construction of the commercial premises in the disputed plot started in 2018 up to 2020. It also gathered from the record that the letter dated 20/04/2020 addressed to the court by the administrator of the deceased estate, Ms. Ruth Charles Ndetto to give the disputed plot to the applicant and that the transfer process has to proceed.

From the record, what I find to be contention between the parties is whether the purported transfer of the right of occupancy from the late Charles Ndetto to the applicant was absolute or there was condition under it.

It is averred by the applicant that he was given the disputed land as part of his inheritance from the deceased estate while the 2nd and the 3rd respondents averred that the disputed land was granted to the applicant so as to use it as a security for loan and to use his company to secure loan from the bank so as to develop it as one of the investments that can benefit the whole family. The same is supported by the affidavit of the administrator of the deceased estate, Ms. Ruth Charles Ndetto who gave the disputed land to the applicant. And, as it is shown from the affidavits and submission of both parties, the construction started in the



year 2018 before the said letter purported to transfer the disputed land to the applicant is written. Since at this stage the court does not go deep into the merit of the case. This is a triable issue.

As to the second criteria, the applicant has to show that there will be irreparable loss if the injunction will not be granted. As per the decision of **Kibo Match Group Limited** (supra), the applicant has to show that unless immediate action is taken otherwise the applicant will suffer a quantified and or unquantified irreparable damage and if the temporary injunction is withheld the final decision would be rendered nugatory.

In our present application, the applicant has failed to meet this criterion. In his affidavit he admits that the 1st respondent entered into contract with the 2nd and 3rd respondents who supervised the construction of the disputed plot and that the 1st respondent invested his money by developing the ground floor. Further, in his affidavit the applicant failed to show the irreparable loss he is going to suffer if the application will not be granted on how he cannot be adequately compensated.

On the last criteria which is the balance of convenience, the applicant did not show the greater hardship likely to be suffered if the



application will not be granted apart from averred that he borrowed money from the bank and his colleague and that he is not enjoying the fruits of his alleged investment. In the persuasive decision of Uganda case of **Gapco (U) Ltd v Kaweesa Badru** HCMA No 259/2013 (unreported) court held that:


"Balance of convenience literally means that if the risk of doing an injustice is going to make the applicants suffer then probably the balance of convenience is favourable to him/her and the court would most likely be inclined to grant to him/her the application for a temporary injunction."

All said and observed, it is my firm view that the applicant has failed to meet the criteria as articulated in the case of **Atilio v Mbowe** for this court to exercise its discretionary power to grant injunction pending the determination of the main suit. Thus, consequently the application is dismissed and I make no order as to costs due to the relationship of the parties to the case.

It is so ordered.

Dated at Mwanza this 10th day of August 2022




M. MNYUKWA
JUDGE

Court: Ruling delivered in the presence of the parties' counsels.



M.MNYUKWA

JUDGE

10/08/2022