**IN THE HIGH COURT OF TANZANIA**

**(MWANZA DISTRICT REGISTRY)**

**AT MWANZA**

**MISC. CIVIL APPLICATION NO.117 OF 2022**

**CHARLES MARWA.....APPLICANT**

**VERSUS**

**VIOLETH SISTY CHUWA.....1ST RESPONDENT**

**BONIFACE NGILI SAYI.....2ND RESPONDENT**

**MISUNGWI DISTRICT COUNCIL.....3RD RESPONDENT**

**COMMISSIONER FOR LANDS.....4TH RESPONDENT**

**REGISTRAR OF TITLES.....5TH RESPONDENT**

**ATTORNEY GENERAL.....6TH RESPONDENT**

**RULING**

*Date of Last Order:03/11/2022*

*Date of Ruling: 07/11/2022*

## Kamana. J:

Charles Marwa, the Applicant, has filed this Application under certificate of urgency under section 2(3) of the Judicature and Application of Laws Act, Cap. 358 [RE.2019] and section 95 of the Civil Procedure Code, Cap.33 [RE.2019]. The main relief sought by this Application is maintenance of *status quo* in respect of Plot No. 3, Block B located in Misungwi District, Mwanza Region pending institution of the Civil Suit against the Respondents Violeth Sisty Chuwa, Boniface Ngili

Sayi, Misungwi District Council, Commissioner for Lands, Registrar of Titles and the Attorney General.

The Application is supported by the affidavit sworn by Charles Marwa, the Applicant. It is countered by the counter affidavit taken by the 1st Respondent Violeth Sisty Chuwa. Further, there was a joint Counter Affidavit of 3rd, 4th, 5th and 6th Respondents sworn by Chiyenegere Wandore, learned State Attorney.

Briefly, the facts that led to this Application are to the effect that the Applicant intends to file a suit seeking rectification of the Land Register with regard to Plot No. 3, Block B located in Misungwi District, Mwanza Region which he claims to own after purchasing the same from the 2nd Respondent. It is his contention that the 1st Respondent has been registered by land authorities as the owner of the said Plot. On her part, the 1st Respondent claims to own the Plot in question after purchasing the same at the Public Auction organized and conducted by Access Microfinance Bank (T) Limited and Boston Auction Mart and General Agency Co. Ltd respectively. It is her position that the said Plot

was auctioneered after the 2nd Respondent failed to settle his loan on which the Plot in question was a collateral.

At the hearing of the Application, the Applicant was represented by Mr. Stephen Kitale, learned Counsel. Mr. Amos Gando, learned Counsel represented the 1st Respondent. Mr. Wandore, learned State Attorney represented 3rd, 4th, 5th and 6th Respondents. The 2nd Respondent did not enter appearance.

Mr. Kitale, learned Counsel prefaced his submission by referring this Court to the case of **Newsmaster Corporation Ltd v. Attorney General and Others**, Misc. Land Application No.42 of 2022. In that case, the Court reiterated three conditions that should be met before the Court issuing an order for maintenance of *status quo*. The conditions as per the cited case are existence of a prima facie case with a probability of success, the likelihood of the Applicant to suffer irreparable loss which cannot be compensated in damages and the balance of convenient. The Court stated:

> *'It is therefore, apparent from the above quotation that mareva injunction can be granted where an applicant has successfully established a prima facie*

*case with a probability of success. An injunction will not normally be granted unless applicant might otherwise suffer irreparable loss, which could not be compensated in damages. But however, when the Court is in doubt it will decide the application sought on the balance of convenience.'*

Starting with first condition that there must be a *prima facie* case with a probability of success, Mr. Kitale contended that in Paragraphs 1 and 2 of the affidavit, the Applicant has raised a triable issue. It was his observation that the Applicant intends to file a suit with a view to seeking orders of this Court to the effect of rectifying the Land Register in respect of Plot No. 3 Block B Title No. 87075 located in Misungwi District.

The learned Counsel submitted that the Applicant is a lawful owner of the Plot which he purchased from the 2nd Respondent. To substantiate his arguments, the learned Counsel referred this Court to the annexed Agreement between him and the 2nd Respondent. Despite that purchase, the learned Counsel submitted that the said Plot was

registered in the name of the 1st Respondent by the 3rd, 4th and 5th Respondents. In that case, Mr. Kitale averred that after the expiry of 90 days notice issued pursuant to the Government Proceedings Act, Cap. 5, his client will file a suit for that purpose of rectifying the Register.

Responding, Mr. Gando, learned Counsel for the 1st Respondent prefaced by subscribing to the three conditions for the order of maintenance of *status quo* to be issued. However, he contended that there is no a triable issue as the 1st Respondent is a legal owner of the said Plot after purchasing the same at the public auction organized by Access Microfinance Bank (T) Ltd following loan default on the part of the 2nd Respondent. He averred that the said Plot was a collateral for securing the loan issued by the Bank to the 2nd Respondent. To bolster his arguments, the learned Counsel referred this Court to Paragraph 7 and annexure 3 of the Counter Affidavit. Paragraph 7 of the Counter Affidavit is to the effect that the Applicant bought the Plot in question when the same was already pledged by the 2nd Respondent as a security for the loan issued to him by the Bank. Annexure 3 is a letter from Misungwi District Council informing the Applicant what is reflected in Paragraph 7 of the Counter Affidavit.

Reacting on whether there is a triable issue or otherwise, Mr. Wandore, learned State Attorney while admitting that there is a triable issue, he was of the opinion that the issue is a not a serious one to fit within the ambits of the conditions set for the order for maintenance of status quo to be issued. He was of the view that in the exclusion of the purchase agreement, the Applicant does not have sufficient evidence to prove his ownership taking into consideration the fact that he has never been in possession of the disputed Plot. The learned State Attorney submitted that the 1st Respondent has overwhelming evidence to prove her ownership of the land in question.

When rejoining, Mr. Kitale reiterated his argument and stressed that the issue of rectification of the Land Register is a legal issue as per section 99(f) of the Land Registration Act, Cap. 334. According to that section, as the learned Counsel contended, if there is an error in the Land Register, the aggrieved party may file a suit in the High Court with a view to seeking the rectification of the Register.

In determining whether there is a triable issue or otherwise, this Court warned itself that the same is not a proper forum to determine the merits of the triable issue as the learned Counsel for both parties found themselves arguing in that line. Having gone through the affidavit of the Applicant and the Counter Affidavit as filed by the 1st Respondent, I am of the settled view that there is serious triable issue. I hold so after taking into consideration the fact that both parties have documents that purport to establish their ownership of the disputed Plot. Whether the Applicant or 1st Respondent is the legal owner of the disputed Plot, that is not the domain of this Court.

Submitting on the second condition that the Applicant stands to suffer irreparable loss which cannot be compensated in damages, the learned Counsel for the Applicant referred the Court to paragraph 4 of the affidavit in which the Applicant testifies that the 1st Respondent has commenced construction on the said Plot including demolishing existing structures, cutting of shading trees and degrading the environment and ecological functions on the disputed Plot. Mr. Kitale argued that the said structures and trees were part and parcel of land bought by his client to the tune of Tshs.38,000,000/-. He was of the view that the ongoing

construction and demolition and cutting of structures and trees respectively may cause irreparable loss which cannot be monetarily compensated. Further, in line with paragraph 5, the learned Counsel submitted that his client will suffer injury with regard to his reputation and goodwill if the order will not be issued. He averred that such injury can not be compensated with any amount of money. He summed up by contending that his client has managed to prove that he stands to suffer irreparable loss.

Averring on the second condition, Mr. Gando, learned Counsel for the 1st Respondent was of the position that the Applicant has failed to prove that he will stand to suffer loss irreparably. He was of the view that his client being the legal owner with a title, occupier and developer of the disputed Plot is the one who will suffer irreparable loss and not the Applicant. He averred that the Applicant has failed to adduce any evidence in support of his testification that there is ongoing destruction on the Plot. Mr. Gando stressed that the affidavit, though authoritative, in some instances there is a need to add additional proof by annexing the same to the affidavit. To buttress his argument, the learned Counsel referred this Court to the decision of this Court in the case of **Trustees**

**of Anglican Church Diocese of Western Tanganyika v. Bulimanyi Council and Others**, Miscellaneous Civil Application No. 1 of 2022. In that case, as argued by Mr. Gando, it was insisted that for the irreparable loss to be met there must be prima facie evidence. In that regard, the learned Counsel contended that the condition has not been met as there is no evidence as to the alleged destruction. He referred this Court to the case of **Christopher Chale v. Commercial Bank of Africa**, Miscellaneous Civil Application No. 65 of 2017 in which this Court observed that particulars of irreparable loss must be given for the Court to exercise its discretion.

Mr. Wandore, learned State Attorney submitted that the irreparable loss as alleged by the Applicant is reparable since the value of the house and trees is inclusive in the alleged purchase price as provided in the purchase agreement annexed to the Applicant's affidavit. He further argued that there is to evidence to establish that there is destruction on the disputed Plot.

Rejoining, Mr. Kitale, learned Counsel for the Applicant reiterated his position that his client will suffer loss irreparably. He averred that

cutting of trees and environmental and ecological degradation cannot be monetarily compensated.

At this point, I think it is pertinent to understand what irreparable loss means in the eyes of the law. The Essential Law Dictionary, Amy Hackney Blackwell, Sphinx Publishing, 1st Edition, 2008 did not define "irreparable loss" but defined "irreparable injury" which I take it to have the same meaning with "irreparable loss" as:

> *'An injury for which no adequate legal remedy exists, usually addressed by an injunction.'*

This Court had the opportunity of defining what irreparable injury means. In the case of **T.A Kaare v. General Manager Mara Cooperative Union** (1984) Ltd [1987] TLR 17, Mapigano, J (as he then was) stated:

> *'…by irreparable injury it is not meant that there must be no physical possibility of repairing the injury but merely that the injury would be material i.e one that could not be adequately remedied by damages.'*

From the cited definition, it is clear that for the Court to conclude that there is likelihood of the Applicant to suffer from irreparable loss, it should warn itself that the loss in question cannot adequately remedied by compensation. In Paragraph 4 of the affidavit, the Applicant stated:

> *'……The 1st Respondent took advantage of the situation and has started to develop the suit premise day and night by demolishing the house therein, cutting down shade trees and other trees (mentioned in sale agreement), this will lead to destruction of environment and ecological function will lost or definitely impaired.'*

Now, the issue I am invited to determine is whether the contents of paragraph 4 of the affidavit as quoted above connotate that the Applicant will suffer loss irreparably in the event that the prayed order will not be issued by this Court. I am of the considered view that for the Court to hold that the Applicant stands to suffer irreparable loss, the said Applicant must prove that the anticipated irreparable loss is a serious one and not frivolous and that the same cannot be monetarily compensated. In this, I am persuaded by the case of **SCI (Tanzania)**

**Ltd v. Gulam Mohamed Ali Punjani and Another**, Misc. Commercial Application No. 184 of 2020 in which my learned Brother Ismail, J stated:

> *'With regards to irreparable loss, the applicant is under the legal requirement to ensure that the loss to be prevented is evidently or manifestly irreparable. Moreover, the loss should be serious, not trivial, minor, illusory, insignificant or technical only.'*

As per paragraph 4 of the affidavit, the 1st Respondent is alleged to have started to develop the disputed Plot including demolishing existing structures. Despite the contention of the learned Counsel for the 1st Respondent that the Applicant did not prove that allegation, I am inclined to believe that since the disputed Plot is not in the possession of the Applicant, the 1st Respondent is as of now at liberty to execute anything on such Plot which will be detrimental to the Applicant in case the intended suit is decided in the Applicant's favour. I am further of the firm opinion that if the alleged demolition of the house and the cutting down of trees will take place, surely the Applicant will suffer irreparable loss.

Normally, courts have been issuing orders intending to monetarily compensate houses and trees but in actual fact such compensation is unequal to physical houses and trees. In this regard, I am fortified by the decision of the Court of Appeal in the case of **Deusdedit Kisisiwe v. Protaz B. Bilauri**, Civil Application No. 13 of 2001 in which it was stated:

> *'The attachment and sale of immovable property will, invariably, cause irreparable injury.* ***Admittedly, compensation could be ordered should the appeal succeed but money substitute is not the same as the physical house. The different between the physical house and money equivalent, in my opinion, constitutes irreparable injury.'*** *(Emphasis added).*

Mindful of the averment in paragraph 4 of the affidavit, the fact that the 1st Respondent is in possession of the disputed Plot and the above cited observation of the Court of Appeal, I am of the view that

the Applicant has successfully established that he stands to suffer irreparable loss if this Court will not order maintenance of *status quo*.

On the third condition, Mr. Kitale, learned Counsel for the Applicant submitted that his client is likely to suffer hardship as compared to the 1st Respondent who at the time of this Application is in the possession of the disputed Plot. He averred that since the year 2020 when Land Application No. 212 of 2020 was instituted in the District Land and Housing Tribunal at Mwanza to sometimes in 2022 when the Application was withdrawn, there was an injunctive order with regard to the disputed Plot. In view of that the 1st Respondent will not suffer much as compared to the Applicant if this Application will be granted.

On the other hand, Mr. Gando, learned Counsel for the 1st Respondent observed that his client will suffer hardship compared to the Applicant. He reasoned that since his client is in possession of the land in question and has a title over it if there is any destruction the same will be monetarily compensated by 1st Respondent.

Mr. Wandore, learned State Attorney was of the position that it was incorrect on the part of the learned Counsel for the Applicant to allege that at the time of withdrawing the Land Application there was an injunctive order as the same expired on 7th February, 2021. In that case, he submitted that from 8th February, 2021 up to the withdrawal of the said Application there was no order restraining the 1st Respondent from developing the land in question. When rejoining, Mr. Kitale reiterated his position he made in submission in chief.

Starting on whether at the time of withdrawal of the Land Application there was an injunctive order, I reproduce such order dated 6th October, 2022 as follows:

> *'Kwa maafikiano ya mawakili wote pamoja namdaiwa Namba 1, shauri hili limeondolewa kama walivyoomba na pia countrt claim Pamoja na Amri ya zuio vinakufa, kila upande ubebe gharama zake.*
>
> ***MURIRYA N.***
>
> ***MWENYEKITI***
>
> ***06/10/2022'***

Without much ado, I take judicial notice of the withdrawal order of the Mwanza District Land and Housing Tribunal and conclude that up to 6th October, 2022 there was in force an injunctive order.

Having weighed arguments of both legal minds with regard to balance of convenience, I am satisfied that the Applicant will suffer more hardship than the 1st Respondent if the Application will not be granted. This is due to the fact that the disputed land is now occupied by the 1st Respondent who is capable of causing irreparable loss to the Applicant if this Court refuses to grant the Application.

Consequently, I grant the Application without costs and order maintenance of *status quo* pending hearing and determination of an application for temporary injunction. It is so ordered.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MWANZA DISTRICT REGISTRY

**KS Kamana**

**JUDGE**

**07/11/2022**

The Ruling delivered this 7th day of November, 2022 in the presence of learned Counsel for both parties.

**KS Kamana**

**JUDGE**

**07/11/2022**