

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MUSOMA DISTRICT REGISTRY
AT MUSOMA**

MISC. CIVIL APPLICATION NO. 45 OF 2022

BETWEEN

WEREMA MWITA MARIANGWE..... 1ST APPLICANT
MAGOIGA MARIGIEI..... 2ND APPLICANT
TUMAINI ABEL MASANJA..... 3RD APPLICANT
ABEL MASANJA YAHIRITA..... 4TH APPLICANT
LOYCE MUSHUMBA..... 5TH APPLICANT
KULWA M. JOSEPH..... 6TH APPLICANT
NCHAGWA MRONI..... 7TH APPLICANT
MAGRETH SLYVESTER..... 8TH APPLICANT
PASCHALIA SLYVESTER..... 9TH APPLICANT
MWITA MWIKWABE..... 10TH APPLICANT
MARWA WEREMA..... 11TH APPLICANT
DAUDI CHRISTOPHER MASAI..... 12TH APPLICANT
SIMON CHACHA SAGUGE..... 13TH APPLICANT
GIDION G. MURIAN..... 14TH APPLICANT
BHOKE MRONI..... 15TH APPLICANT

VERSUS

TOWN DIRECTOR OF TARIME TOWN COUNCIL.....1ST RESPONDENT
ATTORNEY GENERAL.....2ND RESPONDENT

RULING

16th & 16th December 2022

M. L. Komba, J.:

The applicants has filed this application seeking for temporary injunction order restraining respondents and/or her agents from construction of the school building in the suit land situated in Tarime occupied by the applicants pending hearing and determination of the main suit and waiver of 90 days notice to respondents. The application has been brought by way of chamber summons made under Order XXXVII Rule 1 and Section 95 of Cap, 33 RE 2019. Applicant also seek the waiver of 90 days requirement for the 1st respondent.

Gist of this application is that, applicants are the occupiers of the suit land located at Kebikiri Street in Turwa Ward at Tarime Township. Sometimes in October, 2022 surprisingly they saw construction is taking place in the suit land without their permission nor their consent. Upon follow up, they were informed by Town Director of Town Council that the place has been planned for schools. Being dissatisfied by respondents activities over the disputed piece of land, applicants filed Land case No. 19 of 2022.

During the hearing of this application, the applicants were represented by Mr. Joseph Rhobi M. an advocate while the respondents were enjoying the service of Mr. Haruna Mustapha Matata, learned State Attorney.

The issue for determination before this court is whether the application meets the conditions for granting of temporary injunction.

- Arguing in support of the application, Mr. Rhobi, adopted joint affidavit of
- his colleague Upendo (Adv) filed in favor of the applicants on 14th December 2022 to form part of his submission. Taken in its totality, the applicants pray for issuance of temporary injunction as there is a pending suit which may be defeated if the temporary injunction is not granted. He further argued that, applicants believe the area in dispute belong to them.

He referred this court to the case of **Atilio vs. Mbowe** (1969) HCD at 284 which laid down three principles to be trailed before issuing temporary injunction. Before arguing on the case cited, Mr. Rhobi cited a Book of Halsbury's Law of England at paragraph 955 that the author was analysing the case of **Atilio Vs Mbowe** to the effect that the existence of the main suit is enough to grant the prayer. He further cited the case of **American Cyananid Company vs. Ethcon Limited (4) 510** where his Lordship Diplock insisted the existence of the main suit in issuance of temporary injunction.

He said possessors has the right to economic value of the place although he supports good intention of the Town Director. Development over the disputed land started in October and it is his believe that applicants has a chance to win in main suit if so, and if the Government will fail to compensate applicant, the school will be demolished and it will cause loss to the

Respondents. On the second prayer it was his submission that they pray for the waiver due to the speed of construction at the disputed land. He informed the court that all parties have been served but they can't tolerate to wait for the expiration of the time needed. He finalized by asking this court to grant both injunction and waiver of 90 days, costs and any other relief deem fit by this court.

In reply thereto, Mr. Matata on behalf of respondents he submitted that 90 days notice is creature of law and he don't think if the court can decide contrary to the law and he prayed the same not to be granted.

Further to other prayer, he submitted by joining hand in the cited case of **Atilio** that before the Court can grant the injunction all three elements must be proved in affirmative. He said on the second element of existence of irreparable loss it was not indicated in the affidavit. However, according to him this is a loss which cannot be adequately compensated. He further submitted that there was no structure at the area where the construction is taking place and if the applicants will win in the main suit, compensation to the value of the suitland can be made after valuation so the loss if at all will be met can be compensated. Finally, on the last element on balance of convenient he said if the prayer will be granted it will affect respondents rather than applicants. In determining the balance of convenience, one

- should ask what will happen if the prayer will not be granted or how will the
- applicants be affected if the prayer will not be granted.

Mr. Matata submitted that respondents will be much affected as there are eight (8) classrooms at site, three among them roofed and other in various stages, the school intend to enroll around 100 students and it intends to start its operation in January, 2023. He insisted that for a party to be granted temporary injunction all elements must be proved and pray the court to dismiss the application with costs.

When given an opportunity to rejoin, Mr. Rhobi he agrees that 90 days' notice is statutory and they complied by serving the relevant authorities but he prays for waiver and said section 2 and 6 of Cap 358 give this court description. On three elements as listed in **Atilio case** he said the main suit is in existence, applicants were not consulted before the construction and therefore there is a loss and the balance of convenient has been proved. He reiterates his prayers as in submission in chief.

I have keenly followed the submissions advanced by both parties in this application. The duty of this court is to decide whether the application has merit.

Starting with the application for waiver of 90 days notice, it is true that is the requirement of the law but nature of this application demand this court to invoke S. 2 of Cap 358 and considering the common law and the doctrine of equity, as the construction of the school is still under the way, the 90 days requirement is waived so that the main suit can be heard and determined on merit.

On a second prayer, injunction is a court order that is valid for the duration of the legal proceedings where the court orders a party to do or not to do something until the parties are heard in a trial when there is an emergency of some kind. For the court to issue a temporary injunction, the moving party must show that without the injunction irreparable loss will be caused and there are no other proper legal remedies available to deal with the issue.

As the application before the court is for a temporary injunction, there are guiding principles as rightly submitted by the counsel for which the applicants have to meet for an order of temporary injunction to be granted. I will start by stating the said principles which were established in a number of cases. Just to mention the few. The cases of **Atilio V. Mbowe** (supra), **Giela Vs. Cassman Brown & Co. LTD** (1973) E.A 358, and **Gazelle Trucker Ltd Vs. Tanzania Petroleum Development Corporation**, Civil Application No, 15 of 2006. The said principles are:

1. That on the facts alleged there must be a serious question to be tried by the Court and a probability that the Plaintiff /Applicant will be entitled to the relief prayed for in the main suit;

2. That, the temporary injunction sought is necessary in order to prevent some irreparable injury be falling Plaintiff/Applicant while the main case is still pending; and

3. That, on the balance, greater hardship and mischief is likely to be suffered by the Applicant if temporary injunction is withheld than maybe suffered by the Defendant if the Order is granted.

It is the position of the law that all the above principles must be met consecutively by the applicant for an order of temporary injunction to be granted.

With regards to the application before this Court for the first principle that, on the facts alleged **there must be a serious question to be tried by the Court** and a probability that the plaintiff/applicant will be entitled to the relief prayed for in the main suit, the court is aware that applicants have instituted the suit (Land case No. 19 of 2022) which is pending before this court. I find that the first principle as to the order sought by the respondents has been met.

For the second principle that, the temporary injunction sought is necessary in order to prevent some irreparable injury/loss be falling to the applicant while the main case is still pending; the applicants claimed that, there is a danger to suffer irreparable loss if the prayer sought is not granted but the

same was not pleaded in affidavit neither annexed any evidence nor any elaboration was given to prove that they have interest over the land which the school is under construction. As rightly submitted by Mr. Matata, irreparable loss is a loss which cannot be adequately compensated, there was no structure at the area which the construction is taking place and if all applicants will win in the main suit, compensation to the value of the land can be made after valuation so the loss if at all will be met, can be compensated. From the submission the second element is not proved.

Referring to the third principle that, on the balance, greater hardship and mischief is likely to be suffered by the respondents if temporary injunction is granted as the school construction will stop and the enrolment of students will be affected. How will the applicants suffer? this question fail to get an answer as the applicants are not in occupation of the disputed land, the area had no permanent structure serve for the ownership which will be determine in the main suit. Again, this element did not pass the test as set by **Atilio case**.

As well submitted and analysed, there is a land dispute which presupposes the existence of prima facie case and therefore a triable issue. There is no damages to properties especially the area under construction was bare land and lastly, on the balance of convenience, the respondents is likely to suffer

more than the applicants as when the issue of ownership will be determined, then the matter will take its cause.

As is not proved who is the rightful owner of the disputed land, the application did not pass the test set by **Atilio case**. I have no other option than to decline to issue the injunction as prayed.

I make no order as to costs as this ruling do not determine the matter in conclusive.

It is so ordered.




M. L. KOMBA

JUDGE

16th December, 2022