

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
MISC. LAND APPLICATION NO. 18 OF 2021
(Arising From Land Case No. 9 of 2021)**

**REGISTERED TRUSTEES OF THE MORAVIAN
CHURCH IN SOUTHERN TANZANIA.....APPLICANT**

VERSUS

**DAR ES SALAAM CITY COUNCIL.....1ST RESPONDENT
THE COMMISSIONER FOR LANDS.....2ND RESPONDENT
THE ATTORNEY GENERAL.....3RD RESPONDENT**

RULING

Date of Ruling: 15/12/2021
Last order: 8/2/2022

MASABO, J.:-

Through the service of Mr. Barnaba Lugua, learned counsel, the Registered Trustees of the Moravian Church in Southern Tanzania have moved this court by way of chamber summons filed under Order XXXVII of the Civil Procedure Code, Cap 33 RE 2019 vide which they are praying for an injunctive order restraining the respondents from issuing offers or rights of occupancy in parcels of land identified as Plot Nos. 160, 161, 163, 176, 181 and 182 Block "B" Part II Tabata Liwiti area in Dar es

Salaam to any person pending determination of Land Case No. 9 of 2021 currently pending before this court.

Accompanying the chamber summons is an affidavit deposed by Rev. Sauli Kajura who is identified as the chairman of the Board of the Applicant. The following facts are discernible from this affidavit: The applicant currently occupies the disputed plots having acquired the same from the late Mohamed Kiponda and his Wife, Bi Halima Mohamed Kiponda and one Simwana Mwinyimkuu. The consideration price for the suit premises was paid partially in cash and in kind whereby, the applicant constructed a residential house for the vendors. Having furnished the consideration in full, the applicant moved the respondent for formal allocation and registration of the plots in her name but the same was halted due to existence of a law suit (Land Case No. 95 of 2016 between **Tanzania Zambia Railways Zambia Railways Authority v The Registered Trustees of Moravian Church in Southern Tanzania, Ilala Municipal Council, The Commissioner for Lands and The Attorney General**) which ended on 17th April 2020 after the plaintiff withdrew it with leave to refile. Surprisingly, even after the

termination of the suit, the respondents have refused to proceed with the allocation and registration and as a result the applicant instituted **Land Case No. 09 of 2021** now pending in this court. In paragraph 10 of the affidavit, it is deponed that the applicant who has been in occupation of the said land for the past 15 years stands to suffer an irreparable loss and great inconvenience if the application is not granted. Its congregation's programs will be adversely affected as there will be no enough land left for the church.

On their part, the respondents objected through a counter affidavit deponed by Adelaida Camilius Lekule, learned State Attorney representing all the respondents in which it is deponed that the disputed land was never owned by the said Mohamed Kiponda, his wife, Bi Halima Mohamed Kiponda or their sister one Simwana Mwinyimkuu. Rather it was primarily and legally owned by the **Tanzania Zambia Railways Zambia Railways Authority** (TAZARA) who sold the same to her employees in 2007. Thus, it was not possible to have the suit premisses registered in the applicant's name.

Hearing proceeded in writing. Both parties had representation. For the applicant Mr. Chevawe Charles Mberesero, learned counsel, reiterated the averments made in the affidavit and proceeded to submit that the refusal by the respondents to formally allocate the suit premises to the applicant and their intention to allocate the same to other people is unjustified and prejudicial to the applicant's interest as she not only lawfully acquired the premises by furnishing full consideration to the original owners but she currently occupies the said land. He argued further that much as there was an attempt by the Government to acquire the said plots from the owners with the purpose of allocating the same to TAZARA, this process was incomplete as the 1st Respondent and its mother ministry declined to compensate the owners whereas on the other hand, the applicant furnished consideration to the owners of the land hence legally acquired a legal interest/right over the suit premises.

He then proceeded that, there are three reasons why the injunctive orders should be granted, namely preventing the suit from being rendered nugatory, long-term occupation of the suit premises and balance of convenience. On the first ground he argued that a temporary

injunction can issue where it is proved that the disputed premise is in a danger of being wasted, damaged or alienated by and party to the suit or is in danger of suffering loss of value owing to the continued use by any of the parties. He added that it may also issue where the defendant threatens or intends to remove or disposed of the property. He argued further that, since an order for temporary injunction cannot issue against the Government this court be pleased to make declaratory orders that the allocation of the suit premises to other persons will be prejudicial to the applicant's interests. Further, it was argued that the impending allocation of the suit premises to other persons will render the pending case nugatory as the suit premises will possibly change hands prior to the completion of the suit. Consequently, if the applicants emerge successful in the main suit, they will have difficulties in executing the decree as the ownership of the suit premise may have changed hands and vested into other persons who are alien to the suit.

It was then argued that, it is in the interest of justice that the application be granted as the applicant has been in occupation of the suit premises for a long time. Any adverse decision may lead to her eviction prior to the

conclusion of the pending suit. In support of this point, the case of **CIRA Kimoka v Surumbu Axweso** [2002] TLR 255 was cited. Lastly it was argued that on the balance of convenience, the applicant stands to suffer more than the respondent if the injunction is withheld as they are in occupation of the suit premises and any eviction may cause a serious inconvenience on them compared to the respondent who are not in occupation of the suit premises.

Submitting in reply, Mr. Mberesero started by challenging the applicant's submission for having been premised on wrong a provision. Let me outright state that, I will neither accord a full attention or dwell further on this point as the mistake is merely clerical. In my settled view, dwelling on this issue will serve no purpose other offending the principle of overriding objective under which this court and courts of all hierarchy in our jurisdiction are enjoined to administer substantive justice and not to be bogged down by technicalities.

On the merit of the application, Mr. Mberesero cited the case of **Atilio vs Mbowe** [1969] HCD 284 and submitted that, there are three criteria

upon which to exercise the discretionary powers to grant injunction, namely, there must be a serious triable issue between the parties; the courts interference is necessary to prevent an irreparable injury likely to occur and third, on the balance of convenience the applicant stands to suffer than the respondent. On the first criteria, the case of **Colgate Palmolive v Zakaria Provision Stores and Others**, Civil Case No. 1 of 1997 was cited in support of the point that it is a mandatory requirement for the applicant to prove that there exists a serious triable issue between her and the respondent. It was further stated that, the applicant did not pass this test as she failed to demonstrate how she become the owner of the suit premise. It was further argued that, the applicant has failed to demonstrate the irreparable loss she is likely to suffer if the injunction is rejected and she has failed to show that the balance of convenience tilts heavily against her compared to the respondent. Lastly, the case of **Charles D. Msumari & 83 others v The Director of Tanzania Harbours Authority, Civil Appeal No. 18 of 1997** was cited in support of the argument that for the injunction to issue, all the above certain above must be satisfied. This marked the end of submissions.

I have importunately considered the submissions ab. Temporary injunctions are governed by Order XXXVII rule 1 which state that:

Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit or suffering loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree; or

(b) that the defendant threatens, or intends to remove or dispose of his property with a view to defraud his creditors,

the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of the property as the court thinks fit, until the disposal of the suit or until further orders:

Provided that, an order granting a temporary injunction shall not be made against the Government, but the court may in lieu thereof make an order declaratory of the rights of the parties.

The rationale for temporary injunctive orders was stated in **American Cyanamid Co. V. Ethicon Ltd** [1975] 1 All ER 504 at p.509 Per Lord

Diplock) as cited in **Hotel Tilapia Ltd v. Tanzania Revenue Authority**, Commercial Case No. 2 of 2000 (unreported). In this case, Lord Diplock held that:

"... The object of the temporary injunction is to protect the plaintiff against injury by violation of his right for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favour on the trial...."(at p.509)

Also, as correctly submitted by the learned State Attorney, in our jurisdiction, the criteria employed in determining applications for temporary injunction were elucidated by Georges, C. J in the landmark case of **Atilio vs Mbowe** (supra) where it was stated that before granting prayers for temporary injunction the court must be satisfied that:

- i. There is a serious question to be tried on the facts alleged and the probability that the plaintiff will be entitled to the relief prayed.
- ii. the Applicant stands to suffer irreparable loss requiring the courts intervention before the Applicants legal right is established;
- iii. that on the balance, there will be greater hardship and mischief suffered by the plaintiff from

withholding of the injunction than will be suffered by the defendant from granting of it.

For a temporary injunction to issue, all the three criteria must be proved as held in *Chalres D. Msumaru & 83 others v The Director of Harbours Authority (supra)* where this court emphatically stated that:

Courts can not grant injunction simply because they think it is convenient to do so. Convenience is not our business. Our business is doing justice to the parties. They only exercise this discretion sparingly and only to protect rights or prevent injury according to the stated principles. The courts should not be overwhelmed by sentiments, however lofty or mere high driving allegations of the applicants such as that the denial of the relief will be ruinous and cause hardship to them and their families without substantiating the same. They have to show that they have a right in the main suit which ought to be protected or there is an injury (real or threatened) which ought to be prevented by an interim injunction and that if that was not done, they would suffer irreparable injury and not one which can possibly be repaired.

In the instant case, regarding the first criterion, as alluded to earlier on, there is a pending suit between the parties herein. In this suit, Land Case No. 9 of 2021, the parties herein contend over ownership of the suit premises above listed. What remains to be determined is whether the dispute between the parties constitutes a serious triable issue. The law is now settled that, at this stage all what the applicant should demonstrate is existence of a prima facie case/triable issue between her and the respondent. As stated in **Colgate Palmolive v. Zakaria Provision Stores and Others** (supra), it suffices at this stage for the applicant to demonstrate that he has a case worth consideration and that there is a likelihood of the suit to succeed.

Looking the affidavit and its annexures, I am convinced that the applicant has ably demonstrated that there exists a triable issue between her and the respondents as to whether she holds any right or interest over the suit premises. I respectfully differ with the learned State Attorney's submission that the applicant has failed to demonstrate how she acquired the right/interest in the suit premise as, in my strong view, this has been well asserted in the affidavit filed in support of the application. Through

the affidavit, the applicant has demonstrated how she acquired the said premises by way of purchase and after furnishing the full consideration to the late Mohamed Kiponda, Bi Halima Mohamed Kiponda and Simwana Mwinyimkuu who were the original owners/occupiers of the suit premises. It remains to be determined in the main suit whether or not a legal interest/right was passed unto her through this process. This question cannot be determined at this stage. It can only be determined after a full trial in the main suit. Endorsing the view expressed by the learned state Attorney will undeniably amount to exaggeration of this legal requirement beyond proportional heights and would entail prematurely determining the main suit as held in **Suryakant D. Ramji vs Savings and Finance Ltd and others**, Civil Case No. 30 of 2000 HC (Commercial Division) at Dar es Salaam(unreported). Regarding the 2nd and 3rd criteria, this court is of the considered view that, the applicant has through her affidavit ably demonstrated that the balance of convenience tilts heavily against him. The eviction impending from re-allocation of the premises to other persons, will certainly have a heavy toll on the occupiers of such premises and would render the suit nugatory.

To prevent such suffering and for the other reasons demonstrated above, I allow the application and subsequently declare that the allocation/registration of the suit premise to other persons will be prejudicial to the applicant's interest/right which await to be finally determined by this court in Land Case No. 9 of 2021. Accordingly, the respondents are restrained from issuing offers/registering the plots in names of other persons pending determination of the main suit. The restraint shall remain valid for a period of 6 months. Costs to be shared by the parties.

DATED at DAR ES SALAAM this 8th day of February 2022.

X



Signed by: J.L.MASABO

J.L. MASABO

JUDGE

