

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 11 OF 2021**

(Arising from Land Case No. 01 of 2021)

**JUSTIN MILLYOONI KIBONA MALLYA..... APPLICANT**

**VERSUS**

**JULIUS MAGANGA.....1<sup>ST</sup> RESPONDENT**

**MAKAZI SOLUTION (T) LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

*Date of last Order: 15/12/2021.*

*Date of Ruling: 18/02/2022.*

**E.E. KAKOLAKI, J**

This ruling is seeking to address the applicant's prayer for grant of an order of injunction to restrain the Respondents, their agent, servants, assignees, workmen or any other person working under their instruction, from continuing with exercise of survey and planning and or dispose the already demarcated plots from the Applicant's property, measuring Five Hundred (500) acres situated at Muhimbili area, Pemba Mnazi ward, Kigamboni Municipality (formerly known as Tundwi Sogani Village Temeke Municipality),

Dar es salaam pending hearing and determination of the main suit filed in this court. The application which has been strenuously resisted by the respondent through the counter affidavit and supplementary counter affidavit of the 1<sup>st</sup> Respondent as well as counter affidavit of the 2<sup>nd</sup> Respondent is preferred under Order XXXVII Rule 1(a) and (b) of the Civil Procedure Code, [Cap. 33 R.E 2019] referred herein as CPC and any other enabling provision of the law). Hearing of the matter proceeded by way of written submission and both parties are represented. The applicant hired the services of Harrison Lukosi learned advocate while the 1<sup>st</sup> and 2<sup>nd</sup> respondents enjoyed the services of Mr. Victor Ntalula and Mr. Shundu Mrutu respectively, both learned counsels.

The facts giving rise to this application can be briefly narrated as hereunder. The applicant who claims ownership of the land measuring Five Hundred (500) acres located at Muhimbili area, Pemba Mnazi ward, Kigamboni Municipality, Dar es salaam through sale agreement executed on 10/04/2004 before this court has sued both respondents for encroachment of his land and conduction of survey, planning and or demarcation of plots therein vide the survey plan No. E 332/447, and Registered plan No. 89755, 89756 and 89757. It is from that filed suit in Land Case No. 01 of 2021, the applicant

has preferred this application which is contested by both respondents, as the 1<sup>st</sup> respondent who is also claiming ownership of the said disputed land asserts to have disposed it to the 2<sup>nd</sup> respondent hence unmeritorious application by the applicant.

As alluded to above the applicant is seeking for an injunctive order against the respondents. What is gleaned from both parties is that, they are at one on the applicable principles or tests for grant of injunctive orders as well spelt in the famous case of **Atilio Vs. Mbowe** (1969) HCD 284 and restated in a number of cases some of which are **CPC International Inc. Vs. Zainabu Grain Millers Ltd**, Civil Appeal No. 1999 (CAT-unreported), **Vodacom Tanzania Public Limited Company Vs. Planetel Communications Limited**, Civil Appeal No. 43 of 2018 (CAT-unreported), **Christopher P. Chale Vs. Commercial Bank of Africa**; Misc Application No. 635 Of 2017 (HC-unreported) and **Urafiki Trading Agencies Ltd and Another Vs. Abbasali Aunali Kassam and 2 Others**, Misc. Civil Application No. 53 of 2019 (HC-unreported). 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 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; and*
- 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.*

What remains in contest, is whether the applicant has managed to meet all those tests as it is also the law that, all three conditions set out must be met since meeting one or two of the conditions only will not be sufficient for the purpose of the court exercising its discretion to grant an injunction. See the case of **Christopher P. Chale** (supra). In this matter, the applicant is asserting to have met all three tests. In this ruling, I am intending to address one test after another as canvassed by the parties. Submitting on the first test, Mr. Lukosi while adopting the applicant's affidavit argued that the applicant claims ownership of the disputed land which he purchased as deposed in paragraph 2 of the affidavit in which also the 1<sup>st</sup> respondent claims its title. That, in the main suit, the applicant is seeking to prove to the court that, he is a lawful owner and not the respondents who interfered with his land, thus this court's interference is necessary to determine whom the ownership of the land is. He reinforced his argument with the case of **Freda**

**Andrew Kaiza and 2 Others Vs. Nassoro Mshewa and 40 Others,**

Misc. Land Application No. 332 of 2021 (HC-unreported) where it was held that since there was a complaint by the applicant of the respondents trespassing his land that assertion sufficed to show there was triable issue that required interference of the court. He therefore invited the court to find the first test was met. In response Mr. Ntalula for the 1<sup>st</sup> Respondent is of the contrary view arguing that apart from this court being moved without citing the provision of section 95 of the CPC, the applicant has failed to meet the first condition as the disputed land belongs to the 1<sup>st</sup> respondent, who acquired it through village land allocation procedure and has already disposed it of to the 2<sup>nd</sup> respondent after survey and plan were processed, following authorization by the Commissioner for Land upon satisfaction that, the 1<sup>st</sup> respondent was a lawful owner of the disputed land as deposed in paragraph 5 of 1<sup>st</sup> respondent's counter affidavit. Thus there was no arguable case Mr. Ntalula stressed while moving the court to so find. As regard to the 2<sup>nd</sup> Respondent Mr. Mrutu submitted that, the disputed land belongs to the him (2<sup>nd</sup> respondent) as he purchased it from the 1<sup>st</sup> respondent through a sale agreement dated 09/07/2019. He added, even if parties are at issue as

to who is the lawful owner, that alone cannot meet the criteria for granting the prayer sought in the chamber summons.

Upon chewing the rival submission of both applicant and 1<sup>st</sup> respondent, I am convinced that, the appellant has managed to meet the first test for relying on the sale agreement executed in 2004 to claim ownership of the disputed land which title is also claimed by the 1<sup>st</sup> appellant who further allege to have passed it to the 2<sup>nd</sup> respondent through sale. However, the submission by the 1<sup>st</sup> respondent is contradicted by what he deposed in paragraph 5 of supplementary counter affidavit that, he is in the process of disposing the land to the 2<sup>nd</sup> respondent, meaning that the disposition is incomplete. Now who is the owner to the said contested land, I find is an arguable case or serious issue calling for interference and determination by this court, as it will be premature to determine the chances of success of the applicant's main case at this stage particularly, where both parties are claiming title over the land with documentations.

Next for consideration is the second condition whether it is necessary to grant the application for prevention of irreparable injury to the applicant/plaintiff, pending determination of the main suit. In this Mr. Lukosi intimated if grant of application is withheld, then the applicant will suffer

irreparable loss for loosing valid ownership of the suit property, as there is no measurable damages likely to be suffered by him after determination of the main suit. He relied on the case of **Mariam Christopher Vs. Equity Bank Tanzania Limited and Christopher Makindi Edward**, Misc. Land Case Application No. 1070 of 2017 (HC-unreported), where this court said, irreparable injury does not necessary mean absence of physical reparation but merely injury that would be material such as one that could not be adequately remedied by damages. Contrary view is aired by Mr. Ntalula for the 1<sup>st</sup> respondent who contends, the 1<sup>st</sup> respondent acquired ownership of the suit land measuring 50 acres and thereafter disposed it of to the 2<sup>nd</sup> respondent, thus it is the 2<sup>nd</sup> respondent who will suffer more beyond monetary compensation, for having improved the land than the applicant would do as he can be monetary compensated. He added even the case of **Mariam Christopher** (supra) relied on by the applicant, supports 1<sup>st</sup> respondent's position on who will suffer irreparable loss if temporary injunction is granted. Mr. Mrutu for the 2<sup>nd</sup> respondent is at one with Mr. Ntalula in that, the 2<sup>nd</sup> respondent who is the bonafide purchaser has invested in the land already thus, standing higher chance to suffer irreparable loss. Considering the above fighting submission the issue before

this court for determination is whether an intervention by this court for issue of injunctive orders to the applicant is necessary to prevent him from the alleged injury pending determination of the main suit. What seems obvious to me is the fact that if the respondents are left to complete survey, planning, division and sale of plots of the disputed land to third parties after acquisition of title by the 2<sup>nd</sup> respondent, the applicant is likely to suffer loss that could not easily be remedied by damages should he emerge successful in the main suit than the respondents would do, particularly when the sold plots are already developed by the third parties to a large extent. To that end interference of this court is necessary under the circumstances. With that line of reasoning, I find the case of **Mariam Christopher** (supra) relied on by the applicant is relevant in this matter, and further hold, the second condition has been met by the applicant.

Lastly is the test as to whether on the balance of probabilities the applicant will suffer more than the respondents would do, should grant of injunction be withheld. It is Mr. Lukosi's contention that, on the balance of convenience the applicant is likely to suffer more inconvenience than the respondents would do if the grant of the prayer is withheld, as until the main case is determined, the title of the land might have moved to respondents and cause



more chaos to the applicant, unlike when injunction is issued where both parties' status will remain equal. Mr. Ntalula on this test reiterated his submission as argued in the second test above, and further stated if the order for temporary injunction is granted, respondents will suffer greater hardship and mischief than the applicant would do if the same is withheld. As for the 2<sup>nd</sup> respondent Mr. Mrutu argued, the submission by the applicant that he will suffer more hardship if the grant of injunction is withheld is a sham one, since he has never been in possession of the land in dispute unlike the 2<sup>nd</sup> respondent who has injected his capital on planning and surveying the area under the blessings of the Ministry for Lands, Human Settlement and Developments and Kigamboni Municipal Council. He said the authorities cited by the applicant are distinguishable to the facts of the present matter as the applicant is not the owner of the disputed land.

To start with the argument by Mr. Mrutu I would want to make it clear from the outset that, the issue of who is the owner of the disputed land is still at contest and pending for determination before this court as every party claims ownership. This court cannot believe parties stories of who is the lawful owner of the disputed land at this stage. What the court has to concentrate on is to establish the balance of convenience who will suffer the most should

the grant of temporary injunction be withheld. Upon considering both parties' submission, I am of the profound view that, the scale tilts on the applicant's side, meaning that, he will suffer the most if injunction order is withheld than the respondents would do. The reason is not far-fetched as it has been disclosed when determining the second test and concluded that, if the respondents are left to execute their plans which include disposition of the land to third parties, it will be difficulty for the applicant to be remedied by damages timely if not adequately, than position the respondents will be maintaining as there is no threat of disposition of land by the applicant. It was held in the case of **Leonard Nicholaus Seif Vs. Mohamed Ally Dalla**, Misc. Land Application No. 818 of 2018 (HC-unreported) that:

*"...there is no dispute that the purpose of granting temporary injunction is to prevent irreparable injury befalling on the applicant while the case is still pending."*

In light of the above cited case which I fully subscribe to the court has a duty to prevent the applicant where the circumstances are indicative that he is likely to suffer irreparable injury. In the present matter since the applicant has convincingly managed to meet all three conditions set for the grant of

temporary injunction, I find no difficulties in holding that this application has merit and the same is hereby allowed.

That said and done, I hereby proceed to grant the order of temporary injunction to the applicant as prayed in the chamber summons, by restraining the respondents, their agent, servants, assignees, workmen or any other person working under their instruction from continuing with exercise of survey and planning and or dispose the already demarcated plots from the Applicant's property, measuring Five Hundred (500) acres situated at Muhimbili area, Pemba Mnazi ward, Kigamboni Municipality, Dar es salaam pending hearing and determination of Land Case No. 01 of 2021 which is pending in this court.

I order each party to bear its own costs in this application.

It is so ordered.

DATED at DAR ES SALAAM this 18<sup>th</sup> day of February, 2022.



E. E. KAKOLAKI

**JUDGE**

18/02/2022.

The Ruling has been delivered at Dar es Salaam today on 18<sup>th</sup> day of February, 2022 in the presence of Mr. Moses Mwitete advocate holding brief for advocate Lucky Mgimba for the applicant, Mr. ViCtor Ntalula, advocate for the 1<sup>st</sup> Respondent, Mr. Elinihaki Kabura advocate for the 2<sup>nd</sup> Respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI  
**JUDGE**  
18/02/2022

