

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

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 458 OF 2021**

(Arising from Land Case No. 03 of 2021)

<b>OMARI KILALU</b> <b>BAKARI MPILI</b> <b>WAMBURA TUMBO</b> <b>JUMA MABRUKI</b> <b>NUNU MTINGE</b>	}	<b>APPLICANTS</b>
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**VERSUS**

<b>TEMEKE MUNICIPAL COUNCIL .....</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>ATTORNEY GENERAL.....</b>	<b>2<sup>ND</sup> RESPONDENT</b>

**RULING**

*Date of last Order: 14/12/2021.*

*Date of Ruling: 04/02/2022.*

**E.E. KAKOLAKI, J**

This application emanates from the Representative suit in Land Case No. 03 of 2021 where the applicants and 41 other fellows are suing the respondents for declaratory orders among others, that the applicants (plaintiffs) are lawful owners of the business cages, shops/frames situated at Tandika market within Temeke Municipality – Dar es salaam and that applicants have

the right to run the business affairs in Tandika Market and the 1<sup>st</sup> respondent's right is to impose and collect taxes and various levies according to the law. And for orders that, the respondent has no right and powers to acquire and then own or rent the said business cages, shops/frames for being owned by them and permanent injunction to restrain the 1<sup>st</sup> respondent from interfering with the rights of ownership of the said business cages, shops/frames.

In this application preferred under section 68(e) and Order XXXVII Rule 1 of the Civil Procedure Code, [Cap. 33 R.E 2019] supported by joint affidavit of the above mentioned applicants, applicants are therefore seeking for temporary injunction against the 1<sup>st</sup> Respondent, its workmen, servants, agents, or any other person acting under it from renting, the suit business frames to any person pending determination of the above mentioned main suit. On their side the Respondents filed the counter affidavit duly sworn by the principal officer of the 1<sup>st</sup> respondent resisting the application. Hearing of the application proceeded viva voce as both parties were represented. The applicants hired the services of Mr. Juma Nassoro learned advocate while the respondents represented by Ms. Janipher Msanga learned State Attorney.

During their submission both parties were at one that in applications for grant of temporary injunction like the present one the court is guided with three principles as enunciated in the celebrated case of **Atilio Vs. Mbowe** (1969) HCD 284 and restated in a number of cases such as **Noor Mohamed Van Mohamed Kassamali Virji Madani** (1953) 20 EACA 8, **E.A Industries Ltd Vs. Trufford Ltd** (1972) EA 20 **American Cyanamid Vs. Ethicon Ltd** (1975) 1 All ER 504, **CPC International Inc. Vs. Zainabu Grain Millers Ltd**, Civil Appeal No. 1999 (CAT-unreported) and **Vodacom Tanzania Public Limited Company Vs. Planetel Communications Limited**, Civil Appeal No. 43 of 2018 (CAT-unreported). And that all three principles/conditions must be met by the applicant for the court to exercise its discretion to grant the injunction. See the case of **Christopher P. Chale Vs. Commercial Bank of Africa**, Misc. Civil Application No. 635 of 2017 (HC-unreported). The said three principles or conditions according to **Atilio case** 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.

Submitting on the first condition Mr. Nassoro for the applicant intimated to the court that there was no dispute that the applicants are the ones who built and own the said business cages, shops/frames at Temeke Market in which the 1<sup>st</sup> respondent wants to disown them and rent to the third parties as the decision to acquire them was arrived at without availing them with the right to be heard, hence there is serious issue to be argued during hearing of the main suit. In response Ms. Msanga for the respondent argued that the applicant have failed to demonstrate to the court that there is no serious issue for determination by this court as they have been doing business without paying rent to the 1<sup>st</sup> respondent bearing in mind that she is the supervisor of landed property in which the disputed cages and shops/frames are situated. She thus prayed the court to find the condition is not met. It is noted in paragraph 3 of the counter affidavit that respondent

is disputing ownership of the said cages and shops/frames by the applicant deposing that they were built without obtaining permit from the 1<sup>st</sup> respondent who is the owner of the land. In other words the respondents are not disputing the fact that, it is the applicants who built the disputed cages and shops/frames. What remains in dispute is their ownership in which the applicants are seeking remedy of being declared as lawful owners in the main suit in Land Case No. 3 of 2021 as the 1<sup>st</sup> respondent is claiming to be the owner of the land in which they are built in. Who is the owner of the said disputed cages and shops/frames I find is a serious issue to be discussed and decided on by this court in Land Case No. 3 of 2021, hence agree with Mr. Nassoro that the first condition has been met.

As to the second principle Mr. Nassoro submitted that if injunction is not granted applicants stand to suffer loss irreparably as their lives are depending on doing business in those business cages and shops/frames. Ms. Msanga is of the contrary view when submitted that in fact it is the 1<sup>st</sup> respondent and not the applicants who are to suffer loss if injunction is issued as the applicants are not paying rents to the Municipal Council thus curtailing its developmental plans to the community. According to her the second condition is not met by the applicants. Upon perusal of both affidavit

and counter affidavit by the applicants and respondents respectively, I am not afraid to hold that the applicants have failed to establish the second condition as there is nowhere it is stated in their affidavit that they were or are conducting business in the disputed cages and shops/frames, therefore their livelihood depend entirely on them as submitted by Mr. Nassoro and that any withholding of grant of injunctive order will suffer them irreparable loss. In absence of such affidavital evidence there is nothing to convince this court that should the grant of injunctive order be withheld then the applicants will suffer irreparable loss which cannot be atoned by monetary value if the disputed issue is resolved in their favour.

I now move to the last principle to determine on the balance of convenience who between the applicants and respondent stands to suffer greater hardship if the order is not made and vice versa. It was Mr. Nassoro's submission that the applicants have been paying taxes and other levies and collecting revenue for the 1<sup>st</sup> applicant on agreement that 10% will be returned back to the applicants as commission but the 1<sup>st</sup> respondent failed to honour the agreement. According to him since the applicants are paying taxes and levies in accordance with the law, the respondents will suffer no loss or hardship if the application is granted. Ms. Msanga resisted the

submission by Mr. Nassoro contending that, since the applicants were not paying rent of the cages and shops/frames, thus limiting the 1<sup>st</sup> respondent's revenue sources dependable for developmental projects to the society, granting of injunction will curtail her ability to collect revenue in furtherance of the public policy that citizens are to pay taxes for the development of the nation. She relied on the case of **Alhaji Muhidini A. Ndolanga and Another Vs. The Registrar of Sports and Sports Association and Others**, Misc. Civil Cause No. 54 of 2000 (HC-unreported) where this court emphasized on the need of the court to take into account public interest to public policy when deciding on whose balance of convenience the weighing scale will tilt. In his reply Mr. Nassoro while admitting that public interest has to be considered and that it was in the public interest for the 1<sup>st</sup> respondent to collect taxes and levies which applicants were paying, he countered that does not mean dispossessing ownership of the applicants' properties. According to him since there is dispute over ownership of cages and shops/frames then public interest demands that status quo be maintained.

Having considered the above submission it is evident to me that the issue of whether taxes and levies are paid by the applicants as submitted by Mr. Nassoro is still a matter of contest as it is not supported by any affidavital

evidence. Likewise the question of none payment of rent by the applicants as deposed by the respondents in paragraph 4 of the counter affidavit is never disputed by the applicants. Since that fact is not disputed Public interest demands that applicants should pay that rent to the 1<sup>st</sup> respondent so as to boost her sources of income for developmental projects. I therefore find the case of **Alhaji Muhidini A. Ndolanga and Another** (supra) relevant to this case and proceed to hold that under the circumstances since the applicants are accused of failure to pay rent to the 1<sup>st</sup> appellant as one of the sources of income and since I have already held the applicants have failed to prove that they will suffer irreparable loss should the grant of injunction be withheld, then the balance of convenience tilts on the side of the respondents who are to suffer hardship if the injunctive orders are granted. I therefore find the applicants have failed to establish the third condition.

As the applicants have failed satisfy the 2<sup>nd</sup> and 3<sup>rd</sup> condition and since it is mandatory that all three conditions must be met for the court to properly exercise its discretion whether to grant or not, I find the application is without merit and the same is hereby dismissed.

Given the nature of dispute, I order each party to bear its own costs.



It is so ordered.

DATED at DAR ES SALAAM this 04<sup>th</sup> day of February, 2022.



E. E. KAKOLAKI

**JUDGE**

04/02/2022.

The Ruling has been delivered at Dar es Salaam today on 04<sup>th</sup> day of February, 2022 in the presence of the Mr. Juma Nassoro, advocate for the applicants and Ms. Asha Livanga, Court clerk and in the absence of the Respondents.

Right of Appeal explained.



E. E. KAKOLAKI

**JUDGE**

04/02/2022

