IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

MISCELLNEOUS CIVIL APPLICATION NO. 01 OF 2022

TRUSTEES OF ANGLICAN CHURCH DIOCESE OF

WESTERN TANGANYIKA .....APPLICANT

VERSUS

1. **BULIMANYI VILLAGE COUNCIL.....1ST RESPONDENT**
2. **BUHIGWE DISTRICT COUNCIL ..... 2ND RESPONDENT**
3. **THE HON. ATTORNEY GENERAL .....3RD RESPONDENT**

RULING

23/03/2022 & 30/03/2022

F. K. MANYANDA, J.

This Court is being moved to grant orders for temporary injunction and maintenance of *status quo* of the parties by restraining the 1st Respondent and her agents, privies or whomsoever acting on her behalf from digging rubble or doing anything in respect of a land measuring 19 acres located at Bulimanyi area in Nyamgali Village and Ward, Buhigwe District.

The application is made under certificate of urgence under provisions of section 2(3) of the Judicature and Application of Laws [Cap. 358 R. E. 2019] and Section 95 of the Civil Procedure Code, [C 33 R. E. 2019]. I may point out right from here that the Applic wrongly cited the chapter number of the Judicature and Applicatior Laws Act as "Chapter No. 318 R. E. 2019", the proper one is [Chap No. 358 R. E. 2019]. However, this defect did not cause miscarriage justice, it is curable under the principle of overriding objectives provic by section 3A of the Civil Procedure Code.

The application is supported by an affidavit sworn by Elisha Lame Mkuyu. It is countered by the Respondents in a counter affidavit swc by Alfred Kalimbele Imani.

Both the affidavit and counter affidavit together with other records giv the background of this matter as follows. That the area in dispu described above, is located within the precincts of Bulimanyi Villag Council. In 2018, the said Village Council decided to harvest buildir materials such as grit and wood from the disputed land. The Plainti interfered claiming to be the owners, the same been allocated to ther during colonial period in 1953. The Respondents on the other han

claim the land in dispute to be under the ownership of the First Respondent.

The dispute was referred to the Nyamgali Ward Tribunal which decided in favour of the First Respondent. The District Land and Housing Tribunal (DLHT) eon appeal nullified the proceedings for want of jurisdiction. The Applicant intends to file a suit in this Court, they served the Respondents with a 90 days' notice which is yet to materialize. Fearing continued wanton destruction of the suit land, the Applicant has come with this application pending an intended suit to be filed in this Court. Such an application is known under common law as "Mareva Injunction".

At the oral hearing of this application, the Applicant was represented by Mr. Michael Mwangati, learned Advocate. The Respondents enjoyed the representation services of Mr. Allan Shija, learned State Attorney.

Mr. Mwangati argued that the Applicant has served the Respondents with a statutory 90 days' notice intending to sue them in this Court for ownership of the piece of land in dispute. That the said notice is yet to materialize as the 90 days have not elapsed. That as there is continued wanton destruction of the land in dispute, under the blessings of the

First Respondent whereby she is rampantly digging out the land and felling down trees to the level of permanently destroying it. Therefore, the Applicant is asking for temporary injunctive orders restraining the First Respondent and her agents, privies or whomsoever acting on her behalf from digging grit, rubble or doing anything in respect of the land in dispute.

The Counsel submitted in alternative to the orders prayed above that this Court to dispense with the 90 days' notice and allow the Applicant to file their suit premature before elapse of the 90 days. However, he did not cite any law. He was of the views that grant of the sought orders will not prejudice the Respondents. He prayed the application to be granted.

In reply, Mr. Allan Shija submitted opposing the application on grounds that in application for Mareva Injunctions, the test for grant of such order is likelihood of success of the intended suit. He was of the views that the Applicant ought to have adduced *prima facie* evidence of ownership of the land in dispute, hence demonstrating the likelihood of success. The State Attorney argued further that the Applicant did not re-file the case as ordered by the DLHT and that injunctive orders will

definitely affect the First Respondent for his building projects will come to halt. He prayed the application to be dismissed.

In rejoinder, Mr. Mwangati re-iterated his submissions in chief and added that the Applicant could not re-file the suit because of the requirement of a prior statutory 90 days' notice.

Having heard the Counsel on the equally urging submissions, I find the issue for determination is whether this application is meritorious.

The application in this matter is a specie of temporary injunction orders which are exceptional to the general rule on temporary injunction orders that are granted pending determination of an already filed suit in court. Such temporary injunction orders are granted without a pending suit in court.

Under common law, such temporary orders are known as "Mareva Injuctions" having roots in the famous case of **Mareva Compania Naviera SA vs. International Bulk Carriers SA** [1980]1 All ER 213 where his Lordship Denning accorded a broader interpretation to section 25 of the Judicature Act of 1873 which provided for grant of temporary injunctions pending suits filed in courts to cover grant of interim injunctions in anticipatory suits.

In our jurisdiction the reasoning in the Mareva's case has been followed in plethora of authorities including the cases of **Nicholas Nere Lekule vs. Independent Power (T) Limited vs. the Attorney General**, Miscellaneous Civil Cause No. 117 of 1996 and **Tanganyika Game Fishing and Photographic Limited vs. Director of Wildlife and Two Others,** Miscellaneous Civil Cause No. 48 of 1998, (both unreported) to mention a few. In these cases, Honourable Judges Kaji and Katiti, as they then were, held that a court has jurisdiction to issue a temporary order where there is no pending suit under the provisions of section 2(3) of the Judicature and Application of Laws Act and Section 95 of the Civil Procedure Code.

On this position of the law see also the cases of **Tanzania Sugar Producers Association vs. The Ministry of Finance of the United Republic of Tanzania and Another,** Miscellaneous Civil Case No. 25 of 2003 (unreported), **Issa Selemani Nalikila and 23 Others vs. Tanzania National Roads Agency and Another**, Miscellaneous Land Application No. 12 of 2016 (unreported), **Abdallah M. Malik and 545 Others vs. Attorney General,** Miscellaneous Land Application No. 119 of 2017 (unreported) **Jetish Ladwa vs. Yono Auction Mart and Company Limited,** Miscellaneous Land Application No. 26 of 2017

(unreported) and **Ugumba Igembe and Another vs. The Trustees of the Tanzania National Parks and Another,** Miscellaneous Civil Application No. 01 of 2021 (unreported) and **Daudi Mkwaya Mwita vs. Butiama Municipal Council and Another,** Miscellaneous Land Application No. 69 of 2020 to mention a few.

In the latter case, it was held that Mareva Injunction cannot be granted where there is a pending suit in court because it is an application obtaining a legal standing to institute a suit where institution of the same is prevented by some legal impediments.

Therefore, in this application, it has been demonstrated enough that the suit cannot be brought in court until the period of the statutory 90 days' notice elapses. The application is therefore in the right track and this Court has jurisdiction to grant the same.

However, as I have said above, Mareva Injunctions been a specie of temporary injunction orders, is subject to tests applied to other kind of temporary injunctions. The principles in temporary injunction applications are applicable to Mareva Injunctions because both have the same purpose of holding the parties to the same position before the suit is filed. The only difference between temporary injunctions pending

determination of the suit and Mareva Injunction is that the latter are granted ante filing of a suit while the former are granted after filing of a suit.

In this application, the Applicant prays for ante temporary injunction orders for the purposes of maintenance of status quo of the parties before institution of the suit, is subject to the tests for grant of temporary injunction orders.

The tests for temporary injunctions were expounded in the famous case of **Atilio vs. Mbowe** (1969) HCD n. 284. In that case three conditions were set up to be established prior to grant of temporary injunctions; that the applicant must demonstrate a prima *facie case* by showing that there is a serious question to be tried on the alleged facts and probability that the applicant will be entitled to the relief prayed; he must demonstrate that the courts interference is necessary to protect the applicant from any kind of injury which may be irreparable before his legal rights are established and the balance of convenience whether there will be greater hardship or mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendant from granting it.

The next question is whether the application meets the test for grant of temporary injunction.

As regard to demonstration of a prima *facie case* by showing that there is a serious question to be tried on the alleged facts and probability that the applicant will be entitled to the relief prayed, the Counsel for the Applicant submitted that the application meets this condition. The State Attorney on the other hand submitted that there has is not enough evidence to show that there is a serious question to be determined and that it is high probability for the same to be decided in his favour.

I have navigated through the affidavit and the submissions by the Applicant's Counsel, I have been unable to find any *prima facie* evidence showing or establishing any serious question which may be resolved in favour of the Applicant. I say so because there is no any document supporting the assertions that the Applicant was allocated the land in dispute during colonial era. Moreover, village lands became under ownership of villages during villagization in early 1970s, it is unlikely that allegations of land allocation by colonial government without any documentation establishes chance of winning the case by the Applicant. Moreover, there is no any documentation witnessing the alleged land

cases filed in any land court so as to avail this Court with opportunity to weigh the issues if they lead to a successful *prima facie* case.

Regarding the irreparable loss and the balance of convenience on hardships for either party likely to suffer if the temporary orders are granted, the Counsel for the Applicant submitted that it is the Applicant who is likely to suffer most if the temporary orders for maintenance of status quo are not granted than the Respondents if the same are granted. He gave a reason that the land will be irreversibly destroyed and that they can collect the building materials from the other places where they used to obtain before encroaching the land in dispute. This contention was strongly contested by the Respondents on reasons that their construction projects will be impaired and that the land is intact.

I think the State Attorney is right. It needs not to be overemphasized that there is no irreparable loss established by the Applicant rather than mere assertions of suffering loss. It is a requirement of the law that one has to demonstrate the eminent of loss by tangible evidence and not mere statement of remote fear of loss. Moreover, it has been submitted for the Respondents that there are some construction projects which are likely to suffocate in case the sought orders are granted. The Applicant lightly countered this strong argument that they Respondent will collect

the building materials from other places they used to do before 2018 without even mentioning the same. I could not find any evidence in the affidavit whether there is such alternative land. I am in agreement that it is the Respondents who are likely to suffer most if the temporary orders sought in this application are granted.

In the result, it is the findings of this Court that this application fails to meet the conditions for grant of Mareva Injunction.

The Applicant also made an alternative prayer for this Court to dispense with the 90 days' notice and allow the Applicant to file their suit premature before elapse of the 90 days.

With due respect I have failed to find such powers. I said above, the Counsel did not cite any law to support his prayer. The requirement of furnishing a 90 days' notice is mandatory as provided under section 6(2) of the Government Proceedings Act, [Cap. 5 R. E. 2019] which reads as follows: -

> *"6(2) No suit against the Government **shall** be instituted, and heard unless the claimant previously submits to the Government Minister, Department or officer concerned a notice of not less than ninety days of his intention to sue the Government, specifying the basis of his claim against*

*the Government, and he **shall** send a copy of his claim to the Attorney-General and the Solicitor General."* (emphasis added)

As it can be gleaned, the provision is couched in mandatory terms using the word "shall". Moreover, the purposes of the notice is to avail the Government time to sort out the claim with a purpose of settling the same before coming to the court.

Before I pen off, in my view, as the spirit of the courts goes on encouraging amicable settling of disputes, and so is my advice to the Applicant, to wait for the 90 days period elapse before filing the suit is even more advantageous to the Applicant than the Respondents because it will provide time for him to pursue his rights amicably with the Government officials, with a view to settling the same.

Having found that this application fails to meet the conditions for grant of Mareva Injunction, I do hereby dismiss the same for want of merit with costs. It is so ordered.

F. K. MANYANDA

JUDGE

30/03/2022