

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IN THE DISTRICT REGISTRY OF KIGOMA)**

**AT KIGOMA**

**MISC. LAND APPLICATION NO. 9 OF 2022**

**NINGA S/O ZAKAYO AND 159 OTHERS .....APPLICANTS**

**VERSUS**

**KIGOMA/UJIJI MUNICIPAL COUNCIL ..... 1<sup>st</sup> RESPONDENT**

**THE ATTORNEY GENERAL .....2<sup>nd</sup> RESPONDENT**

**R U L I N G**

09/05/2022 & 27/05/2022

**L.M. MLACHA, J.**

The applicants, Ninga Zakayo, Andason Ntaholija, Simon Kilemo, Bossy Bilali, Mwamvua Iddi Bilali, Samwel Pulugu, Ibrahim Ntiruhungwa, Hamisi Ntiruhungwa, Said Athumani Bibombe, Abdu Ndagowe, Sadiki Hamisi, Mdi Jaled Musuf, Manuelli Damiano, Gervasi Karima, Anna D. Baragwiha, Aron Rudanga, Jafari Bonifasi Yampanye, Ajuwaye William Subiye, Joeli Gelevas Lali, Fedrick Emanuel, Nikodemu Daniel, Noel Samsoni, Zabron Juma Poyongo, Cost Dismas, Felician Paul Byarugaba, Saidy Masudi Ally, Patrick Emmanuel Lusama, Gracia Batromeo Mahwisa, Andrew Hagamye Mbilizi, Emiliana Sadock, Godfrey D. Marambugi, Ivon Kagabo, Kuora Ahmad, Paschael J. Bimbiza, Emmanuel J. Kombe, Elisha Isaka Malalo, Omari Rajabu,

Hasani Haruna, Sestewdi Sanya, Zena Omari, Paschael Jackson Msole, Tamba Edwini Justas, Salum Amran, Kasito Rukas Robati, Ramadhani Kajana Khalfan, Zubhakwa Phomas Robati, Bariki Rubay Thomas, Nsabwe Thomas Robot, Alex Emanuel Chata, Vacco Rukas Robert, Seda Staniphod Nkiliye, Ajuwae Tamby, Timotheo Samwel Ndabelese, Sada Yahaya Anzuruni, Jonas Ruziga Kalibwami, Joel Samwel, Nabosi Nikodem, Joisi Wilson Babaye, Mvukiye Robert Nsanze, Bichadi Hungukayambo, Hassan Amrani Maguta, Iddy Shabani Bilali, Bungamie Mustapha, Maneno Mabundi, Hussein Haji, Dward Venasi, Omari Miraji, Martha Ezekiel, Joji Kanyondwi, Almas Almasi, Dina Mande, Betrice Kiobya, Sia Ezekiel, Sadoki Venasi, Swaumu Abdala, Jastini Fideli, Sada Yahaya Anzuluni, Kalima Mustapha Mkole, Maisala Hussein, Mhile Athumani, Yasini Samora, Felesia Jeston, Olein Jeston Nkuyumba, Mgeni Hamisi, Sungura Athumani, Eudoxia Athanas John, Bora Ismail Muyenzi, Vailet Armon Yarasemeze, Sevelina Kalulu, Gaudensia J. Gawa, Rebeka Kalima Turula, Happy Roman, Finias Manuli, Mwatumu Kasimu, Wilbroad Raphael Ruttanzibus, Irene Boazi Mkeya, Augustino J. Hwago, Jitihada S. Rashidi, William M. Philipo, Muganya Liberatus Morisi, Fatuma Salum Nzumyi, Benedictor Kasalo, Jeneroza Kimori, Hamisi Ntilihungwa, Zuhura Haruna Msemakweli, Imani Augustino Sponga, Hadija

Hilali Swalehe, Elizabeth Hermance Kilikiza, Shamsa Hussein, Mwaya Mayane, Jofrida Joseph, Mikidadi Hussein Kulalule, Kashola Hamis, Aron Meshak, Aloys Gwajekale Ngoromero filled an application under certificate of urgency seeking a temporary injunction against the respondents, Kigoma/Ujiji Municipal Council and The Attorney General (hereinafter to be referred to as the first and second respondents respectively) from evicting them at Mwanga Market in Kigoma/Ujiji Municipality where they are doing business pending the filling, hearing and determination of a Land Case in this court upon the lapse of the ninety (90) days statutory notice which they issued to the respondents. They also prayed for costs and any other relief(s) the court may deem fit to award.

The application is made under section 2(3) of the Judicature and Application of Laws Act, Cap. 358 R.E. 2019 and item (g) to the schedule to the Interpretation of Laws (use of English Language in Court) (Circumstances and Conditions) Rules, 2022 GN No. 66/2022 and is supported by the affidavit of their counsel Musa Kasimu. The respondents were dully served and filled a counter affidavit in opposition sworn by Josephine Chilongozi, a Solicitor for the first respondent.

It was stated in the affidavit that, the applicants are carrying their business in the business stalls they built at Mwanga market through their own efforts and expenses in which the first respondent regard them as tenants and is collecting monthly rents. That, the first respondent started to collect rent outright without giving them time to recover what they had invested. That in a shocking and unexpected manner, the first respondent issued a threatening notice of eviction to the applicants on 1/4/2022 demanding them to stop doing business in the market and vacate. In response to the notice, the applicants served the first respondent a 90 days' notice to sue them. A copy of the notice was also served to the second respondent. The notice will elapse on 14/7/2022.

The applicants proceeded to state that the first respondent's notice require them to vacate by 30/6/2022 a moment when the 90 days' notice will not have expired. They thus decided to file the application to stop the eviction pending the filling and hearing of the case. The two notices and the list of the applicants are attached in the affidavit.

The counter affidavit denied the contents of the affidavit and put the applicants in strict proof. It was stated further that the applicants redeemed the costs of building the stalls because they have been in the area since

1987. The contracts of two applicants were attached marked 'KUMC 1.' They agreed that they issued the notice which they said that it was intended to allow them to prepare to shift to another area specified in the notice. They said that it was not shocking and unexpected. They accepted to receive the 90 days' notice which they called a legal requirement. They stressed that the notice which they issued was not threatening but was merely requiring them to shift to Masanga Market as per the agreement reached between the first respondent and applicants' leaders.

During the hearing, Mr. Musa Kasimu appeared for the applicants while the respondents were represented by Mr. Allan Shija and Josephine Chilongozi State Attorneys. Mr. Athumani Msabila, the Municipal Director was also present in person. The applicants (at least the majority of them) were present in court. Hearing was done by oral submissions.

It was the submission of Mr. Musa Kasimu that the first respondent issued a notice which is due to expire on 30/5/2022 requiring the applicants to move out of Mwanga Market. Counsel submitted that the reason behind the notice is good because the government wants to build a modern market. But he hurried to say that the notice requires them to move to Masanga Market where there is no space set aside or prepared for the applicants. With this

in mind, counsel submitted, the applicants decided to issue a 90 days' notice to sue the government. The notice was issued on 13/4/2022 and expires on 14/7/2022. It expires on this date while the first respondent's notice expires on 30/6/2022 hence the need for filing the current application. Counsel proceeded to submit that the notice requires them to stop doing business as of now. This is difficult because the life of the applicants depends on the business. If they will be moved out before the expiry of the 90 days' notice they will suffer hardship and irreparable loss. He went on to submit that the court have power to issue the orders under section 2(3) of the Judicature and Application of Laws Act, Cap. 359 R.E. 2019 something which is commonly known as the Mareva injunction. He went on to say that conditions for granting a temporary injunction were stated by the Court of Appeal in **Sophia Amiri Mrisho v. New Sudan Building Materials Co-Operative Society Ltd**, Civil Application No. 235 of 2014 pages 7 to 9. He said that the application meets the conditions set in the case. He stressed that there is no space for the applicants at Masanga Market. He added that their lives depend on the market stalls. And that, if they will not do business they will suffer more than the first respondent. He went on to say that the respondents cannot compensate them because it is difficult to quantify their

properties. The only remedy available in the situation is an injunction, he submitted. He referred the court to **Auto Mech Ltd v. TIB Development Bank Ltd and 3 others**, High Court Misc. Land Application No. 73/2020, **TANESCO V. Independent Power Tanzania Ltd (IPTL) and 2 others** [2000] TLR 324 page 327 and **Mashaka Joseph and 4 others v. Conservation Commissioner Tanzania Wildlife Management Authority (TAWA) and two others**, High Court Miscellaneous Land Case Application No. 15 of 2021 for guidance and reference. He ended by saying that if the injunction will not be granted, the case which they are going to file against the government will be meaningless.

It was the submission of Mr. Allan Shija that the applicants have filed an application seeking for the issue of a Mareva injunction against the respondents in resistance of the notice which requires them to vacate from the market by 30/6/2022. He said that the case of **Mareva Campania Naviera S.A v. International Bulk Carriers SA** [1980] ALLER 213 have set 3 conditions which must be met before the order is issued, (i) There must be a prima facie case; (ii) Irreparable loss and (iii) Balance of inconvenience on hardship. Counsel had the view that the applicants have not met the three conditions. They have not shown a prima facie case; no any document

shown to the court indicating their rights to the disputed land. There is no any tangible evidence showing that they are owners or tenants in the land. Counsel had the view that the applicants were supposed to establish a prima facie case but have not done so. He said that the 90 days' notice and the list of names is not tangible evidence. They expected to see the lease agreements but are missing. He added that the applicants did not even sign against their names. Some of them like Nos. 99, 96, 107 and 108 are recorded twice, he said. On irreparable loss, counsel submitted that there is no any supporting document showing irreparable loss. He said that Masanga is also a potential business area equal in status like Mwanga. It is a big area which is designed to accommodate 900 people. The applicants are only 160. Others have already left, he said. He added that, if there was no business, the 740 people could not have moved to the area. Counsel proceeded to submit that Masanga Market has been designed to pave way for Mwanga Market which is supported by the World Bank through the tactic project which supports strategic projects. The project will be implemented starting 1/7/2022 up to 30/6/2024. It is a project worthy Tshs. 1.6 billion, he said. Adding that if the project will not be implemented, the money will go back to the bank and none of the parties will benefit. But if the project will be



implemented, the applicants will be given priority in allocation and work in a better environment. Their income will also increase.

On the question as to who will suffer more, counsel submitted that the first respondent will suffer more if the injunction is granted because the council will miss the new market and income which could come out of it. Giving examples, counsel said that the town suffered irreparable loss at the airport project and on an earlier attempt to build the market. That, there were funds set aside for the airport project but returned back due to disputes. And that, the NSSF needed to develop the market at one time but left due to disputes.

Counsel proceeded to say that the first respondent have set aside a place to go. And that if any hardship will be temporary, not permanent.

On the balance of inconvenience counsel submitted that the applicants will not suffer any hardship compared to the first respondent who will be forced to work without a stable means of income. He added that the applicants who are mere tenants will not suffer than the first respondent.

While accepting the principles of granting injunction shown in the cases cited by Mr. Musa Kasimu, the counsel for the respondents asked the court to seek

further guidance from **Nicolaus Nere Lekule v. IPTL**, Misc. Civil Application No. 117 of 1996, **Tanganyika Game Fishing and Photographic Ltd v. Director of wildlife and 2 others**, Misc. Civil Case No. 48 of 1998 (H/C) and **Trustees of Anglican Church Diocese of Western Tanganyika v. Bulimanyi Village Council and 2 others**, H/C Misc. Civil Application No. 1/2022.

Mr. Musa Kasimu made a rejoined submission and joined issues with counsel for the respondents.

Going through the submission of counsels, I could not see any dispute on the jurisdiction of this court to grant an injunction without a suit. The parties agree that the position is now settled and is as explained by my brother Maige J. (as he then was) in the case of **Auto Mech Limited** (supra). I agree with them. The court has jurisdiction to grant an injunction without a pending suit under section 2(3) of the Judicature and Application of Laws Act, Cap. 358 R.E. 2019. The issue now is whether the applicants have demonstrated good base for the grant of the orders.

The leading case in this area is the English case of **Mareva Campania Naviera SA vs. International Bulk carriers SA** [1980], ALL ER 213 which

was cited by both counsel. In this case, the court cited with approval a proposition made in an earlier English case of **Beddow v. Beddow** [1878] 9 Ch. D 89 where it was said that the court has unlimited power to grant an injunction in any case where it would be right or just to do so. It was also said that the court will not grant an injunction to protect a person who has no legal or equitable right whatever. Citing **Halsbury's Laws of England, 3<sup>rd</sup> Edition**, Page 348, para 729, the court said that whenever a right can be asserted either at law or in equity, and does exist, then the court, in a proper case, can grant an injunction to protect that right.

The law on injunctions in this country is well settled with numerous authorities. The leading case in our jurisdiction is the case of **Atilio v. Mbowe** [1969] HCD 284. This case set principles which were later followed and adopted by this court and the Court of Appeal. In **Sophia Amiri Mrisho** (supra) the Court of Appeal put guidance in one area which is often mistaken. That is the limits of the court in its discussions and findings in the course of hearing an application for injunction. It said at page 7 that, during the hearing of an application for a temporary injunction, the court should not make a finding on issues involved in the suit. This includes the validity of documents which form the basis of the rights of the parties in the main

suit. It should be careful so as not to prejudice the case of any of the parties. The court went ahead and stated the conditions or tests favouring the grant of injunctions. It said at page 8 as under:

- i. The plaintiff must show a prima facie case with probability of success.*
- ii. That, the applicant will suffer irreparable loss if injunction is not granted, such loss being incapable of being compensated by an award of damages; and if in doubt;*
- iii. The balance of inconvenience in favour of the party who will suffer inconvenience in the event the injunction is or is not granted.*

These conditions have their origin in **Atilio v. Mbowe** (supra). The discussion which follows now will try to show the extent to which the the applicants have passed or failed to pass through the three tests. I will limit myself to the affidavit, documents attached to it and the submissions.

I will start with the first test. In this area, the court has to find if the applicants have established a prima facie case against the respondents; the establishment of a legally required rebuttable presumption. A cause of action that is sufficiently established by a party's evidence to justify a verdict in his favour provided that evidence is not rebutted by the other party. It is *an*

*assumption made by a court that is taken to be true unless someone comes forward to contest it and prove otherwise* (see [en.m.wikipedia.org](http://en.m.wikipedia.org)). This however has to be done with care, as pointed out, to avoid making a finding or decision on issues involved in the main suit. So, in my view, we must limit ourselves to the pleadings and anything attached to it and submissions made to see if the applicants have established a case with *probability of success* against the respondents. The court must see a case with probability of success.

The affidavit supporting the applicant at para 3 and 4 show that the applicants built the business stalls using their money and they are yet to recover the construction costs. They are tenants of the first respondent paying monthly rents. Para 5 shows that the applicants were served with a notice to vacate and move to another area. They call this a threatening notice. Paras 6 and 7, 8, and 9 speak of the 90 days' notice to oppose the notice. The affidavit has three attachments; the notice to vacate, the 90 days' notice and the list of names. They could not attach any lease agreement or construction costs.

On the other hand, Para 4 of the counter affidavit says that the business stalls were built in 1987 and as of now the applicants have already recovered

their construction costs. Para 5 and 6 state that the notice issued was not threatening but was rather giving an alert to the applicants to shift to another area to give way to construct a new market.

I have read the pleadings and annexures. I have also considered the submissions. With respect I could not see a case stated against the respondents. The case is not stated anywhere in the affidavit and the annexures. The notice complained of was simply an intension on the part of the first respondent to shift the applicants to another place to give way to construction of a new market. I think that they were supposed to give more facts to enable me to see the case. They were supposed to state in clear words, what was going to be their case against the respondents so as to put this court in a position to see if there was any prima facie case established for as was said in **Beddow v. Beddow** (supra) the court will not grant an injunction to protect a person who has not established a legal or equitable right whatever. I don't think that the notice was enough on its own to constitute a case and course of action against the respondents with the legally required rebuttable presumption. I have failed to see any case with probability of success against the respondents upon which the injunction can be based. So, the applicants have failed to go through the first test.

The second test is on the irreparable loss, loss which cannot be compensated by an award of damages. I had a close look at the facts stated in the affidavit and the annextures. I have also considered the counsel submission on this area. The applicants are businessmen doing their business at Mwanga market. They are required to shift to another area to give way for the construction of a new market. Moving to another area may cause hardships. That is a fact admitted by both parties. The expected hardships include the cost of building temporary structures for doing business. Customers may also be few, particularly on the first days. But the returns, in my view, will be big because they will get a better working environment and a bigger income. They will now work in a new market with modern facilities. So, there is no any irreparable loss. The loss which is likely to arise will be compensated in the end. And if there is any loss which have been caused by the first respondent and proved to exist in the case which they are going to file, it can easily be compensated by way of damages by the respondents. I don't believe that the respondents can fail to satisfy the decree of this court if the case is decided against them. The second test is decided against the applicants.

The third test is on the balance of inconvenience. The applicants talk of hardship in the course of shifting and the life at the new market during the construction period. The respondents talk of return of the funds and missing a modern market. They also talk of loss of income from the new market. Having examined the facts closely, I have the view that the first respondent will suffer more than the applicants if the injunction is granted. The council will suffer the loss of a modern market and income compared to the applicants whose suffering may be just temporary. This test is also resolved in favour of the respondents.

That said, the application is found to be devoid of merits and dismissed with costs. It is ordered so.



A handwritten signature in blue ink, appearing to read "L.M. MLACHA".

**L.M. MLACHA**

**JUDGE**

**27/05/2022**

**Court:** Ruling delivered. Right of Appeal Explained.



A handwritten signature in blue ink, identical to the one above.

**L.M. MLACHA**

**JUDGE**

**27/05/2022**