

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

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

**AT TANGA**

**LAND APPLICATION NO. 71 OF 2022**

**DANIEL ZAKAYO SULE & 2362 OTHERS-----APPLICANTS**

**VERSUS**

**1. THE HON. ATTORNEY GENERAL -----1<sup>ST</sup> RESPONDENT**

**2. PERMANENT SECRETARY, MINISTRY**

**OF NATURAL RESOURCES AND TOURISM-----2<sup>ND</sup> RESPONDENT**

**3. REGIONAL MANAGER, TANZANIA FOREST**

**SERVICES (TFS) AGENCY-----3<sup>RD</sup> RESPONDENT**

**4. ZONAL MANAGER, TANZANIA FOREST**


**SERVICES (TFS) AGENCY -----4<sup>TH</sup> RESPONDENT**

**RULING**

**13/01/2023 & 02/02/2023**

**MANYANDA, J.**

This ruling is in respect of both, a preliminary objection and the application. The preliminary objection was raised by the Counsel for the Respondents on two points of law that the application is not attainable as it is overtaken by events and that the application is bad in law for being prematurely brought before this Court and contain omnibus prayers.

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This court directed both the preliminary objection and the application be argued together orally, so that it can proceed with determination of the application in case the preliminary objection is overruled.

Ms. Luciana, learned State Attorney represented the Respondents while the Applicants enjoyed representation services of Mr. Patrick Paul, learned Advocate.

Before I deal with the nitty-gritty of the matter let me narrate the background of it albeit in a nutshell as gleaned from the pleadings by the parties.

The Applicants, who are 2363 in number, are residents of an area known as Bondo of the size of 7240 Hectors located at Mswaki Village, Msanja Ward, Bondo Division in Kilindi District, Tanga Region. That, they have been living there since the 1950s, have erected residential houses, schools and dispensaries. Have also buried their dead thereon. Currently, they carry on agricultural activities such as livestock keeping and growing business and food crops. That, recently, the Respondents have signified an intention of evicting the Applicants by serving them with eviction notices and given dead line of up to 30/12/2022 or

else forced eviction will be carried out thereby causing irreparable loss to them.

That the Applicants served the Respondent with a 90 days' notice to sue them, however the matter is not yet to materialize, hence they have approached this Court praying for injunction to the Respondents pending expiry of the 90 days' notice in order to file a suit in court.

On the other hand, the Respondents in a joint counter affidavit averred that the Applicants are trespassers to the disputed land by encroaching a reserved land since 1960. That, they have been trespassing since 2014. It is known as Bondo Territorial Forest Reserve gazetted through GN No. 341 of 1960. The size of the area is approximately 18,278 acres. That, been a reserve, there are no public institution buildings therein. At one time the Applicants did ever attempt to apply for allocation of residential land within the disputed area but the same was turned down.

Due to the urgency nature of the intended eviction, the Applicants have approached this Court applying for temporary injunction pending filing of a suit after expiry of the 90 days' notice.

As usual once a court is seized with a legal issue in a form of a preliminary objection has to dispose it before determining the main matter. The Court of Appeal of Tanzania said in the case of **Khaji Abubakar Athumani vs. Daudi Lyakugile T.A DC Aluminium and Another**, Civil Appeal no. 86 of 2018 that the trial court ought to have heard the preliminary objection first before going into merits or substance of the suit. Also, in the case of **Shahida Abdul Hassanali Kassam vs. Mohedi Mohamed Gulamali Kanji**, Civil Application No. 42 of 1999 (unreported) the Court of Appeal of Tanzania on point of objection, meticulously stated that: -

*"The law is well established that a court seized with a preliminary objection is first required to determine that objection before going into the merits or the substance of the case or application before it."*

In this matter the application hearing is objected to on two points of law that it has been over taken by events and brought prematurely.

Arguing in support of the objection Ms. Luciana submitted that the application is untenable because the prayers sought are overtaken by event. She stated that the first prayer is for this


Court to dispense with the requirement of giving notice. She added that since the notice has been given already, then the orders prayed for is redundant.

In regard to the second limb of objection Ms. Luciana submitted that a notice of 90 days to sue the Respondents was given on 24/10/2022 and 90 days have not yet expired hence, this application has been pre-maturely filed, it was supposed to be filed after the expiration of that period.

Opposing the preliminary objection Mr. Paul for the Applicants submitted that the preliminary objection has been misconceived as the State Attorney overlooked the words "*this application.*"

The notice to be dispensed with was a notice to be given to the Respondents in an ex-parte hearing in "this application". That the main application is for "*mareva injunction*" pending expiration of the 90 days' notice.

He cited a case of **Abdallah M. Maliki and 545 others vs. AG**, Misc. Land Application No. 119 of 2017 (unreported) where it was *inter alia* held that mareva injunctions are grantable without pending case in court.

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In rejoinder, the State Attorney reiterated her submissions in chief and added that the prayers in the chamber summons is for dispensation of notice which notice has already been served, hence overtaken by events.

The controversy in these legal points is very simple either the application is overtaken by events or it has been brought prematurely.

The application will be overtaken by event if what is sought has already been obtained or no longer available, and it will premature if the application has been brought in this Court before the time to do so expires.

Looking at the chamber summons, there are three orders sought by the Applicants. The said orders are grouped into two, namely, ex-parte and inter-parties.

The first prayer under attack is in the group of ex-parte orders. It was intended by the Applicants that a temporary injunction be granted ex-parte before the Respondents are called in to be heard as natural justice dictates.

In such a situation, Order XXXVII Rule (4) of the Civil Procedure Code, [Cap. 33 R. E. 2019], (hereafter "the CPC") require that the Applicant to serve the opposite party unless such a requirement is dispensed with by the court.

Therefore, as it can be seen, the Applicants in this matter, having requested for an ex-parte temporary injunction against the Respondents, they were required to issue a notice to the said Respondents informing them that they have applied for an ex parte order of temporary injunction pending inter parties hearing of temporary injunction. In my understanding of the law, the Applicants were asking for utilization of the exception provided under order XXXVII Rule 4 of the CPC by requesting this court to dispenses with this legal requirement.

Such a request is not overtaken by events as opined by the State Attorney for the Respondents on mere grounds that a 90 days' notice was already served to the Respondents.

The notice envisaged under Order XXXVII Rule 4 of the CPC is quite different from the 90 days' notice of intention to sue the agencies of the Government under section 6 (2) of the Government Proceeding Act. [Cap. 5 R. E. 2022] (hereafter "the

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GPA"). The State Attorney misconceived the first limb of objection.

As regard to the second limb of preliminary objection that the application has been filed pre-maturely, I took it to understand that this matter has been filed too early before the expiration of the 90 days' notice for an individual to sue agencies of the Government per the provisions of section 6(2) of the GPA. The Counsel for the Applicants opposed this view arguing that this application is for Mareva injunction, that is issuance of temporary injunction order in absence of an already filed in court, in this case pending expiration of the 90 days' notice.

In other words, the Counsel argument means that the impugned application is meant to move this court grant a temporary injunction before a suit is filed in court. Does such an application require expiry of the 90 days' notice? The Counsel for the Applicants answers that question in negative, while the State Attorney for the Respondents answers the same in affirmative.

In my view, with due respect, the answer is in negative. I say so because, the application seeks grant of orders of temporary injunction before a suit is filed in court, legally such orders are

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known as Mareva Injunctions. These are orders exceptional to the general rule that temporary injunctions are filed in courts pending an already filed suit in court. The purpose of the 90 days' notices as rightly submitted by the State Attorney is to avail the parties time to sort out the dispute and where possible resolve the same amicably.

It follows therefore that Mareva Injunction application is not among the proceedings envisaged under section 6(2) of the GPA because they don't intend to sue the Government but rather for a holding order of *status quo* so that the intending party may file the suit after expiration of the 90 days' notice or after removal of any other legal impediment. The second limb of objection is also misconceived.

In the result, for reason I have explained above, I find that the preliminary objection has no merit. I do hereby overrule the same.

This brings me to the main application. Mr. Paul for Applicants submitted in support of the application adopting the joint affidavit of the Applicants and added that the application is made

under section 2(3) of the Judicature and Application of Laws Act, [Cap. 358 R. E. 2019], hereafter the JALA.

The Applicants are seeking for order prohibiting the Respondents, their agents or any other person acting on their instructions from doing anything on the disputed land or evicting them pending hearing of a suit intended to be filed after expiry of the 90 days' notice served to the Respondents.

The Counsel went on submitting that the dispute is over ownership of the 7240 Hectors disputed land located at Mswaki Village, Msanja Ward, Bondo Division in Kilindi District, Tanga Region and that the parties are in negotiations to resolve the same.

That, the applicants will suffer more loss if the Respondents are not stopped from evicting them because they are the owners of the disputed land and have been occupying the same since their childhood in the 1950s. Hence, once evicted they cannot regain their ancestral land or be atoned by any damages. He was of the views that the Respondents have nothing to lose if stopped as the land in dispute is always there.

On the balance of convenience, the Counsel argued that if injunction is not granted it is the Applicants who stand to be hit with more inconveniences than the Respondents.

Mr. Paul argued further that the criteria for grant of temporary injunctive orders are met in this matter. He cited the case of **Atilio vs. Mbowe** [1969] HCD. 284. He prayed the application to be granted.

On her side Ms. Luciana, learned State Attorney for the Respondents submitted in opposition to the application adopting the counter affidavit. She conceded on the position of the law in the case of **Atilio vs. Mbowe (supra)** that there are three conditions precedent to issuance of temporary injunctions namely:

1. Applicant must demonstrate a prima facie case that there is a serious case to be tried between the parties;
2. Interference of the court is necessary in order to prevent the applicant from suffering irreparable loss; and
3. Balance of convenience.

Then the State Attorney argued that the Applicants have not managed to establish all the three conditions. She went on demonstrating that the Applicants have failed to establish a prima facie case because they have not shown proof of ownership of the land in dispute. That in the counter affidavit it is shown that the disputed land is a forest reserve declared via GN No. 341 of 1960 as Bondo Territorial Forest Reserve and the order has never been revoked. She cited the case of **Trustees of Anglican Church Diocese of Western Tanganyika vs. Bulimani Village Council and 2 Others**, Misc. Civil application No. 01 of 2022 (unreported) where this Court insisted on the need for the applicant to at least establish high probability of ownership of the land in dispute in order to establish a prima facie case.

On the second test, Ms. Luciana submitted that it is not true that the Applicants will suffer irreparable loss if the injunctive order is withheld because the land in dispute is a forest reserve legally declared since 1960. She referred to the **Bulimani Village Council's case (supra)** where this court insisted on the need to show the loss not merely allegations of loss.

As regard to the third test of balance of convenience, the State Attorney argued that the Applicants have failed also to establish that they will be hit with inconvenience harder than the Respondents if the temporary injunction order sought is withheld. She was of the views that the Applicants are trespassers hence cannot suffer any inconvenience.

The State Attorney concluded that since the Applicants are praying for temporary injunction and not Mareva injunction as distinctively explained in the **Bulimani Village Council's case (supra)**, then the orders prayed for are not grantable. She urged this Court to dismiss the application.

In rejoinder, Mr. Paul basically reiterated his submissions in chief. He added that there is a dispute because the Applicants have given evidence that the land in dispute belongs to them. That the application is for temporary injunction pending expiry of 90 days' notice so that a suit will be filed, such an application is called Mareva Injunction, therefore, it is grantable.

Those were the submissions by the Counsel for both sides. The issue is whether the application is meritorious.

I stated the law on applications of this nature where temporary injunction order is sought without a pending case in court in the **Bulimani Village Council's Case (supra)** cited by the State Attorney. In that case I stated as follows: -

*"The application in this matter is a specie of temporary injunction orders which are exceptional to the general rule that orders of temporary injunction are granted pending determination of an already filed suit in court. Under common law, such temporary orders are known as "Mareva injunction" having roots in the famous case of **Mareva Campania Naviera SA vs. International Bulk Carriers SA** [1980] All ER 2013 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 to be filed in courts to cover grant of interim injunctions in anticipatory suits."*

Having referred to the law as was enunciated in the common law jurisdiction, I found in that case that the said position of law was recognized in our jurisdiction as held by Honourable Judges Kaji and Katiti in the cases of **Nicholas Mere Lekule Vs Independent Power (T) Ltd vs. AG**, Misc. Civil Cause No. 117

of 1996 and **Tanganyika Game Fishing and Photographic Ltd vs. Director of Wildlife and Two Others**, Misc. Civil Cause No. 48 of 1998. In those two cases it was held that a Court has jurisdiction to issue temporary injunction order where there is no pending suit under the provisions of section 2(3) of the JALA and section 95 of the CPC. Therefore, this application is in the right track.

Moreover, I agree with the counsel for both sides on the tests for issuance of temporary injunctions as per the case of **Atilio vs. Mbowe (supra)**. That case put three conditions for issuance of temporary injunction order that is establishment of a prima facie case, existence of circumstances of irreparable loss on the side of the Applicant and balance of convenience.

As to the prima facie case, the Applicant must demonstrate existence of a serious question to be tried and probability that the prayed orders have high probability of been granted.

In the matter at hand, Mr. Paul for the Applicants, has argued that the Applicants have established a prima facie case because in their affidavit, they have stated that they have been in occupation of the land in dispute for a long time since 1950s and

some were born there and found their ancestors were in occupation of the same. That they have been earning their livelihood therein to date. Hence, they demonstrated that they are true owners of the land in dispute, their eviction will lead to a serious case that will be tried with great likelihood for them winning.

On the other hand, the State Attorney has argued that the Applicants are a mere trespasser because the land in dispute is a forest reserve declared via GN No. 341 of 1960 as Bondo Territorial Forest Reserve and the same has never been revoked. Hence the Applicants have no serious question to be tried likely to be decided in their favour.

I have followed closely the submissions by the Counsel for both sides and gone through the affidavit and counter affidavits. I am of settled views that the Applicants have failed to establish a prima facie case. I understand that it is not a duty of this Court to determine who has good title or ownership over the land in dispute but it is a duty of this court to gauge who is likely to be favoured as far as prima facie case is concerned. It has been uncontroverted that the disputed land was declared a forest



reserve before independence in 1960. To date the same is still a forest reserve. On the other side, the Applicants have been in occupation of the land in dispute also before independence, since 1950s. As it can be seen, each party claim ownership over the disputed land before independence. However, a GN No 341 of 1960 is a law in itself and has not been revoked to date. If the Applicants were present when the land in dispute was so declared as a forest reserve and are unhappy with GN No. 341 of 1960, then, and they are at liberty to challenge the same in a proper avenue which may not entail giving 90 days' notice.

Be it as it may, the question of ownership over the land in dispute does seem to be a serious question to be determined as far as the Applicants are concerned, a prima facie does not seem to be in their favour.

The next test is on the likelihood of suffering irreparable loss. The applicants, say that they will not be in a position of re-acquiring the land once demarcated and been evicted. The Respondents say the Applicants are mere trespassers hence no loss will be suffered. I have navigated through the pleadings and found as a matter of facts that though the Applicants are

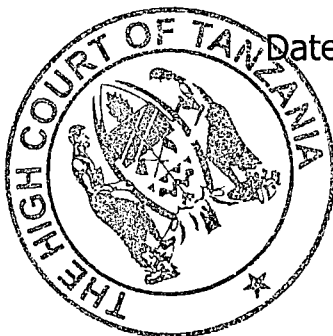
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occupying the land in dispute and some schools have been put in place, yet they appear to be trespassers because there is in force a declaratory order by the Government that the land in dispute is a forest reserve. In the circumstances then, the Applicants cannot benefit from their own wrongs. They have been given time to take their belongings with them. Moreover, they can still pursue their rights in different forums as demarcation of land doesn't prevent them from litigating their rights.

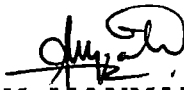
This test covers the third one, that of convenience. If placed on a balance machine, the Applicant seem not to be inconvenienced relative to the Respondents because their right to litigate will not be curtailed if the injunction order is not granted.

In the upshot, for reasons I have stated above, I find the application as non-meritorious. Consequently, I dismiss it in its entirety with costs.

Order accordingly.



Date at Tanga this 2<sup>nd</sup> day February, 2023

  
**F.K. MANYANDA**  
**JUDGE**