

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TABORA DISTRICT REGISTRY)

AT TABORA

MISC. CIVIL APPLICATION NO. 13 OF 2023

DECENT INVESTMENTS LIMITED.....APPLICANT

VERSUS

TANZANIA RAILWAY CORPORATION.....1ST RESPONDENT

COMMISSIONER FOR LANDS.....2ND RESPONDENT

THE REGISTRAR OF TITLES.....3RD RESPONDENT

HON. ATTORNEY GENERAL.....4TH RESPONDENT

RULING

Date 01/3/2023 & 06 /3/2023

BAHATI SALEMA, J.:

The Applicant, **DECENT INVESTMENT**, filed this application under the certificate of urgency pursuant to the provisions of section 2(1) and (3) of the *Judicature and Application of Laws Act*, Cap.358 [R.E. 2019] seeking, pending the institution and determination of the intended suit after expiration of statutory notice; the following orders;

- I. The court to issue an interim order of injunction (Mareva Injunction) to restrain the 1st respondent from demolishing the wall surrounding the applicant's landed property described as Plot No. 56, Block "BB" Kiloleni Area Tabora Township under Certificate titled No. 118053/29.*
- II. The costs and incidental hereto abide by the results of the intended suit.*
- III. Any other relief the Court shall deem just and fit to grant.*

This application is supported by an affidavit sworn by Ms. Neema Roman Mahunga, learned counsel for the applicant. The respondents filed a counter affidavit sworn by Mr. Adonia Mmanywa, Estate officer.

In the course of the hearing, the applicant was represented by Mr. Peter Mwakabungu whereas the respondents were represented by Ms. Mariam Matovolwa, State Attorney.

Submitting in support of the application, Mr. Mwakabungu adopted the affidavit supporting the application with annexures P1, P2, P3, P4, P5, P6, and P7 to form part of his submissions. He proceeded to submit that they have filed this application under a certificate of urgency on the ground that the 1st respondent has issued 30 days' notice of demolition of the wall surrounding the applicant's property on Plot No. 56 Block BB Kiloleni Area at Tabora Township which is lawfully owned by the applicant.

He further stated that the applicant is seeking an order of *Mareva* restraining the respondents against the unlawful acts of demolishing the applicant's wall pending expiration of 90 days statutory notice dated 27th January, 2023. He submitted that if the application is not granted, the applicant will suffer irreparable loss because the defendant has issued a 30days notice requiring him to demolish his wall and the notice is due to expire. He further submitted that the matter at hand has met all conditions for the *mareva* injunction to be granted as set out in the cases of **Udulu Makoa Agricultural Limited v. Makoa Farm**, Misc. Application No. 1 of 2022 (page 21); **Daudi Nkwaya Mwita v. Butiama District Commissioner** Misc. Land Application No. 69 of 2020 (page 3) [both unreported]; and **Vidyadhar Girdharal Charda V Director of Immigration Services and others 1995 TLR 125** (HC) pgs. 10 -11. He submitted that the applicant has demonstrated a *prima facie* case as they are claiming better title than the 1st respondent; and that there is a legal impediment because the respondents cannot be sued until the expiration of 90 days. In that regard, he prayed for this application to be granted with costs.

In reply, Ms. Matovolwa resisted the application. She also adopted the counter affidavit deposed by Mr. Adonia Mmanywa and its annexures to form part of respondents' submissions. She proceeded to submit that there are pre-requisites for granting an injunction which is used both in *Mareva* and temporary injunctions. Amplifying her point, she cited the

case of **Atilio v. Mbowe [1968] HCD 284** that before the courts can grant interim order in the nature of injunction, there are certain conditions to be observed that there must be a *prima facie* case in where the applicant is likely to succeed. Also, whether he is likely to suffer an irreparable loss and on the balance of convenience.

She submitted that for this matter, in respect of *prima facie* case, the applicant has failed to show ownership of land in the dispute since the certificate of title attached in the affidavit reads that the owner of the said property is Tabora Saw Mills and as he claims the land through transfer. The law requires for any sale or transfer of land to be in writing but the applicant has failed to show evidence of transfer regardless of whether the building permits are in the name of the application but the permits do not prove ownership of the land.

Also, she stated that the disputed area is within the railway crossing area which is the area defined by law. Expounding her argument, she stated that according to the **Railways Act, Regulations, 2018**, Level Crossing area is an intersection of roads and railways at the same level and the area is measuring 100 meters from each of the 4 sides. She added that the boundaries and demarcation of the area are provided statutorily and for the applicant to start his construction without being aware of the law is negligence on his part. She submitted that there is no chance of the applicant's success if he intends to sue the defendants.

She advanced further another pre-requisite to be observed is suffering irreparable loss. She stated that allowing the applicant to construct a wall at the railway level crossing can be dangerous to the applicant, road users, railway users, and train drivers cause erecting a new wall will impair visibility to the users since the area is an intersection. She also stated that, this will lead to accidents and cause injuries, deaths and also can lead to the destruction of railways, roads and trains. She insisted that losing lives of people cannot be compared to the demolition of the wall. According to her, life is more important as it cannot be calculated. The applicant has not demonstrated to what extent he will suffer irreparable loss in case the application is not granted.

On the issue of balance of convenience, she submitted further that, if the order is granted the respondents are likely to suffer more than the applicant since the railway is active and is likely to cause fatal accidents due to impair visibility.

Order 37 Rule 1 (b) provides that;

“An order for a temporary injunction may not be made against the government but may make declaratory on the parties.”

She stated that no arguable case has been established. This should not be granted for the above-mentioned reasons. She finally, prayed that this application should be dismissed with costs.

In his rejoinder, the counsel for the applicant argued that the prerequisite addressed by the respondent is misleading this court due to the fact that the application for *Mareva* injunction is different from temporary injunction where the case of **Atilio Mbowe**(*supra*) is distinguishable with this application of *Mareva*. The case of **Atilio** (*supra*) provides for interim orders in the nature of injunction which are governed under the **Civil Procedure Code**, Cap 33 while *Mareva* injunction is governed under the **Judicature and Application of Laws Act**, Cap 355 as adopted under the common law.

He added that the issue of ownership as claimed by the respondent cannot be established at this juncture since the respondent is trying to pre-empt the intended application which will have the right to determine issues of transfer. He submitted that the applicant acquired all the necessary documents to build the wall. The Railway regulation was enacted in 2018 while the applicant had already acquired ownership of the title in 1990. The respondent found the applicant on the said premises and there was no such evidence produced by the respondent. The applicant has invested since 1990 up to this moment. He submitted that for *Mareva* injunction to be granted, no suit must be pending but the expiration of the statutory notice. He ended his rejoinder by stating that the case of **Chavda** and Order 37 (Rule) provide for temporary

injunction differently. The respondents must do so within the ambit of the law.

Having carefully and dispassionately considered the affidavit, counter affidavit filed by the parties and their respective annexures as well as the arguments of both camps thereto, the issue for determination is whether the applicant has satisfied the required grounds for granting the orders sought.

It is trite law that the interim injunction is sought prior to the institution of a suit. It should be noted that an interim injunction order preceding the institution of a suit “*Mareva* Injunction” which is a common law remedy developed by courts of England. It derives its name from the case of **Mareva Compania Naviera SA v International Bulk Carriers SA** [1980] 1 All ER. Applying this principle, the supreme court of Canada in **Aetna Financial Services v Feigelman** (1985) 1 SCR 2 stated that;

“In granting Mareva injunction, two conditions must be established firstly, the applicant must demonstrate a strong prima facie case or a good and arguable case and secondly having all the circumstances of the case, it appears that granting the injunction is just and justifiable”.

In Tanzania, the court has jurisdiction under section 2(3) of the **Judicature and Application of Laws Act**, Cap.358 [R.E 2019] which supports the application of common law and equity in our jurisdiction. This court has on numerous occasions accepted applications for a temporary injunction even where there is no pending suit. In special circumstances, an application for a temporary injunction may be applied and granted without a pending suit. In the case of **Registered Trustees of Calvary Assemblies of God v. Tanzania Steel Pipes Ltd & 2 Others**, Misc. Land Case Application No. 677 of 2019 HC Dar es salaam (unreported), Makani, J observed that,

“A court has jurisdiction to issue an interim order where there is no pending suit”.

As stated earlier, *Mareva* injunction may be issued where the applicant cannot institute a case in a court of law because of an existing legal impediment. Since this application has been made pending the expiration of the 90 days' notice to sue the Government which impends the institution of a suit by the applicant; this application falls within the realm of *Mareva* precepts and can be issued if the conditions for the grant of the injunction are established.

Even though I agree with the respondent herein that the wall which is being built by the applicant will impede the vision of the users since there is an intersection on the railway cross. Nevertheless, having

gathered from the case, in this case at hand, the applicant has demonstrated to be the owner of the disputed land which is Plot No. 56 Block "BB" Kiloleni Area under the Certificate of Title No. 118053/29. It is evident under para 2 of the affidavit that, the 1st respondent issued a notice of demolition within 30 days. This fact is also featured in the counter affidavit (paras 3, 4, 5 and 6) where both the parties claim to have the better title on the disputed land.

It is my considered view that, there is a triable issue or arguable case which cannot be determined at this point. Also in the instant application, there is no dispute that a 30 days' notice was issued to the applicant on 27 January, 2023. This was attached to the affidavit as annexure P2 while the 90 days' notice to sue the Government as Annexure P7. Therefore, it is my view that there is a danger that the respondents may demolish the wall to defeat the ends of justice before the institution of the suit. This court has jurisdiction to issue an interim order to prevent the respondents.

Definitely, the first respondent has issued a statutory notice to the applicant which was duly issued on 27 January, 2023. It is common knowledge that the applicant cannot institute a case against the respondents before the maturity of 90 days of the notice in question. Thus, it is apparent that there are 90 days that impede the applicant from instituting the suit. With such impediment, anything may happen to the

disputed land which may cause irreparable loss to the applicant. It is my considered view that the applicant has met the conditions set in *Mareva* injunction.

For the foregoing reasons, I find the application meritorious. Therefore, I proceed to grant it accordingly. In the event, the 1st respondent is hereby restrained from demolishing any structure pending the institution of a suit after the expiry of 90 days demand notice. Each party is to bear own costs.

Order accordingly.

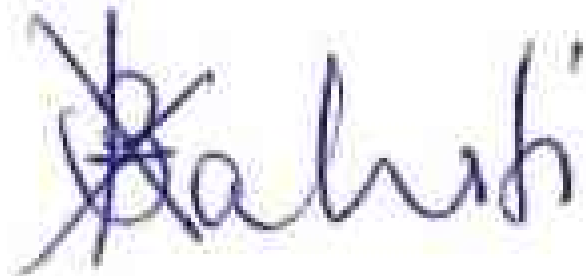


A.BAHATI SALEMA

JUDGE

6/3/2023

Court: Ruling delivered in presence of both parties.



A.BAHATI SALEMA

JUDGE

6/3/2023

Right of Appeal fully explained.



A.BAHATI SALEMA

JUDGE

6/3/2023

