

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA SUB- REGISTRY

AT BUKOBA

MISC. LAND APPLICATION NO. 1979 OF 2024

(Arising from Land case No 1208 of 2024)

ANATORY JOHN AMANI.....APPLICANT

VERSUS

BUKOBA MUNICIPAL COUNCIL.....1ST RESPONDENT

ATTORNEY GENERAL2ND RESPONDENT

RULING

18/03/2024 & 26/03/2024
E. L. NGIGWANA, J.

This ruling is in respect of the application brought by the applicant herein under certificate of urgency and by way of chamber summons made under Order XXXVII Rule 1(a) and (b) of the Civil Procedure Act, [Cap.33 R.E 2019], seeking for the following orders;

- (i) *That, this court be pleased to issue temporary injunction order restraining the 1st respondent from trespassing and allocating the suit land to other people pending hearing and determination of the main suit*

(ii) *Costs and,*

(iii) *Any other and further reliefs the court may deem fit and just to grant.*

The application is supported by an affidavit affirmed by the applicant herein and is opposed by a counter affidavit sworn by Mr. Victor Mhana, learned Attorney for the respondents. When the application came for hearing, the applicant was represented by Mr. Aderick Runyoro, learned advocate and the respondents were represented by Mr. Victor Joseph Mhana and Mr. Audax Joseph, both learned State Attorneys.

The application was heard orally. Mr. Aderick Runyoro prayed to adopt the affidavit supporting the application to form part of his submission and stated that, it is a settled law that for an order of temporary injunction to be granted, the court must be satisfied that; **one**, the plaint should disclose on the face of it, some reasonable probability of success. **Two**, that the applicant will suffer irreparable loss which cannot be adequately remedied or attoned by damages and **three**, that in the balance of conveniences, the applicant will suffer greater loss than the respondent if an order for temporary injunction is not granted. To bolster his stance, the learned counsel cited two cases to wit; **Atilio versus Mbowe** (1969)

H.C.D 284 and **Happson Mwinyi Kimaro & 6 Others**, HC Civil Revision No. 15/2003.

He further submitted that paragraphs 3 and 5 of the founding affidavit carry the reasons as to why this application should be granted. He insisted that if this application is not granted, the applicant will suffer irreparable loss, and if it is granted, the respondent will suffer no loss. He ended up his submission praying the court to grant the order sought in the chamber summons.

To counter the application, Mr. Victor Joseph Mhana prayed to adopt the counter affidavit to form part of his submission. He submitted and argued that, injunctive order cannot be issued unless the applicant satisfies the court that the conditions for granting temporary injunction have been met.

He added that first of all, the applicant must show that he has a right in the main suit which ought to be protected or there is an injury which needs to be prevented by an interim injunction and that if that was not done, he would suffer irreparable injury and not one which can possibly be repaired. To bolster his stance, Mr. Mhana cited the case of **Leopard Net Logistics Company Limited versus Tanzania Commercial Bank**

Ltd & 3 Others, Misc. Civil Application No. 585 of 2021, (HC) (unreported), in which the said position was stressed. He also referred this court to the case of **Abdi Ally Salehe versus Isac Care Unit Limited & 2 Others**, Civil Revision No. 3 of 2012, CAT (Unreported) where the court held that once the court finds that there is a *prima facie case*, it should then go on to investigate whether the applicant stands to suffer irreparable loss, not capable of being atoned for by way of damages.

Mr. Mhana further submitted that the learned counsel for the applicant has mentioned specifically paragraphs 3 & 5 as paragraphs that carry the reasons why this application should be granted, but reading them between line, it goes without saying that they do not show how the applicant will suffer irreparable loss if this application is not granted. Furthermore, Mr. Mhana referred this court to the case of **Mwakeye Investment Limited versus Access Bank Tanzania Limited**, Misc. Land Application No.654 of 2016 (HC) (unreported), whereby temporary injunction was refused on the ground that the applicant has failed to demonstrate that he will suffer irreparable loss which cannot be compensated in monetary terms. He ended his submission urging the court to draw inspirations from **Mwakeye's Case** (Supra) and dismiss this application for want of merit.

Mr. Audax Joseph was also invited but he had nothing new to add, meaning; he just ended up supporting submission by his fellow State Attorney Mr. Victor Mhana.

In his rejoinder submission, Mr. Runyoro stated the pleadings (founding affidavit and counter affidavit) are the documents which ought to govern the court because they show what the applicant stated and what the respondent stated in reply thereto.

As regards the argument that applicant has failed to demonstrate the loss to be suffered by him if the application is refused, Mr. Runyoro submitted that paragraph 4 of the founding affidavit is clear to the effect that the court's intervention is necessary since there are infrastructures in the Suit land and since the applicant's family depends on the same, it will suffer irreparable loss if the interim injunction order is not issued. According to Mr. Runyoro, the cases cited by the learned State Attorney are not relevant to this case. He ended his rejoinder submission urging the court to consider the balance of convenience and grant the prayer sought.

After considering the submissions from the counsel for the parties, the court has found that the issue to determine in this matter is whether the

application deserves to be granted. This application was brought under Order XXXVII Rule 1(a) and (b) of the Civil Procedure Act, [Cap.33 R.E 2019] which provide that;

"1; - Where in any suit it is provided by affidavit or otherwise:-

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit or suffering loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree; or*
- (b) that the defendant threatens, or intends to remove or dispose of his property with a view to defraud his creditors, the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of the property as the court thinks fit, until the disposal of the suit or until further orders:*

Provided that, an order granting a temporary injunction shall not be made against the Government, but the court may in lieu thereof make an order declaratory of the rights of the parties"

At the outset, I would like to state that the granting or refusal of a temporary injunction, which is an interlocutory order, is an exercise of judicial discretion which must be exercised judiciously. **See: Sargent versus Patel (1949) 16 E.A.C.A 63).**

As rightly argued by both counsel for the parties, the conditions governing grant of temporary injunction in our jurisdiction were well laid in the famous case of **Attilio versus Mbowe** (supra) where it was stated as follows:-

- (i) There must be a serious question to be tried on the facts alleged, and the probability that the plaintiff will be entitled to the relief prayed.*
- (ii) The applicant stands to suffer irreparable loss requiring the courts intervention before the applicants legal right is established.*
- (iv) On the balance of convenience, there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendant/ respondent from granting of it.*

In the case of **Christopher P. Chale versus Commercial Bank of Africa**, Misc. Civil Application No. 635 of 2017 Mwandambo J (as he then was) had this to say in relation to the herein above conditions;

"It is trite law that the conditions set out must all be met and so meeting one or two of the conditions will not be sufficient for purposes of the court exercising its discussion to grant an injunction".

Indeed, I do subscribe to this position. In light of the aforestated general principles, I now turn to the facts of the application. Paragraphs 2 & 3 of the founding affidavit are to the effect that the 1st respondent trespassed into the applicant's land while paragraph 3 of the replying affidavit is to the effect that the 1st respondent had never trespassed into the suit land since no one can trespass into his/her own land. In his oral submission, the learned counsel for the applicant reiterated what has been stated in the founding affidavit. On the other hand, the learned State Attorney reiterated what has been stated in the counter affidavit. The documents shows that there is a dispute over ownership of the suit land. To that extent, I find that the totality of the facts disclose that there is an arguable case to wit; Land case No. 1208 of 2024. However it is worth noting that this stage, the court cannot prejudge the case of either party. In other words, a decision

on the merits or demerits of the main case must await the substantive consideration of the facts, evidence and applicable law after full hearing of the same. Consequently, I am satisfied that the Applicant has crossed over the first hurdle.

I now come to the second condition, namely, that the Court's intervention is necessary to protect the Applicant from the kind of injury which may be irreparable and which cannot be compensated by way of damages in the event the application is refused.

Before reaching far, it is very important to know the objective of interlocutory injunction. Its objective was articulated in case of **American Cyanamid Co. versus Ethicon Ltd (1975) AC 396** as follows;

"The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be

adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at trial. The court must weigh one need against another and determine where 'the balance of convenience' lies"

See also **Hotel Tilapia Ltd versus Tanzania Revenue Authority**, commercial case No. 02 of 2000 HC (unreported). In the case of **Abdi Ally Salehe versus Isac Care Unit Limited & 2 others (Supra)**, addressing the conditions to be met before granting application for temporary injunction, the court of Appeal of Tanzania held that;

"Once the court finds that there is a prima facie case, it should then go on to investigate whether the applicant stands to suffer irreparable loss, not capable of being atoned for by way of damages. The Applicant is expected to show that, unless the court intervenes by way of injunction, his position in some way be changed for the worse; that he will suffer damage as a consequence of the plaintiff's action or omission provided that the threatened damage is serious, not trivial or minor, illusory, insignificant or technical only. The risk must be in respect of a future damage"

In the matter at hand, during his submission, Mr. Runyoro stated clearly that Paragraph 4 of the founding affidavit reveal that if the order is not issued, the applicant will definitely suffer irreparable loss. For easy reference, the said paragraph was coached as follows;

"THAT, the court's interference is necessary to protect the applicant from the kind of injury which is irreparable before the rights are established as the developed infrastructure in the suit land will be destroyed and the applicant's family which is depending on it will suffer"

Paragraph 4 of the counter affidavit is to the effect that the applicant has failed to demonstrate anywhere in his affidavit how he will sustain irreparable loss if the application will not be granted while paragraph 5 is to the effect that there is no any action that the respondents have initiated or undertaken over the suit land to the moment.

It is elementary principle that affidavits in chamber proceedings like the one at hand, constitutes both pleadings and evidence. Equally straight; the applicant must make out his case in his founding affidavit and that he must stand or fall by the allegations contained therein. It follows therefore that

the applicant must set out sufficient facts in his founding affidavit which will entitle him to the relief sought.

The weight of the affidavit in law has been underscored by the Court of Appeal of Tanzania in the case of **Registered Trustees of Archdiocese of Dar es Salaal versus the Chairmain Bunju Village Government and Others**, Civil Appeal No. 147 of 2006, CAT (unreported) where the Court emphasized that, an Affidavit is evidence, in absence of the reasons pegged in the affidavit, there is no material evidence upon which the Court can determine on merit the Application before it. It goes without saying that the three conditions for Temporary Injunction must be cumulative reflected in the Affidavit in support of the Application.

Again, it is a law in our legal fraternity that submissions are not evidence. They are generally meant to reflect the general features of a party's case. Submissions are elaborations or explanations on evidence already tendered. They are expected to contain arguments on applicable law; they are not intended to be substitute for evidence. See **Registered Trustees of Archdiocese of Dar es Salaam versus the Chairman- Bunju Village Government and Others** (Supra).

As far as the case at hand is concerned , the founding affidavit is to the effect that the developed infrastructure will be destroyed but the same does not go further to state what kind of infrastructure it is , what it is used for and how the applicant will suffer irreparably. In his submission, the learned counsel for the applicant just reiterated the contents of the founding affidavit. He did not make elaboration or explanation of the infrastructure mentioned in the founding affidavit.

I am alive that in considering the balance of convenience, the court weighs the prejudice to the applicant if the interim relief is not granted against the prejudice to the respondent if the relief is granted. Considering the fact that the applicant has failed to demonstrate how he will suffer irreparable loss if the application is not granted, it goes without saying the founding affidavit does not disclose material facts/evidence to enable the court to decide whether the applicant will suffer greater injury if the injunction is refused than the respondents will suffer if it is granted.

In light of the foregoing, I shake hands with Mr. Mhana, and Mr. Audax Joseph learned State Attorneys for the respondents that the applicant has failed to demonstrate that irreparable injury will be occasioned to him if the

order sought is not granted. In the result, this application is accordingly dismissed. No order as to costs entered.

Dated at Bukoba this 26nd day of March 2024.



E. L. NGIGWANA

JUDGE

26/03/2024

Ruling delivered this 26th day of March 2024 in the presence Mr. Ali Chamani learned advocate for the Applicant, Mr. Victor Joseph Mhana and Mr. Audax Joseph both learned State Attorneys for the Respondents, Hon E.M. Kamaleki, Judge's Law Assistant and Mr. Respichius Renatus, B/C.



E. L. NGIGWANA

JUDGE

26/03/2024

