

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(TABORA SUB-REGISTRY)

AT TABORA

MISCELLANEOUS LAND APPLICATION NO. 28340 OF 2023

LIMI JOHN.....APPLICANT

VERSUS

MOHAMED ALLY AMARY.....1ST RESPONDENT

MINNING COMMISSION.....2ND RESPONDENT

ATTORNEY GENERAL3RD RESPONDENT

RULING

4/1/2024 & 2/2/2024

MANGO, J

The Applicant filed this application under section 2(3) of the Judicature and Application of Laws Act, [Cap. 358 R.E 2019] and section 95 of the Civil Procedure Code, [Cap.33 R.E 2019] seeking for the following orders:-

- i. That this court be pleased to grant a temporary order prohibiting the Respondents, their agents or any other person acting on their behalf and instructions from doing anything or evicting the Applicant on the land property measuring over five acres located at Kajima area Mwamapuli village within Igunga District pending hearing of the suit intended to be filed after expiration of 90 days' notice already served to the Respondents
- ii. Costs of the application

iii. Any other orders that the Court may deem fit and just to grant

The application is supported by an affidavit sworn by the Applicant. The Respondents contested the grant of orders sought in the chamber summons and they filed counter affidavits to that effect. The first Respondent filed a counter affidavit affirmed by himself while the second and third Respondents filed a joint counter affidavit sworn by Gureni Nzinyangwa Mapande a State Attorney working in the office of Solicitor General.

On 4th January 2024 when the application was called on for hearing, the Applicant was represented by Advocate Kanani Chombala, the first Respondent was represented by Advocate Maclean Steven Haule while the second and third Respondents enjoyed legal services of Gureni Mapande, State Attorney.

In his submission in support of the application, Advocate Chombala adopted the contents of the affidavit filed by the Applicant to form part of his submission. He then submitted that, the land in dispute measures over 5 acres belongs to the Applicant who uses the same as a farm. Between February and March 2023, the first Respondent alleged that, Mining Commission has issued mining licence No. PMLO/76/3TBR dated 14th March 2023 in his favour. He submitted further that, immediately after the mining licence was issued, the first and second Respondents ordered the Applicant to stop his activities in the disputed land. He added that, the Applicant has attempted to challenge the actions of the first and second Respondents via Land Application No. 22 of 2023 which was instituted before the District land and Housing Tribunal for Tabora District. Unfortunately, the Applicant

did not join the 2nd and 3rd Respondents in his application thus, he had to withdraw the application in order to comply with mandatory legal requirements. The Applicant is in the process of instituting a suit against the Respondents. On 1st December 2023, the Applicant issued a 90 days statutory notice to the second and third Respondents in compliance with section 6 of the Government Proceedings Act. Before the notice period has expired, the first and second Respondents have attempted to evict the Applicant from the disputed land. The Applicant filed the application at hand to restrain the Respondents from evicting him from the disputed land before expiry of 90 days' notice. The learned counsel cited the case of **Tanzania Electricity Supply Company (TANESCO) versus IPTL** [2000] TLR and the case of **Magreth Nuhu Halimenshi versus Kigoma Municipal Council and two others** Misc. Land Application No. 17 of 2022 to cement his arguments that, the Court can grant injunction orders pending institution of a suit.

In his reply submission, Gureni Mapande learned state attorney adopted the contents of the counter affidavit filed by the 2nd and 3rd Respondents to form part of his submission. He then registered the 2nd and 3rd Respondents position that, they object issuance of orders prayed by the Respondent on the reason that, the Applicant has not met the conditions set for grant of temporary injunctions. Citing the case of **Otilio versus Mbowe** 1979 HCD 284 he argued that, for the court to grant temporary injunctions, three conditions should be established. He mentioned the conditions to be existence of a serious triable issue, irreparable loss and balance of probability

Submitting on the first condition, he argued that there is no serious triable issue between parties to this application since the first Respondent complied with all conditions before being granted a mining licence over the land in dispute. He also added that, the Applicant was well informed of the need to issue 90 days statutory notice in order to join the second and third Respondents since April 2023. However for reasons best known to himself the Applicant decided not to issue the said notice up to 1st December 2023.

On the second condition, he submitted that if the injunction order will be granted, the Respondents will suffer irreparable loss. He explained the possible irreparable loss to the Respondents to include loss of employment to all persons who are employed by the first Respondent to work in the activities that being conducted in the disputed land, and that the first Respondent's mining licence might expire before any mining exploration has been conducted in the disputed land.

On third condition he submitted that the Government will not be able to collect the expected revenue from the first Respondent. The monies that has been spent by the first Respondent will be wasted.

The learned state Attorney conceded that they have the Respondents have attempted to evict the Applicant from the land in in dispute peacefully but the Applicant has unreasonably resisted the eviction. He added that, the first Respondent has complied with all procedure including payment of compensation assessed by the responsible authorities. The learned State Attorney is of the view that, the Applicant has no valid reasons to resist the eviction.

On her part, Advocate Haule for the first Respondents submitted that, the Applicant has not complied with Order XXXVIII Rule 1(a) and Rule 4 of the Civil Procedure Code,[Cap 33 R.E 2019] and has not fulfilled the conditions set in the famous case on injunctions, *Otilio Versus Mbowe*.

The learned counsel challenged the competence of the Applicant to file this application on the ground that, he has no locus stand. She argued that, it is not clear whether the Applicant has filed this application as the administrator of the estate or in his personal capacity. Citing the case of **Emmanuel Kidenya and 18 others versus Kikundi cha Ukombozi Nyalingoro**, Misc. Civil Application No. 32 of 2023 High Court of Tanzania, Shinyanga sub registry, she argued that, the Applicant need to establish to have a right in the main suit or injury.

On the three conditions for injunctions, she submitted that, the Applicant has not established any of the three conditions. On the existence of a serious triable issue, she argued that there is actually non worthy to be determined by the Court. On the issue of irreparable loss, she submitted that the nature of loss mentioned by the Applicants' counsel cannot amount to irreparable loss since it can easily be remedied by monetary compensation. The learned counsel argued further that, it is the first Respondent who will suffer more since he has already installed mining machines in the disputed land, he has employed some employees and he is paying government levies for the activities that are conducted in the disputed land. She is of the view that, the Applicant is incapable of paying compensation for the loss that will be suffered by the first Respondent incase the injunction orders will be granted.

She added that, the Applicant will not suffer any loss because the land in dispute is not the only land available for the applicant's activities and the Applicant has been compensated. The amount paid as compensation for the land was deposited to the Local Government Authority within the locality in which the land in dispute is located and the Applicant has already been notified but he has refused to collect the same for reasons best known to himself.

In his brief rejoinder learned counsel for the Applicant reiterated his submission in chief. He the challenged application of Order XXXIXVIII of the Civil Procedure Code and the principles laid down in the case of *Otilio versus Mbowe* on the ground that they can only be applicable in application for temporary injunctions pending determination of a case. He argued that, the application at hand is for mareva injunction orders.

He also faulted the allegations that the Applicant was paid compensation for the land. In this, he referred the Court to annexure 2 of the counter affidavit filed by the second and third Respondents. He the argued that, the document clearly indicates that, the alleged compensation was paid to the account which is operating under the names of Kata ya Kinumbi and not the Applicant

Regarding the Applicant's locus stand, the learned counsel submitted that, the Applicant is the owner of the disputed land and he filed this application in his personal capacity. He does not claim the land in a representative capacity. The learned counsel also argued that, the averment of the first Respondent under para 2 of his counter affidavit are not clear because they

do not indicate as to who had a dispute with Bundala's family and connection between Bundala's family and the Applicant.

Advocate Chombala submitted also on the loss that will be suffered by the Applicant. In this he argued that, the farm in dispute is the only land for the Applicant's activities. Thus, if he will be evicted from the land, he will have nowhere to cultivate his crops for his survival. In brief, the Applicant will suffer from hunger and loss of income since he depends on the farm produce from the disputed land for his survival and economy, that is, food and source of income for his other basic needs. In that regard, he prayed the Court to grant injunction orders against the Respondents and allow the Applicant to continue with his activities in the disputed land pending institution of an intended suit.

I have considered submissions by both parties and Court record. Ordinarily temporary injunction orders are issued pending hearing of a suit pending before the Court. In rare cases the Court may issue temporary injunctions pending filing of a suit. Such injunction orders falls under the category of mareva injunctions and they are issued to protect properties from undesirable acts of the Defendant which might make the final judgment or order of the Court nugatory.

In Tanzania, the Court is empowered to grant such orders under section 2(3) of the Judicature and Application of laws Act and section 95 of the Civil Procedure Code which provides for inherent powers of the Court. The Court has articulated on its jurisdiction to grant mareva injunction orders in a number of cases including the case of **Ugumba Igembe and Machanya**

Nemba Singu versus The Tanzania National Parks and Another (Misc. Civil)[2021] TZHC 2043(18 January 2021)in which my brother, Hon. Utamwa J(as he then was) stated clearly that, the Court can grant injunction orders against government institutions before the expiry of 90 days statutory notice.

The principles applicable in granting ordinary temporary injunctions do also apply when determining an application for mareva injunctions. I hold so while aware that the basic pre-determining factor in an application for mareva injunctions is existence of an impediment as correctly submitted by the learned advocate for the Applicant. Existence of an impediment is a pre-condition which should be considered first before assessing other factors for granting mareva injunction orders. This means, in situations where existence of impediments have not been established, an application for mareva injunction orders cannot be considered.

Where impediments have been established, then the Court can move on to determine the application for mareva injunction by assessing whether there exists a serious triable issue between parties and all other circumstances pertaining to justiciability of granting orders sought by the Applicant. The High Court of South Africa in the case of **Commissioner for the South African Revenue Services versus Maloto and Others** (63778/2021) [2022] ZAGPPHC 832 listed three main requirements that need to be fulfilled by the Applicant before mareva injunction orders can be granted. The conditions includes *equity and fairness* which means the Court after considering circumstances underlying the application must be satisfied that the decision clearly needs to be made. This can simply be considered

to be balance of justice and convenience between parties. Second, existence of strong prima facie claim and third, difficulty of recovery in case an injunction order is not issued.

A careful consideration of the conditions for granting mareva injunctions reveals that the conditions are similar to those set in determining applications for ordinary temporary injunction orders which have been expounded extensively by learned counsels for the Respondents. The only difference is that, in applications for mareva injunctions, the Applicant need to establish existence of an impediment compelling him to file an application for mareva injunction instead of ordinary application for temporary injunction orders.

The Applicant in this application has established existence of an impediment which is the requirement to issue 90 days statutory notice before instituting a suit against the second and third Respondents. The impediment is very clear since it is a legal requirement provided for under section 6(2) of the Government proceedings Act, [Cap 5 R.E 2019]. However, before ruling out as to whether the Applicant has established the remaining three conditions that is, existence of a serious triable issue (strong prima facie case), balance of justice and convenience between parties and the difficulty of recovery (irreparable loss to either of the parties), I have noted that, the Applicant seeks for a strange injunction and not mareva Injunction as expressed by his counsel.

According to the Chamber Summons, the Applicant in the application at hand seeks injunction pending hearing of a suit intended to be filed after the expiry of 90 days' notice. Such kind of injunction are unknown in our laws and

cannot be issued by the Court because the orders, if granted, will have no defined time limit. I hold so because the court cannot compel the Applicant to file the intended suit after expiry of the 90 days' notice and the injunction order will restrain the Respondent from conducting any activities in the disputed land until when the case to be filed by the Applicant has been heard by the Court. In other words, the expiry of injunction orders sought in this application will solely depend on the wishes of the Applicant. The court in **Daudi Mkwana Mwita versus Butiama Municipal Council and Attorney General** (Misc. Land Application 69 OF 2020) [2020] TZHC 4174(11 December 2020), found lack of certainty in the orders sought to be one of the irregularities which moved it to struck out the application. I also find the life span of the orders sought in this application to be unascertainable, thus incapable of being issued by this Court as it will be contrary to the balance of justice principle.

For that reason, the application is hereby struck out. Given the nature of parties involved in this application and the need to create conducive environment for parties to settle their dispute within the 90 days' notice period, I award no costs.

Dated at Tabora this 2nd day of February 2024



A handwritten signature in black ink, appearing to read "Z. D. Mango", is written over a set of horizontal lines.

**Z. D. MANGO
JUDGE**