

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBASUB- REGISTRY

AT BUKOBA

MISCELLANEOUS LAND APPLICATION NO. 5739 OF 2024

GODFREY SYRIVAN (*Administrator of the Estate of the late Aloys Merichior Ndyetabura*).....APPLICANT

VERSUS

BUKOBAMUNICIPAL COUNCIL.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

RULING

27/03/2024 & 03/04/2024
E. L. NGIGWANA, J.

The Applicant Godfrey Syrivan who is the administrator of the Estate of the late Aloys Merichior Ndyetabura, through the legal services Mr. Alli Chamani learned Advocate, has moved this court under Certificate of Urgency, and by way of chamber summons made under section 2 (3) of the Judicature and Application of Laws [Cap. 358 R. E 2019].

The main prayer in his application is for a "mareva " injunction restraining the 1st respondent from demolishing the house built at Rwomunda/Ihyolo area, Nyanda Ward within Bukoba Municipality pending the institution of a suit after the expiry of 90 days' statutory notice issued to the respondents.

Apart from the main prayer, the applicant is also praying for any other relief (s) and/or orders this Honourable court may deem just and equitable to grant.

The application is supported by an affidavit sworn by Mr. Alli Chamani, learned advocate for the applicant. The application was contested by respondents through a counter affidavit sworn by Mr. Victor Mhana, learned State Attorney.

During the hearing of the application, Mr. Alli Chamani, appeared for the applicant while the respondents enjoyed the service of Mr. Victor Joseph Mhana and Mr. Audax Joseph, both learned State Attorneys.

Submitting in support of the application, Mr. Alli Chamani adopted the affidavit supporting the application and proceeds to submit that, the application seeks to restrain the 1st respondents from demolishing the house built at Rwomunda/Ihyolo area, Nyanda Ward within Bukoba Municipality pending the institution of a suit after the expiry of 90 days' statutory notice issued to the respondents. He went on submitting that the 90 days' notice is a mandatory legal requirement before suing the government and as reflected in paragraphs 7 and 9 of the founding affidavit, the applicant has already

issued the 90 days' notice dated 11/03/2024 to the respondents and the respondents have acknowledged to have received it on 12/03/2024.

He added that the conditions for granting mareva injunction were clearly stated in the case of **Mujibu Islam Mutanda and Another versus Wilson Christian Sekulo and 3 others**, Miscellaneous Land Application No.112 of 2022 HC at Bukoba (unreported) as follows; **firstly**, existence of prima facie case or triable issues, **secondly**, granting the injunction is just and justifiable and **thirdly**, the applicant cannot institute the case because of existing legal impediment.

According to him, all three conditions have been met in the matter at hand because the applicant has managed to demonstrate through the founding affidavit that despite of the settlement order, there is still a prima facie case between him and the first respondent in relation to ownership of the suit land, and that for the interest of justice it just and justifiable to issue the order sought.

He added that, if the order is issued pending the expiry of the 90 days' notice, the respondents will not suffer any loss but if the same is not issued, the applicant's side will suffer due to the fact that in early dates of March, 2024, the servants of the 1st respondents have entered on the suit land and

started making some preparations of erecting a house and cutting down some trees and since the said land is a developed land and being occupied by some families of the late Aloys Merichior Ndyetabura, the acts of the 1st respondent, will cause the said families to suffer irreparable injury by rendering them homeless.

In reply, Mr. Mhana conceded that the conditions stated in the case of **Mujibu** (Supra) are the conditions which must be considered by the court before exercising its discretion to grant or refuse mareva injunction. He added that as far as the matter at hand is concerned, the three conditions were not at all met due to the fact that the disputed land was initially under ownership of Bahaya Chiefdom but later on, it was acquired by the Ruling Party Chama Cha Mapinduzi (C.C.M) as reflected in paragraph 3 of the counter affidavit.

He went on submitting that the said land was later given to the 1st respondent by Chama cha Mapinduzi (C.C.M) for the purpose of erecting Bayanga Ward Dispensary and staff houses whereas, the Dispensary was constructed in 2008 and since then, the late Aloys Merichior Ndyetabura had never claimed ownership of the said land, therefore; the applicant's claims of ownership of the same are just mere allegations.

Mr. Mhana added that in Land Case No.13 of 2022 between the applicant herein and the respondents, the applicant sued the 1st respondent for trespass unto the Suit land situated at Ihoyo Street in Nyanga Ward within Bukoba Municipality in Kagera region, praying to the court to declare that the Suitland is among the estates of the late Aloys Merichior, but the parties settled their differences amicably and upon filing the Deed of Settlement on 25/05/2023, this court the same marked the matter settled and it was agreed that the applicant will present the map of building structure of the site and therein include the current built house and present to the 1st respondent but he has not done so to date.

According to Mr. Mhana, the applicant has not demonstrated that there is a triable or prima facie case between him and the respondents. To bolster his stance, he made reference to the case of **Leopard Net Logistics Company Ltd versus Tanzania Commercial Bank Ltd and 3 others**, Misc. Civil Application No. 585 of 2021 HC at Dsm (unreported) where the need for the applicant to demonstrate that there is a prima facie case, was emphasized.

As regards, the issue of irreparable loss, Mhana submitted that the applicant has to blame himself for his failure to act upon the court order dated 25/05/2023 issued in Land Case No.13 of 2022, thus the principle of ***Volenti***

non fit injuria must come into play. He further submitted that even if it is assumed that the said principle does not apply in this matter, still, it is apparent that the applicant has failed to demonstrate how he will suffer irreparable loss since it not enough to show that there is a prima facie case. He supported his stance with the case of **Abdi Ally Salehe versus Asac Care Unit Ltd**, Civil Revision No3 of 2012 CAT (unreported) and the case of **Mwakeye Investment Ltd versus Acces Bank Tanzania Ltd**, Misc. Civil Application No. 654 of 2016 HC at Dsm.

In his rejoinder, Mr. Chamani submitted that the settlement order was not to the effect that the applicant or the family of the deceased was occupying suit land illegally and there was no order to vacate the suit land or destroy the houses built there on. He added that paragraph 12 of the founding affidavit describes how the applicant will suffer in case the application is not granted, and for that matter, the case of **Leopard Net Logistics (Supra)** is distinguishable. He also submitted that as per the case of **Abdi Ally Salehe (Supra)**, at this stage, the court is not required to discuss the merit of the main case.

I have carefully and dispassionately considered the contents of the application and the prayers thereto, the affidavit filed in support of the

application and the counter affidavit filed by the respondents and their respective annextures. It is trite that a Mareva injunction is a discretionary remedy which entitles the court to balance the parties' respective interests. Therefore, in the matter at hand, the issue for determination is whether or not the Applicant is entitled to a Mareva injunction pending the institution of a suit after the expiry of 90 days' statutory notice issued to the respondents on 12/03/2024.

It should be noted that an interim injunction order preceding the institution of a suit mareva injunction is a common law remedy developed by the courts of England, and it derives its name from the case of **Mareva Compania Naviera SA versus International Bukkcarries SA** [1980] 1 ALL ER 213. Applying this principle the Supreme Court of Canada in **Aetna Financial Services versus Feigelman** (1985) 1 SCR 2 stated that, in granting Mareva injunction, two conditions must be established **firstly**, that the applicant must demonstrate a strong prima facie case or a good and arguable case, and secondly, having regard all the circumstances of the case, it appears that granting the injunction is just and justifiable, and **thirdly**, as per the case of **Mujibu Islam Mutanda and Another versus Wilson Christian**

Sekulo and 3 others (Supra), that the applicant cannot institute the case because of existing legal impediment.

In Tanzania, it is a settled principle that this court has jurisdiction to grant such injunction under section 2 (3) of the Judicature and Application of Laws Act [Cap. 358 R.E 2019] which braces the application of common law and equity in our jurisdiction.

There are many cases which have discussed mareva injunction. See **Abdak M. Malik & 545 Others versus AG**, Misc. Land Application No. 119 of 2017, HC LD (unreported), **Jitesh Ladwa versus Yono Auction Mart and Co. Ltd & Others**, Misc. Civil Land Application No. 26 of 2020 HC DSM (unreported) and **Leonilah Kishebuka versus Novat Rutageruka and 2 others**, Land Application No.70 of 2022.

As I have said earlier, mareva injunction may be issued where the applicant cannot institute a case in a court of law because of an existing legal impediment, and since, this application at hand 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, it goes without saying that this application falls within the realm of "mareva injunction". The 1st respondent

did not dispute to have entered into the suit land and started making some preparations for the purpose of constructing staff houses.

It is trite that a Deed of Settlement needs to be drafted with clarity and precision to ensure that the parties' intentions are accurately reflected so as to prevent the parties from entering into further litigation. The Deed of Settlement enjoys the status of a court order. However it may be challenged in court on grounds of fraud, misrepresentation, coercion or improper execution. The applicant is not intending to file a suit to challenge the same on the herein above grounds but his intention is to file a fresh suit.

I have gone through the settlement order in Land Case No. 13 of 2022 and found that the same does not show that the applicant or the family of the late Aloys Merichior Ndyetabura is occupying the suit land illegally or that they have no any other right over the same. On that ground, it cannot be said that the applicant has failed to demonstrate the existence of a prima facie case. It is understood that each case should be determined on its own merits and circumstances. Considering the circumstances of the application at hand, it is my considered view that the applicant has managed to demonstrate that there is a prima facie case.

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, I shake hands with Mr. Chamani learned advocate for the applicant that, if a mareva injunction is not issued, definitively, the applicant's side will suffer irreparable loss as opposed to the 1st respondent.

In the fore going, I find the application meritorious; therefore I proceed to grant it accordingly.

In the event, the 1st respondent is restrained from demolishing the house built at Rwomunda/Ihyolo area, Nyanda Ward within Bukoba Municipality pending the institution of a suit after the expiry of 90 days' statutory notice issued to the respondents on 12/03/2024.

Considering the dictates of "Mareva injunction", this mareva injunction order will not cover the period after filing the main suit until its final determination. It is so ordered.



E.L. NGIGWANA

JUDGE

03/04/2024

Ruling delivered this 3rd day of April 2024 in the presence of Mr. Alli Chamani, learned advocate for the Applicant, Mr. Joseph Mhana learned State Attorney for the respondents and Ms. Peace Musasa, B/C.



E.L. NGIGWANA

JUDGE

03/04/2024