

IN THE HIGH COURT OF TANZANIA

(MWANZA SUB-REGISTRY)

AT MWANZA

MISCELLANEOUS LAND APPLICATION NO.99 OF 2023

(Arising from Land Case No.42 of 2023)

MARY ISDOR SHIRIMA (Administratrix of the Estates of the

Late Mbonea Eliapenda Mngulu).....APPLICANT

VERSUS

ILEMELA MUNICIPAL COUNCIL.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

AMINA LUNYILIJA MANGOMBE.....3RD RESPONDENT

YUNIA ODIRIA.....4TH RESPONDENT

INNOCENT STEPHENS MASHIKU.....5TH RESPONDENT

JOSEPH OPONDO WILLIAM.....6TH RESPONDENT

HEMED HARUNA.....7TH RESPONDENT

MALUGU KALAMU DUBA.....8TH RESPONDENT

MICHAEL MUHANGWA.....9TH RESPONDENT

NEMES WILBARD.....10TH RESPONDENT

SHAMINA BAKARI JUMA..... 11TH RESPONDENT

WILLIAM LUCAS MAGOHA.....12TH RESPONDENT

RULING

19th & 22nd February, 2024

KAMANA, J:

By way of chamber summons, the Applicant lodged this application in terms of Order XXXVII Rule (1) (a) and (4) of the Civil Procedure Code, Cap.33 [RE. 2019] (CPC) seeking a temporary injunction restraining the respondents or their agents from developing or disposing by way of sale, mortgage or lease the suit premises pending the determination of the main suit. The application was premised on the affidavit whose affiant is the applicant.

The background to the application is that on 26th June, 2010, Mbonea Eliapenda Mngulu did purchase Plot No.1382 Block "A" situated at North Buswelu in Mwanza Region. The seller was Hands of Mercy Outreach Tanzania which had a letter of offer granted to her by the first respondent effective from 1st April, 2007. While the transfer process was underway, the purchaser joined his ancestors. Consequently, his dear wife Mary Isdor Maro was appointed to administer her husband's estate.

Sometimes in the year 2021, while waiting for the completion of the transfer process by the first respondent, it came to the applicant's knowledge that the purchased plot had been invaded by the 3rd to 12th respondents. It was further revealed to her that the first respondent was

about to re-survey the plot while it was known to the said respondent that the plot was surveyed way back in 2005. It is against that background, that the applicant filed Land Case No. 99 of 2023 seeking this Court's declaration that she is a lawful owner of the plot in question. Further, the applicant saw it prudent that during the pendency of the main suit, the respondents be restrained from developing or disposing of the suit property.

On 19th February, 2024 the matter came for a hearing. The applicant was represented by Mr. Duttu Chebwa, learned Counsel. The 1st and 2nd respondents were represented by Mr. Allen Mbuya, learned State Attorney. Mr. Akram Adam, learned Counsel represented the rest of the respondents save for the 12th respondent who chose not only to file the counter affidavit but also not to enter an appearance. It should be noted that the first and second respondents did not file a counter affidavit despite being twice given such an opportunity.

Submitting in support of the application, Mr. Chebwa prefaced by adopting the affidavit supporting the application. He submitted further that there are three conditions to be met before the application for temporary injunction be granted. First, whether there is a serious triable issue or prima facie case and the probability that the applicant will be

entitled to the reliefs prayed. Second, whether the applicant stands to suffer irreparably if the application is not granted. Third, whether on the balance of convenience, the applicant is likely to suffer greater hardships than the respondent if the prayed order is refused. In strengthening his argument, he cited the celebrated case of **Atilio v. Mbowe [1969] HCD 284** in which the principles for granting injunction orders were pronounced.

Expounding on the first condition, Mr. Chebwa contended that there is a serious triable issue. He referred to paragraphs 4, 5 and 6 of the applicant's affidavit which states that the plot was sold to the late Mngulu by Hands of Mercy Outreach Tanzania. He further contended that in purchasing the plot, an agreement between the late Mngulu and Hands of Mercy Outreach Tanzania was concluded and the letter of offer in respect of the plot that is in the name of the seller was handed over to the buyer. On that basis, Mr. Chebwa was of the firm view that there is a serious triable issue in which the applicant is highly positioned to get the prayed relief.

On the second condition, Mr. Chebwa contended that his client is likely to suffer irreparably as the contemplated resurvey and allocation of the plots from the disputed plot to the respondents will render the main

case nugatory. Explaining, he argued that once the plots are allocated, the respondents will be at liberty to dispose of them or deal with them in any way fit them but detrimental to the applicant.

Concerning the third condition, Mr. Chebwa, learned counsel averred that the balance of hardship falls greater onto the applicant if an injunction is not granted compared to the respondents when it is granted. He reasoned that since the applicant is the lawful owner and not responsible for paying compensation to the respondents, he stands to suffer greater hardship than the respondents who might be paid their compensation by the relevant authorities.

The learned Counsel assailed paragraph 11 of the counter affidavit as baseless for contending that the resurvey of the plot was a result of the consent judgment in Land Case No. 7 of 2018 between **Stephania Yadoma, Michael Muhangwa, Nemes Wilbard Lyimo and Limbu Bagasa v. Ilemela Municipal Council** (HC-Mwanza). He contended that the said case had nothing to do with his client taking into consideration the fact that the said case involved only three respondents amongst the twelve respondents in the instant matter.

Mr. Chebwa went on to argue that in the said case, there is no description as to whether the plot to be surveyed is Plot No.1382 Block

"A" North Buswelu. He further argued that in the said case, the applicant was not a party. Also, the applicant was not notified about the existence of the said case. In that case, he held the view that the applicant is not bound by the decision of the case as she was not involved at all. He rested his case by urging the Court to only consider the affidavit and the plaint in Land Case No.42 of 2023 to determine the merits of the application. In this regard, the reliance was placed on the case of **Salim Mbaruku Traders T/A Maarifa English Medium Pre and Primary School v. Registered Trustees of Islamic Culture School**, Misc. Land Application No.633 of 2021 (Unreported). He prayed that the application be granted with costs.

Responding, Mr. Adam, learned Counsel prefaced by concurring with Mr. Chebwa so far as the three conditions stated in the case of **Atilio v. Mbowe** (Supra) are concerned. He further insisted that the three conditions must be met cumulatively for the application for a temporary injunction to be granted.

On the first condition, Mr. Adam brushed off Mr. Chebwa's argument that there is a serious triable issue. He contended that according to paragraphs 4, 5, 6 and 7 of the counter affidavit he deposed, the late Mngulu had never owned the said plot. He argued

further that the respondents have interests in the plot as the said interests were not cleared to pave the way for its allocation to other persons other than the respondents.

On the second condition, Mr. Adam held the view that the applicant is not likely to suffer irreparably. He reasoned that each piece of land has a known value and in case the applicant wins the case, she can commensurately be compensated.

On the last condition, Mr. Adam contended that the respondents are likely to suffer the most. He referred the Court to Annexure 1 of the counter affidavit which depicts that the plot in dispute has already been resurveyed and plots Nos. 1574 to 1588 were produced. On that basis, he argued that the resurveyed plot was passed on 18th May, 2023 and its registered plan is No.176084. In that case, the learned Counsel held the view that the Court cannot restrain the resurvey of the plot as it is already resurveyed.

Mr. Adam went on to argue that some respondents including the 5th and 6th have been allocated the plots and paid for them which means that Plot No. 1382 Block "A" is no longer in existence. He argued further that some respondents have residences in the said area. Given that, he

held the view that there are already developments in the said disputed area that cannot be restrained by the Court.

Concerning Land Case No. 7 of 2018, Mr. Adam averred that the 10th and 11th respondents are indeed living in the disputed land and they resolved the dispute with the 1st respondent. In that case, he opined that this Court cannot issue an injunction against the execution of the Court's order concerning 10th and 11th respondents but it can stay execution which was not prayed by the applicant.

In summing up, Mr. Adam contended that the applicant has failed to establish cumulatively the three conditions. He prayed for the dismissal of the application with costs.

Submitting on the point of law, Mr. Mbuya, learned State Attorney raised two issues. One, since the application was premised on Order VII Rule 1(a) and (4) of the CPC, the Court is precluded from issuing a temporary injunction against the Government. Two, the three conditions stated in the case of **Atilio v. Mbowe** (Supra) must be cumulatively met. In strengthening the second issue, the learned State Attorney cited the case of **EA Industries Ltd v. Trufford Ltd** [1972] EA.

Rejoining, Mr. Chebwa reiterated his submission in chief.

I dispassionately went through the pleadings, submissions and the cited cases. The issue for my determination is whether the application is meritorious or otherwise. In determining that question, I will be guided by the celebrated case of **Atilio v. Mbowe** (Supra). In that case, it was observed that the Court, before issuing an order for maintenance of the status quo, must consider that the Applicant has met the following conditions:

1. The applicant must demonstrate the existence of a serious triable issue on the alleged facts and probability that the applicant will be entitled to the relief prayed.
2. The Applicant must demonstrate that the court's interference is necessary to protect the applicant from any kind of injury which may be irreparable before his legal rights are established.
3. The Applicant must demonstrate that on the balance of convenience, there will be greater hardship suffered by him from withholding the prayed order than will be suffered by the Respondent from granting it.

Starting with the first condition, the applicant in her affidavit has elaborately stated how his late husband acquired the disputed plot. She

further stated how such ownership has been interfered with by the respondents and the pending suit for the declaration that the plot in question belonged to her. On the other hand, those facts deponed by the applicant have been vehemently disputed by the respondents. In such circumstances, it is my holding that there is a serious triable issue for determining who is a rightful owner between the parties. Further, in my opinion, and without prejudging the main suit, there is a likelihood of the applicant being granted the prayed reliefs if she can substantiate her claims.

Concerning whether the applicant will suffer irreparable loss, this Court thought it pertinent to understand what irreparable loss means. In the case of **Morgan Air and Sea Freight Logistics Limited v. Serengeti Fresh Limited**, Misc. Civil Application No. 10 of 2021, this Court (Mteule, J.) had this to state:

'At this point the conceptual and contextual meaning of irreparable loss is not a new notion in our jurisprudence. In short, it is simply measured by an injury which cannot be recovered by way of damages or if recoverable, not sufficiently or adequately. (See Kaare v. General Manager Mara Cooperation Union [1924] Ltd (1987) TLR 17).

It is crystal clear from the above passage that irreparable loss must be the one that cannot be remedied sufficiently by way of damages. Besides, I wish to add that for the Court to grant an order for a temporary injunction, the applicant must demonstrate in his affidavit not only that he will suffer irreparably but also such suffering cannot be redressed by monetary means.

Considering the orders prayed and the fact that the center of contention is ownership of the disputed plot, I asked myself whether the development of the disputed plot during the pendency of the main suit would make the applicant suffer irreparably. Suppose, the respondents build houses in the disputed plot, does such development make the applicant suffer irreparably? In my opinion, such development will not make any irreversible suffering to the applicant. If the respondents develop the said plot, they do so at their own risk as when the applicant is declared the lawful owner of the plot, the only option for them is to vacate the plot together with their developments at their costs.

As regards the disposing of the plot in dispute in terms of selling, mortgaging or leasing, I asked myself whether such an act may cause the applicant to suffer irreparably. Suppose, the respondents decide to sell, mortgage or lease the plot in question, does such an act make the

applicant suffer irreparably? In my opinion, selling, mortgaging or leasing the plot in dispute may cause the applicant to suffer irreparably.

On the last condition, it is my considered opinion that the applicant stands to suffer greater hardships compared to the respondents if the sought orders are not granted. I take that position while I am aware of the nature of the dispute which is centered on ownership and the fact that the respondents are in actual possession of the disputed plot. Assuming, the respondents sell, mortgage or lease the disputed plot, the one who will suffer mostly is the applicant. As of now, the respondents despite the controversy are enjoying the suit premises to the extent of developing the same at their own risk. However, such enjoyment cannot overstretch to the extent of selling, mortgaging or leasing the suit land during the pendency of the main suit.

Concerning the arguments that the Court cannot issue a temporary injunction against the Government, I agree with Mr. Mbuya, learned State Attorney. According to Order VII Rule 1(a), the Court is vested with powers to issue a temporary injunction to any party other than the Government. However, such provision vests in Court the powers to issue declaratory orders instead of temporary injunctions against the Government. The provision reads:

'1. Where in any suit it is proved 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) N/A

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.'

Based on that provision and considering that a temporary injunction is not made against the Government but the Court has discretionary powers to make declaratory orders instead of the temporary injunction, I declare that the selling, mortgaging or leasing of the disputed plot will be prejudicial to the rights and interests of the applicant which await to be finally determined by this Court in Land Case No. 99 of 2023.

As regards other respondents, save for the 9th and 10th respondents, are restrained temporarily from selling, mortgaging or leasing the suit premises. Concerning the 9th and 10th respondents, the applicant may use proper procedures to challenge the decision of this Court in Land Case No. 7 of 2018. Each party shall bear its costs. It is so ordered.

DATED at MWANZA this 22nd day of February, 2024.



KS KAMANA

JUDGE