

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**MBEYA SUB-REGISTRY**

**AT MBEYA**

**MISC. LAND APPLICATION NO. 86 OF 2022**

*(Originating from Land Case No. 33 of 2022)*

**INDUSTRIAL CLOTHING AND SUPPLIES CO. LTD.....APPLICANT**

**VERSUS**

**ABRAHAM MWAKITALU.....1<sup>ST</sup> RESPONDENT**  
**CHARLES KANJOKA MANENGE.....2<sup>ND</sup> RESPONDENT**  
**ELISARIA ABRAHAM KISANGA.....3<sup>RD</sup> RESPONDENT**  
**BENSON DAVID KAMBINDE.....4<sup>TH</sup> RESPONDENT**  
**KETHA FRANCIS E. AHOBOKILE.....5<sup>TH</sup> RESPONDENT**  
**EBENEZER RICHARD MOSHI.....6<sup>TH</sup> RESPONDENT**  
**EMMANUEL BETSON SANGA.....7<sup>TH</sup> RESPONDENT**  
**EMMANUEL VENANCE KIPEPEO.....8<sup>TH</sup> RESPONDENT**  
**DANIEL USWEGE MWAIGOMOLE:.....9<sup>TH</sup> RESPONDENT**

**RULING**

*3<sup>d</sup> and 22<sup>nd</sup> April, 2024*

**Kawishe, J.:**

The applicant approached this court seeking injunctive orders, restraining the respondents jointly and severally, their employees, agents, assigns, workmen and any other person(s) acting under

authority or claiming right, interest or title derived from the respondent jointly and severally of the applicant land situated at Mbeya with following title number 4599-MBYLR with L.O. No. 136737, Plot No.12 Block "BB", measured at 7989 square meters, at Uyole Industrial area, Mbeya City, from trespassing, selling and erecting any building structures thereat pending hearing and determination of the main suit.

The application is made under sections 68 (c), (e) and section 95 of the Civil Procedure Code, Cap. 33 R.E 2019 (now R.E 2022) and Order XXXVII Rule 1(a) of the same Act. The applicant's application is filed under the certificate of utmost urgency supported by the affidavit sworn by Lena Edson Mkisi, the principal officer of the applicant. In reply the respondents filed their joint counter affidavit.

During the hearing of the application, the applicant was represented by Mr. P. Bana, learned counsel while, the respondents enjoyed the service of Mr. S. Shitambala, learned counsel. The application was argued by a way of a written submissions.

The facts ascertainable from the affidavit of the applicant is that, the respondents around 13<sup>th</sup> February, 2017 jointly trespassed and interfered the land owned by the applicant, claiming the land to be their property. The said disputed land is a registered land with title number

4599-MBYLR with L.O. No. 136737, Plot No. 12 Block "BB", measured at 7989 square meters, at Uyole Industrial area, Mbeya City, registered in the name of INDUSTRIAL CLOTHING AND SUPPLIES CO. LTD, the copy attached as annexure MK. The applicant is seeking a temporary injunction order pending the determination of the main suit. He went further to state that the respondents are on site and they are using the said land for construction of their residential buildings, therefore without being restrained they may deform the applicant's land irreparably.

In their written submission the applicant adopted the contents of the affidavit supporting chamber summons. Briefly, stated that they instituted a series of cases to wit; Land Case No. 10/2017, Land Case No. 11/2018, Land Case No. 9/2020 and Land Case No. 13/2020 the trespassers were only four, namely Abrahaman Mwakitalu, Elisaria Kisanga, Clavery Mayango and Ester Nywage. But later on, the third and the fourth defendants sold their pieces of land to other unknown persons. In the Land Case No. 33 of 2022 the number of trespassers increased from four to nine. Thus, the applicant fears that if the present defendants are not restricted to sell the pieces of land which they own illegally, the number of trespassers will increase from time to time.

Therefore, the applicant will face more defendants and will not be able to execute the decree against unknown persons.

The learned counsel further stated that since there is a triable issue of ownership of land, this court be pleased to order for maintenance of status quo of the disputed property. The counsel referred the case of **Atilio vs. Mbowe** (1969) HCD No. 284 which laid down prerequisite three conditions in order to grant temporary injunction. The counsel argued that the applicant has met all the three conditions. That there is the prima facie case, the attached certificate of title shows that the applicant is the lawful owner. In the second condition it is true that the applicant has the legal right and the intervention of this court is necessary, and in the third condition that if the status quo is not maintained for the respondents from further selling of the said land the applicant is the one who will suffer more irreparable loss.

The learned counsel reverted to the respondents' counter affidavit which requires the applicant to strictly prove without adducing evidence through their joint counter affidavit to contradict the evidence of ownership, thus it means that they admit the facts in the affidavit. He cited the case of **East Africa Cables (T) Limited vs. Spenco**

**Services Limited**, Misc. Application Case No. 61 of 2016, H.C Dar es Salaam and the case of **Kebo Seed Company Ltd vs. Deusdedith Hunja and 3 Others**, Misc. Civil Application No.2 of 2021, H C, Iringa.

The counsel continued to submit that under paragraph 5 of the respondents' joint counter affidavit they stated that they had their own legally allocated plots apart from the plot in dispute. Thus, it is the applicant's counsel submission that the injunction to be granted, and the respondents to remain as they are without selling more of the land or present houses until the matter is determined. It is the applicant's prayer that the order to be granted with costs.

In reply the respondents' counsel by adopting his counter affidavit submitted that, they do not dispute the fact that the applicant is the lawful owner of the disputed land with certificate of title No.CT 4599, Plot No. 12 Block BB, L.O No. 136737 with 7889 square meters located at Uyole.

He stated that the respondents are the owners of plots No. 775 to 786; 1022 and 1023 Block "B" at Gombe Kusini area within Mbeya City. That Abraham Mwakitalu owns Plot No. 1022, Charles Kanjoka Manenge owns Plot No. 779, Elisaria Abraham Kissanga, Plot No. 782 and 777, Benson David Kambinde Plot No. 776, Ketha Francis Ahobokile, Plot No.

775, Ebenezar Richard Moshi, Plot No. 781, Emmanuel Beston Sanga Plot No. 1023, Moses Venance Kipepeo, Plot No. 780 and Daniel Uswege Mwaigomole Plot No. 784. The copies of the certificate of titles attached as annexure Plot No. 1- Plot No.9.

The counsel went further to state that it is true that the applicant instituted a series of cases since 2017. But all the four cases were not heard on merit, were struck out for legal defaults.

In the issue that the third and the fourth respondents as stated in the applicant's submission, namely Esther Nywage and Clavery Mayango that they sold their pieces of land to another unknown person, the counsel stated that the applicant is misleading this court. He stated that the above-mentioned persons had no land on a disputed place, rather Clavery Mayango was a ward councillor of Itezi Ward and Esther Nywage was the chairperson of (Mwenyekiti wa serikali ya mtaa) Gombe street and they were sued for forcefully order of stopping construction by the contractor and order him to vacate the site.

The counsel contended that the respondents were not trespassers when the applicant was instituting this dispute in 2022. They were living on their own pieces of land even before the applicant started to file cases. The respondents owned the surveyed land called Block B Gombe

area, Mbeya City, while the applicant claims Block BB, Plot No. 12. Therefore, there is a claim in different lands, this cannot invalidate other people's right to live peacefully in their legally owned land. He added that there is no point of raising an issue of status quo to an extent of not mortgaging or selling or alienating the land on part of the respondents while, they have an absolute right on occupation, use and enjoyment of their titles. The counsel stated that the case of **Atilio vs. Mbowe** (supra) does not apply in this case at hand because there are two different lands and there is no prima facie case established by the plaintiff. Both applicant and respondents have legal rights. Also, there is no hardship to be suffered by the applicant as no one is interfering with his title.

In the issue of evidence, the counsel argued that the respondents are not barred to give their evidence during submissions. For that matter the respondents still insist that they have their own surveyed pieces of land. This does not amount to admission of the claims at this stage where the case is not heard yet. The respondents' counsel prays the application to be dismissed with costs.

In rejoinder the applicant's counsel, notify this court on four grounds, first that the respondents have submitted themselves as

defendants and not as respondents in this application, in their title and in their submission, second that the respondents counsel has submitted 40 pages of his written submissions, he did not comply to the court order that submissions should not exceed 4 pages, third that the defendants have attached evidence in their written submission contrary to the directives of the court of appeal, and on the fourth ground is that all evidence attached by the respondents are not reflected nor mentioned or attached in their joint counter affidavit.

The counsel reiterated almost what he submitted in chief. But he added on the issue of evidence attached in the submission that all evidence not attached in the counter affidavit but attached in the submissions are contrary to the directives of the court of appeal. He cited the case of **Jongo Mwikola vs. Geita Gold Mining Limited**, Civil Appeal No. 344 of 2020, CAT at Mwanza (unreported) to cement his position. He claims that the respondents do not dispute that the applicant is the rightful owner of the disputed land, and the certificate of titles tendered herein by the respondents in their reply were all made as double allocation from the disputed land of the applicant. The respondents also do not dispute for an order of injunction to be issued in respect of the disputed land. Therefore, the fact that the respondents



have not stated how much they will be affected if the injunction is granted in respect of the disputed land owned by the applicant. The applicant counsel insists that the prayer of the said temporary injunction or maintenance of the status quo be maintained and an order for temporary injunction be granted with costs.

Having summarised the submission of both parties and having a thorough perusal of the records, there is **one issue** to be determined; whether the applicant has established sufficient grounds for the order of temporary injunction to be granted. Section 68 (e) of the CPC Cap 33 R.E 2019 provides that:

*"In order to prevent the ends of justice from being defeated the court may, subject to any rules in that behalf-*

*(c) grant a temporary injunction ....*

*(e) make such other interlocutory orders as may appear to the court to be just and convenient. Order XXXIV rule 1(a) provides;*

*1. Where in any suit 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) 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”.*

Having cited the above provision of the law, the law is very specific that granting of temporary injunctive orders is the discretion of the court. But the court established principles to be applied when exercising its discretionary powers in this aspect. Those principles were set out in the landmark case of **Atilio vs. Mbowe** (supra) that:

- (a) That there is a serious question to be tried on the facts alleged, and the probability that the plaintiff will be entitled to the relief prayed.
- (b) The applicant stands to suffer irreparable loss requiring the courts intervention before his legal rights are established.
- (c) That 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 from granting of it.

The principles as stated in the case of **Atilio vs. Mbowe** (supra), in the first principle that whether there is the prima facie case. There is no dispute between parties that the main case (Land case No.33 of 2022) is pending before this court. That being the case, is there a

serious question to be tried in the main case. The applicant in this application stated that he has the certificate of title together with the official search from the registrar which shows that the applicant is the lawful owner of the disputed property. Also, at the same time the respondents attached their certificate of title in their submission to prove that they are the lawful owners of the same land in dispute. Therefore, this court has to determine who is the lawful owner of the land in the main dispute. Thus, the first principle has been met by the applicant that there is the serious triable issue to be tried by the court.

Considering the second principle as to whether the applicant has shown any irreparable loss which cannot be adequately compensated in damages. The case of **J. A Kaare vs. General Manager Mara Cooperative Union** [1987] TLR 17B TZHC defined irreparable loss to mean an irreparable injury which means that there must be no physical possibility of repairing the injury but merely that the injury will be material that is to say one that could not be adequately remedied by damages. See the case of **Cosmoss Properties Limited vs. Exim Bank Tanzania Limited**, Misc, Civil Application No. 584 of 2021(unreported)at pg 8 referred the case of **American Cyanamid vs. Ethicon Limited** (1978) AC pg 396 where it was held that:

*“If damages in the measure recoverable at common law would be adequate remedied and if the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strong the plaintiff’s claim appeared to be at that stage”.*

In this application at hand, even if in the main case it will be declared that the applicant is the lawful owner of the disputed land, the respondents can be able to compensate the applicants on the loss suffered for non industrial development and well being as stated in the applicant’s affidavit. The applicant also in his plaint claim for damages thus, if he will be declared the lawful owner he will be compensated for the losses suffered. Hence, the applicant cannot claim that there is irreparable loss only on the ground that he will end up on unexecutable decree against unknown trespassers. That the act of the respondent selling the same land to the other person the number of the defendants will end to increase and he fail to execute his decree against unknown trespassers in this case. Therefore, the second principle has not been proved by the applicant.

In the last principle that there will be greater hardship and mischief suffered by the applicant from the withholding of the injunction than will be suffered by the respondents from granting the same. The applicant argued that he will suffer more loss because the number of the

defendants increase as time goes on, as the respondents continue to sell the land in dispute to other persons. The applicant in his affidavit stated that the area was for industrial purpose but there is no proof there is anything erected there for industrial purposes. The applicant claim that there is only imminent danger that the land may be interfered further, altered, deformed and destroyed irreparably by the respondents. On the side of the respondents stated that they have erected buildings for residential purposes and the photographs were attached by the applicant affidavit to prove the same. Thus, in balance of convenience there is no proof that the applicant will suffer hardship if temporary injunction would not be granted.

Basing on the above discussion, this application is non-meritorious as the three criteria from the case of **Atilio vs. Mbowe** (supra) are not met. There are plethora of cases which provide that the court has to satisfy itself that all the three conditions have existed for the court to grant an order for temporary injunction. This was held in the case of **Emmanuel Ngatara Laizer vs. Enjoro Village Council**, Civil Application No.29/2023 pg. 8 and 9 HC at Arusha, it was held:

*"In this application the applicant has managed to establish that there is a pending main case and the existence of prima facie case but has not managed to demonstrate that if the order for temporary injunction will not be*

*granted, he will suffer irreparable loss that is the kind of loss that cannot be made good in anyway even by award of general damages or specific damages”.*

There were other issues raised by the applicant’s counsel during his rejoinder under paragraph (i) and (ii). I find them not useful to this application hence, I did not labour on them. It is on the basis of the discussion above that the applicant has failed to establish the three factors of granting temporary injunction.

Consequently, I am inclined with the respondents’ counsel submissions. Application is hereby dismissed with costs.

It is so ordered.

**E.L. KAWISHE**

**JUDGE**

**22/4/2024**

Dated and Delivered at **MBEYA** this 22<sup>nd</sup> day of April, 2024 in the presence of Ms. Caroline Luhugnu learned counsel holding brief of Mr. Peter Bana and in the presence of 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents.



**E.L. KAWISHE**

**JUDGE**