

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MOROGORO DISTRICT REGISTRY

AT MOROGORO

MISC LAND APPLICATION No 87 OF 2023

(Arising from Land Case No 5 of 2023)

BETWEEN

NKUMBI MALASHI HOLELA AND 47 OTHERS.....APPLICANTS

VERSUS

MUSA CHRISTOPHER GINAWELE1ST RESPONDENT

ANNA MUGANDA BALALI.....2ND RESPONDENT

RULING

MRUMA, J

This is a ruling on an application for temporary injunction filed by the Applicants seeking an order to restrain the Respondents from entering into, evict or dispose of or permit to be disposed of and /or use of a land which is in dispute in Land Case No 5 of 2023 pending before this court for hearing and determination.

The application is predicated under **Order XXXVII Rule 1 (a) (b), 2 (1), section 68 (c) and (e) and section 95 of the Civil Procedure Code [Cap 33 R.E. 2019]** and it was brought under a certificate of urgency. The application is supported by three affidavits. The first affidavit was sworn by the 1st, 2nd, 8th, 9th, 16th, 18th, 25th and 33rd Applicants, and another affidavit sworn by the 4th, 5th, 7th, 10th, 12th, 13th, 14th, 15th, 17th, 19th, 20th, 21st, 23rd, 24th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 34th, 35th, 36th, 37th, 39th, 40th, 41st, 42nd, 43rd, 45th, 46th, 47th and 48th. The third affidavit is sworn and affirmed by 3rd, 22nd and 38th Applicants.

In the said affidavits, the Applicants deposed that at different times and years they acquired lands by buying from original owners (villagers), the village council and by clearing virgin lands. It is further deponed that in the year 2022 the Respondents trespassed onto the suit land as a result of which the Applicants instituted Land Case No 10 of 2022 to challenge the Respondents' invasion over their land. Land Case No 10 of 2022 was struck out by this court (**Ngwembe J**, as he then was), on technicalities on 4th April 2023. It was re-instituted on 3rd May 2023 and re-registered as Land Case No 5 of 2023. Under paragraph 5 of the Complaint, the plaintiffs are alleging that on different dates they acquired the suit lands by buying them from their original owners, by being allocated by Village Councils

and by clearing virgin lands. It is further averred in the plaint that, sometimes in 2021 the first Defendant introduced himself to them as the legal owner of the suit land and in the same year police officers attempted to forcibly remove them from the suit lands. Under paragraph 6 of the Applicants' affidavit it is averred that on 15th September 2023 the Respondents used three tractors to forcefully enter into suit land and start cultivation thereon. It is further averments of the Applicants that the Respondents are still on the suit land they trespassed and they are unlawfully using a copy of the ruling of this court which struck out Land Case No 10 of 2022 to justify their continued occupation and use of the suit land.

The Respondents resisted the application through their joint counter-affidavit and claimed that the Applicants are the ones who trespassed onto their lands.

At the hearing the Applicants were represented by Mr Yuda Thadei, learned advocate while the Respondents were represented by Mr Rabin Mafuru and Mr Ansebert Rugaibura also learned advocates. The application was argued by way of written submissions.

The term injunction ordinarily means a judicial process where a party is required to do or to restrain himself from doing any particular act or thing.

Tanzania inherited the law of injunction from India who initially borrowed it from England. Injunction law traces its origin from Roman Law. It is an equitable relief and not a right that prohibits an individual or a group of persons to do or commit any specified act or doing or undoing something wrong. Rule 1 (a) and (b) of Order XXXVII of the Civil Procedure Code [Cap 33 R.E. 2019], talks about temporary injunction. Rule 1 (a) provides that:-

"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;

(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 purpose of staying and preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of property as the court thinks fit, until the disposal of the suit or until further orders....."

In his submission counsel for the Applicants explained principles governing grant of temporary injunction as laid down in the case of **Atilio Versus Mbowe (1969) HCD 284** where the court held that for injunction to be granted the following conditions must be fulfilled:

1. that 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;
2. That the court's interference is necessary to protect the Plaintiff from the kind of injury which may be irreparable before his legal right is established;
3. That on the balance of probability there will be greater hardship and mischief suffered by the Plaintiff from the withholding of the injunction than will be suffered by the defendant by granting it.

The learned counsel contended that since there is a complaint that the Respondents have trespassed and forcefully entered onto the Applicants' land and they have tried to evict them from their land, then there is a dispute to be resolved by the court and therefore there is a serious question to be tried by the court.

Regarding the second principle, the learned counsel submitted that the Applicants had averred under paragraphs 8, 9 and 10 of their affidavits

that the Respondents were using some of the unfaithful Police Officers to assist them to evict some of the applicants in the suit land which facts has not been disputed by the Respondents in their counter affidavit. It is the counsel's submissions that there is serious threat of breach of peace and therefore court's interference is necessary to protect the Applicants from the kind of injury which may be irrepealably before their legal rights are established.

Regarding the third principle, the learned counsel submitted that under paragraph 2 of the Applicants affidavit the Applicants asserts that they have been in the suit land since 2013 until 2022 when the Respondents interrupted enjoyment over their land. He said that it will be to the disadvantage of the Applicants if they are evicted from the suit land and they will suffer greater hardship and mischief which will expose them to physical and emotional disturbance and what they will suffer will be greater than what the Respondents stand to suffer out of the same. The counsel submitted that the Applicants are entitled to protection pending the disposal of main case which is before the court

Replying to the submissions by the counsel for the Applicants, Mr Mafuru, counsel for the Respondents cited the case of **Benny Josephaty Mdesa And Another Vs National Mcrofinance Bank & 3 Others**

Miscellaneous Land Application No 8 of 2021 H.C. Dar Es Salaam,

the Court while emphasizing on conditions to be established for the order of temporary injunction to be granted, enunciated that the duty to prove that there is likelihood for the Applicants to suffer irreparable loss if the order is not granted is on the Applicants but the Applicants did totally fail to establish the element for irreparable loss and arguable case. The learned counsel contended that it is trite law that certificate of occupancy is the final and conclusive evidence of ownership of land, thus the chances of the Applicants to succeed in the main suit is minimal as the 2nd Respondent holds a valid title over the suit land under Certificate of Title No.77387 L.O No.1799411 K.B/L.D NO.7231 which is registered under the Land Registration Act Cap 334 [R.E 2019]. He said that granting this application will be detrimental on the part of the Respondents who are quietly enjoying their property rights in the suit premises.

The learned counsel further submitted that the contention by the Applicants that the Respondents are trying to evict them is far-fetched and fallacy with the intention of misleading this honourable Court. He concluded that if this application is granted the Respondents will be exposed into vagaries of nature due to the reasons that they have activities going on and they have crops in the suit lands which they must

take care during the pendency of the main suit. The learned counsel added that the Applicants' allegations that the Respondents are using Police Officers to harass them and pose threats on them are unfounded and far-fetched because the Respondents are conducting their normal activities in their farms without help of any law enforcement agency since they are in possession of the suit land before and after the institution of the main suit and this application. In the circumstances, it is the counsel's submission that the Respondents stand a chance to suffer irreparable loss if this application is granted as their usual activities of crop cultivation may stop and this may cause an imaginable loss both financially and psychologically, thus it is the Respondents' humble submission that this application be dismissed to its entirety.

From the submissions of the parties and indeed in every application, for injunction the court's power to grant injunction is predicated upon the Applicant meeting the conditions set out in **Atilio vs. Mbowe** (supra). That 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.

There is plethora of authorities which the above stated principles are reflected [See for instance the case of **Giela vs. Casman Brown & Co. Ltd [1973] EA 358** and **Tanzania Tea Packers Ltd vs.**

Commissioner of the Income Tax, Commercial case no 5 of 1999 (unreported) and **American Cyanide vs. Ethicon Ltd** [1975] 1 All. ER 504. It is also the law that all the conditions set out in Mbowe's case must be met and so meeting one or two of the conditions will not be sufficient for the purpose of the court exercising its discretion to grant an injunction.

In the present case from the pleadings and submissions of the parties, there can be no dispute that parties are battling over ownership of the suit premises. The Applicants allege that they are the lawful owners of the lands having acquired them by buying from original owners and by being allocated by Village councils since 2013. On the other hand, the Respondents allege that the suit lands belonged to them having being granted with ownership documents such as a Certificate of Title No 77387 issued under Land Office No 7231 which was issued on 6th September 2007. To me the fact that both sides are claiming ownership of the same land, establishes the first test laid down in Mbowe's case (*supra*), that is to say there is a serious question to be tried on the facts alleged.

On the probability of the Plaintiff winning the case or t a probability that the Plaintiff will be entitled to the reliefs claimed, my view is that once the court finds that there is a triable issue between the parties and where no evidence had been yet produced by either party the probability of either

party to be entitled to win to the reliefs claimed in the case is 50/50. In other words after finding that there is triable issues of the alleged facts, and before receiving evidence from the parties to substantiate their allegations, a court should stand between them and give each party equal chance to win the case. I thus find that there is probability that the Applicants who are Plaintiffs in the main suit may be entitled to the reliefs claimed in the suit. From the above, I find and hold that the first condition for granting temporary injunction has been established by the Applicants.

On the second condition which is about irreparable loss to the Plaintiff, I note from paragraph 7 of the Applicants supporting affidavit that the acts of the Respondents to enter into the suit land has caused serious misunderstanding and breach of peace. In their reply to paragraph 7 of the Applicants' affidavit, the Respondents simply put the Applicants to strict proof of the averment under that paragraph. It should be noted here that affidavit is a substitute of oral evidence. It is a body of facts or information indicating what the deponent believes to be true. Once the facts are stated by one party to be true then the duty shifts to the opposite party to adduce counter-facts showing that the deponed facts are actually not true. Thus, putting the deponent to a strict proof of the facts asserted does not make the facts asserted to

not true. In other words putting the deponent of a fact to a strict proof is not denying the facts asserted. In law if the facts are not specifically denied they are presumed to be admitted. I thus find that the allegation of threat to breach of peace was not denied. Breach of peace simply mean disturbance of public peace or order and given the number of the plaintiff is this case, I find that breach of peace is possible outcome if the application is denied. In the case of **Kaare vs. General Manager Mara Cooperation Union [1924] Ltd [1987] TLR 17**, this court (Mapigano J as he then was), stated that:-

"The court should consider whether there is an occasion to protect either of the parties from the species of injury known as irreparable injury before his rights can be established..."

From the facts asserted in the supporting affidavits, it is my humble view that breach of peace and tranquillity may result into irreparable damages and loss both of property and even life. It is on those grounds I find that the second principle has also been established.

Coming to the third condition which is about balance of probability, the Applicant's counsel is of the view that on the comparison, and in the event if the prayer sought is denied, the Applicants will suffer more than the Respondents. I agree with the learned counsel, I only add

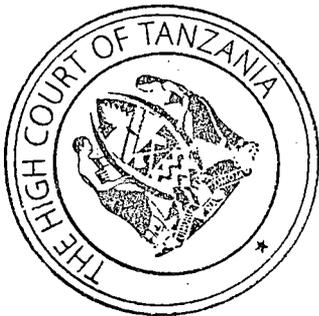
that having found that both parties stand equal chance of winning the case, grant of temporary injunction will benefit both. This is so because this is a land case. Parties are battling over ownership of lands. If one of the parties is allowed to continue with cultivation activities on the land there is a risk that if it loses the case before harvest, it may suffer irreparably. In the case of **Abdi Ally Salehe Versus Asac Case Unit Limited & Others, (Civil Revision 3 of 2012) [2013] TZCA 179 (30 July 2013)** the Court of Appeal had this to say:-

".....And on the question of balance of convenience, what it means is that, before granting or refusing the injunction, the court may have to decide whether the plaintiff will suffer greater injury if the injunction is refused than the defendant will suffer if it is granted".

In the present case both sides are claiming ownership of the same land. It would appear that currently the Applicants are in occupation and use of the land by cultivating and planting some crops. Similarly it is evident that the Respondents are in occupation and use of some pieces of the suit land. In such circumstances interference of the court is necessary for maintaining peace and tranquillity. In my view this is a fit case for the court to grant a temporary injunction restraining either party from continuing using the land pending hearing and

determination of the main suit. However, as stated above it would appear that some of the parties are doing some cultivation activities in the suit land. This necessitates granting of a temporary injunction order to restrain either party from doing and continuing to do anything in the suit lands. The only thing that parties are allowed to do is to harvest any crops that they may have planted in the suit land during the previous season in the land they are currently occupying. Otherwise, there should be no further activities in the suit land till hearing and determination of Land case No 5 of 2023. Accordingly the application is granted to the extent and conditions stated hereinbefore.

Costs will be in the cause.




A. R. MRUMA

JUDGE

30. 5. 2024