



THE JUDICIARY OF TANZANIA

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT SHINYANGA

(CORAM: HON. FRANK MAHIMBALI)

MISCELLANEOUS CIVIL APPLICATION NO. 28 OF 2023

EMMANUEL MADUHU MBITI COMPLAINANT / APPELLANT / APPLICANT /
PLAINTIFF

VERSUS

MWANTIMBA VILLAGE COUNCIL RESPONDENT / DEFENDANT

RULING

Fly Notes

Application for temporary injunction and declaratory orders under order XXXVII, Rule 1 (a) and (b) of the Civil Procedure Code, Cap 33 R.E 2022, whether grantable

Facts

The applicant in this application has filed a land dispute against the respondents for unlawful acquisition of his land measuring 350 acres (Land a case No. 10 of 2023 which is pending before this court. In efforts of safeguarding his interests in the said land, the applicant has filed this application seeking for temporary injunction order against the 2nd -6th respondents and declaratory orders against the 1st and 7th respondents or their servants, workmen, employees, agent or otherwise from selling, distributing, entering or alienating the disputed land pending the determination of the main suit. The application has been brought under order XXXVII, Rule 1 (a) and (b) of the Civil Procedure Code, Cap 33 R.E 2022.

Ratio Decidendi

Under Section 68 (e) and Order XXXVII, Rule 1 (1) a, b, and (2) of the Civil Procedure Code, Cap 33 R.E 2022., the law is, in addition to the “triple test” set out in *Attilio V. Mbowe* i.e (i) Where the suit property is in a danger of being wasted, damaged or alienated by any party to the suit (It may be either the plaintiff or defendant). (ii) When the suit property is in a danger of losing value for the reason of continued use by any party to the suit (He may be the plaintiff or defendant). (iii) Where the suit property is in a danger of being wrongly sold in execution of a decree; the applicant if can establish that the irreparable injury sought to be protected is of immediate effect (*Tai Five Hotel Limited & Another v. CRDB Bank PLC and Another, Misc. Land Application No. 151*), an injunction order is then grantable. This is regardless whether the party concerned is a government or not.

27th of May 2024

Hon. MAHIMBALI.:

RULING

16th April & 27th May 2024

F.H. MAHIMBALI, J

The applicant in this application has filed a land dispute against the respondents for unlawful acquisition of his land measuring 350 acres (Land a case No. 10 of 2023 which is pending before this court. In efforts of safeguarding his interests in the said land, the applicant has filed this application seeking for temporary injunction order against the 2nd -6th respondents and declaratory orders against the 1st and 7th respondents or their servants, workmen, employees, agent or otherwise from selling, distributing, entering or alienating the disputed land pending the determination of the main suit. The application has been brought under order XXXVII, Rule 1 (a) and (b) of the Civil Procedure Code, Cap 33 R.E 2022.

The issue for consideration by this court is whether the application is merited. During the hearing of the application, the applicant was represented by Mr. Geoffrey Tuli, learned advocate whereas for the 1st, 7th and 8th respondents, appeared Ms Amina Mkuya learned state attorney who resisted the application. As regards to the 2nd – 6th respondents, the application proceeded *ex parte* as per their none appearance while dully served.

As per adopted affidavit by the applicant, it has been averred that the applicant owns a total of 350 acres of land located at Mwantimba village, Matongo ward within Bariadi District in Simiyu Region valued at Tsh 350,000,000/=. That the said land he had got it between 1969 and 1975 by purchasing from three individuals (Polepole Maduhu, Sylvester Lyande and Musa Lunyenye). That he has been using the said land for agricultural and livestock keeping peacefully all the way from 1969 to 2011. That in the course of the said use, he also hired some villagers for various works in his farm.

That to his surprise, in 2011 the 1st respondent while under the leadership of the 2nd respondent, claimed possession of the said land as belonging to the Mwantimba Village, the fact that is disputed. That the 3rd to 5th respondents on 9th July 2011, unlawfully entered into possession of the applicant's land and maliciously destroyed his crops there on.

Pressing for the issuance of the requested orders on temporary injunction and declaratory orders against all respondents from selling, dispose, entering and distributing the disputed land until the hearing of the land case filed, Mr. Tuli while citing the case of **Atilio V. Mbowe** submitted that, firstly, there is a serious question to be tried on the facts alleged and the probability that the plaintiff will be entitled to the reliefs sought. Secondly, the applicant stands to suffer irreparable loss requiring court's intervention before the applicant's legal right is established. Thirdly, that on the balance there will be greater hardship and mischief suffered by the plaintiff from withholding the injunction than will be suffered by the defendants in granting it.

Resisting the application, Ms Amina Mkuya learned state attorney after adopting the sworn affidavit in reply be adopted by the court as part of submission, emphasized that for the court to grant the application on temporary

injunction, it is guided by Order XXXVII, Rule 1 (1) a of the CPC. In consideration of this, Court of law has developed criteria for the grant of the said injunction (Atilio V. Mbowe), where the Court narrated situations in which must be met before the court grants the said application: Existence of prima facie case, irreparable loss, and balance of convenience. She submitted further that in the case of **Star Com Consumer Healthcare Ltd V. Diamond Trust Bank & 3Others**, Misc Land Application No. 08 of 2023, HC at Morogoro, at Page 18, the court added other conditions to be met to warrant the said grant: danger of refusing sought orders, clean hands of the applicant on the matter, court not to be used as a tool of denying one's right, that refusal of grant will make one not atoned by damages, public interest and public policy.

With case at hand, she submitted that with the prima facie case has not been established as required by law. Reading paragraph 3, 4, 5 of the applicant's affidavit, it is clear that the applicant obtained the said land by clearing, cutting bush and purchasing from various individuals. This being unregistered land, the applicant has failed to establish the land boundaries on his neighbors to the suit land. The applicant has further not been able to establish the purchase agreement of the suit land from Polepole Maduhu, Sylvester Lyande, and Musa Lunyenye. The Applicant has further failed to establish size of the land he had purchased and the obtained land by clearing the bushes. With the irreparable loss, paragraph 11 of the applicant's affidavit, it is averred that if the sought orders are not granted, the applicant will suffer irreparable loss. She attacked the submission, on the premise that the applicant's advocate has averred that there is invasion and destruction of various properties. There are no particulars of the said loss as alleged. In essence, the applicant has failed to establish the substantial loss that is likely to suffer could not be adequately compensated for by an award of general damages as stated in the case of **Tanzania Cotton Marketing Board V. COGECAT Cotton (COSA) (1997) TLR 63**.

On balance of convenience, as per 12th paragraph, Ms Mkuya submitted that the applicant has failed to demonstrate in court's satisfaction, how it could detriment the applicant and not the respondent. The suit land is a general land, owned by the first respondent and is used for public use. Thus, any injunction order will cause detriment to the public.

With public interest / public policy, she submitted that the court should not be used as an instrument to cause injury to the society or loss to the community. As the suit land is owned by the 1st respondent, it is reserved for public use such as school, dispensary, bus stand etc. If the application will be granted, the 1st respondent and the whole community will be deprived of their rights to enjoyment of the general land. Since the applicant has failed to meet the compelling circumstances warranting the grant of interim/injunctive orders pursuant to order XXXVII and the cases cited, she prayed that the sought orders not to be granted as per reasons adduced.

In his rejoinder submission, Mr. Tuli reiterated what he submitted in chief and added that, what has been counter submitted, does not qualify to deny the orders sought as all those issues raised will be stated in the main case. Establishing them at this stage, is tantamount to establishing the main case which is not the relevant stage of the case.

I have critically digested the prayers in the chamber application, the facts deposed in the respective affidavits for and against the application and the respective submissions thereof. The relevant question to ask is whether the

application has met the threshold for its grant.

According to law as rightly submitted by the both counsel for the grant of injunction to qualify there are three conditions to be followed as stated in the case of **Atilio vs Mbowe**. The same has been restated in the case of **Total Tanzania limited vs River on Petroleum (T) Ltd and Salim Ali Said**.

The three conditions are:

- i) There must be a serious question of fact to be alleged and the probability that the plaintiff will be entitled to the relief sought.
- ii) 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.
- iii) That on balance, there will be greater hardship and mischief suffered by the plaintiff from withholding of injection them than will be suffered by the defendant from granting it.

In my considered view, as to what has been submitted by both counsel, it is clear that there is a serious contention whether the suit land is owned by the applicant or 1st Respondent and the allocation to the 3rd – 6th respondents whether is lawful as per law. The applicant is arguing that the respondent has been unlawfully acquired his land he lawfully acquired it as per law. Since the law is, for one's land to be acquired there must be full compensation which is fair, prompt and just. In the current situation, that is the center of argument.

In a total consideration of this case as per available material, there is a prima facie contentious issues between the applicant and the respondents in respect of the ownership of the suit land. As to these contentious issues, this Court's intervention is necessary. Otherwise, it is the applicant who is going to suffer irreparable loss for being rendered land less which is used for his agricultural uses. Therefore, in the circumstances of this case, a refusal to grant an injunction despite of availability of prima facie facts, occasions a failure of justice, and such injury to the plaintiff would not be capable of being undone. I think this is the legal wisdom embodied in the principles set in the case of **Atilio Mbowe** and as restated in the case of **Total Tanzania Limited vs River on Petroleum (T) Ltd and Salim Ali Said** and as enshrined under Section 68 (e) and Order XXXVII, Rule 1 (1) a, b, and (2) of the Civil Procedure Code, Cap 33 R.E 2022. . The law is, in addition to the "triple test" set out in **Attilio V. Mbowe** i.e

- (i) Where the suit property is in a danger of being wasted, damaged or alienated by any party to the suit (It may be either the plaintiff or defendant).
- (ii) When the suit property is in a danger of losing value for the reason of continued use by any party to the suit (He may be the plaintiff or defendant).
- (iii) Where the suit property is in a danger of being wrongly sold in execution of a decree; the applicant if can establish that the irreparable injury sought to be protected is of immediate effect (**Tai Five Hotel Limited & Another v. CRDB Bank PLC and Another**, Misc. Land Application No. 151), an injunction order is then grantable. This is regardless whether the party concerned is a government or not.

In the circumstances of this case, I am satisfied at this juncture that the application is merited as it has met the legal threshold, and it is hereby granted as prayed. The restraint order against the 2nd to 6th respondents and declaratory order to 1st, and 7th respondents are hereby issued that no any eviction, demolition, alienation of the suit land should be carried out now until the filed suit is conclusively determined by the Court or amicably settled by the parties themselves.

No order as to costs

It is so ordered.

DATED at SHINYANGA this 27th day of May 2024.

F.H. Mahimbali

Judge



Dated at SHINYANGA ZONE this 27th of May 2024.

FRANK MAHIMBALI
JUDGE OF THE HIGH COURT