

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI SUB-REGISTRY

AT MOSHI

MISC. LAND APPLICATION NO. 10549 OF 2024

FESTO CHARLES MTEY APPLICANT

VERSUS

ROMBO DISTRICT COUNCIL 1ST RESPONDENT

TANZANIA RURAL AND URBAN ROADS

AGENCY(TARURA) 2ND RESPONDENT

ATTORNEY GENERAL 2RD RESPONDENT

RULING

05/06/2024 & 14/06/2024

SIMFUKWE, J

The applicant, Festo Charles Mtey is moving this court under **section 2(3) of the Judicature and Application of Laws Act** [Cap 358 R.E 2019] and **section 95 of the Civil Procedure Code**, [Cap 33 R.E 2019].

He is seeking Mareva injunction, restraining the respondents and any other person working under their instruction from destroying and or

demolishing his business structure built on his lawful owned piece-of land at Itefroni Street of Kelamfua Mokala Ward in Rombo District pending expiration of ninety (90) days' Statutory Notice of intention to sue the Government duly issued and served to the respondents.

The application was filed by way of a chamber summons filed under certificate of urgency, supported by an affidavit sworn by the applicant. The respondents resisted the application through their joint counter affidavit sworn by Africano Lawrence Orrota, the Principal Officer of the 2nd respondent. It was heard orally; whereas the applicant was represented by Mr. Constantine Kimario, learned counsel while Ms. Glorian Issangya, learned State Attorney resisted the application for the respondents.

Supporting the application, Mr. Constantine on the outset adopted the applicant's affidavit to form part of his submission. He informed the court that this is an application for temporary injunction in absence of the main suit, commonly known as Mareva injunction. He explained that the application seeks an interim injunction due to presence of legal impediment that is ninety days' notice which was issued to the respondents on 03/5/2024 and 10/5/2024 respectively. That, pursuant to

the law, the main suit is supposed to be instituted upon expiry of the ninety days' notice while in this case the notice shall expire on 10/8/2024. He argued that since this is the requirement of the law which is inevitable and they must wait expiry of the notice, the respondents are continuing with the construction of the road of 1.4 kilometre at the tarmac level from Mkuu Rombo Bus Stand to the Prison of Rombo District. That, in the said project they intend to demolish a business building the property of the applicant which was built at the suit land from 2004- 2009. The learned counsel stated that the applicant acquired that land from his father Charles Ally Mtei who owned that land since early 1960 before the construction of that road.

Mr. Constantine submitted further that they are seeking injunction because they believed the applicant has rights as the lawful owner of the land, which he has used for almost twenty years. The applicant was astonished when he was ordered by the 2nd respondent to demolish his building and vacate the premises so that construction of the road may proceed. Mr. Constantine was of the view that such order did not comply to the laid down procedure as the applicant was notified by the contractor of the road that he should vacate from that area. They wanted to demolish that building so that they may proceed with construction of the road. The

said notice was oral, and the applicant was supposed to vacate within three days only.

Mareva Injunction being among the varieties of temporary injunctions, Mr. Constantine subscribed to three conditions of granting temporary injunction as expounded in the case of **Atilio V. Mbowe (1969) HCD.**

Submitting on the first condition which is existence of prima facie case; Mr. Constantine said that the respondents have alleged in their joint counter affidavit that the said road was upgraded from soil to gravel standard. Also, they agreed that the survey was done in 2020. Whereas the beacons of the road reserve were installed making that road measured 14 metres wide and 100 metres long. The building is within that area. The survey was done without notifying the applicant, nor compensating him so that his land could be converted into a road reserve. The learned counsel averred that since the applicant had never been compensated, he believed that the disputed land was still his property. Thus, the respondents were supposed to comply with procedures before ordering the applicant to demolish his building and vacate the area. On their part, the respondents believe that the disputed

land is a road reserve. Thus, there is a prima facie case among the parties which must be resolved by the High Court.

On the second condition for granting temporary injunction, Mr. Constantine argued that the applicant will suffer irreparable loss if the temporary injunction is not granted. He explained that the premise is a business building where welding, carpentry, and aluminium profile are conducted. The said activities are the source of income for the applicant and his entire family. He clarified that the applicant will not be able to earn income if that building is demolished. Further, his family will be affected considering the fact that his income which he earns from his business at that area is used to pay for education of his children and their necessities. Also, it is through that income that the applicant pays his loans from financial institutions and satisfies his needs. The learned counsel was of the opinion that if the respondents are allowed to demolish that business building, the applicant will suffer irreparable loss which cannot be compensated.

Submitting on the third condition which is in respect of balance of convenience; Mr. Constantine submitted that the applicant will suffer more if an interim injunction is not granted compared to the respondents

if it is not granted. The respondents are government institutions and will suffer no loss if they are restrained from demolishing the building. Instead, they will be required to comply with procedures of evicting the applicant pursuant to the law. Unlike the applicant who will suffer more as he will be forced to find a capital to start afresh, find another place and build infrastructures which will suit his business and employ new techniques for attracting customers.

Based on such submission, Mr. Constantine believed that this is among fit applications in which the court can show that justice should not only be done, but also be seen to be done. He submitted further that since the suit land was designated as a road reserve without compensating the respondent, issuing notice, or complying with the law, there are cogent reasons for granting an interim injunction. Mr. Constantine invited this court to refer the Court of Appeal decision in **Abdi Ally Salehe v. Asac Care Unit Ltd and 2 others**, Civil Revision No. 3 of 2012 in which his Lordship Massati, J.A at page 13 of the judgment quoted from the book of **Sarkar on Civil Procedure, 10th Edition Vol II** in which it is stated that:

"In deciding application for interim injunction, the Court is to see only prima facie case and not record finding on the main controversy involved in the suit prejudging issue in the main suit, in the latter event the order is liable to be set aside."

Mr. Constantine insisted that there is a prima facie case between the parties. Thus, since the aim of this application is to restrain the respondents from demolishing that area and to maintain the status quo, he prayed for this court to issue an injunctive order against the respondents pending the institution and determination of the main case. Also, he implored the court to find that the applicant has met the conditions for granting temporary injunction and grant this application.

In reply, Ms. Glorian adopted their joint counter affidavit to form part of their submission. She prayed that the applicant should not be granted the interim injunction on the reason that the road in question is a public road and it is natural. The learned State Attorney said that, it is the main road which is used by the public/civilians of that area. The road was published in Government Notice No. 176 of 1996 to upgrade it from a soil road to a gravel road. In 2020, the road was surveyed for construction at the tarmac

level. Ms Glorian informed this court that meanwhile the contractor is at the site constructing the road at tarmac level. During the survey the applicant was informed orally as there was no reason to notify him formally because he was within the road reserve.

The learned State Attorney referred to paragraph 4 of the applicant's affidavit which is to the effect that the applicant applied for survey of the suit land in 2020. However, his application was denied because he was within the road reserve.

Submitting against the three grounds for granting temporary injunction, Ms. Glorian referred to the cited case of **Atilio Mbowe** (supra) and submitted as follows:

Starting with the first ground of prima facie case, the learned State Attorney was of the view that there is no triable case that can prima facie be instituted. Her reason was that even in his affidavit, the applicant has not proved that he is the lawful owner of the disputed land, how he owns that land, and the boundaries of the land. Based on that failure, Ms. Glorian was of the view that the applicant has no, and he does not deserve that relief. That, pursuant to the case of **Atilio** (supra) the complainant

must show a serious question to be tried on the fact alleged, which will cause the relief to be granted.

On the second ground that the applicant will suffer irreparable loss; Ms. Glorian replied that it is obvious that the applicant is within the road reserve. Thus, there is no loss which he will suffer as long as that area does not belong to him. She argued that even if he could suffer any loss, that loss could be compensated and would not be irreparable. It was argued further that it has not been stated how the applicant will suffer irreparable loss. She referenced the case of **Tasilo Joseph Mahuni v. Omary Othman Daudi and 3 others**, Misc. Land Application No. 209 of 2023, (HCLD), at page 8 last paragraph where it was stated that:

"On the second principle the applicants who claims to be on the brink of suffering irreparable loss must not only establish that they will suffer irreparable loss but are duty – bound to demonstrate that, the kind of injury to be suffered cannot be atoned through monetary means."

Based on the cited case, the learned State Attorney contended that the applicant was supposed to show that he will suffer loss which cannot be compensated in monetary terms. She stated that **Land Regulations of**

2001 show that compensation for the loss of any interest in land shall include accommodation allowance, unexhausted improvements, disturbance allowance, transport allowance and loss of profit. In that regard, if the applicant was worth to be compensated, he could be compensated. Hence, the applicant cannot suffer irreparable loss. On the other hand, it is the second respondent who will suffer irreparable loss for her failure to construct the road. The construction costs TZS 2 billion which includes the suit land. She added that since the road was upgraded from the former road while the applicant was in the road reserve, he cannot suffer irreparable loss.

On the third ground which concerns balance of convenience; Ms. Glorian submitted that in considering which party will suffer more if the injunction is not granted or is granted, it is obvious that the respondents will suffer more because that is a public road. The road facilitates communication, connects villages, schools, hospitals, prisons, markets and a bus stand. In addition, the government has already invested TZS Two Billion for upgrading the road. It was asserted that if that road is closed and restrained, civilians will fail to proceed with their daily life and cause chaos in the society.

Responding to Mr. Constantine's argument that the applicant will lose his business and profit; Ms. Glorian replied that it is the general public which will be affected if the injunction will be granted. She insisted that the temporary injunction should not be granted and quoted **Order XXXVII rule 1 (a) and (b) of the Civil Procedure Code** to support her point.

In her final remarks, Ms. Glorian, for the respondents, prayed this application to be dismissed with costs.

In his rejoinder, submitting against the contention that the temporary injunction cannot be granted against the government, Mr. Constantine submitted that **Order XXXVII rule 1(b) of the CPC** is inapplicable to the present circumstance. That, the provision is clear that the complaint concerns the plaintiff and the defendants. He implored the court not to consider such an argument and instead grant the application as prayed.

Mr. Constantine vehemently opposed the argument that the road was there from the beginning. He said that the road was outside the area of the applicant before 1992. It was shifted to that area as a cow way because of soil erosion.

In respect of the cited GN, Mr. Constantine stated that the learned State Attorney misdirected herself regarding that GN, as she deponed about this fact in paragraph 4 of the counter-affidavit.

Concerning the argument that the applicant has not established grounds for granting temporary injunction; and that the applicant has not proved his ownership of the disputed land, Mr. Constantine replied that ownership will be proved in the main case. He reiterated his submission in chief.

Regarding the cited case of **Tasilo** (supra), the learned advocate argued that the case is not binding to this court because it is the decision of the High Court Land Division. Moreover, that case is distinguishable to the case at hand as the cited case concerned a dispute with the Bank which could be compensated in monetary terms, while in this case the dispute concerns land. He concluded that: "Justice hurried is justice buried" and urged the court to grant temporary injunction against the respondents.

I have considered the submissions of both parties, the affidavit of the applicant and joint counter affidavit of the respondents. The issue is ***whether this application has merit.*** The application has been preferred under **section 2(3) of the Judicature and Application of Laws Act** (supra) which provides that:

"2(3). *Subject to the provisions of this Act, the jurisdiction of the High Court shall be exercised in conformity with the written laws which are in force in Tanzania on the date on which this Act comes into operation (including the laws applied by this Act) or which may hereafter be applied or enacted and, subject thereto and so far as the same shall not extend or apply, **shall be exercised in conformity with the substance of the common law, the doctrines of equity** and the statutes of general application in force in England on the twenty-second day of July, 1920, and with the powers vested in and according to the procedure and practice observed by and before Courts of Justice and Justices of the Peace in England according to their respective jurisdictions and authorities at that date, save in so far as the said common law, doctrines of equity and statutes of general application and the said powers, procedure and practice may, at any time before the date on which this Act comes into operation, have been modified, amended or replaced by other provision in lieu thereof by or under the authority of any Order of Her*

Majesty in Council, or by any Proclamation issued, or any Act or Acts passed in and for Tanzania, or may hereafter be modified, amended or replaced by other provision in lieu thereof by or under any such Act or Acts of the Parliament of Tanzania:

Provided always that, the said common law, doctrines of equity and statutes of general application shall be in force in Tanzania only so far as the circumstances of Tanzania and its inhabitants permit, and subject to such qualifications as local circumstances may render necessary.”Emphasis added.

It is from the above quoted provision that this court is conferred with jurisdiction to grant Mareva Injunction. Mareva Injunction simply means an interim common law restraining order, in the absence of any pending suit, caused by an impediment of the law. In this case, the applicants' intention to sue the respondents herein is subject to the issuance of a ninety days' notice.

For an application of this nature to be granted, in addition to the three conditions established in the case of **Atilio** (supra), one more condition must be met: whether granting the injunction is just and justifiable. This

court in the case of **Decent Investment Ltd v. Tanzania Railway Corporation and 3 others**, Misc Civil Application No. 13 of 2023 (HC) at page 7- 8 of the ruling it was stated that:

*"It is trite law that the interim injunction is sought prior to the institution of a suit. It should be noted that an interim injunction order preceding the institution of a suit "Mareva injunction" which is a common law remedy developed by courts of England it derives its name from the case of **Mareva Compania Naviera SA v. International Bulk Carriers SA [1980] 1 All ER**. Applying this principle, the Supreme Court of Canada in **Aetna Financial Services v. Feigelman (1985) 1 SCR 2** stated that:*

*"In granting Mareva injunction, two conditions must be established firstly, the applicant must demonstrate a strong prima facie case or a good and arguable case and secondly, **having all the circumstances of the case, it appears that granting the injunction is just and justifiable.**"*

Emphasis added

In this case, I am grateful that the learned counsels subscribed to the case of **Atilio v. Mbowe**, which prescribed three (3) conditions for granting temporary injunction, which are: **First**, there must be a prima facie case; **second**, it must be shown that the applicant will suffer irreparable loss and **third**, the applicant must be at risk of suffering more compared to the respondent. In determining this application, I will be guided by the above factors expounded in the case of **Atilio v. Mbowe** together with the additional factor established in the cited case of **Aetna Financial Services** (supra), whether granting the interim injunction is just and justifiable.

In proving the above stated conditions, Mr. Constantine submitted that since the applicant is claiming ownership of the suit land while, on the other hand, the respondents are claiming it to be a road reserve, there is an arguable case. This was disputed by Ms. Gloria, who argued that there is no arguable case. On the second and third grounds, Mr. Constantine elaborated on how the applicant will suffer irreparable loss by stating that the premise is a business building where welding, carpentry, and aluminium profiling are conducted. These activities are the source of income for the applicant and his family. Ms Gloria contested this fact and stated that the road is for public use. Thus, it is the respondents who will

suffer more. She added that according to the **Land Regulations of 2001**, if the applicant was entitled to compensation, he could be compensated.

I have carefully considered all the arguments for and against granting Mareva injunction. I find it important to state that, for Mareva injunction to be granted, the court should consider the surrounding circumstances of each case. It is not enough for the applicant to narrate the existence of arguable case in the first place. Equally, the court should consider whether it is just and justifiable to grant the application by considering all the surrounding factors.

In this case, it is undisputed fact that the suit land will be used for public interest, as rightly submitted by the learned State Attorney. Under paragraph 5 of the applicant's affidavit, he impliedly agrees that the said road is in the process of being improved, which is obviously for public interest, including the applicant as an individual member of the public. Public interest in so far as land is concerned is well covered under **section 3 of the Land Acquisition Act**, Cap 118 R.E 2019 which provides that:

*"3. The President may, subject to the provisions of this Act, acquire any land for any estate or term **where such land is required for any public purpose.**"* Emphasis added.

Section 4(1) (a) of Cap 118 (supra) provides that:

4.-(1) Land shall be deemed to be required for a public purpose where it is-

*(a) for exclusive Government use, **for general public use**, for any Government scheme, for the development of agricultural land or for the provision of sites for industrial, agricultural or commercial development, social services or housing." Emphasis added.*

In the case at hand, since the land will be for general public use, I do not see any justifiable reason for granting this application. Moreover, the respondents will suffer more if the injunction is granted, as it will affect the interests of the public who are using the road. In the case of **Abdi Ally Salehe v. Asac Care Unit Ltd and Others, Civil Revision No. 03 of 2012 [2013] TZCA 179**, at page 9 of the judgment, the Court observed that:

"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.

*.... the **remedy of injunction has its roots in equity and so, equitable principles may be applied in appropriate cases.**"*

On the strength of the above authority, it will be unjust, unjustifiable, and against principles of equity to grant the Mareva Injunction sought by the applicant. Among the principles of equity are that equity follows the law unless there is a good reason to the contrary and that equity looks to the reality of what was intended rather than how it is expressed. In the present matter, since the law allows use of land for public purposes, it will be against the principles of equity to grant this application.

In the upshot, I find the applicant to have failed to establish the conditions for granting Mareva Injunction and temporary injunction as prescribed. Consequently, I dismiss this application without costs.

It is so ordered.

Dated and delivered at Moshi this 14th June 2024.



X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

14/06/2024