

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB REGISTRY

AT MBEYA

MISC. LAND APPLICATION NO. 162 OF 2024

BUPE K. MWAIJIBE AND 61 OTHERS.....APPLICANTS

VERSUS

MBEYA CITY COUNCIL.....1<sup>ST</sup> RESPONDENT

TANZANIA AGRICULTURAL RESEARCH

INSITUTE (TARI).....2<sup>ND</sup> RESPONDENT

ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT

## **RULING**

*Last order 25<sup>th</sup> January, 2024*

*Ruling 14<sup>th</sup> February, 2024*

### **KAWISHE, J.:**

The applicants have moved this Court under a certificate of urgency. The main prayer in their application is for a Mareva injunction restraining the respondents from executing the order issued by the 1<sup>st</sup> respondent until the expiry of the statutory notice of 90 days, so as to enable the applicants to file their case accordingly.

The application is by way of chamber summons filed under section 2 (3) of the Judicature and Application of Laws Act, Cap. 358 R.E 2019 (JALA) and Section 95 Civil Procedure Code, Cap 33 R.E 2019 and is of accompanied by an affidavit deposed by the applicants' learned advocate Mr. Alfredy Chapa from which the following facts are discernible: The genesis of the matter is an order issued by the 1<sup>st</sup> respondent evicting and demolishing the buildings erected by the applicants without being paid fairly and prompt compensation.

That sometimes early in 1993 the 2<sup>nd</sup> respondent had instructed the applicants to build houses and shops in their plot for nane nane exhibitions, and the applicants built the same and the nane nane exhibitions were conducted from that time. While enjoying their presence in the nane nane grounds, on 22<sup>nd</sup> December, 2023 the 1<sup>st</sup> respondent issued the applicants with a 14 days' notice to evict and demolish their buildings while they have not been compensated for the improvements they have made.

Having being required to vacate and demolish buildings at the Nane nane grounds, the applicants were dissatisfied with the notice thus, on 27<sup>th</sup> December, 2023 issued statutory notice of 90 days to the respondents as required by the law prior to filing their case against the respondents. They

decided to file the notice as they were prompted by the eviction and demolition notice issued by the 1<sup>st</sup> respondent while knowing that the applicants were not compensated by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

During the hearing of the application, Mr. Alfredy Chapa, learned counsel appeared for the applicants whereas, the respondents enjoyed the service of Mr. Allan Shija, learned State Attorney.

Submitting in support of the application, Mr. Chapa adopted his affidavit and proceeded to submit that, the application seeks to restrain the respondents from executing the 1<sup>st</sup> respondent's order evicting and demolishing the houses of the applicants. It has been filed pending expiration of 90 days' notice to sue the Government. The notice which is a mandatory legal requirement has been issued to the respondents.

He further submitted that, applicants filed the application to the Court to issue an interim injunction order against the execution of the order issued by the 1<sup>st</sup> respondent on the disputed area while necessitated by the following reasons:

*"First, as per the letter of the 1<sup>st</sup> respondent they want to demolish the area without proper valuation of the development made thus, the applicants will be affected. Second, if this honourable court will not issue the order to stop execution*

*of the order in the area, the main suit to be instituted will be overtaken by events, therefore we pray to this court to issue an order that the respondents stop execution of their orders until the lapse of 90 days so that the main suit can be instituted. **Third**, there will be an irreparable loss as stated under paragraph 8 of the affidavit as there are businesses, residence and other social services.”*

The learned counsel insisted that, the order of stay of execution of an order is not new in this Court, to fortify his argument, he cited the decision in **Decent Investment Ltd vs. Tanzania Railway Corporation and 3 Others** Misc. Civil Appl. No 13/2023 H.C Tabora, where the court agreed with the prayer that, there be stay of execution until the expiry of 90 days statutory notice. He concluded by praying that, the respondents be prohibited from executing their orders they issued in December 2023, until the expiry of the 90 days statutory notice, to allow the applicants to file a suit to be compensated for the development they have made in the disputed area.

Mr. Allan Shija, State Attorney strongly resisted the application. He adopted the affidavit by one Salehe Shaabani Mahanyu and proceeded to argue that, before this Court is an application for Mareva injunction, which is brought under section 2 (3) of Judicature and Application of Laws Act, Cap. 358 R.E 2019 (the JALA) and Section 95 Civil Procedure Code, Cap 33

R.E 2019 (the CPC). He stated that, those sections allow the applicants to bring such an application for Mareva. He added that, in order to succeed in the application, there are requirements which need to be fulfilled as elaborated in the case of **Atilio vs. Mbowe, 1969 HCD 284**. The principles are:

- (a) There must be serious questions of fact or issues to be tried, and the likely of the applicant to succeed.*
- (b) The applicant is likely to suffer irreparable loss which cannot be adequately remedied or attained by damages.*
- (c) Balance of inconvenience that the applicant will suffer greater loss than the respondent if an order for temporary injunction is not granted.*

Expounding on the principles, Mr. Shija commented that, in testing the application, the main issue is whether the applicants can be paid compensation on suit plot.

Mr. Shija kept on arguing that, the disputed plot is owned by Uyole Agricultural Centre, through Certificate No. MBYLR 1633. He further argued that, in testing the first Principle from **Atilio's case**: The applicants are praying for compensation in an area where they have not produced

any evidence to show ownership thus, they cannot succeed in the first principle.

Mr. Shija cemented that, on the second principle of the **Atilio's case**, whether the applicant will suffer loss that cannot be remedied, he averred that, since they do not have any justification, even the second principle may not succeed. That, the one who has the Certificate of Occupancy is the only one who will miss the opportunity to develop the area, as stated in his letter that has obtained funds to develop the area. He added that, the applicants claim to have been instructed to construct houses in the disputed plot but they have not adduced any evidence and neither showed the monetary value to be compensated. That the government secured some funds for a development project in disputed area, which is to build houses for business, where the applicants could discuss with the 2<sup>nd</sup> respondent that they could be given first priority in the new houses. Hence, they cannot suffer any loss as they will proceed with their businesses. Mr. Shija stressed that, the third principle, balance of inconvenience does favour the respondents who will face more inconveniences than the applicants who claim compensation from a plot they do not own.

Further, Mr. Shija attacked the authority cited by the learned counsel for applicants that, the case **Decent Investment** (supra) which at pages 6 and 7 referred to the principles laid down by the case of **Atilio vs. Mbowe** (supra). He stated that, the case referred, supports the respondent's submission than the applicants thus, he prayed for it to be considered in favour of the respondents. In concretizing his argument, he cited **Leopard Net Logistics Company Ltd vs. Tanzania Commercial Bank and 30 others**, Misc. APP. No. 585 of 2021, High Court, DSM, **Mwakeye investment Ltd vs. Accesses Bank Tanzania Ltd**, Misc. Land Application No. 654 of 2016 High Court Land Division DSM and **Abdi Aliy Salehe vs. Asac Care Unit Ltd and 2 others**, Civil Revision No. 3 of 2012 Court of Appeal Tanzania (CAT) at DSM, as they elaborate the principles afore-stated.

In his rejoinder Mr. Chapa started by stating that, there is no dispute that the applicants are in the disputed plot. He continued to dismantle the submission made by Mr. Shija by saying that, the learned counsel dwelled on ownership while, the applicants' affidavit did not touch on ownership. That, the applicants claim compensation for the development they made at the disputed plot and not ownership. He stated that, the respondents'

letter stated clearly that the businessmen and women are there and they have been there since 1993 to the date of the letter. That, since then the Nane nane exhibitions have been conducted and that, they are the ones who built the houses. Mr. Chapa agreed that, there is no evidence that the applicants built the house. Also, he argued that, there is no evidence to show that the respondents built the houses. On the submission that, the applicants could discuss with the 2<sup>nd</sup> respondent to be prioritized in the project, Mr. Chapa claimed that, it does not suffice their claim, the applicants need compensation for the development that made on the plot. Arguing on balance of inconvenience Mr. Chapa stated that, whether the applicants will be considered in the project or not, they have to be compensated first.

Mr. Chapa, went further to disintegrate the authorities cited by Mr. Shija, starting with the case of **Abdi Ally Salehe** (supra) where he stated that, the CAT remitted the case to be continued from where it stopped due to the mistakes committed by the honourable Judge of the High Court. Where the honourable Judge decided the matter in the main suit instead of the injunction thus, this case does not support the application before the Court. He continued to demolish the authorities cited by arguing that, the



case of **Mwakeye investment Ltd** (supra) was decided under Order XXXVII R. 1 of the Civil Procedure Code hence, it is different from their prayer. He stressed that, their application is made under section 2(3) of JALA. Also, he added that, the cited cases were applying for temporary injunction pending the main suit while, the current application is for stay of execution pending the expiry of 90 days thus, they are two different circumstances. He stressed that, the case of **Leopard Net** (supra) is distinguishable from the application at hand, the case cited concerned a loan 1,100,000,000/=.

I have judiciously and impassively considered the contents of the application and the prayers thereto, the affidavit filed in support of the application and the counter affidavit filed by the respondents and their respective annexures. From these documents, it is a common ground that the injunction is sought pending the expiration of statutory notice of 90 days.

Let me start with the issue raised by Mr. Shija requiring the Court to address it. "*Whether the applicants can be paid compensation on suit plot.*" In my view, if the Court decides this issue it will amount to pre-judging the main suit to be filed by the applicants after the expiry of the statutory

notice. I have warned myself while deliberating on this application not to venture into the merits of the main application to be filed by the applicants. In that regard, the issue raised by Mr. Shija touches the cause of action of the main application to be filed, the issue is a premature at this stage.

After I have deliberated on the issue raised by Mr. Shija, the issue for determination, therefore, is whether the application for interim injunction can issue? An interim injunction order preceding the institution of a suit or *mareva* injunction as it is commonly known, is a common law remedy developed by the courts of England. It derives its name from the case of **Mareva Compania Naviera SA vs. International Bulkcarriers SA** [1980]1 All ER 213 where Lord Denning accorded a broader interpretation to section 25 of the Judicature Act of 1873.

In our jurisdiction, it is an established principle of law that, this court has jurisdiction to grant such injunction under section 2(3) of the Judicature and Application of Laws Act which supports the application of common law and equity in our jurisdiction. This position has been stated in overabundance of authorities, including **Allan Charles Kiwia & 8 Others vs. Ubungo Municipal Council & Attorney General** (Misc. Civil Application 116 of 2022) [2022] TZHC 11062 (22 April 2022) and

**Abdallah M. Malik & 545 Others vs. AG**, Misc. Land Appl. No. 119 of 2017, HC. Land Division (unreported). With regard to the argument by both parties, for such an injunction to issue, the Court must be satisfied that there is no pending suit because, as stated in **Daud Mkwya Mwita vs. Butiama Municipal Council and Attorney General** (Misc. Land Application 69 of 2020) [2020] TZHC 4174 (11 December 2020) that, *mareva* injunction cannot be applied or granted pending a suit. It is an application preferred due to legal impediments. Mr. Shija, the learned State Attorney, rightly referred to the criteria articulated in **Atilio vs. Mbowe** (*supra*) as regards grant of injunction apply in the instant application. Thus, the applicants must demonstrate a *prima-facie* case. They must show that, there is a serious question to be tried on the alleged facts and probability that the applicant will be entitled to the relief prayed; they should demonstrate that, the Court's interference is inevitable to protect the applicants from the kind of injury which may be irreparable before their legal rights are established and lastly, the balance of convenience. Thus, on balance, there will be greater hardship or mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendant from granting of it. In his view, Mr. Shija contended that the

applicants have failed in the three principles laid down in **Atilio vs. Mbowe** (supra).

On his turn, Mr. Chapa stressed that, the applicants' have established a triable issue as they claim for compensation for the developments they made on the disputed plot. From that point of view, the case of **Colgate Palmolive vs. Zakaria Provision Store and Others**, Civil Case No. 1 of 1997 referred at page 158 in **Kibo Match Group Ltd, vs. Imoex Limited**, 2001, TLR 152, may be pertinent. It was remarked as hereunder:

*"I direct myself that in principle the prima facie case rule does not require that the court should examine the material before it closely and come to a conclusion that the plaintiff has a case in which he is likely to succeed, for to do so would amount to prejudging the case on its merit. All that the court has to be satisfied of, is that on the face of it the plaintiff has a case which needs consideration and that there is likelihood of the suit succeeding."*

In that reasoning, I am satisfied that the affidavit demonstrates bonafide contentions between the parties in the intended suit. On the probability that the applicant will be entitled to the relief prayed. One of such contentions is whether or not the applicants can be compensated for the developments they made on the nane nane grounds. In my opinion therefore, the first condition has been satisfied.

This now leads me the second condition which requires the applicants to establish the necessity of the grant in preventing irreparable loss. Before I decide whether the condition has been established, it may be necessary to consider the nature of the orders sought. To restrain the respondents from executing the 1<sup>st</sup> respondent's order evicting and demolishing the houses of the applicants. In the documents available, the applicants stated that, if the respondents evict them and demolish their houses without proper valuation of the development made the applicants will be affected. In my view, if the applicants have been in the disputed plot since 1993 almost 31 years, there might be enough developments made to be considered. Whether the applicants will succeed in the suit against the respondents or not, valuation prior to demolition will entail to administration of justice to the parties. I am convinced with the submission of Mr. Chapa that, even if the applicants will be compensated, without proper valuation, injustice may be occasioned. As it has been submitted that, the applicants were instructed to construct their houses in the suit plot, no any document to show the ownership of the houses, businesses and social services thus, demolishing them without proper valuation the

applicants may suffer irreparable loss. In that essence, second condition is also met.

On the third condition as to balance of convenience. I will only confine my deliberation to that extent. What amounts to balance of convenience was considered by the Court of Appeal in **Abdi Ally Salehe vs. Asac Care Unit Limited & Others** (Civil Revision 3 of 2012) [2013] TZCA 179 (30 July 2013), (DSM-Unreported) at page 9 thereof, in the following words:

*"And on the question of balance of convenience, what is meant 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."*


From this reasoning, the applicants will suffer greater injury if the order issued by the 1<sup>st</sup> respondent is executed compared to the respondents who have nothing to lose. The applicants developed the area since 1993 unbothered by the respondents, only to be order to evict and demolish their houses, businesses and social services at the nane nane grounds. Since the ownership of the plot is not in dispute, if the applicants will succeed in the suit, valuation will be conducted and be compensated accordingly. If the respondents will succeed in the suit, the applicants shall

have to vacate and the demolition be conducted, the respondents will suffer time consumed in the hearing and determination of the suit.

In consideration of the observation, I have made above, I grant the applicants' application. I order the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to stop from evicting the applicants and demolishing the houses in nane nane exhibition grounds (John Mwakangale stadium). For avoidance of doubt, I order status quo of the plot be maintained pending the institution of the main case between the parties to be filed after expiration of the 90 days' notice to the Attorney General. No order as to costs.

It is so ordered.

Dated at **MBEYA** this 14<sup>th</sup> day of February, 2024.



**E.L. KAWISHE**

**JUDGE**

**Court:** Ruling delivered in the open court this 14<sup>th</sup> day of February, 2024

in the presence of Mr. Alfred Chapa, learned counsel for the applicants and

in the presence of Ms. Edna Mwamlima State Attorney for the respondents.



**E.L. KAWISHE**

**JUDGE**

**14/2/2024**