

IN THE HIGH COURT OF TANZANIA

DODOMA SUB REGISTRY

AT DODOMA

MISC LAND APPLICATION 67 OF 2023

(Arising from the Land Case No 3 of 2023 which is pending before the High Court)

ZUWENA HINDU KIMOLO.....APPLICANT

VERSUS

SARAH STEVEN MUUKA.....1ST RESPONDENT

NAFTARI UNDERSON MADABA..... 2ND RESPONDENT

JOYCE MUHINA SHILAH.....3RD RESPONDENT

PETER NAFTARI UNDERSON..... 4TH RESPONDENT

STELA LUKAS KAGUNILA.....5TH RESPONDENT

ANNA EMMANUEL.....6TH RESPONDENT

RUBEN EMMANUEL.....7TH RESPONDENT

ROSEMARY E. SHILAH.....8TH RESPONDENT

MOREEN CHISINDE NGONG'WAI.....9TH RESPONDENT

SAMSON E. SHILA.....10TH RESPONDENT



JOYCE GEORGE MHINA.....11TH RESPONDENT
BEATRICE GAUDENCE MKUA.....12TH RESPONDENT
MAGRETH PETER ASSEY.....13TH RESPONDENT
CHIMO FAYA MDAE.....14TH RESPONDENT
MOHAMED IDD KIJUU.....15TH RESPONDENT
EMILY EMMANUEL SHILLAH.....16TH RESPONDENT

RULING

Date of last Order: 06/06/2024

Date of the Ruling: 01/07/2024

LONGOPA, J.:

The applicant on 11th September 2023 under the certificate of urgency filed an application through a Chamber Summons under Order XXXVII Rule 1(a) of the Civil Procedure Code, Cap 33 R.E. 2019 for the following orders, namely:

EX-PARTE

- i. That, this Honourable Court be pleased to issue an order of temporary injunction restraining the respondents since the respondents herein and their agents are disposing as well as damaging and developing the plot of land in quo located at Plot Number 1 Block C, Centre Ipagala area within*



Dodoma City Council in Dodoma City pending hearing and determination of this application interpartes thereof.

INTERPARTES

- ii. That, this Honourable Court be pleased to order temporary injunction to the respondents herein, its agents, assignee, or any other persons who are disposing, developing and damaging the applicant's land in dispute located at Plot No. 1 Block C centre, Ipagala Area within Dodoma City Council in Dodoma City pending the hearing and determination of Land Case No. 03/2023 before this Honourable High Court thereof.*
- iii. Costs of the suit be provided for.*
- iv. Any other relief(s) or order(s) this Honourable Court may deem just and fit to grant.*

The application is supported by an affidavit of the applicant one Zuwena Hindu Kimolo and opposed by the counter affidavit of Sostenes Peter Mselingwa, learned advocate for the respondents.



On 6th June 2024, parties appeared before me for oral submission on the application for temporary injunction. The applicant was represented by Mr. Fred Kalonga, learned advocate while all the respondents were represented by Mr. Sostenes Peter Mselingwa, learned advocate.

Mr. Kalonga was the one who set the ball rolling. He submitted that the application is made under Order XXXVII Rule 1 (a) and (b) of the Civil Procedure Code, Cap 33 R.E. 2019. The applicant prays for temporary injunction against all the respondents, their agents, employees or any of their respective assignees not to do anything relating to transfer, sale or develop the disputed land in Plot No. 1 Block C Centre Ipagala within Dodoma City. This injunction is prayed pending the hearing of the Land Case No. 3 of 2023 that is ongoing before this Court. Supporting affidavit of the applicant was adopted to form part of the submission of the applicant in support for order of temporary injunction.

It was reiterated that the applicant is the owner of the land in Plot No 1 Block C Centre Ipagala within the City of Dodoma. The applicant was granted the same by the Capital Development Authority (CDA) in 2001 as per annexure P. 1 which is the letter offer for a plot of land. On 30/3/2017, the applicant was granted a 33 years' tenure over the land and paid all the required annual land rent up to 2020/ 2021 financial year.

It was argued that on 03/03/2017, the applicant herein requested/ made an application to the planning authority to change the use of land



from provision of orphanage centre facility to residential apartments as per Annexure P2 and P3 forming part of the affidavit.

It was submitted further that between 2017 and 2021, the applicant obtained permits from the Capital Development Authority (CDA) to construct the residential apartments without any disturbances. It was at this time when the 1st to 16th respondents trespassed to the land stating allegedly that it was their respective land while knowing the same belong to the applicant.

Moreover, the applicant did request the respondents to stop and desist from development of the land, but they turned deaf ears. They/respondents refused to heed to the call by the applicant thus the applicant instituted the Land Case No. 3 of 2023. The application was made and on 06/11/2023 this Honourable Court issued an ex parte injunction against the respondents pending determination of the hearing of the application for injunction inter partes. The respondents have continued to develop the land though they are aware of the existing case before this Court.

The applicant cited the case of **Atilio versus Mbowe** [1969] HCD 284 to reiterate the criteria for grant of injunctions. It is applicant's prayer that this application meets the requirements set out in the cited case. First, there must be a serious question between the parties to be determined by the Court. In the instant application there is a serious question regarding



ownership of the suit land. Second, the applicant should demonstrate that he shall suffer irreparable loss. It was submission by applicant that given the applicant has all authorization to develop the land and that respondents cannot compensate for the loss that applicant is continuing to incur for activities that are being undertaken over the land which prevent the applicant to enjoy the lawful authorizations that he was permitted to undertake. Third, on balance of probabilities, there shall be greater hardship on part of the applicant than the respondent. It was submitted that applicant is likely to suffer more harm/ hardship than the respondent who have no rights whatsoever in that land in dispute. Thus, the applicant prayed that this application be granted for the status quo to be maintained until the determination of the case.

On the other hand, Mr. Mselingwa stated that respondents object the application for temporary injunction. Having adopted the Counter affidavit to form part of the respondents' submission and resisted on the following reasons:

First, the disputed land is not the one that respondents are currently occupying and using. The letter forming part of the counter affidavit as revealed in Paragraph 3 of the Counter affidavit states that the Plot Numbers of the Land in question are Plots No. 495,496, 501, 502, 509 and 571 Block C Centre Ipagala. This is per Letter from the Mtaa Executive Officer to the Dodoma City Director dated 04/01/2022 introducing the respondents as owners of the land.



He reiterated that regarding the applicant's contention that she acquired the land upon being granted by the Capital Development Authority (CDA), it was submitted that the respondents being the owners of the land under customary law had no information that CDA surveyed their land. There was no participatory exercise in respect of surveying and granting of the land to the applicant as the former owners were not involved. The Mtaa Executive Officer took the action to write to the relevant authorities for the recognition and registration of the respondents as the rightful owners of the land in question as they were the ones who owned that land.

Second, it was the respondents' argument that the applicant has never been to that disputed land for all the period allegedly she was owning the land since 2001 up to the year 2022 when the dispute arose. The plaint indicates that there was change of the use of land from social services namely orphanage centre to residential apartments. It is obvious that the area is different from the ones owned by the respondents.

The respondents argued that in respect of suffering loss, it is the respondents who shall suffer irreparable loss as they are the ones who have been using the land for residential and cultivation purposes since then. The applicant shall suffer no loss at all as she has never used any part of that disputed land at any point in time.



According to the respondents, the criteria in **Atilio versus Mbowe's** case cannot and have not been established in this application. These aspects do not exist namely there is no prima facie case, irreparable loss nor that the applicant is likely to suffer more than the respondents. It is the respondents who shall suffer irreparable loss if they are prevented from enjoying the use of their land owned under customary right of occupancy under pretext that the applicant had been granted a right of occupancy.

It was a further submission of the respondents that issuance of ex parte order by this Court on 06/11/2023 does not signify that the applicant has any merited issue in this application as the order was not made in full realization of the existing facts on grounds having not heard the respondents.

It was concluded that the applicant has failed to state exactly the specific measurements/ size of the land in dispute so that if an order of temporary injunction is granted the process server should be able to know the coverage to specifically deal with a well-known demarcated area to enforce the order. Otherwise, this application seems to be omnibus intending to curb all those are not concerned. The respondents urged this court to dismiss the application for temporary injunction with costs.

In short rejoinder, Mr. Kalonga reiterated that disputed land is Plot No 1 Block C Centre Ipagala which has not changed at any time and



respondents have trespassed after commencement of development of residential apartments. The respondents were not using the land before. The applicant had obtained granted right of occupancy for 33 years before the respondents started developing the land.

Further, it was argued that there is no evidence that the respondents were not involved in the processes of surveying the land in question before the same was allocated to the applicant.

According to the applicant, there cannot be formalization of the land to the respondents in a land that had already been surveyed, allocated to another person and that granted right of occupancy had been issued thus developments have commenced.

Moreover, it was reiterated that sequence of the events from 2001 to 2017 and 2021 is clear that such disputed land has always been in the hands of the applicant.

Regarding the size of the land in dispute, it was submitted that it is not an issue as the same is surveyed thus the size is well known. In case of grant of the order, surveyors shall identify clear boundaries of the area to the process server to facilitate the enforcement of the order.

Finally, the principle in **Attilio versus Mbowe** case is a fit case in the circumstances regarding the application before this Court. The ownership of land by the applicant has never been revoked at any time. Thus, the applicant reiterated



Having heard the submission by the parties, it is pertinent for this Court to determine whether the instant application has merits. In so doing, I have perused thoroughly the affidavit and counter affidavit of the applicant and respondents respectively.

Determination on whether to grant temporary injunction is governed by Order XXXVII Rule 1 of the Civil Procedure Code, Cap 33 R.E. 2019. It provides that:

1. 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; 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:



For a temporary injunction to be granted there must be proof that the property in question is in danger of being wasted, damaged or alienated by party to the suit or suffering loss of value; or the defendant threatens or intends to remove or dispose of the property with view to defraud his creditor.

It must be noted at the outset that granting of temporary injunction involves exercise the discretion of the Court where all the important criteria for such exercise must exist. In the case of **Ngao Godwin Losero vs Julius Mwarabu** (Civil Application No.10 of 2015) [2016] TZCA 2099 (18 October 2016) (TANZLII), at pages 5-6, the Court of Appeal stated that:

To begin with, I feel it is instructive to reiterate, as a matter of general principle that whether to grant or refuse an application like the one at hand is entirely in the discretion of the Court. But, that discretion is judicial and so it must be exercised according to the rules of reason and justice.

It is applicant's duty to ensure that there is material evidence before the court in substantiation that the property in question is likely to be wasted, damaged or alienated, on one hand. On the other hand, there must be evidence that the defendant intends to remove or threatens to dispose of the property with view to defraud creditors. Proof of these aspects may fit



into the exercise of judicial discretion in accordance with the rules of reason and justice.

It shall be pertinent that in determining criteria for grant of temporary injunction to consider whether there are any aspects related to either of the two limbs of granting the same.

The purpose of the granting of temporary injunction and the criteria for its grant have been articulated in plethora of authorities. In the case of **Abdi Ally Salehe vs Asac Care Unit Limited & Others** (Civil Revision 3 of 2012) [2013] TZCA 179 (30 July 2013) (TANZLII), at pages 8-9, the Court of Appeal elaborated the criteria for grant of temporary injunction namely:

The object of this equitable remedy is to preserve the pre dispute state until the trial or until a named day or further order. In deciding such applications, the court is to see only a prima facie case, which is one such that it should appear on the record that there is a bona fide contest between the parties and serious questions to be tried. Once the court finds that there is a prima facie case, it should then go on to investigate whether the applicant stands to suffer irreparable loss, not capable of being atoned for by way of damages. There, the applicant is



expected to show that, unless the court intervenes by way of injunction, his position will in some way be changed for the worse; that he will suffer damage as a consequence of the plaintiff's action or omission, provided that the threatened damage is serious, not trivial or minor, illusory, insignificant, or technical only. The risk must be in respect of a future damage. 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 controversy between the applicant and the respondent is on ownership of the land within the City of Dodoma at Ipagala Centre. The applicant asserts ownership through granted right of occupancy while the respondents claim ownership under customary right of ownership. Both parties claim ownership of the same land. There is a clear contest between the parties in relation to the Land Case No. 3 of 2023.

In **National Housing Corporation vs Peter Kassidi & Others** (Civil Application No. 243 of 2016) [2019] TZCA 153 (4 June 2019) (TANZLII), at pages 14-15, the Court of Appeal stated that:



*It bears reflecting that a temporary injunction is an equitable relief for maintaining the status quo between the parties pending hearing and determination of an action in court. This remedy is in the nature of a prohibitory order granted at the discretion of the court against a party. The above aside, we are persuaded by a commentary by the learned authors of **Sohoni's Law of Injunctions (supra)** at pp. 737 to 738 to the effect that generally no injunction can be granted to stop a judicial process such as execution of a decree even with the aid of inherent powers of the Court under section 151 of the Indian Code of Civil Procedure barring very exceptional circumstances. We feel obliged to excerpt the relevant passage from page 738 disclosing the logic in that commentary: "**The principle is also well-settled that before an order [of injunction] in exercise of inherent powers is passed, the Court must be satisfied (1) that the applicant has a prima facie case in his favour, (2) that irreparable injury would be caused to the applicant if the order sought by him is not granted during the pendency of the legal proceedings, or (3) that the balance of convenience lies in favour of the applicant.**"*



In the instant application the main issue is whether the criteria for grant of temporary injunction are met. As I have noted that there is clear contest between the parties regarding who is the rightful owner of the plot of land in question between the applicant and the respondents as there are competing claims.

Such competing claim calls for the court's intervention as to who is the rightful owner of the plot in question. Such aspect makes the first criterion on existence of prima facie case between the parties to be vividly established.

In respect of other two aspects of the irreparable injury and that of balance of probabilities lies on the applicant, there are divergent views. In the affidavit, there are three main paragraphs in that respect, which state that:

11. That, it came to the knowledge of the applicant that respondents herein are disposing and damaging and electing(sic!) over the applicant's piece of land in quo while the applicant has a title deed and without even compensating as well as reallocate another plots the applicant's herein thereof.

12. That, it is interest of justice, this Honourable High Court to order Temporary Injunction thus restrain respondents, their agents, assignees, workmen, or any



other persons acting their instructions or on behalf or any person, to refrain and restrain from the same.

13. That, unless this Honourable High Court orders temporary injunction against respondents, their agents, assignees, workmen, or any other persons acting their instructions or on behalf or any person, the applicant herein will suffer irreparable loss, because the applicant's herein depend on the plot of land in quo for residential purposes the same as well the applicant will be denied her right to be heard since she has got no other alternative room to challenge this thereof.

These averments are strongly disputed by the respondents who assert that the respondents did only develop their land and not the applicant's land. They also state that the applicant has no interest(s) or rights over the respondents' land and that the applicant will not suffer any loss as the suit premise does not belong to the applicant.

I cannot agree with the applicant's counsel that mere fact that the applicant allegedly has a title over the land and that he had obtained authorizations to commence development in the land alone amount to the applicant's suffering irreparable loss.



There is no material evidence adduced before this court to substantiate that the applicant is likely to suffer irreparable loss if the temporary injunction is not granted.

It is settled law in this jurisdiction that a person who alleges must prove on existence of the fact upon which he wishes the court to determine the matter in his favour. In **Amos Njile Lili vs Nyanza Cooperative Union (1994) Ltd & Others** (Civil Appeal No. 126 of 2020) [2024] TZCA 13 (31 January 2024), pages 15-16, where the Court observed that:

In our determination of the complaints before us, we shall be guided by the following principles of law. One, is that in civil cases, the burden of proof lies on the person who alleges anything in his favour founded on section 110 of the Evidence Act. Two, is that the burden of proof envisaged above is on the balance of probabilities.

Accordingly, it was the applicant who should have proved that all the criteria pertaining to the grant of temporary injunction exist. Failure to prove such criteria makes the application to stand unproved.

In the case of **Kurubone Timotheo and 2 Others vs Kishuro Village Council and 4 Others** (Misc. Land Application No. 9827 of 2024)



[2024] TZHC 5832 (19 June 2024) (TANZLII), at page 6, this Court (Hon Banzi, J.) stated that:

*Generally, before the court can grant interim orders in the nature of injunction, there are certain conditions to be observed. These conditions were set out in the case of Attilio vs Mbowe (supra) as hereunder: "(i) There must be serious question to be tried on the facts alleged, and a probability that the plaintiff will be entitled to the relief prayed; (ii) 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, and (iii) That on the balance there will be greater hardship and mischief suffered by the plaintiff from the withholding of the injunction than will be suffered by the defendant from the granting of it." **These conditions must be satisfied conjunctively, that is all of them must be satisfied** (Emphasis added).*

Having observed that the applicant failed to prove existence of the irreparable injury that the applicant is likely to suffer and that on balance there will be greater harm to the applicant if the application for grant of temporary injunction is withheld, the criteria for the grant of temporary injunction was therefore not met.



In the circumstances, it is appropriate to withhold the grant of injunctions as there are no material evidence to substantiate this court to exercise its discretion.

In totality, application for temporary injunction is dismissed for lack of merits. Costs shall follow the cause.

It is so ordered.

DATED at DODOMA this 1st day of July 2024.



Longopa

**E.E. LONGOPA
JUDGE
01/07/2024**

A handwritten signature in black ink, appearing to be a stylized 'A' or similar character.