

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. LAND APPLICATION NO. 55 OF 2017

(Arising from Land Case No. 17 of 2017)

**ELVIS BEDA KYARA.....APPLICANT
VERSUS
MAHAMUDU MDENGE.....RESPONDENT**

Date of the Last Order: 26/10/2017

Date of the Ruling: 26/02/2018

RULING

Makuru, J.

The applicant, Elvis Beda Kyara, has moved this Court under **Order XXXVII Rule 1(a) and Rule 4 of the Civil Procedure Code, Cap 33 R.E 2002**. He is seeking for an order to restrain the respondent from trespassing and constructing a building and from doing any activity on the suit premises situated at Pingo, Chalinze, Coast Region pending the hearing and final determination of the main suit. The application is supported by the Applicant's affidavit.

Submitting in support of the application Ms. Winnie Kimaro cited the cases of **Atilio vs. Mbowe (1969) HCD 69, J.A. Kaare Vs. General Manger Mara Cooperative Union Limited (1989) TLR 17**, and **Kibo Match Group Limited Vs. H.S. Impex Limited (2001) TLR 152** in which the three conditions precedent to the grant of temporary injunction were outlined as follows:-

- i) There must be serious question to be tried

ii) Irreparable loss

iii) balance of convenience

On triable issues, the learned counsel submitted that, this matter is worthy to be adjudicated by this court. Hence, injunction has to be issued before it is finally determined.

On the second principle that the applicant will suffer irreparable loss if the application is not granted, it was argued that, paragraphs 6, 7 and 8 of the supporting affidavit clearly shows how the Respondent has trespassed into the land in dispute and destroyed properties. According to her, this requires court intervention by granting injunction pending final determination of the suit.

On the balance of convenience, it was submitted that the Applicant/Plaintiff is the one who will suffer more compared to the Respondent/Defendant if injunction is not granted. According to Ms. Kimaro, the injury is irreparable and no monetary compensation will be adequate to compensate the Applicant.

In reply thereto Mr. Mandele learned counsel for the Respondent contended that, pursuant to Order XXXVII Rule 3 of the Civil Procedure Code, the Applicant is obliged to give security in order to obtain an order for temporary injunction. It was therefore the learned counsel's argument that the Applicant has not pleaded in his affidavit his readiness to give security before obtaining an order for temporary injunction.

Submitting in respect of the first principle, Mr. Mandele was of the view that the Applicant has not shown the probability that he will be entitled to the relief prayed. Thus, he has failed to establish the first principle.

As for the second principle, he contended that, the Applicant has failed to establish that the injury he will suffer, if any, will not sufficiently be compensated by monetary terms.

As for the last principle he submitted that the Applicant failed to establish that if the application is refused he will suffer more compared to the Respondent. According to him, if the application for injunction is refused the Applicant will not suffer any inconvenience because he has never been in occupation of the suit land at any point in time.

In rejoinder, Ms. Winnie Kimaro reiterated her submission in chief and added that the provisions under which this matter is brought does not make a mandatory requirement for the Applicant to give security as alleged by the Respondent.

In determining an application of this nature what the court ought to consider is whether the Applicant has managed to establish the three principles outlined in the case of **Atilio vs. Mbowe** (supra). The three principles outlined therein are:-

1. That there is a serious question to be tried and the Plaintiff is likely to succeed.

2. That the court's interference is necessary to prevent the applicant from suffering irreparable loss.
3. That on a balance of convenience there will be greater hardship on the part of the Plaintiff if injunction is not issued.

In interpreting the three principles **Sarkar on Code of Civil Procedure, Ninth Edition, 2000 at page 1997** had this to say:-

"By irreparable injury it is not meant that there must be no physical possibility of repairing the injury all that is meant is that the injury would be a material one, and one which could not be adequately remedied by damages"

On the balance of convenience the learned author stated that:-

"Where the plaintiffs are likely to suffer irreparable injury in case the injunction is refused and balance of convenience also lies in their favour they are entitled to grant an interim injunction."

The learned author went on to elaborate that:-


"Before granting injunction the court is required to consider the existence of prima facie case which would also imply prima facie consideration of the jurisdiction of that court. There would not be a prima facie case if the court considering has apparently no jurisdiction to entertain the suit."

In order to secure an order for temporary injunction the Applicant has to establish in whole the three co existing requisites (see the case of **Tanzania Breweries Limited and Another (1998) EA 341**).

I will start with the first one that the Applicant must establish that there is a prima facie case or there is a serious question to be tried and the Applicant is likely to succeed. In paragraph 2 of the affidavit the Applicant is praying for a declaration that he is the lawful owner of the 20 acres of land situated at Pingo, Chalinze, in Coast Region. The Applicant is also praying for a declaration that the Respondent is a trespasser. It is further averred in paragraph 6 of the supporting affidavit that the Respondents trespassed into the disputed land and destroyed the fence and caretaker's house. From the above facts, it goes without saying that, the Applicant has established that there is a prima facie case and that there are triable issues to be determined by this court during the hearing of this suit.

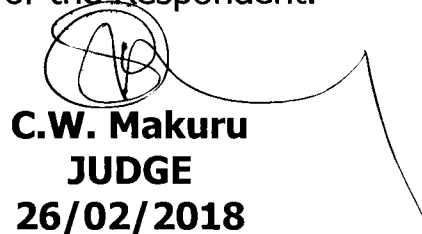
As regards the second principle in respect of irreparable loss, in the plaint it has been clearly shown that the Applicant/Plaintiff is praying for special exemplary damages and general damages. Thus, he can be adequately remedied by damages.

Under the circumstance, I find that the Applicant has not managed to establish all the three principles outlined in **Atilio case** (supra). The application is dismissed. Costs in the cause.



C.W. Makuru
JUDGE
26/02/2018

Court: Ruling delivered in court this 26th day of February, 2018 in the presence of Ms. Anna Lugendo, learned counsel for the Applicant and Ms. Rose Sanga, learned counsel for the Respondent.



C.W. Makuru
JUDGE
26/02/2018