

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPLICATION NO. 332 OF 2021

(Originating from Land Case No. 203 of 2020 before Hon. S.M. Maghimbi, J)

FREDA ANDREW KAIZA.....1ST APPLICANT
LOYISE KAIZA.....2ND APPLICANT
FREDDIE KAIZA.....3RD APPLICANT

VERSUS

NASSORO MSHEWA.....1ST RESPONDENT
SEFU MCHECHELE.....2ND RESPONDENT
JUMA SHOMVI KITONGE.....3RD RESPONDENT
JOHN PIUS NDITI.....4TH RESPONDENT
EMMANUEL ABEL MWASIFIGA.....5TH RESPONDENT
FRED ZAKARIA.....6TH RESPONDENT
THOBIAS MGODE FELIX.....7TH RESPONDENT
JOEL STEPHANO.....8TH RESPONDENT
BONEVENTURA POLYCARP.....9TH RESPONDENT
JUMA MAZANGALA.....10TH RESPONDENT
MONICA PAULO KUNJUMU.....11TH RESPONDENT
ATHUMAN SHEMKONO.....12TH RESPONDENT
GOODLUCK MWONGOZO.....13TH RESPONDENT
LEA KIMBILI.....14TH RESPONDENT

BAKARI MBAGA.....	15 TH RESPONDENT
ESTER GODFREY.....	16 TH RESPONDENT
GODFREY STEVEN.....	17 TH RESPONDENT
JACKSON LIKASA.....	18 TH RESPONDENT
JOHN NASORO.....	19 TH RESPONDENT
ACLEUS KAMUGISHA.....	20 TH RESPONDENT
JOYCE TESHA.....	21 ST RESPONDENT
DAVITA MASAWA.....	22 ND RESPONDENT
HERIETH ANTON.....	23 RD RESPONDENT
JAHAS KASEBELE.....	24 TH RESPONDENT
RAMADHANI JUMA.....	25 TH RESPONDENT
MARIAM HAMI.....	26 TH RESPONDENT
ALEXANDER KWEKA.....	27 TH RESPONDENT
ROSE ZACHARIA.....	28 TH RESPONDENT
SEFU WARIOBA.....	29 TH RESPONDENT
GEOFREY MASAMBWILI.....	30 TH RESPONDENT
SALEH HAMZA.....	31 ST RESPONDENT
JOSEPHAT MSELE.....	32 ND RESPONDENT
ALLY SEUNDO.....	33 RD RESPONDENT
HUSSEIN ALLY.....	34 TH RESPONDENT
JAMILA MUSA.....	35 TH RESPONDENT
NELSON PONSIANO.....	36 TH RESPONDENT
MWAJUMA MASHA.....	37 TH RESPONDENT
ZAINABU RASHID.....	38 TH RESPONDENT

MICHAEL SARIMBO.....39TH RESPONDENT
JOSEPHAT MSELE.....40TH RESPONDENT
HABIBU KASSIMU.....41STRESPONDENT

RULING

Date of last Order: 16.08.2021

Date of Ruling: 03.09.2021

A.Z MGEYEKWA, J

The applicants' application is brought under Order XXXVII Rule (1) (a), (2) and (4), section 68 (c),(e) and 95 of Civil Procedure Code Cap.33 [R.E 2019]. The application was accompanied by a joint affidavit sworn by Freda Andrew Kaiza, the first applicant. Opposing the application, the first respondent filed a counter affidavit sworn by Daniel John Bushele and signed on behalf of all respondents.

The application is borne from the facts that, there is a pending Land Case No. 203 of 2020 before this court whereas the applicants prays for an injunction to restrain the respondents, their agents or otherwise whatsoever from disposing of, developing or further developing and/or alienating suit

land or any part of the suit land as comprised in Farm No. 2628 vide Certificate of Title No. 50021 with L.O No. 168376; and Farm No. 2628 vide Certificate Tile No. 515555 with L.O 168375. Both farms are situated and located at Bonyokwa area within Ilala Municipality, Dar es Salaam Region pending final and conclusive determination of the main suit.

Following the events that transpired on the case, the counsel for the applicants filed this application and urged this court to grant a temporal injunction to restrain the restraining the respondents, their agents or otherwise whatsoever from disposing of, developing or further developing and/or alienating suit land or any part of the suit land as comprised in Farm No. 2628 pending the hearing and final disposal of the main suit.

When the application was called for hearing on 16th August, 2021, the applicants enjoyed the service of Mr. Selemani Almasi, learned counsel while the respondents enjoyed the service of Mr. Daniel Buhere, learned counsel. The parties prayed to argue the appeal by way of written submissions. By the consent of this court, the applicants' Advocate filed his submission in chief on 20th August, 2021. The respondent's Advocate filed a reply on 25th August, 2021 and the appellant's Advocate filed a rejoinder on

30th August, 2021. The matter was scheduled for Ruling on 03rd September, 2021.

The learned counsel for the applicants was brief and straight to the point. He argued that the application is filed pending the determination of the pending Land Case No. 203 of 2020 between the parties before this court. He submitted that the applicants is seeking an order for a temporary injunction to restrain the respondents, restraining the respondents, their agents or otherwise whatsoever from disposing of, developing or further developing and/or alienating suit land or any part of the suit land as comprised in Farm No. 2628 vide Certificate of Title No. 50021 with L.O No. 168376; and Farm No. 2628 vide Certificate Tile No. 515555 with L.O 168375. Both farms are situated and located at Bonyokwa area within Ilala Municipality, Dar es Salaam Region which are the properties in dispute in the main case, pending the final and conclusive determination of the main case.

Mr. Almasi contended that on 4th April, 2000 the 2nd applicants was granted a right of occupancy over the property registered as Farm No. 2627 with Certificate of Title No. 50021 with L.O No.168376, and on 28th May, 2001, the 3rd applicants was granted the right of Occupancy over the property

registered as Farm No. 2628 vide Certificate of Title No. 51555 with L.O No. 168375. Both farms are situated and located at Bonyokwa area within Ilala Municipality, Dar es Salaam Region pending final and conclusive determination of the main suit i.e. Land Case No. 203 of 2020. The learned counsel for the applicants urged this court to adopt the affidavit and reply to the counter affidavit and form part of his submission.

The learned counsel for the applicants started with a brief background of the facts which led to the instant application which I am not going to reproduce in this application.

Mr. Almasi submitted that in deciding whether to grant or refuse an order of temporary injunction, the court has to exercise its discretion by considering the factors and principles for granting the sought order. He went on to argue that in the application for interlocutory injunction, the principles have been outlined in a famous case of **Atilio v Mbowe** (1969) HCD 286. He added that the case of **Atilio** (supra) was referred in various decisions of this court in the cases of **Dominic Daniel & Another v CRDB Bank PLC Ltd & Another**, Commercial Case No. 39 of 2011, **Valence Simon Matunda (Suing via Power of Attorney of Musa Yusuf Mamuya) v Sallah Philip Ndosy & 2 Others**, Misc. Land Application No.55 of 2019 and **Barretto**

Haulliers (T) Ltd v Joseph E. Mwanyika & Another, Misc. Civil Application No. 253 of 2016. He added that in the case of **Barretto Haulliers** (supra) the court listed three conditions as follows:-

- (i) *There must be a serious question to be tried on the facts alleged, and a probability that the plaintiff will be entitled to the reliefs 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.*

Mr. Alhmasi added that the court cannot grant the order sought of temporary injunction unless all the above conditions are satisfied. On the first condition, that there must be a serious question to be tried on. The learned counsel for the applicants submitted that the same is reflected under paragraphs 3 and 11 of the affidavit, the applicants urged the court to declare the 2nd and 3rd applicants as lawful owners of the suit land via the certificates of title as attached. He added that the applicants have satisfactorily proved their ownership of the suit land thus the land has been unlawful and forcefully occupied by the respondents without authorization alleging to have

purchased from the 1st, 2nd, and 3rd respondents on the power granted to them by the 1st applicants which they dispute. To fortify his submission he referred this court to paragraphs 4, 5, 6, 7, and 8 of the affidavits.

He valiantly argued that annexure NM1, NM2, NM3, and NM4 attached to the respondent's counter affidavit does not qualify as proof of power alleged to be given to vendors of the 2nd and 3rd applicants' land to sell the suit land to the remaining respondents. It was his view that the applicants have proved that they are the lawful owner of the suit land and the same are serious triable issues to be determined by this court. Fortifying his position he referred this court to the cases of **Valence Simon Matunda** (supra) and **Dominic Daniel** (supra).

Submitting on the second condition that the Court's interference is necessary to protect the plaintiff from kind of injury which may be irreparable before legal rights are established. He stated that refusal of temporary injunction has serious consequences depending upon the nature and circumstances of each particular case. He referred this court to the case of **Dominic Daniel** (supra). He added that the court must satisfy itself that the applicants will suffer such damages, mere monetary compensation will be not adequate. He went on to state that the respondents have started

construction. To support his submission he referred this court to paragraph 12 of the counter affidavit. He added that the applicants in their reply to the counter affidavit have challenged the ongoing construction on the suit land. He valiantly argued that building schools cannot be compensated by money, if the desire will not be accomplished because of unauthorized interference and construction of unplanned structures on the applicants' land.

On the third condition, Mr. Almasi submitted that the applicants have stated the greater hardship and mischief which they will stand to suffer more than the respondents if the order for a temporary injunction will be withheld. To buttress his submission he referred this court to paragraph 12 of the affidavit. Mr. Almasi contended that if the illegal constructions on the suit land will continue and further disposed of parts of the suit land, the applicants stand to suffer irreparable loss. He added that the 2nd and 3rd applicants' plans for developing the suit land will be come to an end without any hope of a revival.

The learned counsel for the applicants continued to submit that the applicants have greater chances to succeed in the main case. He went on to state that in case the judgment will be entered in favour of the respondents then the applicants will have lesser trouble in executing the decree. The

learned counsel for the applicants further submitted that if the judgment will be decided in favour of the applicants then they will have difficulties in reserving their ownership since the damages in monetary forms which they will claim from each respondent is on the higher scale. To bolster his submission he referred this court to the case of **Valence Simon Matunda** (supra).

On the strength of the above submission, the learned counsel beckoned upon this court to grant the application and restrain the respondents from developing or selling the suit land pending final determinations of the main suit with costs.

Responding, the learned counsel for the respondents' confutation was strenuous. He urged this court to adopt the counter affidavit of all respondents to form a part of their submission. He valiantly argued that the applicants is a defaulted borrower seeking injunctive orders against recovery. He submitted that it is settled position of the law that granting an injunction is upon the Court exercising its discretion, which means that no part can claim it as a right and he referred this court to the criteria for granting temporally injunction which was set in the case of **Atillo v Mbowe** (1969) HCD 284, to mean that:-

It is generally agreed that there are three conditions that must be satisfied before such an injunction can be issued:-

- (i) *There must be a serious question to be tried on the facts aged, 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 Plaintiff from withholding of the injunction than will be suffered by the Defendant from granting of it- It is trite law that all the three conditions must be fulfilled for an order of injunction to be granted.*

The learned counsel for the respondents stressed that the principles in the case of **Atilio** (supra) were not met. He contended that it is clear that there is no any serious question to be tried between the parties and there is no any possibility that applicants shall succeed in their reliefs prayed in the main suit.

The learned counsel for the respondents contended that the first applicant entered into an agreement of sale of the disputed premises. To

support his position he referred this court to annexure NM4 attached to the counter affidavit which shows. He added that the parties were disputing over boundaries of the suit land. He went on to argue that there was an agreement and the first respondent was fulfilling the said agreement by selling the land.

It was his view the applicants had no any serious question to move this court to determine his application. Insisting, he argued that the applicants cannot succeed in the reliefs prayed. He concluded by stating that the first condition of injunction fails. To fortify his argumentation he referred this court to the case of **Dominic Daniel Another v CRDB Bank PLC & Another**, Commercial Case No. 39 Of 2011, the Court cited with approval the case of **Construction Company Limited v Nbc Limited another**, Commercial Case No. 105 of 2003 whereby the Court of Appeal of Tanzania held that:-

“ it is is a trite law that all the three conditions must be fulfilled” the Honourable Judge was referring to the three conditions for the granting of a temporary injunction As shown above in this case the first condition fails to be fulfilled and temporary injunctions should not be issued.”

Submitting on the second condition for the grant of temporary injunction. The learned counsel for the respondents argued 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. He stated that irreparable loss is that loss that cannot be adequately be compensated by an award of any amount of money. In his view, the alleged loss in the instant case if any to the applicants can be adequately compensated by a mere award of damages in terms of money, since the applicants do not depend in any way over the suit premises. He added that on the other side, the respondents are already leaving in the suit premises. To bolster his position, the learned counsel for the respondents referred this court to the case of **Dominic Daniel** (supra).

"Moreover, the applicants has not convincingly demonstrated that the contemplated damage are not capable of being compensated by way of damages. Taking note of the consequences and other aspects highlighted by all the parties, a more convenient way, is for the parties to co-operate with the court for the early conclusion of the hearing of the main suit.

Mr. Daniel went on to argue that the above position of the law means a temporary injunction cannot be issued since the applicants have failed to demonstrate the damages they are likely to incur and the same cannot be compensated by way of damages. He added that on the contrary the respondents are victims and have invested money, skills, and manpower their families depend on that property only.

Concerning the third condition for the grant of temporary injunction. The learned counsel for the respondent cementing on the third condition argued that this condition is in favour of the respondents. It was his view that the respondents legally bought their land, they have developed the suit land by building residential houses and construction is ongoing their land, they have brought building material over the land some materials like cement can be affected by weather condition.

Insisting, the learned counsel for the respondents argued that in case the application for temporary injunction will be granted, the respondents will suffer big loss as of now there is a big hospital that has been constructed and it is operational is offered to children, women, and people with disability. He urged this court to consider the respondents' prayers for not granting a temporary injunction against the respondent.

On the strength of the above submission, the learned counsel for the respondents beckoned upon this court to dismiss the applicants' application with costs for lack of merits.

In his rejoinder, the learned counsel for the applicants reiterate his submission in chief. He valiantly contended that the respondents' argument and the evidence does not hold water as annexure NMI does not qualify in law at all to be an agreement of sale. The learned counsel for the applicants added that the respondents' allegation in respect to annexure NM4 requires proof and the same has no weight with regards to the applicants' case. He claimed that annexure NM4 does not constitute a conclusive determination of the issue, whether the first respondent had been given the power to sell second and third applicants land which was under the guardian of the first applicants. He forcefully argued that the issues of boundaries cannot be raised.

The learned counsel for the respondent further argued that applicants proved that there is a serious questions to be tried on the facts alleged and the possibility that applicants would be entitled to the reliefs claimed on the main suit. and arguments on their submission in chief in support of the application.

The learned counsel for the applicants argued that the respondents had impliedly accepted to the truth that applicants would be heavily affected by respondents' desire of developing the land only that monetary damages are suitable to them if awarded. He claimed that the suit land is for building schools and all architectural drawings to accomplish the purpose of building schools were in place. Therefore, he refuted that the applicants do not depend in any way on the suit premises for the grant of temporary injunction. He went on to submit that each case has to be determined based on its own facts and circumstances. He continued to argue that the respondents failed to support their arguments with tangible evidence.

Insisting, Mr. Almasi argued that in case this court will withhold the injunction then the applicants will suffer considering that the respondents admitted to having started developing the suit land for residential and others started to build hospitals which are outside the purpose of the settlement plan.

The learned counsel for the applicants in his long submission ended by stating that building hospitals or residential houses will cause hardships in the execution of the Decree.

On the strength of the above submission, the learned counsel for the applicants beckoned upon this court to grant the applicants' application with cost

Having heard the submissions of both learned counsels for the applicants and the respondents. I should state at the outset that, the matter before me is regarding an application to restrain the respondents, their agents or otherwise whatsoever from disposing of, developing or further developing and/or alienating suit land or any part of the suit land as comprised in Farm No. 2628 vide Certificate of Title No. 50021 with L.O No. 168376, and Farm No. 2628 vide Certificate Tile No. 515555 with L.O 168375. Both farms are situated and located at Bonyokwa area within Ilala Municipality, Dar es Salaam Region pending final and conclusive determination of the main suit.

In determining this matter, I will be guided by the principle governing a temporary injunction has been established in various decisions by the Court. **First, *prima facie***, the court must be satisfied that there is bona fide dispute raised by the applicants and the Court must be satisfied that there is a bona fide dispute raised by the appellant, that there is a strong case for trial that needs investigation and a decision on merits and on the facts before the

Court, there is a probability of the applicants entitled to the relief claimed by him. **Second**, an injury the applicants must satisfy the Court that he will suffer irreparably. Injury if injunction, as prayed, is not granted and that there is another remedy open to him by which he can protect himself from the consequences of apprehended injury. **Third**, a balance of convenience which is likely to be caused to the applicants by refusing the injunction will be higher than which is likely to be caused to the opposite party by granting it.

The Courts have tested the above principles in various cases such notable cases include; **Atilio v Mbowe** (1969) HCD 284. **Agency Cargo International v Eurafrican Bank (T)** (HC) DSM, Civil Case No. 44 of 1998 (unreported), and **Giella v Cassama Brown & Co. Ltd** (1973) to mention just a few.

Relating the facts before me and the said principle I should take note that at this point I do not have the full evidence before me. The standard of proof required would be somehow below that which is generally required upon full trial. For example, the sale agreement in question needs to be proved at the main suit.

The records reveal that the applicants have tried to prove that they are the lawful owner of the suit plots. I have perused the applicants' affidavit specifically paragraphs 4 and 11, and found the applicants stated that Farm No. 2627 with a certificate of title No. 50021 with LO No. 168376 and Farm No. 2628 bearing a certificate of occupancy No. 51555 with Lo. 168375 belongs to them. The applicants also complained that the respondents have trespassed their suit land and that they have built houses therein and some of them sold the suit plots to other people. The facts reveal that the applicants' wants to prove that they are the lawful owners and the respondents have interfered with the said suit plot. For those reasons, it suffices to say that the applicants have shown there is a triable issue that requires the interference of this court.

As to the second condition, the applicants must satisfy the Court that they will suffer irreparably. Injury if injunction, as prayed, is not gran the applicants have alleged that they are the lawful owners of the said two farms. They have stated that they have a plan to build a school and a plan is in place. Allowing the respondents to proceed with construction and occupying the suit plots will disturb the applicants' plan. They will not be in a position to continue with developing their plan. I have considered the fact there will be no hope for the

applicants to recover their disputed land after allowing 41 respondents to continue with the construction of residential houses and selling plots to third parties.

I have considered the submission made by the respondents Advocate that in case the applicants will win the case, he will be compensated an award of damage in terms of money. However, it is noteworthy that the issue involved in this instant case is not only compensation of money. In case it will be proved that the applicants are the lawful owners of the suit land then the eviction of more than 41 people from the suit land will not be easy. It will take long time to evict all the invaders from the suit plot. Additionally, as rightly pointed out by the learned counsel for the applicants, after the said eviction there is a possibility of continuations of legal litigation from parties who bought the said plots from the respondents. As a result, the applicants will suffer irreparable loss. In my view, this condition is met.

With respect to the third condition, a balance of convenience which is likely to be caused to the applicants by refusing the injunction will be higher than which is likely to be caused to the opposite party by granting it. Having determined the first two conditions in favour of the applicants, I fully subscribe to the learned counsel for the applicants' submission, the

applicants will suffer greater hardship than the respondents because they alleged that they are the lawful owners. To confirm that they are lawful owners, they have attached certificates of title. It is my considered view that in case the matter will be decided in favour of the respondents then it will be difficult for the applicants to recover their suit plots within a short time. It will be lesser troubled to execute the decree compared to the applicants. Additionally, in case it will be decided in favour of the applicants then it will be not difficult in reserving their ownership. Therefore, the applicants have met the third condition.

Having weighed the different probabilities in this application, it appears that the relationship between the applicants and the respondents has soured the same requires this court intervention. Failure to grant this application for a temporary injunction will directly affect the merit of the main case. Consequently, this court has observed further that there is a pending Land Case No. 203 of 2020 before this court on the same subject matter. Thus, I find it prudence to restrain the respondents, their agents, or otherwise whatsoever from disposing of, developing, or further developing and/or alienating the suit plot pending the hearing of Land Case No. 203 of 2020. Application is allowed. No order as to costs.

Order accordingly.

DATED at Dar es Salaam this 3rd September, 2021




A.Z.MGEYEKWA

JUDGE

03.09.2021

Ruling delivered on 3rd September, 2021 in the presence of Mr. Selemani Almasi, learned counsel for the applicants, and Mr. Daniel Buhere, learned counsel for the respondents.




A.Z.MGEYEKWA

JUDGE

03.09.2021