

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

**MISC.LAND APPLICATION No. 486 OF 2020**  
*(Arising from Land Case Number 114 of 2020)*

**PHILEMON KAMWADI PHIRI ..... APPLICANT**

**VERSUS**

**ATHANAS PIUS MEZA ..... 1<sup>ST</sup> RESPONDENT**

**LOVEGOD NDEMFOO MUNISI.....2<sup>ND</sup> RESPONDENT**

**JOCELINE TUMWIBAZE ..... 3<sup>RD</sup> RESPONDENT**

**SALMA MAFAUME MLAPONI..... 4<sup>TH</sup> RESPONDENT**

**SELINA MICHAEL .....5<sup>TH</sup> RESPONDENT**

**MPAJI PHABIAN SUGWAYO..... 6<sup>TH</sup> RESPONDENT**

**NAIMA BAKARI NINGA ..... 7<sup>TH</sup> RESPONDENT**

**ELIZABETH FUGO .....8<sup>TH</sup> RESPONDENT**

**HALIMA HAMIDU MAR ..... 9<sup>TH</sup> RESPONDENT**

**HEMED ABDALLAH MLANZI..... 10<sup>TH</sup> RESPONDENT**

**DEOGRATIUS THARUS MKAPA.....11<sup>TH</sup> RESPONDENT**

**MARIA DONALD MOSHI ..... 12<sup>TH</sup> RESPONDENT**

**SEKUNDA PETER SILAYO ..... 13<sup>TH</sup> RESPONDENT**

**RULING**

*Last Order date: 03/8/2021*

*Ruling date: 06/8/2021*

**MSAFIRI, J:**

The applicant Philemon Kamwadi Phiri, have moved this Court under the provisions of Order XXXVII Rule 1 and Section 68(e) of the Civil Procedure Code Cap 33 R.E 2019 seeking for the following orders:

- a) That this honorable Court may be pleased to issue an interim order of injunction to restrain the respondents, their servants, workmen, agents and or whoever reporting to act on the respondents' behalf from continuing constructing or building houses or whatsoever on the suit premises pending hearing and determination of the main case.
- b) The costs of this application.
- c) Any relief as this honorable Court may deem fit and just to grant.

The Application is supported by an affidavit affirmed by the applicants dated 14th August, 2020.

With the leave of the court the matter proceeded by way of written submissions. The applicant was represented by Mr. Didace Celestine Kanyambo, learned advocate while the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 14<sup>th</sup> were represented by Ferdinand Thaddeus Masoy, Advocate. No submissions were filed by the remaining respondents i.e. 1<sup>st</sup> and 10<sup>th</sup>.

In his submission, Mr. Kanyambo centered his submission from the principles/criteria set out by Georges, CJ in the landmark case of ***Atilio***

***versus Mbowe (1969) HCD 284.*** On the first criteria he submitted that, the applicant filed Land Case No. 144 of 2020 (the main suit) in which there is a serious question to be tried by this court and that there is a great like hood of the plaintiff to succeed or being entitled to the relief prayed. He submitted further that the plaintiff is the genuine owner of the disputed premise, and has the genuine sale agreements which proves that he has right and ownership of the disputed property.

On the second criteria, he submitted that immediately after purchasing his land, he started cultivating maize and animal husbandry, and for now the property has been subdivided into small portions and sold by the first respondent to the rest of the respondents and each portion is fenced.

He submitted further that creating building and other infrastructure relating to residential human activities over the applicant's land makes it difficult and creates unfavorable condition to support farming and livestock keeping activities and ultimately the respondents' action herein over the applicant's land will hinder all projected economic activities he had started to implement thereon.

He argued that if the respondents are left to proceed with their activities the applicant will suffer more irreparable loss as he will not be able to do such economic activities over the suit premise as it had been planned prior the respondents' illegal actions that are in progress at the high pace. He added that in regard to what the applicant had planned before the invasion, he finds it prudent that the order of injunction be issued till final determination of the main suit so as to minimize the great loss that the applicant is likely to suffer as compared to if the sought orders will not be granted.

On the last criteria, he submitted that if the orders sought by the applicant herein will not be granted the applicant herein stands to suffer more inconveniences and hardships compared to the respondents because the applicant will either be forced to remove all structures and waste thereon so as to be able to implement the planned economic activities that had been intended thereon as mentioned earlier or be forced to change the plan that is already in place of which all this testify the level of inconveniences and hardships that are likely to be suffered by the applicant as compared to the respondents.

He added that immediately after the applicant had notified the respondents herein on trespassing, some of them started to initiate the disposition process over the piece of land that they occupy illegally, so, if this court does not intervene there will be illegal disposition by the respondents to other persons who are not part of this case. He therefore prayed for the order sought by the applicant be granted so as to rescue him from more suffering/damages.

In reply to the first criteria, Mr. Masoy advocate for the all respondents save for 1<sup>st</sup>, 10<sup>th</sup> and 13<sup>th</sup>, submitted that it is true that the main suit has been filed but the matter is not serious as claimed by the applicant, for the fact that 1<sup>st</sup> respondent was given land to take care and later advised and or allowed by the applicant himself to sell the land and thus it is surprising for the applicant to file this application.

On the second criteria he submitted that he reiterated the submission in the reply to the first criteria, he added that, the applicant himself directed the

1<sup>st</sup> respondent to sell the land and the proceed of sale was deposited to former's own bank account, so he cannot suffer irreparable loss for something that he chose to do.

On the third criteria, he submitted that the one to suffer when injunction is granted are respondents as they are the true and valid owner, they bought the land from the 1<sup>st</sup> respondent who was allowed to sell the land by the applicant, and it is not true that the same respondents intend to dispose their property while they are known and witnessed by the local government as true owners of the said land. He then cited the case of **Abla Estate Developers & Agency Company Ltd vs KCB Bank Tanzania Ltd**, Misc. Land Application No. 604 of 2017 and prayed for this court to dismiss this application. He also prayed to adopt the respondents' counter affidavits to form part of his submissions.

In rejoinder, Mr. Kanyambo began by challenging the counter affidavit of the 2<sup>nd</sup> , 3<sup>rd</sup> , 4<sup>th</sup> , 5<sup>th</sup> , 6<sup>th</sup> , 7<sup>th</sup> , 8<sup>th</sup> , 9<sup>th</sup> , 11<sup>th</sup> , 12<sup>th</sup> and 14<sup>th</sup> for the disputed and undisputed facts, he raised the point of law that where a person swears or affirms a counter affidavit disputing the contents of an affidavit sworn by the another party he/ she shall state or add another fact in controversy to the fact he /she is disputing, rather than ending by stating that an applicant is put to strict proof thereof. He cited different authorities to strengthen his point and that the court in the cited authorities implied that as admission of fact. He therefore invited the court to the record the said paragraphs 3 to 15 of the affidavit as being admitted.

Replying on the issue that the proceeds of sale were deposited into applicant's bank account, he submitted that there is no proof attached otherwise they are mere words and deserves to be ignored by this court.

He added that if the applicant allowed the 1<sup>st</sup> respondent to sell the suit land it could have been indicated in the sale agreement that he is selling the same on behalf of the applicant. He then reiterated his submission in chief and added that the respondents do not dispute the fact that the applicant will suffer more than the respondents.

Before I began my determination, I have noted the objection raised by the applicant in rejoinder that in their counter affidavits, the respondents have disputed some of the facts in the affidavit without stating or adding another fact in controversy to the fact they are disputing, and that amounts to the admission of the said facts. This objection being raised at the rejoinder intended to preempt the respondents as they have no room to reply. This is unprocedural and it is against the principal of natural justice of right to be heard. Thus, I cannot take it on board.

Again, the applicant in his submission in chief alleged that the respondents initiated disposition process of the piece of land that they occupy illegally, thereof he prayed for injunction so as the respondents could not be able to dispose it to the third parties. This fact was not pleaded in the chamber summons and even in the affidavit. It is a trite law that parties are bound by their pleadings, and thus the applicant was required to plead the issue that the respondents intend to dispose of the suit land or injunction to be granted so as the respondents could not be allowed to dispose the suit land. He only

prayed for injunction to restrain respondents from developing the suit premises. Since the said fact was not pleaded, I cannot take it also on board.

I have considered the records of this application and submissions of the applicant. In determining an application of this nature what the Court ought to consider as correctly submitted by Mr. Kanyambo is whether the applicant has managed to establish the three principles outlined in the celebrated case of **Atilio versus Mbowe (supra)**. The three principles outlined therein are:

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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 favor, 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.*

Therefore, 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 versus Kibo Breweries Limited and Another (1998) EA 341**).

On this foot, I will start with the first principle 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. The applicant's (who is also a plaintiff) cause of action arose from 2019 when he visited his land and found out that it has been invaded and the eleven houses has been erected at his 1.5 acre land. He alleged that he did not allowed the 1<sup>st</sup> respondent to dispose the said land although he acknowledge to allow the 1<sup>st</sup> respondent to take care of the said land. On the other hand, the 1<sup>st</sup> defendant admitted to be a caretaker of the farm and that he was allowed to dispose the same by the plaintiff and the proceed of sale were banked to his account worth 33,500,000/=. As for now all the plots are in the hand of the 2<sup>nd</sup> to 14<sup>th</sup> respondents and they have already developed it.

The only concern is on sale on the suit land to the third parties as to whether the 1<sup>st</sup> respondent was allowed to sell the same or not. Therefore, much as there are triable issues, the respondents are already in the suit land, should



the matter end in the plaintiff's favor, any order will affect the people who are currently in possession of the suit land and in the present matter, the respondents.

On the second principle of irreparable loss, the applicant's counsel submitted that, if the order for temporary injunction will not be granted the applicant will suffer irreparable loss as a he will not be able to do such economic activities as it has been planned and that if the respondents are not stopped the applicant will incur costs of removing waste derived from an authorized residential development.

From the nature of the claim, the applicant has stopped making his alleging economic activities of livestock and animal husbandry, what he has now is the plan. But the respondents have already erected structures and they are living on the suit land. My determination is since the applicant has not made any development in the suit land, the respondents are the one who will suffer irreparable loss. Hence the second principle established in **Atilio versus Mbowe** (supra) is squarely in favor of the respondents.

On the balance of convenience, having found that the loss that will be suffered by the applicant is less than what the respondents can suffer, and the fact that the applicant is not in possession of the suit land where the suit land is covered by about 11 respondents houses, the balance of convenience lies on the respondents to continue residing on the suit land than the applicant's claim for land that is not in his possession and which depends on the outcome of the main suit and his prayer can be granted to all the

residents/respondents who allegedly bought it from the 1<sup>st</sup> respondent. In the upshot, the application is hereby dismissed with no order as to costs.

Dated at Dar es Salaam this 06<sup>th</sup> day of August 2021



*Aelle*

**MSAFIRI, J**

**JUDGE**