IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 721 OF 2021
(Arising from Land Case No. 239 of 2021)

VALERIA T. NGUMA AND 53 OTHERS.....APPELLANTS

Versus

ATTORNEY GENERAL.....1st RESPONDENT

MINISTRY OF WORKS
AND TRANSPORTATION.....2nd RESPONDENT

RULING

19/05/2022 & 17/08/2022

Masoud J.

The applicants herein are seeking an injunctive order to restrain the respondent from demolishing their suit properties pending determination of the suit pending between them. The pending suit is Land Case No. 239 of 2021. The application is brought under among other things section 68(e) and Order XXXVII, rule 1(a)4 of the Civil procedure Code, cap. 33 R.E 2019. The application is opposed by the respondents.

The affidavit supporting the application had a good number of averments from which I am entitled to inquire into whether the applicants have met the conditions to be considered in exercising the discretion of this court in granting the sought orders. I am mindful that I am not entitled look at the submissions only as they are not evidence as was held in **The Registered Trustees of Arch Diocese of Dar es salaam v The Chairman, Bunju Village Government and Others,** Civil Appeal No. 147 of 2006, and **Morandi Rutakyamirwa v Petro Joseph** [1990]TLR 49 (CAT) cited in **Christopher P. Chale v Commercial Bank of Africa,** Misc. Application No. 635 of 2017.

The applicants demonstrated that they are in lawful ownership of their various properties in respect of which they were given notices of demolition. The same were annexed to the affidavit supporting the application. It is shown that it is alleged by the respondents that the said suit premises are on the road reserve, hence they ought to be demolished. The alleged road reserve is disputed by the applicants who have been peacefully enjoying such ownerships and occupation for over 40 years.

The applicants equally demonstrated that despite the notices being hinged on the respondents intention to demolish the premises, they have not been compensated at all for their properties situated on the suit premises. Aggrieved, the applicant served notices of intention to sue the respondents which notices were also annexed to the affidavit. According to the applicants the intended demolition will cause loss of their properties, their business investments and profits, and hence hardship and mental agony on their part. In addition, the applicants will also suffer inconvenience, resulting from homelessness if the properties were to be demolition.

In their counter affidavit, the respondent opposed the application, saying that the applicants are mere trespassers on the suit premises in which they have built residences, and carry businesses; and thus hindered the development of infrastructures for the benefit of the general public. As such, the general public suffers delays associated with improvement the road infrastructure. They also averred that the suit premises are situated within the road reserve area whose dimensions and boundaries are a matter of law. However, it is denied that the second respondent did issue the alleged notices to the applicants directing their removal and

demolition of their properties. The Tanzania National Roads Agency is, it is further averred, not an agent of the second respondent.

This matter was disposed of by filing written submissions. The learned counsel for both sides, filed their written submissions as ordered by the court. Whilst the applicants had their written submission prepared and filed by Mr Benitho Mandela, learned Advocate; the respondents' written submission in reply was prepared and filed by Mr Daniel Nyakiha, learned State Attorney. I have looked at the submissions against the backdrop of the affidavit, and the counter affidavit filed by the applicants and the respondents respectively.

The applicants' counsel had it in a nutshell that whilst the applicants claim of ownership of various parcels of land (herein the suit land), the respondents are disputing the claim saying that they are mere trespasser unlawfully occupying the road reserve area. It is apparent that there is a triable issue as between the applicants and the respondents. The learned counsel for the applicants thus referred me to the case of **Attilio vs Mbowe** (1969) HCD 284, among others, as to the condition that there must be a serious question to be tried by the court. He linked his

submissions with relevant paragraphs in the affidavit supporting the application.

As to the other condition relating to irreparable loss, the applicant hinged his submissions on paragraphs 6 and 18 of the applicants' affidavit and linked them to the demolition notices issued which in his submission are geared at demolishing the applicants' premises. The applicants' counsel argued that the applicant's occupation on the suit premises was not disputed by the respondents. Thus, if the demolition is effected as intended, the applicants would be rendered homeless and would experience sufferings of irreparable nature. The counsel was fortified that what he demonstrated in relation to triable issue and irreparable loss would equally cater for the condition on balance of convenience which would be suffered far beyond those to be suffered by the respondents.

Conversely, the learned State Attorney sought to show the court that the application did not meet the conditions and the court cannot therefore consider exercising its discretion in granting the injunction. He had it that while all conditions must be shown to exist, it was not shown that the conditions were all met in relation to the application. And the court was,

in this respect, referred to the case of **Christopher P. Chale v Commercial Bank of Africa**, Misc. Civil Application No. 635 of 2017.

In particular, Mr Nyakiha, learned State Attorney, showed that the condition as to balance of convenience was not sufficiently shown to be in the favour of the applicants. It was so argued because, according to Mr Nyakiha, circumstances and particulars of the expected loss and substantial loss to be suffered and which could not be compensated were not shown. Similar misgivings were expressed in relation to circumstances which would prove the existence of such sufferings.

In relation to the foregoing, it was argued that there were problems as to the claim of ownership since not all applicants were shown to hold good titles over the suit premises, whilst some of those shown to have titles were, it was argued from the bar, not parties to this application. Further that, whilst the complaint is against TANROADS which is alleged to have issued the notices, she has surprisingly not been made a party to the matter at stake.

Argument on right to be heard was thus fronted by Mr Nyakiha for failure of the applicants to join the said agency, namely TANROADS, and hence the case of **Ngerengere Estate Co. Ltd v Edna William Sitta,** Civil Appeal No. 209 of 2016 was accordingly relied on. At the outset, the authorities were dismissed by the learned counsel for the applicants, saying that they are distinguishable.

As the respondents' State Attorney was arguing that there were no sufficient materials shown which are consistent with the conditions which must be shown to exist for the court to be able to exercise its discretion in favour of the applicants, the court was shown that the general public have been denied right to peacefully enjoy right of way by expansion of the road because of dubious acts of the applicants alleged by the learned State Attorney from the bar. It was in this respect argued that public interest must as well be considered, which in the present instance, according to Mr Nyakiha, does not in any way favour the applicants.

In his very brief but focussed rejoinder, Mr Benitho Mandele, the learned counsel for the applicants, brought to the attention of the court that the applicants' submission that loss of accommodation to the applicants and

their families would lead to untold sufferings and hardship as also averred in paragraphs 17 and 18 of the affidavit was not challenged in the submissions by the counsel for the respondents.

It was furthermore shown by Mr Mandele that the counter affidavit of the respondents did not show that the public will suffer if injunction is granted. Rather, such argument only emerged in the submissions as the counter affidavit only associated the alleged sufferings with delayed road expansion. Either way, it was argued that nothing was shown as to particulars of sufferings by the public and as to the extent of delay within which such sufferings would be experienced. With such rejoinder, I was told that such allegations as to public sufferings were mere speculative.

The cases of **Ngerengere Estate Co. Ltd v Edna William Sitta** (supra) and **State of Assam v M/S M.S Associates AIR**[1994] GAU 105 cited by Mr Nyakiha, in relation to right to be heard and the failure to join TANROADS as a party, were said to be distinguishable and not relevant in the circumstances of this matter. As to the said agency, it was said that it is operating under the auspicious of the second respondent.

I am, on my part, aware and mindful of the useful authorities and arguments referred and made by the counsel for both sides in their rival submissions. The authorities included **Attilio vs Mbowe** (supra); **Agnes Kosia and Others vs Board of Trustees of NSSF and Another**, Misc Land Application No. 590 of 2016; **Tanzania Cotton Marketing Board** [1997] TLR 63; **State of Assam v M/S M.S Associates AIR** (supra); **Alhaj Muhidin A. Ndolanga and Alhaj Ismail Aden Rage v The Registrar of Sports and Sports Association and Others**, Misc Civil cause No. 54 of 2000; **Christopher P. Chale v Commercial Bank of Africa** (supra); and **Ngerengere Estate Co. Ltd v Edna William Sitta** (supra). The authorities, by and large, provide rules of practice pertaining to entertaining the instant application, and the conditions whose existence would entitle the court to consider exercising its discretion in favour of granting the order of temporary injunction.

It is, thus, settled law that this court will only grant injunction if, firstly, there is a serious question to be tried on the facts alleged with probability of success in the suit; secondly, there is evidence that there will be irreparable loss on the part of the applicants which cannot be adequately compensated by award of damages if the sought order is not granted;

and thirdly, there will be greater hardship to be suffered by the applicants than the respondents if the order is not made.

As to the first condition, I am satisfied that there is a serious question involving ownership of parcels of land occupied by the applicants. The applicants claim to own and occupy the premises whilst the respondents claim that the suit premises are on the road reserve area whose dimensions and boundaries are a matter of law. The respondents have not also disputed the existence of this condition, if I go by their counter affidavit and written submission in reply which they filed before the court.

As to the second condition, it is seriously opposed by the respondents, saying that there were no particulars and circumstances of loss shown as is also for substantial loss which cannot be compensated. Nonetheless, the respondents did not dispute that the applicants occupy the premises which they have developed as their residence and business investments.

In the circumstances of this matter which involves 54 applicants, and in which the applicants claimed that, firstly, they have peacefully been in the

suit premises for over 40 years; secondly, they have developed the same for accommodation, commercial production, factories, and other social and economic activities; and thirdly, that the disputed area is so enormous that it covers various parcels of land located between Kimara Bucha and Kimara Resort, within Kimara Area, Ubungo Municipality, Dar es salaam, I am inclined to find in the favour of the applicants. It is my finding that there is thus irreparable loss shown in terms of particulars and circumstances shown in the applicants' affidavit and expounded upon in the submissions made on their behalf.

As to the third condition, it is also, in the circumstances, addressed by what I looked at and discussed in relation to the second condition herein above. If I may add, other than disputing in the counter affidavit, the submission of the counsel for the applicants on the third condition was not clearly replied to by the respondents' counsel.

If one takes the argument by the counsel for the respondents that the "*dubious acts*" of the applicants deny the community the right to enjoy the peaceful right of way as they hinder road expansion, it will equally in my opinion fail. I am in this regard mindful that it has not been disputed

that the applicants are on the disputed premises for over 40 years and within such period the road expansion was not effected. In any event, the allegation of "dubious acts", which is in my view a mere afterthought, was not stated and particularised in the counter affidavit, let alone being clarified in the respondents' submission in reply. It means that the court was denied materials on the alleged "dubious acts", which could have been considered in exercising its discretion on whether or not to grant the application.

It has not been also shown by the respondents that the applicants had not indeed been enjoying peaceful use of the premises throughout such period of over 40 years. With the afore going in mind, I think Mr Mandele had a point when in his rejoinder, he lamented that the allegation of sufferings by the public is mere speculative in the circumstances, regard being had to the failure to ascertain the extent of delay in road expansion which is likely to cause sufferings to the public as alleged.

I will on this condition relating to balance of convenience, likewise, find in favour of the applicants. Given the nature of the averments in the affidavit and counter affidavit, and the rival submissions that ensued, I will also

find in the favour of the applicants on the other condition relating to consideration of public interest and public policy.

In the event, I find merit in the application which is hereby granted with costs. It is so ordered.

Dated and Delivered at Dar es Salaam this 17th day of August 2022.

B.S. Masoud

Judge