

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 366 OF 2022

BETWEEN

DENISI MKABAI.....1ST APPLICANT
ABDULWAHAAB SALIM.....2ND APPLICANT
NICHOLAUS S. NYAMWENGA.....3RD APPLICANT
ALLY OMARY KAPUNGU.....4TH APPLICANT
ABIBA RASHIDI MAULID.....5TH APPLICANT
YAHAYA HUSSEIN SAGILLOH.....6TH APPLICANT
KHAMIS OTHMAN MWANYA.....7TH APPLICANT
HEZRON DANSTAN MUHEZI.....8TH APPLICANT
ALLY HASSAN NAMPUNGILA.....9TH APPLICANT
ANASTAZIA PETRO.....10TH APPLICANT
AMRAN HUSSEIN SAGILLOH.....11TH APPLICANT
DENNIS SAMWEL KIWANGO..... 12TH APPLICANT
DEBORAH MBWAMBO.....13TH APPLICANT
SALIM TENGA.....14TH APPLICANT

VERSUS

KINONDONI MUNICIPAL COUNCIL 1ST RESPONDENT
BOARD OF TRUSTEES NATIONAL
SOCIAL SECURITY FUND (NSSF).....2ND RESPONDENT

Ally

RULING

Date of last Order: 11/08/2022

Date of Ruling: 20/09/2022

A. MSAFIRI, J.

The 14 applicants in this matter, moved this Court for the following orders inter-partes which I reproduce herein below for ease of reference;

- 1. That this Honourable Court be pleased to issue an order that, status quo in respect of occupation and use by the applicants their matrimonial houses (suit property) located within Mji Mpya Street (Kinondo area) of Mabwepande Ward, Kinondoni District, claimed to by the 1st respondent and 2nd respondent, be maintained pending the hearing and determination of an application for maintenance of status quo and main suit to be filed in this Court by the applicants upon the expiry of the mandatory ninety (90) days statutory notice already issued to the respondents by the applicants of intention to sue them.*
- 2. Any other Order (s) this Honourable Court may deem proper to grant.*

The application was preferred under Section 51 (1) of the Land Disputes Courts Act, Cap 216 (R.E 2019), Sections 68 (e) and 95 of the Civil

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Procedure Code, Cap 33 R.E 2019, and Section 2(3) of the Judicature and Application of Laws Act, Cap. 358 R.E. 2019.

The application was supported by a joint affidavit sworn and affirmed by all the applicants. The respondents objected the application through a joint counter affidavit sworn by one Jumanne Mtinangi, a Principal Officer of the 1st respondent, Kinondoni Municipal Council.

During the hearing of the application which was oral, the applicants were represented by the learned counsels Mr. Daniel Oduar and Ms. Shela Julius. The respondents were represented by the learned State Attorneys, Mr. Galus Lupogo and Ms. Leah Mnzava. Also present in person were officers from the office of the 2nd respondent.

In their joint affidavit, the applicants contended that they are and always have been the lawful owners of the pieces of land comprising the disputed land, and that the same has been allocated to them by Mabwepande Village Government in 2003 and that they have developed the disputed land by building their matrimonial houses.

That on 16/6/022, the 1st respondent's agents assisted by the police officers, without justification, demolished some of their properties and

threatened to evict them from the same on allegations that, they have constructed their matrimonial houses in an area belonging to Kinondoni Municipal Council.

That, the 1st respondent is currently threatening to survey, possess and dispose of the disputed property without any notice or justification. They stated that, they have issued a 90 days' Notice to the respondents and for the purpose of preserving their constitutional right of ownership of the suit property, and to prevent continuous demolition, eviction, and surveying by the 1st respondent, they pray that status quo be maintained pending the hearing and determination of an application for maintenance of status quo and main suit which the applicants intends to file upon the expiry of mandatory ninety days' Notice.

They averred that on a balance of convenience, the applicants stand to suffer more irreparable loss than the respondents if this application will be denied.

In the counter affidavit, the respondents denied the contents of the affidavit. The respondents stated that the applicants have never been allocated any land and the alleged pieces of land measuring 2000 acres

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which are claimed to belong to the applicants are neither existing nor their boundaries are known.

The respondents added that, the alleged pieces of land in dispute, is within a planning area and the mandate to instruct the carrying on of any development on the said land is vested with the 1st respondent.

The respondents averred that, the 2nd respondent owns landed property within Mji Mpya Street (Kinondo Area) of Mabwepande Ward, Kinondoni Municipality which covers the area in dispute.

They stated further that the alleged eviction of trespassers, demolition, survey and earmarking of land owned by the 2nd respondent including the disputed land have already been completed by the legal owner i.e. 2nd respondent. They pointed that, the applicants being not legal owners of the disputed land, have nothing to lose compared to the respondents who stands to suffer irreparably.

In their oral submission, Mr. Oduar, counsel for the applicants submitted on the three issues which he termed them as, first; whether there is a contest between the parties i.e. if there is a prima facie case between them, second; whether there is eminent irreparable loss on the applicants

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side and third, whether in the balance of convenience, the applicants will suffer more than the respondents.

He stated that these three issues/conditions were set and discussed in the famous case of **Attilio vs. Mbowe** (1969) HCD 284, and the case of **T.E Kaare vs. General Manager, Mara Cooperative Union** (1984) TLR 17. Mr. Oduar stated that, the first condition has been met by the applicants. This is clearly shown in their joint affidavit at paragraphs 2 & 4, and in the respondents' joint counter affidavit at paragraphs 7, 8, 9 and 12.

He said that, the said paragraphs discloses that, the 1st and 2nd respondents have evicted the applicants and demolished their matrimonial houses. That, the respondents are threatening to demolish the other parts of the disputed property which are yet to be demolished. He said that since there is a prima facie case which is clear in the affidavit and counter affidavit, it is in the interest of justice that the prayers sought be granted.

On the second condition, Mr Oduar contended that it has been established by the applicants. He said that the joint affidavit of the applicants shows that the matrimonial houses of the applicants have been demolished in some parts of the disputed land and surveying is going on. *Atte*.

That, since the applicants are claiming ownership of the disputed land and they intend to institute the main suit after 90 days, then it is important that this application be granted as the applicants are in the risk of getting irreparable loss without any compensation.

On the third condition, counsel for the applicant stated that has also been met by the applicants. He said that, the applicants stands to lose their rights more than the respondents, because even the respondents have admitted in their counter affidavit that they have demolished and are continuing to survey and earmark the land in dispute. That, if the application will be dismissed, the applicants will be denied the chance to solve the land dispute between them and the respondents.

Replying, Mr. Lupogo, State Attorney started his submissions by praying to adopt the joint counter affidavit of the respondents. He submitted that, the first condition of prima facie case has not been established. He relied his argument on paragraphs 2 and 5 of the joint counter affidavit.

On the 2nd condition, of irreparable loss, he said that the applicants are admitting that the eviction and demolition have already been effected.

Hence, this application is already been overtaken by events as far as the loss

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is concerned. He said further that, the act of survey of the suit property cannot cause loss. And if the applicants will succeed in their intended suit, then the surveyed plots will be reallocated/restored to the applicants. So the applicants can be compensated or the Court can declare them the rightful owners of the suit property.

On the 3rd condition on the balance of convenience, the counsel for the respondents stated that, this was also not met. He said that, if the applicants will win the intended main suit, there are remedies and the applicants will be compensated. However, the respondents will suffer much more compared to the applicants and this is in terms of loss of expenses already incurred in survey of the disputed land, the area being an investment area for the 2nd respondent, and the applicants cannot compensate the respondents. He concluded that, the plan of developing the disputed area by planning authority which is the 1st respondent is for the interest of the public. He prayed for the dismissal of the application.

In rejoinder, counsel for the applicants responded on the first condition that each case is taken differently on the circumstances by looking at the pleadings before the court and evidence or annexure therein. He maintained that a prima facie case has been established. *Alls*

On the second condition, the counsel argued that the matter has not been overtaken by events as there is still a threat of eviction and demolition in areas which have not been demolished. The process of survey is also going on. He argued that there is no proof of the irreparable loss which can be suffered by the respondents.

On the third condition, the counsel argued that, there is no tangible evidence before the Court that the respondents will suffer more, and also there is no evidence of ownership of the disputed land by the 2nd respondent. He reiterated the applicants' prayers.

From the submissions from the parties, it is agreed that the Court's power to grant injunction is predicated upon the applicants meeting the conditions set in the famous case of **Attilio vs. Mbowe (supra)** and reiterated in numerous cases some of which have been referred to this Court by the parties in their submissions.

It is also not in dispute that these conditions must be met cumulatively, and must be reflected in the affidavit in support of the application. Having considered the submissions by the parties, the evidence in the pleadings i.e. affidavit, counter affidavit and reply to the counter affidavit, the pertinent

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issue is whether or not the applicants' application at hand has meet all three legal conditions for this Court to grant the prayed orders.

Starting with the first condition, the applicants are obliged to establish the prima facie case and probability of success. In the case of **Mariam Christopher vs. Equity Bank Tz Limited & Another**, Misc. Land Application No. 1070 of 2017, HC Land Division, Dar es Salaam, while determining the first condition on requirement of establishment of prima facie case by the applicant, Hon. Madam Judge Mgonya was of the view that; regarding the extent of proving whether there is a serious question for determination, it is not conclusive evidence which is required but rather the facts as disclosed by the plaint and the affidavit, and so the standard of proof required would be somehow below the expected standard in full trials.

Subscribing to the above finding, in determining whether the applicants managed to establish a prima facie case in the current application, I went through the facts as disclosed in the joint affidavit and reply to counter affidavit by the applicants. In the joint counter affidavit, at paragraph 2, the applicants avers that they are and always have been the lawful owners of all pieces of land measuring 2000 acres of land located at Mji Mpya Street, Kinondoni area of Mabwepande. They stated that they

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acquired the said land by being allocated to them by Mabwepande Village Government/Council in 2003 which was by then within Bunju Ward, of Kinondoni.

The applicants has attached as annexure 1, minutes of Village Council allowing allocation dated 24/1/2001. Attached also is Annexure 2, a letter from the office of the chairman of Mabwepande Village Government dated 19/8/2003, which, according to paragraph 3 of the joint affidavit, instructed the applicants to start development on the suit property. Both annexures 1 and 2 forms part of the joint affidavit.

I read the whole of Annexure 1, it is a minutes of Village meeting of 24/01/2001. The contents shows that it was village general meeting and various projects were discussed, but the meeting did not allocate any land to the applicants or to anyone for that matter.

I have also read Annexure 2. It is titled "Uendelezaji wa Mashamba ambayo ni mapori," and it is addressed to the owners of farm lands at Mabwepande Village, instructing to develop the said farms.

However, this letter is not specifically addressed to the applicants, the same as annexure 1 did not allocate any land to the applicants.

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The applicants are claiming to be the owners of the disputed land and that the same was allocated to them by the village council as per Annexure 1. As clearly seen, Annexure 1 did not allocate any land to anyone. Furthermore, the applicants were even not among the villagers who attended the Village meeting as per annexure 1.

In his submissions on the first condition, Mr. Oduar told the Court that paragraphs 2 and 4 of the joint counter affidavit and paragraphs 7, 8, 9 and 12 of the counter affidavit discloses a bonafide contest between the parties. Paragraphs 2 and 4 of the joint counter affidavit states that the applicants are the lawful owners of the disputed property and paragraph 4 shows that some of the applicants houses in the suit property were demolished. The respondents at paragraph 5 have pointed that the applicants were not among the attendees in the village meeting of 24/01/2001 and the meeting did not allocate any land to the applicants.

As pointed out earlier, the standard of proof required at this stage is below the expected standard in full trials. The standard of proof in deciding this kind of application was also discussed and laid down by the Court of Appeal in the case of **Abdi Ally Salehe vs. Asac Care Unit Limited & 2**

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others, Civil Revision No. 3 of 2012. This case was also referred to me by counsel for the respondents.

In the said case, the Court of Appeal held that;

*"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 bonafide contest between the parties and serious questions to be tried so, at this stage the Court cannot prejudge the case of either party. **It cannot record a finding on the main controversy in the suit; nor can genuiness of document be gone into at this stage.**" (emphasis mine).*

I am bound by this principle. In the present matter, the applicants are claiming to own lawfully the disputed property. They have established their ownership by documents annexures 1 and 2. Strangely, Annexures 1 and 2 does not support the applicant's claims.

On the respondents' side, I have gone through their joint counter affidavit and at paragraphs 2, 3 and 4, they claim that the land in dispute was declared to be a planning area by an Order published in a Gazette on 13 August 1993. Following that, the land in dispute with other parcels of land

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became general land and was vested onto her Excellency the President of the United Republic of Tanzania.

The respondents further claimed that, the land in dispute being within a planning area, the mandate to instruct and carry on any development is vested onto the planning authority which in the present case is Kinondoni Municipal. The respondent argued that the 2nd respondent is the owner of the land in dispute. However, same as to the applicants, the 2nd respondent did not establish in their counter affidavit how they came to own the land in dispute. It is not clear on how the disputed land which was declared a planning area, came into ownership of the 2nd respondent.

Since there is dispute between the applicants and the 2nd respondent on ownership of the land in dispute, I find that there is contest between the said parties and hence existence of a serious question on the facts alleged by each party which is to be tried by the Court, and hence the first condition has been met.

On the second condition on irreparable loss, the applicants in their joint counter affidavit have stated that some of their matrimonial houses have been demolished by the 1st respondent and his agents and they are still

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threatening to survey, possess and dispose of the land in dispute. They said that in the circumstances it is convenient for the status quo to be maintained pending the expiry of 90 days' notice since the applicants are in the risk of getting irreparable loss and not to be compensated.

It was submitted by the counsel for the applicants that, the same have incurred expenses to build and develop the suit premises for the years back and if the prayers will not be granted, it will affect the applicants physically and mentally. However, the counsel did not elaborate on how the applicants might suffer as it was put and did not explain on whether the expenses incurred by the applicants in building their houses cannot be paid by the respondents.

It is my view that the claims by the applicants of their houses in the disputed land can be reparable in the compensation form if the applicants succeed in their intended suit. I say so because, the respondents being the public institutions are capable of compensating the applicants more than the applicants being individuals can compensate the respondents.

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It is in this position that I find that the applicants' purported loss can be atoned by monetary terms hence the second condition has not been satisfied.

On the third condition on balance of convenience, in their submissions, each party has professed to suffer greater hardship. The applicants stated that, they stand to suffer more because their properties have been demolished and there is still threat of demolition and survey on their land. The respondents stated that they stand to suffer more because, they have already invested public fund in housing estate project which is already going on the land in dispute. That, the respondents stands to suffer loss of public fund invested in the disputed property and this loss cannot be compensated by the applicants at the end of intended suit if the respondents win the case. It is stated further that if the applicants will succeed in their intended suit they will be adequately compensated by the respondents.

As I have already found in the second condition, I agree that on the balance of convenience, the respondents stands to suffer more than the applicants. Indeed, if the applicants are successful in the intended suit, they will be compensated, but meanwhile the respondents will have incurred big loss because the project will have been put to halt pending the determination

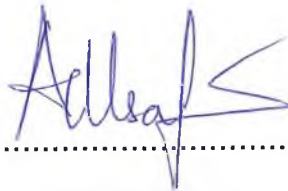
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of the intended suit. I also find that the third condition has not been satisfied by the applicants.

Basing on the principle set out in the case of **Attilio vs. Mbowe (supra)** and other numerous cases referred to in this application that the three conditions must be met cumulatively and not alternatively, I find that the application has no merit and I hereby dismiss it accordingly.

Each party shall bear their own costs.

It is so ordered.



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A. MSAFIRI

JUDGE

20/9/2022.

