

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

MISC. LAND APPLICATION NO. 674 OF 2021

(Arising from Land Case No. 266 of 2021)

YUSUPH MAKAME 1ST APPLICANT
OTTO LINGISEDI 2ND APPLICANT
DEODATUS KAMUGISHA 3RD APPLICANT
MOHAMEDI MWEMBE 4TH APPLICANT
YOHANA CHACHA MAHINDI 5TH APPLICANT
LOCUS PAUL 6TH APPLICANT
DISMUS KUWENAWENA 7TH APPLICANT

VERSUS

AL HUSHOOM INVESTMENT (T)LTD RESPONDENT

Date of last Hearing: 30/05/2022

Date of Ruling: 10/06/2022

R U L I N G

I. ARUFANI, J.

The applicants filed in this court the instant application praying the court to grant an order to prevent the respondent and or her servants or agents from interfering, trespassing and evicting them from the disputed land located at Mwembetogwa (Boko area) Bunju Ward, Kinondoni Dar es Salaam until the main suit pending in this court is determined by the court. The application is made under Order XXXVII Rule 1 (a), (b), & 2 (1) and (2); section 68 (e) and 95 of Cap 33 R. E 2019.

The application is supported by an affidavit sworn jointly by the applicants and it is opposed by a counter affidavit affirmed by Salmin Salmin, Principal Officer of the respondent. When the matter came for hearing the applicants were represented by Mr. Vedastus Majura, learned advocate and the respondent was represented by Mr. Ramadhani Karume, learned advocate.

The counsel for the applicants prayed to adopt the applicants' joint affidavit supporting the application as part of his submission save for paragraph 9 (a) which was expunged from the affidavit. He referred the court to the case of **Yaza Investment Company Limited V. NMB Bank Public Company**, Misc. Civil Application No. 144 of 2019, HC at DSM, (unreported) where the conditions for granting an order of temporary injunction laid in the famous case of **Attilio V. Mbowe**, (1969) EA 61 were listed.

He argued that, there are triable issues in the main suit which need to be determined by this court. He stated that, paragraphs 2 and 3 of the affidavit shows how the applicants acquired the land in dispute. He stated that, the respondent is averring is the lawful owner of the land in dispute vide certificate of title No. 26470 while there is nowhere in the counter affidavit of the respondent shows how the respondent acquired the land in dispute. He went on arguing that, while the applicants are arguing their

land is un-surveyed but the respondent averred the land in dispute is a surveyed land. He submitted that, what is stated hereinabove shows there are triable issues in Land Case No. 226 of 2021.

He argued in relation to the second condition for granting injunctive order which is irreparable loss to be suffered if the order is not granted that, the applicants have stated in their affidavit that they have stayed in the land in dispute for more than 25 years doing their economic activities thereon for their livelihood. He stated that, the applicants are doing small scale quarrying on the land in dispute and the attempt by the respondent to trespass and evict them from the land in dispute will cause them to suffer irreparable loss both socially and economically and it will cause hardship to their survival. He thus prays the court to see its interference is necessary to protect the applicants from the irreparable injuries they will suffer if the order of temporary injunction will not be granted.

He argued in relation to the last condition for granting order of temporary injunction which is about balance of convenience that, as the applicants have been conducting their economic activities on the land in dispute for more than twenty five years, if the sought order will not be granted, they will be much more inconvenienced as there is a danger of the land in dispute to be wasted or sold and it will render the Land Case

No. 226 of 2021 meaningless. At the end he prayed the application be granted with costs.

In his reply the counsel for the respondent prayed to adopt their counter affidavit as part of his submission. He stated that, he is joining hand with the counsel for the applicants in respect of the conditions for grant of order of temporary injunction as laid in the case of **Attilio V. Mbowe**. He however stated that, the counsel for the applicant has skipped one important test in the first condition which is that there must be a serious issue to be argued and the relief sought has a likelihood of being granted. He argued that, the counsel for the applicant has tried to show there are issues to be tried in the case but he has not gone further to show the probability of the reliefs sought in the main suit to be granted.

He argued that, the said omission was not made unintentionally but with intention as the counsel for the applicant knows his clients have stated at paragraph 2 (i) to (vii) of their affidavit that they are claiming for 27.5 acres of land in the land in dispute which is equivalent to 11.12 hectares while the respondent is averring is holding the certificate of title of the land with total of 70.26 hectares. He stated he has pointed those facts out to enable the court to see what order should be made.

He stated further that, while the applicants are deposing their land is un-surveyed the respondent is maintaining the land in dispute is

surveyed with certificate of title No. 26470 which shows they are two different lands. He submitted that, if the order of temporary injunction will be issued it will infringe the right of the respondent who has right to enjoy the use of her surveyed land while the land of the applicants is un-surveyed.

He stated in relation to the second condition for granting injunctive order that, as the applicants are seeking for order of protecting them from being evicted from their un-surveyed lands the order should not be granted because the land in which the order is sought against is probably not in respect of the land of the respondent which is surveyed land. He stated further that, the applicants have failed to show relationship of the land they are claiming is belonging to them with the land owned by the respondent.

He argued that, it is not all loss which are irreparable and supported his argument with the case of **Mwakeye Investment Ltd V. Access Bank Tanzania Limited**, Misc. Land Application No. 654 of 2016, HC Land Division at DSM (unreported) where it was stated that, the court is required to consider whether there is irreparable loss which will be suffered if the injunctive order will not be granted. He also referred the court to the case of **Abdi Ally Salehe V. Asac Care Unit Limited & Two Others**, Civil Revision No. 3 of 2012, CAT at DSM (unreported)

where the case of **Giella V. Cassaman Brown and Co. Limited** [1973] EA 358 was cited and stated the object of temporary injunction is to preserve the pre dispute state. He submitted that, to grant the injunctive order in the present application is to invite the applicants in the land of the respondent which is not prayed in their application.

He argued in relation to the condition of balance of convenience that, it is the respondent who stand to suffer more inconvenience if the order will be granted because the applicants allege that, they own only 11.12 hectares of un-surveyed land which is not stated where their land is located while the respondent asserts that, she owns 70.26 hectares of surveyed land located at Boko Area within Bunju Ward. At the end he prayed the applicants' application be dismissed.

In his rejoinder the counsel for the applicant told the court that, although the counsel for the respondent has argued the applicants have not shown probability of success in their matter but the court is required to determine whether there is a triable issue and not to go further to the facts which are supposed to be proved in the main suit. He argued that, to their view there is a triable issue in the main suit and added that, the argument that the applicants are alleging their land is un-surveyed and the respondent is alleging her land is surveyed that is an issue which is

supposed to be tried in the matter. He reiterated what he stated in his submission in chief and prayed the application be granted with costs.

After considering the submission made by the counsel for the parties and after going through the pleadings filed in this court by the parties the court has found the issue to determine in this application is whether the order of temporary injunction the applicants are seeking from this court should be granted. The court has found that, as rightly argued by the counsel for the parties the conditions governing determination of an application for an order of temporary injunction in our jurisdiction were laid down in the famous case of **Attitlio V. Mbowe** cited by the counsel for the parties. The conditions laid in the above cited case are as follows:-

- (1) *"There must be serious question to be tried on the facts alleged, and a probability that the plaintiff will be entitled to the relief prayed.*
- (2) *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*
- (3) *That on the balance of convenience 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."*

Starting with the first condition of serious question to be tried which sometimes is referred as a prima facie case the court has found the

position of the law as stated in numerous cases including that of **Abdi Ally Salehe** (supra) cited by the counsel for the respondent in his submission is that, the court is not required to examine the material before it closely and come to a conclusion that the plaintiff has a case which is likely to succeed as argued by the counsel for the respondent. The court is required to see only a prima facie case, which is one such that it should appear on the record that there is a bona fide contest between the parties and serious question to be tried. It cannot record a finding on the main controversy involved in the suit as to do so would amount to prejudging the case on its merit.

The similar holding was made in the case of the **CPC International Inc V. Zainabu Grain Millers Ltd**, Civil Appeal No. 49 of 1999, (unreported) where it was stated that, it will be premature to dwell in determining the applicant will win the main suit or will obtain a decree at this stage as the parties have not adduced any evidence to prove or disprove the reliefs the applicant is seeking from the court. The above view is also being bolstered by what was stated by Lord Diplock in the case of **American Cyanamid Co. V. Ethicon Ltd**, (1975) 1 All ER 504 which is a leading case in this aspect that:-

"It is not part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on

which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration. These are matters to be dealt at trial”.

While being guided by the position of the law stated in the above cited cases and as stated in the case of **Surya Kant D. Ramji V. Saving and Finance Ltd & 3 Others**, Civil Case No. 30 of 2000, HC Commercial Division at Dar es Salaam (unreported) the court has found in determining there is a serious question for determination the court is required to use the facts as disclosed in the plaint and in the affidavit. The court has found while some of the applicants are averring at paragraph 2 of their affidavit that they are owner of the land in dispute from 1987 and others from 2002 the respondent is averring is the owner of the land in dispute from 24th January, 2002.

The court has also found that, while the claims of the applicants as deposed at paragraph 2 of the affidavit is about 27.5 acres of land which as stated by the counsel for the respondent is equivalent to 11.12 hectares, the respondent is averring her land is measuring about 70.26 hectares. In addition to that, the court has found while the applicants are alleging the land in dispute between them and the respondent is un-surveyed the respondent is arguing their land is a surveyed land with certificate of title No. 26470. To the views of this court the above

contentions shows there is a prima facie or serious issues need to be determined by the court between the parties. In the premises the court has found the first condition for granting an order of temporary injunction has been established in the case at hand.

Coming to the second condition of irreparable loss the court has found that, the position of the law as stated in the case of **T. A. Kaare V. General Manager Mara Cooperative Union**, [1987] TLR 17 is that, the court is required to consider whether there is a need to protect either of the parties from suffering the species of injuries known as irreparable injury before their right is established. It was also stated in the book of **Sohoni's Law of Injunction**, Second Edition, 2003 at page 93 that:-

"As the injunction is granted during the pendency of the suit the court will interfere to protect the plaintiff from injuries which are irreparable. The expression "irreparable injury" means that, it must be material one which cannot be adequately compensated for in damages. The injury need not be actual but may be apprehended."

While being guidance by the position of the law stated hereinabove the court has found the counsel for the applicants has argued that, if the order the applicants are seeking from the court will not be granted and the applicants are evicted from the land in dispute will suffer irreparable loss as they will be affected socially and economically as they are

depending on the quarrying activities they are doing in the land in dispute for their livelihood. The court has found that, although the counsel for the applicants is arguing the applicants will suffer the stated loss but the applicants have deposed at paragraph 6 of their affidavit that, the respondent has already demolished, vandalized all infrastructures and buildings of the applicants and looted all of their belongings. For the purposes of precision, it is deposed in the cited paragraph that: -

*"That surprisingly over recently this year the 1st defendant (sic) has been unlawfully constantly trespassed into the plaintiffs' (sic) lands and particularly **on 11th October, 2021, the 1st defendant herein trespassed and invaded to the plaintiffs' suit land, demolished, vandalized all the infrastructures and buildings and looted and confiscated plaintiffs' belongings.**"* [Emphasis added].

Form the wording of the above quoted paragraph of the joint affidavit of the applicants and specifically the bolded word it is crystal clear that the applicants have deposed they have already been evicted from the land in dispute and all of their belonging have been confiscated by the respondent. If that is the position of the matter the court has failed to see how the order of preventing them from being evicted from the land in dispute will assist them while impliedly, they have already been evicted from the land in dispute. To the view of this court and as rightly argued

by the counsel for the respondent the order the applicants are seeking from the court if it will be granted will amount to restoring the applicants into the land in dispute while that is not the order they are seeking in the application at hand and is not among the reliefs they are seeking in the main suit.

The court has found it was stated in the case of **Hon. Zito Zuberi Kabwe (MP) V. Board of Trustees, Chama cha Demokrasia na Maendeleo & Another**, [2014] TLR 290 that, the purpose of granting an order of temporary injunction is to preserve the subject matter of the suit in a status quo for the time being to await determination of the rights of the parties. As the court has already found the existing status quo of the suit at hand is that the applicants have already been evicted from the land in dispute, the court has failed to see which irreparable loss will be prevented by the grant of the order the applicants are seeking from the court. In the premises the court has found the second condition for granting preventive or injunctive order in the circumstances of the case at hand has not been established to the required standard.

As the second condition for granting the order of temporary injunction has not been established in the application at hand, the court has found there is no need of belabouring to determine establishment of the third condition of balance of convenience to be suffered if the order

will not be granted. The reason for coming to the above finding is because as stated in the case of **Abdi Ally Salehe** (supra), before granting the order of temporary injunction the court is required to be satisfied the three conditions for granting the order of temporary injunction stated herein above have been established.

In the premises the court has found the applicants have not managed to establish some of the conditions required to be established for the preventive order or temporary injunction to be granted in the application at hand. Consequently, the application is hereby dismissed for being devoid of merit and the costs to be within the cause. It is so ordered.

Dated at Dar es Salaam this 10th day of June, 2022.



I. Arufani

Judge

10/06/2022

Court:

Ruling delivered today 10th day of June, 2022 in the presence of Mr. Vedastus Majura, Advocate for the applicants and in the presence of Ms. Eliwinjuka Kitundu, Advocate holding brief of Mr. Ramadhani Karume, advocate for the respondent. Right of appeal to the Court of Appeal is fully explained.



I. Arufani

Judge

10/06/2022