IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 308 OF 2022

(Originating from Land Case No. 242 0f 2021)

UTEGI TECHNICAL ENTERPRISES (INTL) LTD ..... 1st APPLICANT

ALUTECH ENGINEERS (E.A) LTD ..... 2ND APPLICANT

VERSUS

TANZANIA RAILWAYS CORPORATION ..... 1ST RESPONDENT

COMMISSIONER FOR LANDS ..... 2ND RESPONDENT

DIRECTOR OF MAPPING AND SURVEY ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

RULING

Date of last Order: 27.07.2022

Date of Ruling: 29.07.2022

A.Z MGEYEKWA, J

The applicants' application is brought under Order XXXVII Rule (1) (a), (2), and (4), sections 68 (c), (e), and section 95 of Civil Procedure Code Cap.33

[R.E 2019]. The application was accompanied by an affidavit sworn by Margreth Abigael Mabada, the Principal Officer of the applicants. Opposing the application, the respondents filed a counter affidavit sworn by Mr. Jonas Maheto, Legal Officer.

The application is borne from the fact that there is a pending Land Case before this court whereas the applicants are praying for an order of temporary injunction against the respondents, their employees or agents or any other person acting under instruction to restrain them from sale/dispose or interfere with the suit premises, till the determination of the main suit.

When the application was called for hearing on 18th July, 2022 the applicant did not show an appearance while the respondents enjoyed the service of Mr. Daniel Nyakiha, learned State Attorney. The Court ordered the matter be disposed of by way of written submissions. Pursuant thereto, a schedule for filing the submissions was duly conformed to.

Having stated the background to the application, the learned counsel for the applicants submitted that the reasons for temporary injunction as prayed by the applicants are based on the facts advanced in the applicant's joint affidavit in support of the Application filed on 10th June. 2022. He urged this court to adopt the applicants' joint affidavit to form part of his submission.

The learned counsel for the applicants submitted that it is trite law that for the court to issue an injunction order the applicant must meet the three conditions and the same yardstick guides the court to issue the said order. To buttress his submission he cited the case of **Atilio v Mbowe** [1969] HCD 284. Mr. Kilenzil listed the three conditions as follows; 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, 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 that the balance of convenience there will be greater hardship and mischief suffered by the Plaintiff from withholding injunction than will be suffered by the defendant from the granting of it.

Fortifying his submission he cited the cases of **Musa S. Kaboyonga (Administrator of the estate of the late Siraju Kaboyanga Juma) v Isa Siraju Juma, and Others**, Misc. Land Application No. 359 of 2019 (unreported). The learned counsel for the applicant stated that the purpose of the injunction is to preserve the status quo pending final determination. To support his submission he cited the case of S**uryakant D. Ranji v Saving and Finance Ltd and Others** [2000] TLR 121.

It was his further submission that the applicants in their joint affidavit have stated that the 1st applicant on 1st October, 1991 acquired ownership of the land at Mivinjeni Kurasini Area in Dar es Salaam described as Plot No. S.12. he added that the 1st applicant purchased it from Novatus Ngirwa thereafter the 1st applicant rented the suit land to the 2nd applicant who established there in engineering factory which operates actively and daily until 3rd December, 2021 when the 1st respondent trespassed into the suit land on unfounded claims that the suit land is within the railway reserve. It was his submission that the applicants have met the first condition.

On the second principle, the learned counsel submitted that the court's interference is necessary to protect the Plaintiff from the injury which may be irreparable before his legal right is established. He referred this court to paragraphs 4, 5, 6, 7, 8, 9. 10, 11, and 12 of the joint affidavit. He insisted that court interference is necessary to prevent the kind of injury which may be irreparable before their legal rights are determined. In his view, the second principle is established.

As to the third principle, Mr. Kilenzi argued that on the balance of convenience, the Plaintiffs stand to suffer more if the injunction is refused than what the defendants would suffer if granted. He went on to submit that

if the injunction is refused then the 1st respondent will continue to trespass on the suit landed property thus, the applicants stand to suffer more than what the 1st respondent would suffer if the injunction is granted. To support his argumentation he referred this court to paragraphs 8, 9, 10, 11, and 12 of the joint affidavit and insisted that the 1st respondent is in the process of trespassing the property in dispute.

The learned counsel for the applicants continued to argue that on the balance of convenience, the applicants' stands to suffer more if an injunction is refused than what the 1st respondent would suffer if an injunction is granted. Mr. Kilenzi stressed that the balance of convenience is in favour of the applicants because if they do not succeed in their application, the respondents still reserve their right over the disputed property. But if the respondents' trespasses in the suit landed property before the determination of the case then eventually the applicants succeed in the main case, the 1st respondent will not be able to return the property and if the applicants will be compensated then they would not be in the same position as they were before their property was invaded. It was his submission that the third condition is established.

On the strength of the above submission, the learned counsel for the applicant beckoned upon this court to grant the application based the fact that the three conditions which have been laid down in the celebrated case of **Atilio** (supra) have been established.

Responding, the learned counsel for the respondents' confutation was strenuous. Mr. Daniel started by highlighting the governing principles as far as the interim injunction is concerned. To bolster his submission he referred this court to the case of **Atilio** (supra). He listed the three conditions which need to be considered before granting temporary injunctive order as follows;

(i) Is the existence of a prima facie case, meaning thereby that there is a serious case to be tried, in the case, and on the facts, there is a probability of being entitled to relief.

(ii) Irreparable injury likely to be suffered, i.e the Courts interference, is necessary to protect him, from the injury which is irreparably and

(iii) The balance of convenience, i.e. the comparative mischief or inconvenience likely to be caused from withholding injunction will be greater than by granting it.

To fortify his submission he cited the cases of **Tanzania Cotton Marketing Board Cogecat Cotton (COSA)** [1997] TLR 63 and **State of Assam v M/S M.S Associates Air** [1994] GAU 105. Mr. Daniel submitted that he has found

it necessary to detail in brief the principle which needs to be used and considered while this court is thinking to exercise its discretion on whether to grant or not. It was his submission that the Court of Appeal affirmed the above principles and insisted that the three conditions must all be met. Fortifying his position he cited the case of **Christopher P. Chale v Commercial Bank of Africa**, Misc. Civil Application No. 635 of 2017.

The learned State Attorney submitted that without a flicker of doubt the applicants have miserably failed to canvass the requirement of the law as enunciated by the cited legal principles it was his view that the applicants have stated that the balance of convenience is hardly in applicants' favour while they have neither made nor provide any particular of loss expected and substantial loss to be suffered as required by the law and that cannot be atoned by way of compensation or damages in case the injunction is not granted.

The learned State Attorney went on to submit that the applicant's counsel did not provide facts, the circumstances proving the existence of sufferance and expected irreparable loss as required by the above legal principles governing the procedure of granting an interim injunction. He went on to submit that the applicants have unserious and slightly indicated

in paragraphs 5, 6, 9, and 10 of their affidavit that the premises in dispute are marled Bomoa and they live in fear while the applicants do not hold any title whatsoever in the suit landed property thus they want to continue to occupy the suit land on mere assertions. He stressed that the applicants have not indicated as to what extent they own the premises but rather alleged the respondents are trespassers. The learned State Attorney argued that the applicants behind closed doors request the court to issue an order of injunction against a property that they believe they do not own.

Mr. Daniel, did not end there he argued that it is not in dispute that the applicants are in unlawful occupation of the suit landed premises and are beyond requesting the court to order an injunction against properties which has not been indicated to be in their possession. The learned State Attorney valiantly argued that the applicants have shown any circumstances legally warranting this court to exercise its discretionary power to grant what is asked for. He argued that the counsel has failed to assist the court as to how the facts pleaded in the affidavit meet the legal requirement of the conditions to be proved before granting an injunction.

The learned State Attorney argued that the government and the community have been denied the right to enjoy the peaceful right of

occupation because of the doubts acts done by applicants unjustifiably. He added that the applicants' acts are against public interest and policy as it tends to frustrate the government's plan to execute its duties for the purpose of providing services to society. He urged this court to act bitterly in order to prevent such unbecoming behavior as what is happening in the case he complained that the applicants want to play with the court to benefit from illegalities.

It was his view that while granting a temporary injunction not only three ingredients must be observed but in addition to the public interest and/ or public policy also will have to be considered. The court cannot be used as an instrument to cause injury to society, and or loss to the community by exercising equitable jurisdiction to give benefit to somebody the large interest cannot be sacrificed.

On the strength of the above submission, Mr. Daniel beckoned upon this court to reject the applicants' application with costs for wants of merits.

Having heard the submissions of both learned counsels for the applicant and the respondents. 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 what 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, whether the 1st applicant is a lawful owner of the

suit landed property and whether the respondents are trespasser needs to be proved at the main suit.

On the first condition, the applicants have alleged that there is a triable issue between the 1st applicant and the respondents regarding ownership of the suit land. The applicants in paragraphs 9, 10. 11, and 12 of the applicants' joint affidavit stated that, the 1st applicant is the lawful owner and the 1st respondent has trespassed into the suit land on unfounded claims and they have blocked the gate and wrote BOMOA on the wall that prevented the management, employees, and customers to get in the suit land. They also claimed that the suit property is destructed, thus, the 2nd applicant has been denied the right to proceed with the production at her factory hence total affecting the applicants' business and reputation.

In my considered view, in the instant application, there is no doubt that the applicants have a *prima facie* case in their main pending suit. This is based on the cause of action related to land ownership between the 1st applicants and the 1st respondent. The controversy, however, is whether they have been able to demonstrate that the other two aspects i.e. that they will suffer irreparable loss and that of the balance of convenience.

On the second principle, the applicants who claim to be on the brink of suffering irreparable loss must not only establish that they have a legal right but also that there is an invasion of it which will result in irreparable detriments if the Court will not intervene. Moreover, as a matter of fact, and law, therefore, such a person who claims to be on the brink of suffering such an irreparable injury, is duty bound to demonstrate that, the kind of injury to be suffered cannot be atoned through monetary means. It is noteworthy that the balance of convenience should be parallel and tilt to the favour of the applicants.

In the applicant's joint affidavit and submission, the applicants have argued in paragraphs 12 that the 1st respondent trespassed in the suit land and has prevented activities therein. They also claimed that the 1st respondent has interfered the 1st applicant's peaceful ownership and the 2nd applicant is denied the right to proceed with the production at the factory therein. Hence affected the applicants business and reputation. I am in accord with the learned State Attorney's submission that the applicants' counsel in his submission has not provided the facts or the particulars of the irreparable loss. However, the applicants in their joint affidavit specifically paragraph 12 have stated that the 2nd applicant's factory business will be affected since they will not proceed with production. In my view, this

explanations serve the purpose. In the case of **Deusdedit Kisisiwe v Protaz B. Bilauri**, Civil Application No. 13 of 2001 (unreported) the Court of Appeal of Tanzania held that:-

> *"The attachment and sale of immovable property will invariably, cause irreparable injury. Admittedly, compensation could be ordered should the appeal succeed but money substitute is not the same as the physical house. That difference between the physical house and the money equivalent, in my opinion, constitutes irreparable injury."*

Applying the above authority in the matter at hand, it is vivid that, the second condition is established.

On the third principle, the applicants' counsel argued that if the prayers sought are not granted the applicants stand to suffer more than what the respondents would suffer since they will continue to trespass into the suit's landed property. The question to ask in the instant case is whether it is correct at all to argue that, if the application is refused then applicants will suffer more.

In determining this condition, I find that each case has to be decided on the basis of its underlying facts. The facts in the application at hand shows that if this court will grant the application then the respondents will also suffer

loss. Therefore, it was upon the applicants to convince this court that they will suffer more hardship compared to the respondents. Examining the affidavit and the learned counsel for the applicant's submission, it is my considered view that the applicants have not come out clearly regarding the description of the sufferance. Therefore, I fully subscribe to the learned State Attorney's submission that the applicants have not convinced this court that they will suffer more hardship than the respondents that cannot be atoned by way of compensation. In the case of **Giella v Cassman Brown** [1973] EA 358, the Court held that:-

> *"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted* ***unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages****. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience." [Emphasis added].*

Similarly, in the case of T**.A. Kaare v General Manager Mara Cooperative Union** (1984) Ltd (supra), this Court stated that:-

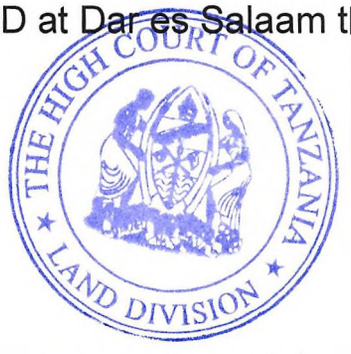
" The injury must be "material, i.e., one that could not be adequately remedied by damages." From this authority, it is indeed clear to me, that, monetary loss is at all times remediable and cannot fall within the so-called 'irreparable injury."

Having weighed the different probabilities in this application, it appears that the applicants have met the first and second conditions, the application was bound to fail on the third condition.

In the upshot, I find no merit in the instant application which is accordingly dismissed without costs.

Order accordingly.

DATED at Dar es Salaam this 29th July, 2022.



A.Z.MGEYEKWA

JUDGE

29.07.2022

Ruling delivered on 29th July, 2022 in the presence of Mr.Jonas, learned State Attorney for the respondents also holding brief for Mr. Kilenzi, learned counsel for the applicant.

A.Z.MGEYEKWA

JUDGE

29.07.2022