IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 102 OF 2023

ADELINA CRISPIN KILIMBA AND 599 OTHERS.....APPLICANT

VERSUS

NOBLE AGRICULTURE ENTERPRISES LTD.....1ST RESPONDENT
BAGAMOYO DISTRICT COUNCIL.....2ND RESPONDENT
MAKURUNGE VILLAGE COUNCIL.....3RD RESPONDENT
ATTORNEY GENERAL.....4TH RESPONDENT

R U L I N G

Date of last Order:28/04/2023
Date of Ruling: 22/05/2023

K. D. MHINA, J.

This application in the nature of Mareva injunction was brought under a certificate of urgency by way of chamber summons, which has been preferred under Section 2 (3) of the Judicature and Applications of Laws Act, Cap 358 R: E 2019 ("the JALA"), and Section 95 of the Civil Procedure Code, Cap 33 R: E 2019 ("the CPC").

The Applicants, *inter-alia*, are seeking the following orders: -

i. *This Court be pleased to issue a temporary injunction order against the 1st, 2nd, 3rd and 4th respondents for not evicting the Applicants from the disputed property pending the expiry of 90 days' notice.*

ii. *This Court be pleased to issue a status quo.*

iii. *Any other relief this Court deems to grant.*

The grounds for the application were expounded in the joint affidavit, which Adelina Crispin Kilimba and Pastory Mayunga Masomhe, among the applicants, swore in support of the application.

After being served with the chamber summons, the 1st, 2nd and 3rd respondents opted not to file the Counter Affidavit. In contrast, the 4th respondent filed the counter affidavit to refute the allegations raised in the affidavit.

Briefly, according to the affidavit and affidavit in reply, the centre of controversy between the parties which triggered the filling of this application is land measuring approximately 6400 acres located at Miyomboni-Gezaulole Village, Makurunge Ward within Bagamoyo District.

The applicants allege that they acquired and used that land for agriculture and pastoralism before the independence. They remained undisturbed until July 2020, when the 1st respondent, with the assistance of the 2nd and 3rd respondents, invaded them and demanded forceful eviction of the applicants and their families from the land. Further, when the dispute was referred to the District Commissioner ("the DC") of Bagamoyo, he convened a meeting, and thereat, the DC maintained that the 1st respondent was the lawful owner since 1980 after the Village Council allocated that land to him.

The applicants allege that they are the lawful owners of the land through a customary right of occupancy.

On the other hand, the 1st respondent alleges acquired the land in dispute after compensating the twenty-three (23) occupants of the land. Therefore, he is the lawful owner of the land in dispute, known as farm no. 26 Makurunge Ward in Bagamoyo District, measuring 2584 hectares with a certificate of title No. 36911.

He further alleges that he enjoyed a peaceful possession of the land until late 2022 when the applicants trespassed into the land and started building mud huts, cutting trees and making charcoals.

At the hearing, the applicants were represented by Mr. Gabriel Masinga learned advocate. The 1st respondent was represented by Mr. Dickson Ngowi , a learned advocate, while Mr. Boaz Msoffe, learned State Attorney, represented the 2nd, 3rd and 4th respondents.

To support the application, Mr. Masinga submitted that the essence of filing this application was to prohibit the respondents from threatening, disturbing and burning the applicants' houses and properties. He said that after the 1st respondent's disturbances in February 2023 by burning the applicants' homes, they filed 90 days' notice to sue the respondents. That notice of 27 February 2023 was yet to expire.

In his further submission, he stated that this application for an injunction is proper because it met the conditions set out in **Atilio vs. Mbowe** [1969] HCD, 284, which was also quoted with approval in **Valence Matunda vs. Sadallah Philip Ndosy and two others**, Misc. Land

Application No. 55 of 2019, Tanzlii (HC- DSM) at page 4, that before granting the order of injunction, the court must be satisfied that:

i. *There is a serious question to be tried on the facts alleged, and the probability that the plaintiff will be entitled to the relief prayed.*

ii. *ii. the Applicant stands to suffer irreparable loss requiring the courts' intervention before the Applicant's legal right is established;*

iii. that on balance, there will be greater hardship and mischief suffered by the plaintiff from withholding the injunction than will be suffered by the defendant from granting it.

In connection with the application at hand, he narrated that the first principle is met, as indicated in paragraphs 4-11 of the joint affidavit. The applicants demonstrated that they are the lawful owners of the land in dispute. Therefore, the applicants successfully established the prima facie case.

On the second principle, he submitted that according to the joint affidavit in paragraphs 5, 7 and 12, the applicants' properties, including their homes, had been burned down, and the 1st respondent intended to continue to burn other houses.

Therefore, the applicants would suffer irreparable loss because they would be deprived of the ownership of their land without due process of law. Because they would be condemned unheard.

Coming to the third principle, he submitted that on the balance of probabilities, the applicants would suffer more because they were living in the disputed land. Therefore, if an injunction is not granted, the applicants would suffer hardship because the 1st respondent will continue demolishing houses.

He concluded by submitting that granting an injunction is a matter of court discretion but that discretion should be exercised judiciously based on factual and legal grounds. Therefore, he prayed for this Mareva injunction to be granted pending filing of the suit with costs.

In response, Mr. Msoffe, who was entitled to submit on points of law only for the reason that the 1st,2nd and 3rd respondents did not file the counter affidavit submitted on the defectiveness of the applicants' joint affidavit.

He pointed out that the applicants were 599 in the affidavit, but in the annexure attached to the affidavit, there were 807 applicants. Therefore,

there was an inconsistency because there was no proper identification of the applicants.

He concluded that according to Order 19 Rule 3 of the CPC, an affidavit must contain facts known or on the deponent's belief. Therefore, without information regarding other applicants, it renders the affidavit defective.

On his side, Mr. Ngowi started to submit by pointing out that the reply to the Counter affidavit raised new facts which were not raised in the counter-affidavit. He revealed that new facts were contained in paragraphs 5,7, and 23 and annexures VAM 1, 2 and 3 of the reply to the counter affidavit, and therefore, those new facts should be expunged from the record.

He further submitted that, like any other injunction, the principles set out in Atilio (Supra) must be met cumulatively in Mareva.

Responding to the 1st principle, he submitted that by looking at the affidavit, the applicants never reveal if they have a cause of action against the 1st respondent.

Further, in paragraph 22 of the affidavit, the applicants indicated that they served the 90 days' notice to the respondents, but yet there was no

proof that the notice was served to the respondents. Therefore, the first condition was not met.

On the second principle, he submitted both the joint affidavit and a reply to the counter affidavit that the applicants failed to indicate how they would suffer irreparable loss. Since the year 2020, they knew that they were not the owners of the land in dispute.

As to the third principle, the 1st respondent is the one who would suffer more because of the failure to continue with agriculture and investment activities in the suit land. Therefore, granting an injunction will amount to the legalisation of unlawful possession.

In rejoinder, Mr. Masinga started by commenting on the issue of law raised by Mr. Msofe. He stated that it was not a point of law because the actual number of applicants needed facts and evidence. Further, in the statutory notice, the applicants were 599.

He further submitted that the applicants reached a number of more than 1000; therefore, the issue of the number of applicants should be deliberated in the suit.

On this, he concluded that by the nature of the application, if the order would be granted would bind the disputed land; therefore, the list and names of the applicants are not legally mandatory.

On the issue of new facts, he submitted that the facts were not new but were elaborative.

Responding to the first principle of granting an injunction, he submitted that the condition was met because of triable issues. Further, the 90 days' notice was served to the respondent, and there was proof. On top of that, the issue of notice was not raised in the counter affidavit.

On irreparable loss, he briefly submitted that in the affidavit, it was indicated that the applicants would lose their homes.

Coming to the third principle, he submitted that what was submitted by Mr. Ngowi was not true because the 1st respondent acquired the land in the 1980s, but he neglected that land until 2020, after 30 years.

Having gone through the submission by the parties, I now turn to deliberate and determine the application. The crucial issue is whether or not it would be proper for this court to exercise its discretion and grant the order

of Mareva injunction pending the expiration of 90 days' notice to sue the Government.

Therefore, it is essential to understand the meaning and scope of Mareva as species of interlocutory injunction.

The ***"Mareva Injunction"*** originated from Lord Denning's statutory interpretation in **Mareva Compania Naveria SA v. International Bulkcarriers SA** [1980] 1 All ER 213 as the court order which restrains the parties being sued (Defendants) from dissipating or disposing of their assets pending determination or disposal of a legal action brought by the parties suing (Plaintiff). In other words, the purpose of the Mareva injunction Order is to freeze the assets of the Defendant to protect the applicant's interest prior to the trial.

As for the scope of Mareva, the decision of this Court in **Daudi Mkwaya Mwita vs. Butiama Municipal Council and Another**, Misc. Land Application No. 69 of 2020 (HC-Musoma) is instructive. It was held that:

> *"Mareva injunction may be issued where the applicant cannot institute a lawsuit because of an existing legal impediment."*

Therefore, one of the crucial issues in Mareva is that it can only be filed where there is no filed suit in court due to some legal impediments. This is one of the remedies under the doctrine of equity; it is a preventive relief.

As I alluded to earlier, the applicants filed this application pending the maturity of 90 days' statutory notice of intention to sue the respondents. Therefore, the legal impediment to this application is the expiration of the 90 days' notice.

In his submission, Mr. Ngowi pointed out that there was no proof that 90 days' notice was not served to the respondents. On the other hand, Mr. Masinga resisted that point by stating that the issue was not raised in the counter affidavit and that the notice was served to the respondent.

Flowing from above, indeed, the issue of service of notice was never raised in the counter affidavit. Further, I am aware that parties are bound by their pleadings as it was held by the Court of Appeal in **Peter Ng'homango vs. The Attorney General**, Civil Appeal No. 114 of 2011 (unreported) held that;

> *"We think it is clear that a judge is duty bound to decide a case on the issues on records and that if there are other questions, they must be placed on record. The decision of the court should be based on the*

issues which are agreed upon by parties, and if this is not done it result miscarriage of justice. The situation becomes worse if it departs from the issue agreed upon".

Also, I am further aware that if the question touches on jurisdictional issues, it can be raised at any stage, even at the appellate stage. But the issue must be placed on record, and parties must be given the right to be heard. This position was announced by the Court of Appeal in **Yusuf Khamis Hamza vs. Juma Ali Abdalla**, Civil Appeal No. 25 of 2020 (Tanzlii), where it was held that;

> *"Of course, we are alive with the settled position of law that time limitation goes to the jurisdictional issue of the court and that it can be raised at any time, even at the appellate stage by the court, but in order for it to be noted and raised it would require material evidence be placed before the court".*

In this application, the matter was raised during the submission and argued by both advocates; therefore, both parties were afforded a right to be heard.

Further, the 90 days' notice in dispute was in the record, covered under paragraph 22 of the joint affidavit and annexed to it.

In addition to that, as I said earlier, the legal impediment in this application is the 90 days' notice. Therefore, that issue of notice touches the competency of this application to the extent of whether this application has jurisdiction to grant the relief sought. Thus, though it was never raised in the counter affidavit since it touches jurisdiction, it can be raised at any stage; hence the issue was rightly raised by Mr. Ngowi advocate.

The joint affidavit did not indicate whether the 90 days' notice was served to and received by the respondents. In submission, Mr. Masinga stated that the notice was dated 27 February 2023 and would expire on 27 May 2023.

Section 6 (2) of the Government Proceedings Act, Cap 5, R: E 2019 reads that;

> *"(2) No suit against the Government shall be instituted, and heard unless the claimant previously submits to* ***the Government Minister, Department or officer concerned*** *a notice of not less than ninety days of his intention to sue the Government, specifying the basis of his claim against the Government, and* ***he shall send a copy of his claim to the Attorney-General and the Solicitor General".*** [Emphasis provided]

Therefore, it is essential that there must be proof that the notice is served to the concerned Government entity, the Attorney General and the Solicitor General. In the absence of service of evidence of service, then the notice can not be taken into consideration. It means there was nothing to initiate proceedings to sue the Government.

In **Emmanuel Titus Nzunda Vs. Arusha City Council and Others**, Land Case No 28 of 2020, Tanzlii (HC-Arusha), this Court insisted on the compliance of the requirement of 90 days' notice by holding that;

> *"The 90 days' notice being a mandatory legal requirement, the same need be complied with before instituting suit or joining the government into any suit. It is upon the Plaintiff to attach a notice showing that the same was duly served and received".*

Therefore, in proving that the notice was served and received, it is necessary to attach such a notice showing that it was duly served and received.

In this application, the 90 days' notice attached to the joint affidavit does not indicate if it was served to and received by the respondents. There are no signatures, stamps or the date indicating whether the respondents

were served and received the notice, and the effect is that there is no 90 days' notice served to the respondent at all.

From the discussion above, this application depends on the validity of the 90 days' notice and as I alluded to earlier that the notice was considered as the existing legal impediment to enabling the applicants to file the injunction by way of Mareva. But since that legal impediment is not proper, therefore, that means there is no longer any impediment invoking this Court to exercise its discretion to grant the order of Mareva injunction pending the expiration of 90 days' notice to sue the Government.

For the reason and analysis above, I don't see the reason to deliberate and determine the issue raised by Mr. Msofe regarding the inconsistency of the applicant's number in the affidavit, which differs from the number of applicants in the attached annexure as well as the merits of the application.

Consequently, the application is struck out with costs.

It is so ordered.

THE HIGH COURT OF TANZANIA
LAND DIVISION

K. D. MHINA

JUDGE

22/05/2023