

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 382 OF 2023

SAIDI HAMISI BAKARI 1ST APPLICANT

WILLHELM SYLVESTER ERIO 2ND APPLICANT

MARIA RASHIDI KIPAE 3RD APPLICANT

BAKARI ATHUMAN HEMED 4TH APPLICANT

AHMED ATHUMAN ALLY (Administrator of

The Estate of the late Athuman Ally Mkumba) 5TH APPLICANT

GEOFREY LUNYILIKO MFUGALE (Administrator of the

Estate of the deceased Lunyiliko Mfugale) 6TH APPLICANT

HEMED NASSORO NAULA 7TH APPLICANT

OMARY JABIR ALLY 8TH APPLICANT

SALUM MASHAKA 9TH APPLICANT

ADAM MASHAKA 10TH APPLICANT

VERSUS

KIBAHA TOWN COUNCIL 1ST RESPONDENT

ATTORNEY GENERAL (AG) 2ND RESPONDENT

Date of Ruling 27/07/2023

Date of the last order 12/07/2023

Adls.

RULING

A. MSAFIRI, J

This is an application for *mareva injunction* filed by 10 Applicants before this Court on 27.06.2023 under the certificate of urgency. The application is intending to restrain the 1st respondent from destroying and evicting the applicants from the disputed land pending the expiration of 90 days applicants' demand note served to the respondents with intention to sue the Government.


The Application was made under Section 2(3) of the Judicature and Application of Laws Act, Cap 358 [R.E. 2019] and Section 95 of the Civil Procedure Code, Cap 33 [R.E. 2019]. The application was made by way of chamber summons supported by joint affidavit of the applicants. It was objected by the respondents who also filed their joint counter affidavits deponed by one Magambo Gibson Ruturugana, a Principal Officer of the 1st applicant.

On 12.07.2023 when the matter came for hearing, all the applicants were represented by Messrs Dominicus Nkwera and Kalunde Kalili both learned Advocates while the respondents enjoyed the legal service of Mr. Boaz Msoffe, learned State Attorney and Ms Lucy Matemu, learned State Attorney for Kibaha Town Council. *Alle*

Mr Nkwera was the first to kick the ball rolling, whereas, he adopted the filed joint affidavit of the applicants and further stated that, the applicants are seeking for *mareva injunction* pending the expiration of the 90 days' notice on reason that they are lawful owners of the suit property since the year 1963, and that each of the applicants have made several developments over the suit property including construction of houses for each of the applicant. That the applicants also are involved in farming on the suit land on short and long term period.

He submitted further that the applicants were notified on 22.05.2023 to demolish their structures and vacate the suit premises within 30 days, for the reason that their structures were constructed without obtaining the building permit.

He contended that the respondents in their counter affidavit at paragraph 3, admit the fact that the suit property does not belong to the 1st respondent. He further stated that the respondents have not attached the title deed that shows that the suit land is owned by one An-Nahl-Trust as alleged by the respondents in their counter affidavit.

Mr Nkwera argued that he is aware that the Government can acquire any land for public purposes, but that the owners must be compensated fairly. 

He referred to the Court the case of **Leopard Met Logistics Co. Ltd vs. Tanzania Commercial Bank Limited & Another**, Misc. Civil Application No. 585 of 2021 HC Dar es Salaam (Unreported) at page 6. He prayed that for the interest of justice this Court be pleased to grant the application.

In response, Mr Boaz learned State Attorney for the respondents adopted the filed counter affidavit and started his submission by admitting that this Court with its discretion has power to grant the application upon fulfilment of the conditions set in the case of **Atilio vs Mbowe**, (1969) HCD namely; -

- i. There must be prima facie*
- ii. That the applicants will suffer irreparable loss*
- iii. Prove that the applicants are at the risk of getting greater loss compared to the respondents.*

Mr Boaz, admitted that the applicants have managed to demonstrate the 2nd and 3rd conditions set in the case of **Atilio vs. Mbowe (supra)**, however, the applicants have failed to establish the 1st condition as they did not demonstrate whether there is a prima facie case and how their intended suit is arguable.

He further stated that the 1st respondent is the planning Authority within Kibaha, responsible in issuing building permits whereas, that the *Atle*

applicants did not obtain building permit from the 1st respondent. He said that building without permit is illegal, suitable for demolish after issuance of Notice.

He argued that, the centre of the dispute between the applicant and the 1st respondent is building without permit. And that the applicants were supposed to address the issue on whether they did obtain building permit from the 1st respondent or not.

To cement his point, he cited the case of Director Moshi Municipal vs. John Ambrose Mwase, Civil Appeal No. 345 of 2017, CAT at Arusha, at pg. 14. He maintained that the applicants have failed to establish a *prima facie* case against the respondents and urged the Court to dismiss the application with costs.

In rejoinder, Mr Nkwera agreed with counsel for the respondents that *mareva injunction* is the discretion of the Court to grant or refuse. He argued that the conditions set in the case of **Atilio vs Mbowe** have been met by the applicants.

He added that the respondents have not well-established which law entitles the respondents to demolish the buildings that were constructed without building permit. That, since there is no such law, then this Court be pleased to grant the application. *Alls.*

After a careful consideration of the rival submission of the parties, it is clear that the parties are in mutual agreement with the conditions for grant of the application set in the case of **Atilio vs Mbowe**, 1969) HCD and that it is mandatory that they have to be met.

It is also undisputed that the learned State Attorney for the respondents admits that the second and third conditions have been met by the applicants. This is what the learned State Attorney stated at page 12 of the hand written proceedings: -

"We have no issue in regard with the second and third conditions. They have been demonstrated by the applicants"

In that regard, I will not determine on the second and third conditions as they are undisputed and the respondents have been satisfied on how have been established by the applicants. I will therefore determine whether the first condition have been met, that is to say whether there is a prima facie case for determination.

The position on establishment whether there is a prima facie case was discussed in the book of **C.K. Takwani, Civil Procedure with Limitation Act**, 1963, 7th Edition at page 347

*'The court must be satisfied that there is a **bona fide dispute raised by the applicant**, that there is an **arguable case for trial*** Allb.

*which needs investigation and a decision on merits and on the facts before the court that **there is a probability of the applicant being entitled to the relief** claimed by him. The existence of a prima facie right and infraction of such right is condition precedent for grant of temporary injunction. The **burden is on the plaintiff to satisfy the court by leading evidence** or otherwise that he has a prima facie case in his favour.’ (emphasis added)*

In the instant application the applicants have alleged to be lawful owners of the suit property since 1963, however there is no primary proof of ownership which have been even attached to their pleadings against the respondents. It should be remembered that the burden of proof is upon the applicants and not otherwise.

The only attached documents are the 30 days’ notice from HALMASHAURI YA KIBAHA dated 22.05.2023 to the Applicants, G1, Demand Note by the Applicants to KIBAHA TOWN COUNCIL dated 20.06.2023. None of the attached documents lead to the proof of ownership of the suit property in the applicants’ favour so as to establish arguable case for trial against the respondents.

In that regard, I subscribe to the position of the learned State Attorney for the respondents that the applicants have not managed to demonstrate first condition to be granted the application. The fact that

Atts.

there was building permit or not at this stage is not an issue for determination.

It should be very clear and state that, if applicant fails to prove prima facie case, he is not entitled to temporary injunction. The applicants therefore have failed to establish a prima facie case, which is the first condition as per the principle set in the case of **Attilio vs. Mbowe**(supra).

Since the three conditions have to be cumulatively met, then the applicants are not entitled to the *mareva injunction*.

The Application is with no merit and it is hereby dismissed with costs.

Order accordingly.


A. MSAFIRI
JUDGE
27/07/2023

