

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND CASE APPLICATION NO. 330 OF 2023**

**JUSTIN MNKENI ..... 1<sup>ST</sup> APPLICANT**

**VERSUS**

**BYABATO LEONARD KILAMA ..... 1<sup>ST</sup> RESPONDENT**

**KIBAHA DISTRICT COUNCIL ..... 2<sup>ND</sup> RESPONDENT**

**HONOURABLE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*Date of last Hearing: 14/07/2023*

*Date of ruling: 03/08/2023*

**RULING**

**I. ARUFANI, J.**

The applicant filed the present application in the court 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 together with any other enabling provisions of the law seeking for the order of restraining the first and second respondents, their agents, or any one acting on their behalf from digging sand and threatening to demolish the houses of the applicant located at Msufini Village, Soga Ward, within Kibaha District, in Coast Region (Henceforth, the land in dispute) pending the expiry of ninety (90) days statutory notice to sue the Government, filing the main case and determination thereof.

The application is supported by the affidavit of the applicant and it was opposed by the counter affidavit of the respondents which one of them was sworn by the first respondent in person and another one was sworn by Emmanuel Wenceslaus Mkwe, Principal Officer of the second and third respondents. During hearing of the application, the applicant was represented by Mr. Mbwana Ally Chipaso, learned advocate and while the first respondent appeared in the court in person the rest of the respondents were represented by Mr. Stephen Kimaro, Learned State Attorney who was assisted by Mr. Joseph Madatula, Legal Officer from the office of the second respondent.

The counsel for the applicant prayed to adopt the affidavit sworn by the applicant as part of his submission and told the court the applicant is the owner of the land measuring thirty (30) acres situated at the location mentioned hereinabove. He said the applicant has built two houses and planted mango trees all over the land in dispute and he has lived on the land in dispute for nine (9) years now. He said the applicant was surprised by the first applicant after seeing him entering cartta pillar onto the land in dispute this year and started digging sand thereon and cutting down his mango trees.

He said according to the information they have the first respondent was permitted to dig the sand on the land in dispute by the second respondent before satisfying themselves the first respondent is the lawful owner of the land in dispute. He stated the first and second respondents have caused big damages in the land in dispute as the first respondent has cut down mango trees which were at the stage of yielding fruits. He said the first and second respondents are now in the process of demolishing his two houses and prayed the court to grant the sought order to await expiration of ninety days for the applicant to file the suit in the court against the respondents.

He referred the court to the case of **Attilio V. Mbowe**, (1969) HCD no. 284 where three conditions required to be established for the order sought in the application to be granted were laid down. He said the first condition is for the applicant to establish there is a triable issue in the suit intended to be tried by the court and there is a likelihood for the reliefs sought to be granted. He said if you read the affidavit of the applicant, you will find the stated condition has been established that there is triable issue in the suit the applicant intends to file in the court against the respondents.

He said in relation to the second condition of irreparable loss to be suffered by the applicant that, the first respondent is digging sand on the land in dispute and he is cutting down the mango trees. He said the permit given to the first respondent by the second respondent was to dig sand in only one acre of land without specifying where the said one acre of the land is located. He said while being assisted by the second respondent the first respondent has now dig the sand in the land measuring seven acres and he has gone close to the houses of the applicant. He said if the respondents will not be restrained the first respondent will dig sand in the whole of the land of the applicant. He submitted that established the applicant will suffer irreparable loss if the applicant will be left to continue with the stated exercise.

As for the last condition of balance of convenience the counsel for the applicant stated that, if the sought order will not be granted and the first respondent is left to continue with the exercise the applicant will be rendered homeless before the suit he intends to file in the court is heard and determined. He argued that, the applicant has managed to establish the above conditions and referred the court to the case of **Kurindo Bunyiriko V. Tanzania Forest Services Agency & Another**, Misc. Land Application No. 28 of 2022, HC at Musoma (unreported) where the

order of maintaining status quo pending expiration of 90 days to file the suit in the court was granted.

In his reply the first respondent told the court he bought the land measuring forty (40) acres located at Msufini Village, Soga Ward, within Kibaha District, in Coast Region from the family of Hadija Athumani Chuma in 2011. He said to have bought other lands from other people and enabled him to have 200 acres of land. He said he bought the land which part of it has been trespassed by the applicant from Dunia Selemani Kapama who sold to him 11 acres and he bought 5 acres from Ally Salum Kinyogoli. He said he surveyed the land in dispute in 2014 before the applicant trespassed the same and said before surveying the land, he obtained approval of surveying the same from the Village Council.

He said he wanted to conduct fish farming on the land he bought and he has already dug two ponds for that farming and he wanted to cultivate vegetable on the land. He said the land the applicant is alleging is his property is within his land surveyed and registered as Farm No. 6916. He said he has four farms which are surveyed and said the land in dispute had sixteen beacons but the applicant has removed all of them.

He said when the applicant started construction of his houses on the land in dispute, he looked for him and he was told he was at Njombe

taking care of his sick wife. He said the applicant was not reachable until last year when he managed to get him and take him to the Village Council but the applicant said he had no confidence with the Village Council on ground that they will not do justice to him. He said he requested for permit of digging sand in the land in dispute from the second respondent and after being granted permission he started digging the sand from last year.

He said after started digging the sand the applicant took him to the Ward Tribunal and the Ward Tribunal directed them to go to the District Land and Housing Tribunal but later on, the applicant withdrew the matter from the District Tribunal. He said on 24<sup>th</sup> May, 2023 his advocate wrote a letter to the applicant demanding him to remove his houses from the land in dispute. He said the applicant has been planting mango trees on the land in dispute and some of the mango trees are on the land.

He said the mango trees are affecting the texture of the sand and caused him to get loss. He said the security of his life is in jeopardy because of the said state of affairs. He said although the counsel for the applicant said the applicant has built two houses on his land but the applicant had another third house which was adjacent to the railway and he was paid compensation for the same. He said from 2011 he has not

done anything on the land until this year is when he has started to work on the land.

Mr. Stephen Kimaro, learned State Attorney for the second and third respondents prayed to adopt their counter affidavit as part of their submission and told the court the application is untenable. He said that is because the applicant is seeking for restraint order which will cover the period of ninety (90) days of serving the notice of intention to sue to the Government together with period of filing the intended suit in the court and the period awaiting determination of the intended suit.

He submitted that the order of temporary injunction cannot be granted to cover the period when the suit has not been filed in the court as it is not known when the applicant will file the intended suit in the court. He submitted further that the order of temporary injunction is supposed to last for a period of ninety days of the applicant's intention to sue the Government. Alternatively, the counsel for the mentioned respondents argued the applicant has not managed to establish the conditions for being granted the order is seeking from the court laid in the Case of **Attilio V. Mbowe** (supra) which were elaborated by this court in the case of **Mpegav Auto Link (T) Ltd V. John Fredrick Musira**, Misc. Application No. 272 of 2022.

He argued it was stated in the mentioned case that, the applicant is required to establish he has a serious question to be tried by the court on the facts alleged and he will be entitled to the relief to be sought in the suit intended to be filed in the court. He argued there is nowhere in paragraphs 3 to 13 of the affidavit it is shown the applicant is entitled to the reliefs he intends to seek from the court and there is nowhere it is stated he will suffer irreparable loss if the order is sought from the court will not be granted.

He argued it is trite law that whoever goes to equity must go with clean hands. He stated the applicant has not attached a sale agreement in his affidavit to substantiate his ownership to the land in dispute and he has not even described the land he is alleging is his property. He stated the applicant has annexed in his affidavit the permits issued to the first respondent by the second respondent and stated the second respondent exercised its power by following the procedure prescribed by the law before issuing the stated permit.

He argued the deposition by the applicant that the second respondent conspired with the first respondent is a serious allegation and the documents attached in the affidavit have not disclosed how the first and second respondents conspired to do anything alleged to have been



done by them. He said the second respondent exercised her power with due diligence by making assessment of the work to be done and verify the place where the sand will be dug before issuing the permit for the said work. He argued the applicant has not shown in his affidavit there is a notice of demolition of his houses which has been issued to him and submitted that demonstrates the applicant has failed to establish he has a prima facie case against the respondents.

He argued in relation to the second condition for granting the order of temporary injunction that, as stated in the case of **Elieza Liwali V. Bay View Properties Limited** cited in the case of **Mpegav Auto Link (T) Ltd** (supra) the court is required to consider variety of reasons before granting the order of temporary injunction. He stated the reasons to be considered includes the reason for the court to prevent relief sought from being rendered nugatory. He submitted the applicant has not managed to establish he will suffer any damage which cannot be remedied by way of compensation.

He said the buildings and the crops alleged are in the land in dispute can be remedied by way of being paid compensation. He argued the counsel for the applicant is not aware of the land where the sand is being dug and stated the permit issued was for digging sand in only one acre.

He stated the permit was issued after all the responsible stake holders including people from environment committee being consulted. He stated the argument that the permit was not issued for digging sand in the land of the applicant cannot make him owner of the land in dispute. He submitted that shows the second condition for granting the applicant the order is seeking from the court has not been established.

He went on arguing in relation to the third condition required to be established for the order of temporary injunction to be granted which is balance of convenience that, the affidavit of the applicant is very clear that the applicant has not established he will suffer irreparable loss. He argued the first and second respondents will be more inconvenienced as they will lose their revenue from the business of digging sand.

He referred the court to the case of **Mwakeye Investment Ltd V. Access Bank Tanzania Limited**, Misc. Land Application No. 654 of 216, HC Land Division at DSM (unreported) where it was stated that, the applicant is required to establish all three conditions for being granted an order of temporary injunction laid in the case of **Attilio V. Mbowe** (supra) before being granted an order of temporary injunction. He submitted that, as the applicant has failed to establish the stated three

conditions, the application be dismissed with costs for being devoid of merit.

In his rejoinder the counsel for the applicant stated it is not true that the first respondent is the owner of the land in dispute and stated the applicant has been in occupation of the land in dispute for nine years. He argued that, the argument by the first respondent that the applicant was paid compensation for his land shows the first respondent is well aware that the applicant is the owner of the land in dispute. He stated it is true that there was application filed in the District Land and Housing Tribunal but the same was withdrawn to pave chance for the applicant to file the suit in this court.

He submitted the case of **Mpegav Auto Link (T) Ltd** (supra) is distinguishable from the present case because there was no need of granting the injunctive order as the directives which had been given had already been complied with and the order was sought after the main suit being filed in the court. He argued even the case of **Mwakeye Investment Ltd** (supra) is distinguishable from the case at hand and prayed the application be granted as the required conditions for granting the order of temporary injunction were not established conjunctively in the foregoing cited case.

Having carefully considered the rival submissions fronted to the court by both sides and after going through the chamber summons, the affidavit and counter affidavit filed in the matter by the parties, the court has found the issue to determine in this application is whether the applicant has managed to satisfy the court he deserves to be granted the order is seeking from the court. The court has found the order the applicant is seeking from the court is the order known as mareva injunction.

As stated in the case of **Hotels and Lodges Tanzania Limited V. Conservation Commissioner & Two Others**, Misc. Com. Application No. 136 of 2021, HC Com. Division at DSM (unreported) mareva injunction is similar to interlocutory injunction orders granted by the court to prevent occurrence of injury before determination of rights of parties in a suit and it is granted pending filing of a suit in court in future. It is a specie of temporary injunctive orders which is exceptional to the general rule of seeking and granting temporary injunctive orders. That is because while under normal circumstances injunctive orders are sought after a suit being filed in court but mareva injunction is sought and granted without having a suit pending in court.

The court has found the applicant is seeking for the order of restraining the first and second respondents, their agents or any one acting on their behalf from digging sand and threatening to demolish the houses of the applicant built on the land in dispute while there is no pending suit in the court. However, the court has found as the order is being sought pending expiration of ninety (90) days' notice of intention to sue the Government issued to the Government by the applicant, it is crystal clear that the applicant is seeking for mareva injunction order.

Mareva injunction order which traces its origin from the famous case of **Mareva Compania Naviera SA V. International Bulk Carriers SA**, [1980] 1 All ER 213 has been sought and considered in number of cases filed in our courts. Some of those cases includes the cases of **Mpegav Auto Link (T) Ltd**, (supra) cited by the counsel for the second and third respondents and the case of **Leopard Net Logistics Company Limited V. Tanzania Commercial Bank Ltd & Three Others**, Misc. Civil Application No. 585 of 2021, HC at DSM (unreported).

The court has found that, as mareva injunction is a specie of temporary injunction, then as submitted by the counsel for the parties the principles used to be considered when determining an application for temporary injunction laid in the case of **Attilio V. Mbowe** (supra) are

supposed to followed in determination of the application for an order of Mareva injunction. The stated view of this court is getting support from the case of **Leopard Net Logistics Company Limited** (supra) where it was stated the criteria laid in the case of **Attilio V. Mbowe**, (supra) for grant of injunctive orders apply in the application of this nature. The criteria or principles articulated in the mentioned case are as quoted hereunder: -

- (1) *There must be a serious question to be tried on the facts alleged, and the probability that the plaintiff will be entitled to the relief prayed.*
- (2) *The applicant stands to suffer irreparable loss requiring the courts intervention before the applicant's legal right is established.*
- (3) *On the balance of convenience, there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendant from granting of it.*

While being guided by the principles stated hereinabove the court has found proper to start with the first principle. The first principle requires the court to be satisfied the applicants have established there is a triable issue or a prima facie case in the suit intend to be filed in the court and there is a probability that the applicant will be entitled to the reliefs intended to be sought from the court.

The court has found the applicant has deposed at paragraph 2 of his affidavit that he is the lawful owner of the suit property and he purchased the same from Tausi Ramadhani in 2013 and from Patrick Mhema in 2014. The applicant deposed further at paragraph 3 that he has built two houses on the land in dispute and he has been residing on land in dispute for nine years now. The applicant deposed at paragraph 4 of his affidavit that, early this year of 2023 he approached the Village Council seeking for approval of surveying land in dispute but his application was refused by the Village Council and the Ward Executive Officer.

He deposed at paragraphs 5, 6 and 7 of his affidavit that, later on he got an information that the second respondent has issued a permit to the first respondent to dig sand on his land and the first and second respondents had started surveying the land in dispute. He deposed at paragraph 8 of his affidavit that the first respondent who is now assisted by the second respondent has trespassed onto the land in dispute by entering carterpillar on the land and they are destroying and alienating the land and cutting down the mango trees owned by the applicant.

The court has found the respondents have strongly disputed in their counter affidavit all the facts deposed by the applicant in the above referred paragraphs of the applicant's affidavit. The first respondent stated at paragraph 4 of his counter affidavit that the land in dispute is

part of the land he bought from different persons. He stated to have bought the first farm from Hadija Athumani Chuma on 21<sup>st</sup> November, 2011, the second farm from Ally Salum Kinyogori on 12<sup>th</sup> September, 2013 and the third farm from Dunia Selemani Kapama on 19<sup>th</sup> January, 2014.

The first respondent deposed further that, later on he made application for approval to survey the farms to the Village Council who after consultation with the members of the village his application was approved. He stated after his application being approved by the Village Council and the Ward Development Committee; he surveyed all the farms which were registered as one farm and given Farm No. 6916 – 6919. He stated after surveying the farm he applied for permit of digging sand on his land from the second respondent and he was granted the permit by the second respondent after the required procedures being observed.

On the side of the second and third respondents it is stated at paragraphs 3 and 4 of their counter affidavit that, there is no sale agreement from the persons the applicant has alleged he bought the suit land from them and there is no document attached to his affidavit to show he applied to survey the land and his application was refused by the mentioned authorities. It is deposed in the other paragraphs of the counter affidavit of the second and third respondents that, the first respondent is the lawful owner of the suit land and he was issued with



permit of digging sand in the suit land after complying with all the required procedures.

After considering the above stated deposition from both sides the court has found there is a serious dispute between the applicant and the respondents over the ownership of the land in dispute which deserve to be determined by the court after hearing the evidence from the parties in the suit intended to be filed in the court. The court has come to the stated finding after seeing the applicant is alleging is the lawful owner of the suit land and the first and second respondents are maintaining the owner of the land in dispute if the first respondent.

The court has considered the argument by the counsel for the second and third respondents that the applicant has not attached any sale agreement from the persons he alleged they sold the suit land to him but find that is the issue to be considered and determined at the hearing of the suit intended to be filed in the court and not in the present application. The court has also come to the stated finding after seeing the criteria for determine there is a probability of the intended suit to succeed was well stated in the case of **Colgate Palmolive Company V. Zacharia Provision Store & Others**, Com. Case No. 1 of 1997 (Unreported) quoted with approval in the case of **Kibo Match Group Limited V. HS Impex Limited**, [2001] TLR 152.

It was stated in the cited case that, the court is not required to examine the material facts presented before it closely and come to a conclusion that the applicant has a case which is likely to succeed or not because to do so the court will be prejudging the case on its merit before the case being heard. It was stated in the referred case that, all what the court is required to do is to be satisfied that, on the face of the facts presented before it the applicant has a case which need to be considered by the court and there is probability or likelihood of his intended suit to succeed.

It is because of the above stated position of the law and all what have been stated hereinabove the court has come to the finding that, the facts deposed in the affidavit supporting the application and the facts deposed in the counter affidavit filed in the court by the respondents together with the submissions fronted to the court by both sides have established the applicant has managed to establish there is a prima facie case or triable issue in the suit intended to be filed in the court which if substantiated there is a probability or likelihood for the applicant to succeed in the intended suit. Consequently, the court has found the first condition for granting the order the applicant is seeking from the court to be granted has been established in affirmative.

Coming to the second condition for granting an order of temporary injunction which is irreparable loss to be suffered if the order is not granted the court has found that, as stated in the case of **T. A. Kaare V. General Manager Mara Cooperative Union**, [1987] TLR 17, cited in the case of **Mpegav Auto Link (T) Ltd** (supra) the court is required to consider whether there is a need to protect either of the parties from the species of injuries known as irreparable injury before right of the parties is determined. 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 guided by the position of the law stated in the above referred cases the court has found that, the argument by the counsel for the second and third respondents that the applicant has not shown in his affidavit supporting the application how he will suffer irreparable loss if the sought order will not be granted but find the stated argument is not supported by the facts deposed in the affidavit of the applicant. The court has come to the stated finding after seeing it is well deposed at paragraph

12 of the affidavit of the applicant that he will suffer irreparable loss if the sought order will not be granted and the respondents are left to continue to accomplish their move.

The court has also found that, even if it will be said the applicant has not shown in his affidavit that he will suffer irreparable loss if the sought order will not be granted but the court has found the applicant has deposed in his affidavit without being disputed by the respondents that the first respondent is digging sand on the land in dispute and the first respondent has said to this court categorically that his advocate has written a letter to the applicant demanding him to demolish the houses he has constructed on the land in dispute.

The court has found that, digging of sand on a land is an activity which can change the structure of the land and it is not easy to return the same to its original structure and textures. The court has also found that, demolition of the houses of the applicant if not restrained is an act which will not only cause the applicant to lose the said houses but also, he will lose place of his residence as the counsel for the applicant said without being disputed by the respondents that the applicant uses the stated houses for his residence. To the view the stated loss cannot be remedied

by payment of compensation as submitted by the counsel for the second and third respondents.

That makes the court to find that, if the order of restraining the first and second respondents to continue with digging of sand in the land in dispute and the order of restraining the move of the first respondent to demolish the houses of the applicant before filing of his intended suit in the court is not granted, and the respondents proceed with their activities, the applicant will suffer irreparable loss. It is because of the stated reasons the court has found the second condition for granting the order the applicant is seeking from the court has been established in affirmative that the applicant will suffer irreparable loss if the order will not be granted.

With regards to the third condition for granting an order of temporary injunction which is balance of convenience the court has found that, as stated in the book of **Solonis Law of Injunction** (supra) the court is required to balance and weigh the mischief or inconvenience to be suffered by either side before issuing or withholding the sought injunctive order. After considering all what is deposed in the affidavit supporting the application and in the counter affidavit the court has found the applicant

is the one stand to be more inconvenienced than the respondent if the order is seeking from the court will not be granted.

The court has come to stated finding after seeing that, if the first respondent will be left to continue with his activities and the houses of the applicant are demolished the applicant will lose place of residence before instituting his intended suit in the court. The court has also found the right he intends to seek in the suit intended to be filed in the court will be rendered nugatory.

The court has considered the argument by the counsel for the second and third respondents that if the order sought will be granted the respondents will lose profit and the revenue they are getting from the activities the first respondent is doing on the land in dispute. The court has found the stated loss of revenue cannot cause higher inconvenience than the one to be encountered by the applicant if the stated activities will be left to continue as the applicant will lose his houses, crops and the place of residence.

It is because of the above stated reasons the court has found all the three conditions for granting an order of temporary injunction laid in the case of **Attitlio V. Mbowe** (supra) have been established in the application at hand. Consequently, the application is granted. The order

to restrain the first and second respondents, their agents or anyone acting on their behalf, from digging sand and threaten to demolish the buildings/two residential houses of the applicant located at Msufini Village, Soga Ward, within Kibaha District in Coast Region pending the expiry of ninety (90) days' notice to sue the Government is granted. Each party to bear his own costs in this applicant. It is so ordered.

Dated at Dar es Salaam this 03<sup>rd</sup> day of August, 20223



  
I. Arufani  
**JUDGE**  
03/08/2023

**Court:**

Ruling delivered today 03<sup>rd</sup> day of August, 2023 in the presence of Mr. Mbwana Ally Chipaso, learned advocate for the applicant and while the first respondent is present in person, the second and third respondents are represented by Mr. Stephen Kimaro, Learned State Attorney. Right of appeal to the Court of Appeal is fully explained.



  
I. Arufani  
**JUDGE**  
03/08/2023