IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 701 OF 2023

ELIUS A. MWAKALINGA .... APPLICANT

VERSUS

THE PERMANENT SECRETARY MINISTRY OF LAND

AND HUMAN SETTLEMENT DEVELOPMENT ....1ST RESPONDENT

THE REGISTRAR OF TITLES.. 2ND RESPONDENT

THE COMMISSIONER FOR LANDS.................................... 3RD RESPONDENT

THE DIRECTOR OF PLANNING AND HUMAN SETTLEMENT

DEVELOPMENT .... 4TH RESPONDENT

THE EXECUTIVE DIRECTOR

KINONDONI MUNICIPAL COUNCIL................................5TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL........................6TH RESPONDENT

RULING

Date of Last Order: 27/11/2023

Date of Ruling: 06/12/2023

A. MSAFIRI, J.

The applicant brought this Application 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 CPC), praying for

an interim order restraining the respondents, their agents, assignees or any other person acting on their behalf from taking any further steps towards taking away the applicant's right over the land contained on Plot No. 106 CT No. 143527 including changing the survey plan or size of the land pending expiry of the ninety (90) days' notice of intention to sue the respondents.

The Application is supported by an affidavit sworn by Elius A. Mwakalinga, the applicant and it is contested through joint counter affidavit of the respondents deposed by Adelfrida Camilus Lekule, the Principal Officer employed by the 1st and the 4th respondents hence conversant with the facts deposed therein. The applicant also filed a reply to the counter affidavit which was also deposed by himself.

The hearing was conducted *viva voce.* The applicant was represented by Mr. Gabriel Mnyele, learned advocate while the respondents were represented by Mr. Ayoub Sanga, learned State Attorney.

Mr. Mnyele was the first to address the Court whereas he prayed to adopt the affidavit and reply to counter affidavit by the applicant. He submitted that the Application is a *Mareva injunction* whereby for legal reasons, it is impossible to file a suit. That the applicant is suing Government Departments so had to issue a 90 days' notice before filing a

suit.

He submitted further that *Mareva injunction* is an injunction hence the applicant must satisfy the conditions necessary for the grant of an injunction order. He said that the applicant has satisfied all three conditions as per the requirement. He said that on the first condition, the applicant must establish that there is a prima facie case or an arguable case. That, this is shown in the affidavit and reply to counter affidavit.

Mr Mnyele submitted on the prima facie case that, first; the respondents have not complied with the provisions of the Urban Planning Act, 2007 under Section 19. That, because the respondents did not follow the process of subdivision as provided under Section 19 of the said Act, whoever could be aggrieved by the subdivision of allocation was not heard.

Second; that the respondents alleges there was revocation but they did not attach a Notice to the applicant to show that his Title of ownership to the suit land was being revoked. Also there is no revocation order by the President so the alleged revocation is questionable.

Third; that the respondents have not served the prior notice of revocation to the applicant to enable him to object the rectification if he had any objection. That the notice is issued under Section 99 of the Land Registration Act.

Fourth; that some part of the applicant's land, approximately 1/3 of the said land has been taken and allocated to another person without compensation.

On the second condition of the irreparable loss, Mr. Mnyele submitted that as it is indicated at paragraph 6 of the reply to counter affidavit, the applicant has shown the losses which if goes without a legal remedy, he will suffer irreparably as no one has shown that he will compensate the applicant.

On the third condition on balance of convenience, Mr. Mnyele submitted that it is shown in the affidavit and reply to counter affidavit that the applicant resides in the suit land with his family. That if the allocation goes to the allocatee one Domina Kagaruki it means that the applicant's house will have to be partly demolished and some of the septic houses will be on the allocatee's plot. That this will inconvenience the applicant as he and his family will be unable to use the septic tanks for their daily needs.

Mr. Mnyele further submitted on three added issues as follows;

One; that this dispute arises from the execution of a decree. That ordinarily, it could have been brought under Section 38(1) of the CPC but the said provision could not been used since some other necessary parties are not parties to the Decree.

Two; that the applicant is not contesting or preventing the execution of a Decree but he wants the same to be executed in accordance with the law.

Three; that the respondents through their counter affidavit have indicated that the applicant could go for prerogative orders. But this proposal is misconceived as the applicant have a right to pursue the legal remedies the best way he deems fit.

To bolster his points, the counsel cited several cases including the case **of Decent Investments Ltd vs. Tanzania Railway Corporation & 3 others,** Misc. Civil Application No. 13 of 2023, HC at Tabora (Unreported).

He concluded by praying for the Application to be granted with costs.

On reply, Mr. Sanga started his submission by adopting the contents of the respondents' counter affidavit. He admitted that *Mareva injunction* is an injunction hence the same conditions featured in the normal Application for injunction should also be fulfilled.

On the first condition on prima facie case, Mr. Sanga was of the view that there is no prima facie case in this dispute. That the reason for the argument is that in the prayers by the applicant in the chamber summons the respondent is praying for the respondents to be restrained to change the survey plan or size of the suit land pending 90 days. That however,

according to paragraphs 4 and 5 of the counter affidavit, the survey plan is already done and there are now three plots as per Approved Plan attached as annexure OSG 2. That what the applicant is praying has already been overtaken by events.

In alternative, Mr. Sanga submitted that there is no an arguable case as all these have raised from execution of the Court of Appeal decision as deponed in paragraph 4 of counter affidavit and annexed as OSG-1. That since the respondents are implementing the Court of Appeal order, then there is no prima facie case.

He argued that the applicant reference to Section 19 of the Urban Planning Act is misconceived. That the cited provision deals with stages for preparation of detailed planning scheme while what has been done in this matter is a subdivision of a plot. He pointed that Section 19 is not on one plot only but the whole area and that is when the claimed process under Section 19 of the Act should be followed.

On the second condition of the irreparable loss, Mr. Sanga referred this Court to **Sarkar's on Code of Civil Procedure, 9th Edition, 2000**, page 1997. In the cited book it is provided that on issue of irreparable injury, it must be an injury which cannot be atoned by money. Mr. Sanga argued that in the affidavit and reply to counter affidavit of the applicant, his major claim is for compensation. That, this can be remedied by way

of damages hence it cannot be irreparable loss.

On the third condition, Mr. Sanga submitted that it is the respondents who will suffer more and they are suffering even now as this Court have issued an order of maintenance of status quo and they have been restrained from executing the Court of Appeal decree. That if the orders sought will be granted, the respondents will suffer more than the applicant. That the applicant will just be paid compensation as he will claim in the main case compared to the respondents who have a Court of Appeal order to comply.

To bolster his submissions, he referred this Court to the litany of cases including the case of **National Housing Corporation vs. Peter Kassidi &4 others**, Civil Application No. 243 of 2016, CAT at DSM (Unreported)

He prayed for the Application to be dismissed with costs.

On rejoinder, Mr. Mnyele reiterated his submission in chief and added that paragraph 11 of the affidavit shows that as of now, only one plot has been allocated hence the execution has not been completed as claimed.

He admitted that the issue of compensation is central in this proceedings and that when one has been deprived of his land, one must be compensated. He argued that the applicant was not accorded the right to be heard as there is no evidence that the rectification notice was served to him. He reiterated his prayers.

Having carefully considered the submissions and pleadings filed by both parties, the issue for determination is whether the Application is meritorious.

Before going into determination of that major issue, I will first determine on whether this Application is competent before the Court. This is for the reason that at paragraph 5 of their counter affidavit, the respondents have averred that the applicant have already filed the similar Application seeking for the similar orders in this Court in Application No. 11 of 2022 with some of the parties who are also party to the instant Application. Mr. Sanga, State Attorney cemented this in his oral submission before the Court that the applicant has previously filed Application No. 11 of 2022 which is substantially the same as the current Application.

Mr. Mnyele for the applicant argued vehemently that first, the Application No. 11 of 2022 did not decide everything about the dispute. Second, that in the said Application, the Court did not decide the matter on merit but it rejected it summarily as there was a raised preliminary objection.

I have read the contents of the said Misc. Application No.11 of 2022 as it was attached in the counter affidavit of the respondents. It is my finding that the orders sought in the former Application are different from

this instant Application. The former Application was brought under Section 38(1) of the CPC while the current one is seeking for interim injunction or famously known as *Mareva injunction* under Section 2(3) of the Judicature and Application of Laws Act. Hence this averment by the respondents is misconceived and it is hereby disregarded by the Court.

Having decided on that point, now I will move on determining the Application on merit.

As correctly submitted by both counsels of the parties, in granting *Mareva injunction*, the principle of temporary injunction must be established. The applicant therefore has to meet all three conditions of temporary injunction as stipulated in the famous case of **Attilio vs. Mbowe** (1969) HCD No. 284, i.e. existence of a prima facie case, proof of sufferance of irreparable loss and balance of convenience.

In his submissions, Mr. Mnyele told the Court that the applicant has established all three conditions as per the requirement of the law. Starting with the first condition on the prima facie case, in the affidavit, it is obvious that the applicant is challenging the revocation, resurvey and subdivision of his land which is Plot No. 106, located at Burundi/Tunisia Road, Kinondoni, Dar es Salaam which he purport to hold under Certificate of Right of Occupancy No. 143527 (the suit property), that the revocation, resurvey and subdivision was not done according to the law. This is clearly

seen in the contents of the affidavit and the reply to the counter affidavit.

In the affidavit, the applicant state that he has recently learned that the Commissioner for Lands has revoked or taken a decision which is tantamount to revoking his right over the suit property on the basis of execution of the decree of the Court of Appeal. That the applicant have read the decision of the Court of Appeal in Civil Appeal No.60 of 2016 and have not seen any party of the said decision directing the Commissioner for Lands or any other person to revoke the applicant's title over the suit property. The applicant added that the respondents have not compensated him or provide any plan on how as a lawful owner of the land contained on Certificate of Title No. 143527 will be compensated for the exhausted improvements.

In reply to counter affidavit, the applicant denies that the Certificate of Title No. 143527 has been revoked by the President as claimed by the respondents. He also contend that the surveys and division of the plots has not been done according to the law and procedure.

In his submission in Court, Mr. Mnyele contended that the respondents are in violation of the law as the applicant was not accorded the right to be heard to enable him to object the rectification if any. He added further that the respondents violated Section 19 of the Urban Authorities Act, 2007.

According to the applicant, all those facts comprise a prima facie case which raises arguable issue to be determined by the court in the intended case.

I have read the decision of the Court of Appeal in Civil Appeal No.60 of 2016. In the said decision, the Court of Appeal held that the 4th respondent (who is now the applicant) was the owner of the detached House No. 3 and not the whole Plot No. 106. By this decision it is clear that the applicant has no claim to the whole Plot No. 106 but to his detached house which comprise only part of the Plot No. 106. In such position then the applicant's claims that the Commissioner for Lands' act of subdivision of the suit property is tantamount to revoking his right over the suit property is misconceived as his ownership has already been decided by the Court of Appeal.

The applicant is disputing the revocation of the suit property. At paragraph 5 of his reply to counter affidavit, the applicant states that;

" *it is denied that the President has revoked the Certificate of Title No. 143527, Plot No. 1o6 of Burundi/Tunisia Road as alleged or at all. I put the deponent on very strict proof".*

However, I find this statement by the applicant to be contradictory as at paragraph 2 of his affidavit, the applicant states thus;

" *I have recently learned that the Commissioner for Land has*

revoked or taken a decision which is tantamount to revoking my right over the suit property on the basis that he is executing the decree of the Court of Appeal in Civil Appeal No. 60 of 2016. ***The Commissioner for Lands decision was confirmed by an official search report dated 9 October 2023 which shows that the registered right holder is His Excellency the President of the United Republic of Tanzania..." (emphasis added).***

The above statement shows that the applicant have made a search and he is aware that the ownership of the suit property has been reverted to the President after revocation.

The applicant has averred that in any case, no notice was issued to him prior to the revocation of the intention to revoke the applicant's Title over the suit plot. It is the law that the affidavit and counter affidavit are evidence. There are letters annexed to the counter affidavit which shows that the applicant was duly served with the notice of rectification dated 16th August 2023. Also there are several letters which the respondents at diverse dates wrote to applicant informing him of the revocation and ordering for the applicant to return the disputed Certificate of Title so that the Registrar of Title can prepare another Title according to the subdivision. These letters are the one dated 22 March 2007 addressed to the applicant, the letter dated 27th August 2019 addressed to the applicant and one Farid Ahmed Mbarak Bazaar who

was the 2nd respondent in Civil Appeal No. 60 of 2016. I hence find the claims by the applicant to have no base at all.

The applicant has argued that the Court of Appeal decision did not order the rectification of the Title of the applicant on the suit plot. He admits that the Court of Appeal ordered the Commissioner for Lands to divide plots No. 105 and 106 into three equal plots.

In this, it is clear that the Court of Appeal has already determined and found that the High Court erred when it concluded that the Plot No. 106 is lawfully owned by the applicant. That according to the evidence the applicant applied to purchase a House on Plot No. 106 and not Plot No 106. This is reflected at page 25 of the Court of Appeal judgment. As said earlier the applicant was declared the lawful owner of the detached house and not the whole of Plot No 106.

In the same breath, the Court went on to order resurvey of plots No 105 and 106 and subdivide them equally into three equal plots. It follows that the respondents were compelled to act on the said Court order. I find that in the execution of the Court of Appeal order, and considering the court's findings that the applicant was not the owner of the whole of Plot 106, the revocation of the old titles was inevitable.

This is confirmed by the contents of the letter dated 22 March 2007 which was addressed to the applicant which directed the applicant to

submit/handover the Title to the authorities so that a new Title according to the Court order can be prepared. Therefore the applicant's right of ownership of his detached house was not denied or robbed in any way by the act of the Commissioner for Land.

About the claim of the applicant that the surveys and subdivision did not follow the law and procedures in accordance to Section 19 of the Urban Planning Act, I have read the said section. It provides for the stages of a detailed planning scheme by the planning authority which I find to be different with the circumstances in this matter where the Court of Appeal has ordered the Commissioner for Land to resurvey and subdivide the three plots in equal size.

It could have been understood if the applicant was challenging that the respondents have failed in executing the order of the Court of subdividing the three plots in equal size, but that is not the case. The respondents are simply carrying the Court of Appeal orders. They could not resurvey and subdivide the three plots while the owners still holds their Titles to the land as they are, the changes of ownership was necessary so as to comply with the said court's order.

Having made analysis of the applicant's averments along with the evidence available, I find that the applicant have failed to establish that there is a prima facie case or a serious arguable case to be tried on the

facts alleged. This dispute emanates from the Court of Appeal order which is being implemented by the respondents and the applicant is challenging the way it is implemented. I find that the respondents are executing the said order as it was directed by the Court and they have not contravened any law or procedure.

On the issue of compensation, I find that it cannot stand in the application for interim injunction as it is a damage which can be atoned by monetary payment.

Since I have found that the applicant have failed to establish the first condition, I need not dwell in determining the other two conditions since it is also trite law that the three conditions are to be met cumulatively and meeting one or two conditions will not be sufficient for the purpose of the court exercising its discretion to grant an injunction.

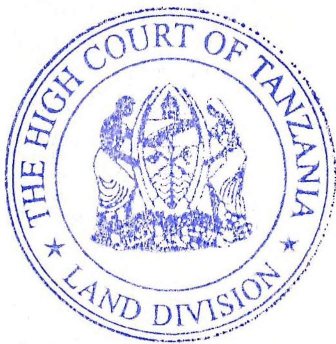
Before I conclude, I will address the point raised in the reply to the counter affidavit that the deponent of the respondents' counter affidavit one Adelfrida Camilius Lekule has no locus to swear on behalf or 2nd,3rd,5th and 6th respondents as she has not displayed an authority to do so and that she did not state that she swore the counter affidavit on their behalf. However, as correctly argued by Mr. Sanga, at paragraph 2 of the counter affidavit, the deponent expressly stated that she has been duly authorized by all respondents to swear on their behalf. In

addition, at paragraph 1 of the counter affidavit, the deponent state that she is conversant with the facts she is deposing. I therefore find the allegations by the applicant to be misconceived and lacks merit and I disregard them.

In the upshot and foregoing reasons, I find this Application to have no merit on the base that the Applicant has failed to establish that there is a prima facie case on the facts alleged.

The Application is dismissed with costs.

Order accordingly.



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A. MSAFIRI

JUDGE

06/12/2023