

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 3258 OF 2024

(Originated from Land Case No. 2384 of 2024)

OMARI MOHAMED WAGE (Administrator of the estate of the late
MNAENU KIDATO alias MNAYENU KIDATO).....APPLICANT

VERSUS

KITWANA MWINCHANDE KIDATO (Administrator of the estate of the
late KIDATO MWINCHANDE KIDATO).....1ST RESPONDENT
THE COMMISSIONER FOR LANDS.....2ND RESPONDENT
THE REGISTRAR OF TITLES.....3RD RESPONDENT
THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

RULING

27th March & 12th April 2024

L. HEMED, J.

This is application has been made under sections 68 (e), 95 and Order 37 Rule 1 (a), of the Civil Procedure Code [CAP 33 R: E 2019]. The Applicant is seeking for the following orders:-

"1. That the Hon. Court be pleased to grant an injunction restraining the 1st respondent or his agents or his assigns or contractors or workmen or any person working under him or

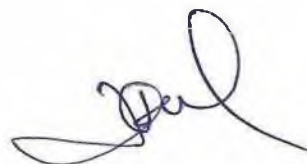


under his instructions, from carrying out construction or any development of whatever kind and nature, in plot no. 7 Block C, Kariakoo area, Ilala, Dar es Salaam (the suit premises) pending determination of land case no. 2384 of 2024, pending in this case.

2. Any other order the Hon. Court may deem fit to issue.

3. Costs of this application be provided for."
(Emphasis added)

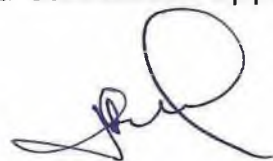
The Application has been supported by the affidavit of one **Omar Mohamed Wage** who is the Applicant in the instant matter and has been challenged by the respondents through the counter affidavits of one **Hosea Chamba** and **Frida Mollel**. Due to time constraint, it was directed that the application to be argued by way of written submissions. The learned advocates, **Mr. Godwin Musa Mwapongo** and **Mr. Samson Mbamba**, actively acted for applicant while the 1st respondent enjoyed the service of **Mr. Hosea Chamba**, advocate. The 2nd, 3rd and 4th respondents were duly represented by **Ms. Frida Mollel**, learned State Attorney. The parties managed to file their respective submissions as directed by the Court.



I have gone through the rival affidavits and submissions filed by the parties. The question for determination is whether the application is meritorious worth for a grant.

The facts and arguments made available by the Applicant to persuade the court are such that, the Applicant is the Administrator of the estate of the late **MNAYENU KIDATO**. He has instituted **Land Case No. 2384 of 2024** in this Court against the respondents claiming that house on Plot No. 7 Block 6 Kariakoo is part of the estate of the late **MNAYENU KIDATO** allocated to him in 1969 vide the letter of offer dated 6th January 1969. He also claims for a declaratory order that the transfer of the property in the names of the late **KIDATO MWINCHANDE KIDATO** was illegal, improper, unlawful and a product of fraud.

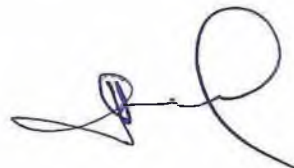
Following his death, the late **KIDATO MWINCHANDE KIDATO**, the oldest son was directed by the family to manage the house by collecting rent and distribute to the beneficiaries. In 2016 the family held a meeting and decided to sale the said house. However, in order to sale it the late **KIDATO MWINCHANDE KIDATO** was directed to commence the probate cause of the late **MNAYENU KIDATO** who refused due to old age, hence the Applicant was nominated and successful applied for letters

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of administration.

In July 2017 he demanded from the late **KIDATO MWINCHANDE KIDATO** to be handed over with ownership documents of the suit property so that he could be registered as Legal Personal Representative, in vain. According to the applicant, it was later discovered that the property had been transferred to the late **KIDATO MWINCHANDE KIDATO** by fraud *vide* CT No. 85177. Aggrieved by such act, the Applicant opted to commence legal proceedings against the respondents challenging the transfer of the said suit landed property to one **Kidato Mwinchande Kidato**. He also alleges that, while the main suit is still pending, the 1st respondent is carrying out development in the plot with a view to alienating it from the applicant, heirs and beneficiaries.

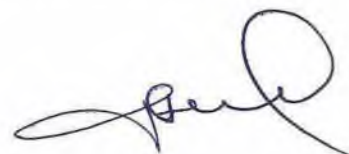
I have taken note of the several grounds supporting the Application but I am of the view that these grounds can be adequately summarized under the question whether the conditions for granting temporary injunction have been met in this case. Applications for temporary injunctions are regulated by Order XXXVII of the **Civil Procedure Code** [Cap.33 R.E 2019] which in Rule 1, provides as follows:-



"(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit or suffering loss of value by reason of its continued use by any party to the suit or wrongly sold in execution of a decree; or

(b) that the defendant threatens, or intends to remove or dispose of his property with a view to defraud his creditors, the court may by order grant temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of the property as the court thinks fit, until the disposal of the suit or until further orders."

Something to note is that, granting of temporary injunction falls within the discretion powers of the court as was held in **Alloys Anthony Duwe vs Ally Juu ya Watu** (1969) HCD 268. The purpose of the temporary injunctive order is to preserve the *status quo* of the suit property until the parties' rights in the subject matter are determined in the main suit. The conditions to be satisfied by a party seeking injunctive orders have been discussed in several cases including the famous case of **Atilio vs. Mbowe**, (1969) HCD 284 where Hon. Georges, C.J, set criteria as follows:

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1. The applicant must show a *prima facie* case with a probability of success;
2. The Applicant is likely to suffer irreparable loss;
3. That on the balance of convenience, there will be greater hardship and mischief suffered by the applicant from withholding of the injunction than will be suffered by the respondent from granting it.

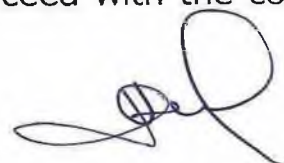
Let me start with the 1st condition on establishment of *prima facie* case. The counsel for the Applicant have asserted that there is a legal question to be determined by the court through the main suit which is pending in this court. The learned counsel have urged the court to find that there is a *prima facie* case and proceed to grant the application.

On his part, the counsel for the 1st Respondent was of the view that there is no *prima facie* case being established as the Applicant is not the registered owner of the suit landed property. In the counter affidavit and submission to oppose the application, it has been insisted by the advocate of the 1st Respondent that the suit property is party of the estate of the late **Kidato Mwinchande Kidato** and hence there is no *prima facie* case established by the applicant warranting grant of the application.



According to the facts demonstrated by the Applicant, there is a pending **Land Case No. 2384 of 2024**, on ownership of the suit land. I have also noted that the Applicant has alleged fraud in the transfer of the suit landed property to the late **KIDATO MWINCHANDE KIDATO**. From the facts demonstrated in the affidavit in support of the application, I find a *prima facie* case to have been established. I am holding so because at this stage it does not need to be proved by evidence that the applicant real has interests in the suit landed property. What is important in the application like the one at hand is only to state facts that establish a contested issue, which the court will be invited to try in the main suit. In my opinion, the Applicant has managed so to do.

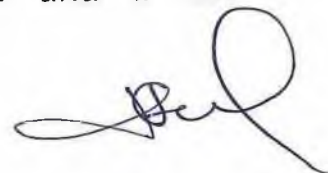
The 2nd condition which the applicant needs to demonstrate is the probability of suffering irreparable loss in case the court refrains to grant the prayer for injunctive orders. In the instant case, the Applicant seeks for injunction order to restrain the 1st respondent from **carrying out construction or any development of whatever kind and nature, in the suit premises pending determination of Land Case no. 2384 of 2024**. The submission of the counsel for the Applicant in respect to the 2nd condition was that if the Applicant is left to proceed with the construction

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activities, will amount to alienating the suit land from the Applicant and the heirs/beneficiaries. On the part of the 1st Respondent, it was argued that the applicant has failed to demonstrate irreparable loss that he will suffer in case the injunctive order will be withheld.

I must state right here that, according to the facts available, there is no dispute that the suit property is currently registered in the name of the late **KIDATO MWINCHANDE KIDATO**. I am also aware that in Land Case No.2384 of 2024, parties are disputing on the ownership of the same suit land. The question is, will the applicant suffer irreparable loss if the 1st Respondent is left to effect develop or construction in the suit landed property? In my firm view, the applicant will suffer no irreparable loss if the construction or any development is left to be carried out therein. I am holding so because if the Applicant will emerge the winner in the main suit then he may be able to recover the suit landed property at the *status ante* as the defendant may be ordered to remove his developments at his own costs. In **American Cyanamid vs. Ethicon Limited**, 1975 AC at page 396, court noted that the injunction would not be granted;


"if damages in the measure recoverable at common law would be adequate remedied and if the

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defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage."

In the instant case, the property is not in danger of being wasted, damaged, alienated, or being wrongly sold. The Applicant alleges that the 1st Respondent is effecting construction or development in it which in my opinion cannot cause irreparable loss on the part of the Applicant. It is the 1st respondent who is effecting the alleged development at own risk/peril as if he will lose in the main case he will be the one to remove the development effected. Going through the entire affidavit and the submissions made by the Applicant, I have failed to see any irreparable loss that the Applicant may suffer in case the court refuse to grant the Application.

The 3rd and the last condition is on the balance of convenience. Under this condition, the Applicant must be able to demonstrate that there will be greater hardship and mischief that will be suffered by him if the court withhold the injunction than will be suffered by the respondent from granting it. I have gone through all paragraphs in the affidavit supporting

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the application together with the submissions thereof; I could not find any facts showing that the applicant will suffer much than the 1st Respondent in case the court refuses to grant the instant application. Having failed to demonstrate irreparable loss, there is no way the Applicant can be said to suffer greater hardship than the 1st Respondent if the court opts to withhold the injunction.

In the final analysis, I find the application devoid of merits as it has failed to meet cumulatively all the three conditions stated in the **Atilio vs Mbowe** (*supra*). I proceed to dismiss it. In the circumstance of the instant application where the Applicant and the 1st Respondent appear to be relatives, I order each party to bear its own costs. Order accordingly.

DATED at **DAR ES SALAAM** this 12th April 2024.




L. HEMED

JUDGE