

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

MISCELLANEOUS LAND APPLICATION NO. 101 OF 2021

OILCOM TANZANIA LIMITEDAPPLICANT

VERSUS

CHRISTOPHER LETSON MGALLA1ST RESPONDENT

TUNDUMA TOWN COUNCIL2ND RESPONDENT

COMMISSIONER OF LANDS3RD RESPONDENT

REGISTRAR OF TITLES4TH RESPONDENT

PERMANENT SECRETARY MINISTRY OF LANDS AND

HUMAN SETTLEMENT DEVELOPMENTS5TH RESPONDENT

ATTORNEY GENERAL6TH RESPONDENT

RULING

A.A. MBAGWA J.

This is a maleva application in which the applicant is praying for temporary injunction against the 1st respondent pending expiry of ninety day notice for instituting ensuing civil case. The application is made by way of chamber summons under section 2(3) of the Judicature and Application of Laws Act [Cap. 358 R.E. 2019], sections 68(e), 95 and Order XXXVII(1)(a)(b) of the Civil Procedure Code [Cap. 33 R.E. 2019] and it is supported by an affidavit of Fuad Omar Mbarak, the principal officer of the applicant. The application is opposed by all respondents through counter affidavit. Apart from opposing the application, the respondents also raised two points of preliminary objection.



The applicant claims to be the lawful owner of a farm No. 1072 comprised in Plot 9 and 10 Block G Katete Village within Tunduma Town Council, Mbozi District in Songwe Region registered under certificate of title No. 12210-MBYRL issued in 2008. In contrast, the 1st respondent also claims ownership over the same piece of land but with title number 26764 – MBYRL issued in 2013.

When the application came for hearing, the applicant was represented by Ramadhani Karume, learned advocate on the one side. 1st respondent had the services Paul William Mashoke, learned advocate, whilst the 2nd to 6th respondents were represented by Joseph Tibaijuka learned State Attorney, on the other side.

At the very outset, Mr. Tibaijuka prayed to withdraw the notice of preliminary objection which he had earlier on filed. The prayer was not objected by other parties. Thus, this Court marked the notice of preliminary objection withdrawn.

Submitting in support of the application, Mr. Karume said that the application has been brought as maleva application in that it has been preferred in absence of the main suit. He said that the intended suit requires the government departments to be joined as necessary parties. Further, Karume argued that section 6(2) of the Government Proceedings Act requires a statutory ninety days notice to be issued to the government departments prior to instituting the case.

Mr. Karume adopted contents of affidavit of Fuad Omar Mbarak and submitted that the prayer sought is for interim injunction against the 1st respondent, his agent or whoever is acting on his behalf to construct or enter any part of the land located in farm No. 1072 comprised in Plot 9 and 10 Block G Katete Village within Tunduma Town Council, Mbozi

District in Songwe Region registered under certificate of title No. 12210-MBYRL in the name of Oilcom Tanzania Limited until to expiry of ninety days' notice. It was further submitted by Karume that the applicant was issued with the certificate of title on 25th August, 2008 but in 2013 the 1st respondent trespassed into the premises by constructing a fence. The counsel said that the applicant complained to the District Executive Director for Mbozi. However, to the applicant's dismay, the 1st respondent claimed to be the lawful owner with certificate of title No. 26764-MBYRL issued in 2013. Mr. Karume continued to submit that since then, they have been trying to settle the dispute amicably but of recent the 1st respondent has started development in suit premises. He prayed the application to be granted by relying on the case of **Mek One Industries Limited vs Rungwe District Council & Attorney General**, Misc. Application No. 08 of 2020 High Court of Tanzania at Mbeya.

On his part, Mr. Tibaijuka for 2nd to 6th respondents, resisted the application. He adopted the contents of counter affidavit and submitted that the application is not a maleva because, in the chamber summons, the applicant indicated that there is a pending case to wit, Land Case No..... of 2021.

Submitting in respect of the provisions of order XXXVII, Mr. Tibaijuka argued that the proviso thereon prohibits temporary injunction against the government. He added that section 25 of the Written Laws Miscellaneous Amendments Act No. 1 of 2020 defines government to include Ministries, Government Departments and Local Government Authorities hence the 2nd to 6th respondents are government entities to which temporary injunction cannot be issued.

With regard to section 2(3) of JALA, Tibaijuka was emphatic that it allows the application of common law, doctrine of equity and statutes of



general application which were in force in England on 22nd day of July, 1920 but the applicant did not show on which common law, doctrine of equity or statutes of general application he predicated the application.

In addition, the learned State Attorney contended that the statutory notice was served to the Attorney General only instead of all the 2nd to 6th respondents as required under section 6(2) of the Government Proceedings Act.

Regarding the contention that the applicant will suffer irreparable loss in case the application is not granted, Mr Tibaijuka said that there is no irreparable loss which the applicant is likely to suffer. He said that where a loss can be compensated in monetary form, such loss cannot be termed as irreparable loss. He relied on the case of **Mwakeye Investment Limited vs Access Bank Tanzania Limited**, Misc. Land Application No. 654 of 2016 High Court Land Division at Dar es Salaam.

On his part, the counsel for the 1st respondent told the Court that there is no any ongoing development in the suit premises. He added that the development stopped in 2019 when the applicant instituted Land Case No. 20 of 2019. When probed by the court on whether his client would suffer irreparable loss, he replied that the 1st respondent would not suffer any irreparable loss in case the application is granted.

In a short rejoinder, Mr. Karume stated that by its nature a maleva injunction is a common law principle and it has been applicable in our jurisdiction for years. In respect of Land Case No ... of 2021, Mr. Karume conceded that it was cited in the chamber summons but hastily submitted that it was just a typing error. He thus prayed the court to apply overriding objective principle.



Regarding the prohibition of temporary injunction against the government departments, the applicant's counsel submitted that the order sought is against the 1st respondent and not the government departments. He stressed that the government departments were joined just as necessary parties.

With respect to sections 68(e), 95 and order XXXVII (a)(b) of the Civil Procedure Code and 2(3) of JALA, Karume submitted that the provisions give the Court powers to entertain application of this nature.

Having heard the rival submissions and upon going through the application documents, I find it apposite to commence by addressing the issue of mentioning 'Land Case No.... of 2021 in the chamber summons'. Mr. Tibaijuka submitted that the application is not a maleva in that the applicant has indicated that there is a pending case. Karume conceded the observation by Tibaijuka but stated that it was just a typing error. In my view, this need not detain me as the cited case is not in existence and no case number has been cited by the applicant. I agree with Karume that this was a typing error and therefore inconsequential. Even by reading the application documents holistically, it is clear that there is no pending case.

On whether temporary injunction can be granted pending institution of the suit and against the government, Mr. Tibaijuka submitted that proviso to order XXXVII (a)(b) of the Civil Procedure Code prohibits the court to grant temporary injunction against the government. Further, with regard to citing section 2(3) of Judicature and Application of Laws Act Cap. 358, Tibaijuka submitted that the applicant was supposed to cite the specific common law, doctrine of equity or statutes of general application which was in force in England on 22nd day of July, 1920.



Mr. Karume replied that the order for temporary injunction, in essence, is sought only against the 1st respondent and that sections 68(e), 95 and order XXXVII(a)(b) of the Civil Procedure Code and 2(3) of JALA give powers the court to entertain the application of this nature.

It is common cause that section 2(3) of the Judicature and Application of Laws Act empowers the Court to apply common law, doctrine of equity and statutes of general application which were in force in England on 22nd of July, 1920. This is particularly where matter is not specifically covered in the existing legislation. It is further the law that, under section 95 of the Civil Procedure Code, the court has powers to grant interim injunction orders pending institution of a suit. This position was stated in **Tanzania Electric Supply Company (TANESCO) vs Independent Power Tanzania Limited (IPTL) and 2 Others** [2000] TLR 324, where it was held;

'The Civil Procedure Code cannot be said to be exhaustive. It is legitimate, therefore, to apply, under section 2(2) of the Judicature and Application of Laws Ordinance, relevant rules of Common Law and statutes of general application in force in England on the twenty-second day of July, 1920, where the Code is silent. So the High Court has jurisdiction in a proper case to grant an "interim injunction order" pending institution of a suit or in circumstances not covered by Order XXXVII of the Code.'

The applicant cited section 95 of the Civil Procedure Code which empowers the court with inherent powers to make any order where there is no specific law governing the situation. Since there is no express provision of law governing temporary injunction pending institution of the suit, it is my views that section 95 of the Civil Procedure Code is a proper enabling provision for the orders sought. I further agree with

Karume that the order sought under inter-parties hearing is for an interim injunction against the 1st respondent, his agents or any other person acting on his behalf and not against the 2nd to 6th respondents.

In view of the above authorities, it is my findings that the argument by the Mr. Tibaijuka that applicant was required to cite specific common law, doctrine of equity or statutes of general application is without merits.

Mr. Tibaijuka argued that the notice was served to 6th respondent only. The applicant counsel conceded and prayed the court to invoke overriding objective principle. Upon navigating through the record, it is common cause that the Attorney General represented all the government departments in this case as such, the 2nd to 5th respondents were not prejudiced in anyhow by not being served with the notice.

Pertaining to the averment that there ought to be affidavit of Dimwe Investment Consult Limited, I think this argument is misplaced as it is not always the case that once a person has been mentioned in someone's affidavit, it necessarily follows that the mentioned person should also swear/affirm affidavit. Application of this nature is interlocutory whose proof is on reasonable grounds.

On whether the applicant stands to suffer irreparable loss, Mr. Tibaijuka said that the applicant can be compensated in terms of money hence he did not see any irreparable loss that the applicant is likely to suffer. Paul William Mashoke, counsel for 1st respondent submitted there is no ongoing development since 2019 and confirmed to the court that the 1st respondent would not suffer any irreparable loss. While I agree with Mr. Tibaijuka that the loss anticipated by the applicant can be recovered through claim for damages, I find it prudent and just to grant the order sought. This is because the 1st respondent's counsel has conceded that

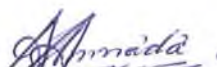
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there is no ongoing development in the suit premises and further assured the court that no prejudice would be occasioned. Further, it is common cause that there is dispute over the land in question and the applicant has established that he is intending to institute a suit. I thus find it just to maintain the status quo pending institution of the suit i.e. until expiry of ninety day notice.

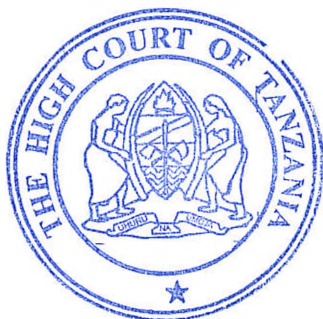
In the upshot, I grant the applicant's prayer. The 1st respondent, his agents or any person acting on his behalf is restrained from developing any part of land located in farm No. 1072 comprised in plot 9 and 10 Block G at Katete Village within Tunduma Town Council, Mbozi District in Songwe Region registered under certificate of title No. 12210-MBYRL in the name of Oilcom Tanzania Limited pending expiry of ninety day notice which was issued and served to the 6th respondent on 1st December, 2021. Each party to bear its own.


It is so ordered.

Right of appeal fully explained.


A.A Mbagwa
Judge
28/12/2021

Ruling delivered in the presence of the 1st respondent's counsel, Mr. William Paul Mashoke and in absence of other parties this day of 28th December, 2021.




A.A Mbagwa
Judge
28/12/2021