

TANZANIA / JUDGMENT

RULING PAULO MTUNGUJA final

COURT
TANZLIIDECIDED
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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB - REGISTRY AT MBEYA MISCELLANEOUS LAND APPLICATION NO. 17236 OF 2024 CASE
REFERENCE NO. 202407181000017236

1. PAULO MTUNGUJA
2. SHADRACK CHAULA
3. NEEMA PAULO
4. PONSIO CHRISPIN KHANDI
5. TEGEMEO MOTO
6. MICHAEL SOLO
7. IRADI PILLA
8. ELIMATI SWALO
9. SALA ROBART
10. DANI NG'OLO
11. EMMANUEL MWAIKOKESYA
12. AJUAYE MWANJI
13. JENY MAHENGE
14. ALAFATI MALONGO
15. SAVALIA LUTEGO
16. DINJELI MWINUKA
17. LUKUSANI PILLA
18. SEVELINA MOTOAPPLICANTS
19. EMANUEL HEPELWA

20. FRENK SANGA
21. JALIWA JOHN
22. SIFAEI CHANDA
23. YONA MWAMBENE
24. ZUBELI MALINGO
25. SALOME RAMADHANI
26. YOLAMU ALONI
27. NIKO MWINUKA
28. AMBELE JOHN
29. ENDELIANA KYANDO
30. FURAHA JAMSONI
31. INOSENTI SEMWA
32. SAMWEL NYINGILE
33. MARKO MBWANJI
34. AMINA BANDA
35. ADAMU SANGA 1
36. RIMONDI HEPOLWA
37. JOHN MGENI
38. NIGILE MWINUKA
39. MAJALIWA MASEBO
40. ZAKALIA MWALYEGO
41. SHUNGU MWALIZI
42. SAMSONI MGAYA
43. BELTA JOEL MGOGO
44. MANINGI MBWAGA
45. ESTA MWALUBANDA
46. ELIZABERT SYANGA
47. LAITA MWASANGUNDA

48. PHILIMONI MBWILO
49. AHAZI MBWILO
50. PAULO MTUNGUJA
51. AIZECK MPOMO
52. KEVINI MPOMA
53. DANIEL ISACK
54. TEGEMEA JEMSI
55. JAFET SANGA
56. FRENK SANGA
57. PAULO MWALONGO
58. WISTONI NDIRIMBWA
59. MPENDWA
60. BAHATI SHERIA APPLICANTS
61. ATUPELE ATUGANILE
62. ANTONI MGAYA
63. KANTE BOY
64. ATUPELE MWALUKASA
65. MAGINUS NDELWA
66. CHALES MWATOSYA
67. EZEKIA SAIMONI
68. ANNA SANGA
69. IBRAHIMU PATSONI
70. BARIDI
71. BONY MGAYA
72. LICY MGAYA
73. FARAHA ATUPELE
74. MARIAM MGAYA
75. SAMWEL SAMSONI

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76. SALAH JAFETI
 77. MAGRET ATUPELE
 78. JOSEPH NYANGA
 79. SUZANA MTUGALE
 80. ELIA MWAIPOPO
 81. ELIA MGAYA
 82. WILLIOSONI MWAMBENJA
 83. LOVENES LUVANDA 2
 84. MICHAEL MWAMBONJA
 85. OMARI WILISONI
 86. BELTA MWAMBENJA
 87. EDINA CHAULA
 88. SALA LUVANDA
 89. MARKO WILISONI
 90. EDINA HAMISI
 91. STELLA WILISONI
 92. SALATIELI LUVANDA
 93. AGNES YESAYA LINGO
 94. ELIZABERT M. MWANDAWALEAPPLICANTS
 95. PETER YESAYA LINGO
 96. ALBERT MWAKA MZURI
 97. ERASTO P. MBWILO
 98. UPENDO MWINUKA
 99. FARAJA MAHENGE
 100. PATRICK MBILINYI
 101. AMINA P. SANGA
 102. ENOCK B. SANGA
 103. JACKSONI M. CHENELA

104. HEZRONI MBILINYI VERSUS TANZANIA FOREST SERVICES (TFS) AGENCY (MBEYA ZONE).....1ST RESPONDENT DISTRICT COMMISSIONER FOR MBEYA.....2ND RESPONDENT DISTRICT COMMISSIONER FOR MBARALI.....3RD RESPONDENT THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

Date of hearing: 6/8/2024 Date of ruling: 4/9/2024 NONGWA, J. In this ruling the applicants have brought this application for maintenance of status quo against the respondents, it is made by way of chamber summons under section 2(3) of the Judicature and Application 3 of Laws Act [Cap. 358 R: E 2019] and section 95 of the Civil Procedure Code [Cap. 33 R: E 2019]. The applicants seek the following orders;

1. This honourable court be pleased to make an order that status quo in respect of the applicants' unsurvey land situated at Lwila, Nsalaga and Itezi Mashariki ward in the district of Mbeya and Mbarali district and being bordered by; in the west Chunya road, East Mtakuja B kitongoji- Machimbo, in the North there is a river and in the South there is a river Ngwese be maintained pending hearing and determination of application for temporary injunction to be filed after expiry of 90 days statutory notice of intention to sue the government.
2. Cost of the suit
3. Any other relief(s) as the honourable court shall deem fit, just and equitable to grant. The chamber summons is supported by applicants' joint affidavit. It is stated that the applicants are residents of Lwila, Nsalaga and Itezi Mashariki within the districts of Mbeya and Mbarali where the land forming subject of this application is situated. It is averred that they have been in the land since 1950's conducting various social economic activities including agriculture, the basis of their lives. That in January 2024 the 4 respondents invaded the land and threatened to destroy house, crops and require to vacate the land without legal justification. That the move has resulted into dispute and they have taken steps by serving the respondents with statutory ninety days. While waiting response from the respondents, they have been told to vacate the land on their will and have threatened to use force in case of defiance. Thus preferred this application for the above-mentioned orders. The application is opposed by a counter affidavit of Isack Felix Mbilinyi, the principal officer of the first respondent. It is averred that the land is owned by the respondents as protected area through G.N. No. 157 of 1942 and it has been unlawfully trespassed by the applicants. That there is no threat to evict the applicants but a meeting was held, ordered the applicants to vacate the area and move to alternative areas allocated by the government. The second, third and fourth respondent did not file counter affidavit to support or oppose the application. When the application came on for hearing the applicant were represented by Mr. Philipo Mwakilima assisted by Ms. Zawadi Erasto, both learned advocates. The respondents were represented by Mr. Allan Shija, Senior State Attorney. 5 In his submission Mr. Mwakilima adopted the contents of affidavit and argued that the application is made for

the court to maintain status quo pending the expiry of ninety days' notice issued to the respondents. That the respondents led by 1st respondent has been interring into the land and requesting the applicants and their families to vacate without following procedures in land acquisition procedure. He submitted that to grant the application of this nature there are certain conditions which must be met as stipulated in the case of Sunset Tarangire Ltd vs Registered trustees of Makame Wildlife Management Area and 2 others, Misc. civil application no. 14533 of 2024, the HC Manyara Babati. One that the respondent must be served with ninety days' notice, which he said the applicants have complied. He said the applicants have interests on the said land, their lives are directly attached to that land referring at page 11 and 12 of the applicants' affidavit. The averment, Mr. Mwakilima said has not been countered by the respondents because in their counter affidavit the respondents evasively denied and put the applicants to the strict proof, without denying what the applicants alleged, this he said was contrary to Order 8 rule 5 of CPC. From the above he prayed the application to be granted. 6 In reply, Mr. Shija adopted the counter affidavit and submitted the application is governed by the condition put in the case of Atilio vs Mbowe (1969) HCD No. 284 and the Mareva Compania Raviera of

1980. He submitted that while the applicants are seeking maintenance of status quo, it would seem they are praying for temporary injunction against the government contrary to Order XXXVII rule 1(a)(b) of the CPC. Arguing the application in merit, state attorney said conditions found in the case of Atilio vs Mbowe must be met to grant the orders sought. On prima facie case, he submitted that although the applicants have deposed to have been in the land since 1950's none of them paraded evidence in form of inheritance or title document. That the respondents under paragraph 4 of the counter affidavit clearly state that they own land legally through GN No. 157 of 1942, thus the respondents are there legally before 1950s therefore on balance of probabilities the weight of evidence is on the respondents. On loss to be suffered, the state attorney contended that the land forming subject of dispute is 3000sqm is very small and the government is able to compensate it in kind or money. He said that the suit land is a reserve area, source of water and water is priceless, its scarcity everyone 7 will suffer, that trees are there for prevention of soil erosion which if disturbed, the loss cannot be recovered. On evasive denial in the counter affidavit, he said the law cited is applicable to complaints which is not the case here. Finally prayed the application to be dismissed. On rejoinder, Mr. Mwakilima said that mentioning of 3,000SQM is just typing errors, the land subject of this application is disclosed in the notice to sue as being 3,000 hectars as seen in prayer (a) in the chamber summons and para 13 of the founding affidavit. On proving ownership, counsel said the argument that the respondents are lawful owner via G.N. No.57 of 1942 is suitable during hearing of the main case and not at this stage. It is trite law that the Mareva injunction being interim injunction is sought prior to the institution of a suit. From the case of Mareva Compania Naviera SA v International Bulk Carriers SA [1980] 1 All ER. applying this principle, the supreme court of Canada in Aetna Financial Services v Feigelman (1985) 1 SCR 2 stated two conditions must be established firstly, the applicant must demonstrate a strong prima facie case or a good

and arguable case and secondly having all the 8 circumstances of the case, it appears that granting the injunction is just and justifiable. This court has on numerous occasions accepted applications for an interim injunction even where there is no pending suit. In special circumstances, an application for interim injunction may be applied and granted without a pending suit. I have considered the application document and rival submissions for and against the application. As stated in the foregoing paragraphs, this is one of the rare cases in which application for interim order is sought in absence of the main suit which is always the case. The powers of the court to entertain such kind of matter is embodied under section 2(3) of the Judicature and Application of Laws Act [Cap.358 R: E2019] which enjoins the court to apply the common law, doctrine of equity and statutes of general application in force in England if the matter is not covered in the existing legislations. This is cemented by the holding in case of Tanzania Electric Supply Company (TANESCO) vs Independent Power Tanzania Limited (IPTL) and 2 Others [2000] TLR 324, the court held that; 'The Civil Procedure Code cannot be said to be exhaustive. It is legitimate, therefore, to apply, under section 2(2) of the 9 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.' From the above, there is no flicker of doubt that this application is competently before this court. I opt to deal with some preliminary points arose in the course of submissions of the parties. One, is the argument by the state attorney that temporary injunction is being sought against the government. I have perused the application documents and that point is not here or there, first in the chamber summons, the court is moved under section 2(3) of JALA and section 95 of the CPC which does not deal with temporary injunction. In prayer (a) the order sought is maintenance of status quo which does not necessary carry the order for temporary injunction. Dealing with merits of the application, there is consensus on both sides that to grant order for maintenance of status quo there are some conditions which must be fulfilled one, existence a serious triable issue between the parties; two, a looming danger of irreparable injury to plaintiff and, on a balance of convenience; and three, the existence of 10 more sufferings by plaintiff if the injunction is refused than would be the case with the defendants if granted. Mr. Mwakilima added another condition that the applicant must serve ninety days to sue to the respondent. It is common knowledge that the applicant cannot institute a case against the respondents before the maturity of 90 days of the notice in question. In this application there is no dispute that the respondents have been served with statutory ninety days as required by section 6(3) of the Government Proceedings Act [Cap 5 R: E 2019]. Thus, the condition is met. On existence of arguable issue, in the affidavit the applicants allege to be the owners while in the counter affidavit the respondent also allege that it is the property of the Government. In the submission state attorney has submitted that the respondent is the owner through G.N. 147 of 1942 as opposed to the applicant who did not parade any evidence. The essence of the requirement of existence of triable issue as between the parties, the court is only requiring to be satisfied that whether

the alleged facts in the affidavit if established the applicant is entitled to some relief. At this stage no evidence as to ownership need be adduced, that is necessary at the stage of deciding rights of parties in the 11 main suit. In Colgate - Palmolive Company vs Zacharia Provision Store and 3 Others, Civil Case No. 1 of 1997, Mapigano, J., as he then was, had this to say; 'I direct myself that in principle the prima facie case rule does not require that the court should examine the material before it closely and come to a conclusion that the plaintiff has a case in which he is likely to succeed, for to do so would amount to prejudging the case on its merits. All that the court has to be satisfied of, is that on the face of it the plaintiff has a case which needs consideration and that there is likelihood of the suit succeeding.' From my perusal of the applicants' affidavit through paragraph 2, 3, 4, 8 and 10, that they are in the land in which the respondents are intending to evict them, the averment not denied by the first respondent under paragraph 8 of the counter affidavit affirms that there is a prima facie case between the parties. Thus, satisfied that the first condition is established by the applicants. The second condition is whether the applicants stand to suffer irreparable loss, Mr. Mwakilima submitted that the applicants depend their earning on that area for sustainability of their lives whilst Mr. Shija said the area is very small and the government is capable of compensating the respondents in form of money or kind. The determination of irreparable loss depends on circumstances of each case, in this the applicants alleges that they depend their living on the land and are living there. The first respondent through counter affidavit did not dispute that the applicants are in the land and depends on it. Nor has been controverted that they are in the process of evicting the applicants in the suit land. The only reason was that the land is the reserve area, source of water from which all depends and trees are there to prevent soil erosion. Further that the government is able to compensate them, unfortunately, these statements not reflected in the counter affidavit. As to balance of convenience, based on the facts presented, I believe the applicants are the ones who stand to suffer as they are in physical occupation of the area. The first respondent in paragraph 8 and 9 states the applicants have trespassed the area and are required to move to alternative area allocated by the government of which it was not disclosed if the applicants have been shown and where it is located. This tells more that the applicants are the one who stand to suffer if the intended plan by the government to evict the applicants is carried out. Further the respondents have not submitted if they will be prejudiced if status quo is maintained. 13 In the upshot, I grant the application and an order that status quo in respect of land located at Lwila, Nsalaga and Itezi Mashariki within the district of Mbeya and Mbarali within the region of Mbeya be maintained pending expiry of ninety days' Notice issued to the respondents. Each party to bear its own costs given the circumstance of the application. V.M. NONGWA JUDGE 4/9/2024 Dated and delivered at Mbeya this 4th September 2024 in presence of Applicants, Ms. Beatrice Kessy for the applicants and Mr. Allan Shija Senior State Attorney and Mr. Alfred Andrew Nkwera State Attorney for Respondents. V.M. NONGWA JUDGE 14

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