

TANZANIA / JUDGMENT

RULING OF AYOUB GERVAS SANGA VS YOHANES LAIN SANGA

COURT
TANZLII

DECIDED
23 December 2024

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA SUB - REGISTRY AT MBEYA MISC. LAND APPLICATION NO. 29570 OF 2024 CASE REFERENCE NO. 202411211000029570 AYOUB GERVAS SANGA (as administrator of the Late GERVAS LAIN SANGA) APPLICANT VERSUS YOHANES LAIN SANGA 1ST RESPONDENT RUJEWU TOWNSHIP COUNCIL2ND RESPONDENT MBARALI DISTRICT COUNCIL3RD RESPONDENT COMMISSIONER FOR LANDS4TH RESPONDENT REGISTRAR OF TITLE5TH RESPONDENT ATTORNEY GENERAL6TH RESPONDENT

RULING

16th & 23rd December 2024 NONGWA, J. This is an application for temporary injunction, the applicant is seeking to restrain the Respondents, their agents, workmen, assignee, successor or any other person working under their instruction interfering with the property under the ownership of the Applicant, Administrator of Estate of late Gervas Lain Sanga by way of trespassing, surveying, processing ownership registering or disposing the land in any way, for as the Land measured 50 Acres (famous known as Vatco Farm) located at 1 Mangenyu area, Mtakuja Hamlet, Isisi, Rujewa Ward within Mbarali District in Mbeya Region demarcated on the South by Kitalima Farm, North by Fyandimi Farm, Mwasavani Farm, Elias Mwaminzi Farm and East Mwang’ombe Farm, pending the determination of the Main Suit. The application is made under section 68(e), 95 and Order XXXVII rule 1 of the Civil Procedure Code [Cap 33 R: E 2019] and supported by the affidavit of the applicant. The 1st respondent has filed a counter affidavit contesting the application. The 2nd to 6th respondents did not file counter affidavit to support or oppose the application. The facts as deposed in the affidavit, the contest is over 84 acres of land located at Mangenyu area mtakuja hamlet, Rujewa Township within Mbarali district. It is averred that the land was allocated to the late Gervas lain Sanga by the Rujewa Village in 1980, 50 acres is in the name of the late Gervas Lain Sanga and 34 acres was registered in the name of Yohanes Lain Sanga on behalf of the late Gervas Sanga. That the late Gervas died in 1991 and the 1st respondent was informally appointed by the clan meeting to supervise the deceased’s estates.

That in 2020, the 1st respondent was allowed to use 34 acres for agriculture, however in corroboration with other respondents has initiated the survey process and grant of certificate of right of occupancy in his name. 2 Further that, to calm the situation, they decided that the 1st respondent remain with 34 acres but has turned down and claims the whole 84 acres. It is averred that the 1st respondent is in use of 34 acres but has encroached other 50 acres which is being used by the applicant. It is stated that the 50 acres has been prepared for new agricultural season and seedling processes by the applicant but the 1st respondent is removing the applicant's family members from cultivating, hence this application. In the counter affidavit the 1st respondent disputed the claim and stated the 84 acres was allocated to him in 1986 by the Rujewa village. Overall, the 1st respondent turned each and every allegation in the applicant's affidavit all in his favour. When the application came for hearing, the applicant has been represented by Ms. Caroline Luhungu however, he prayed to argue on his own capacity whereas the 1st respondent was represented by Mr. Samson Suwi, learned counsel and Mr. Mpogole, state attorney appeared for the 2nd to 6th respondents. In his submission, the applicant adopted the affidavit and submitted that for temporary injunction to be granted three conditions must be met, that is, existence of the triable issue, loss that need to be 3 protected and the balance of convenience. He referred to the celebrated case of Atilio vs Mbowe (1969) HCD No. 284 and Chen Kai vs Hu Tao & 2 Others, Misc. Civil Application No. 28764 of 2024 [2024] TZHC 9756 (26 November 2024; TanzLII). Elaborating each pre-condition, on existence of triable issue, the applicant referred to paragraph 3 through 21 of the affidavit and 4 to 23 of the counter affidavit. The argument was that three issues are in contest one, allocation of the suit land, two; size of the allocated land and three, fraud in the process of allocation as demonstrated under paragraph 16 of the affidavit. The applicant submitted those are triable issues awaiting to be determined by this court Land Case No. 29491 of 2024. He argued at this stage, the court is not required to seek evidence to decide the points. He supported the argument with the case of Abdi Ally Salehe vs Asac Care Unit Limited & Others, Civil Revision No. 3 of 2012 [2013] TZCA 179 (30 July 2013; TanzLII) and Chen Kai (supra). In the second pre-condition on existence of irreparable loss. What amount to irreparable loss, the court was referred to Sarkar on Code of Civil Procedure Edition 9th in which the author states irreparable injury is one that will not be adequately remedied. He also cited the case of Paulo Mtunguja & 103 Others vs Tanzania Forest Service (TFS) 4 Agency (Mbeya Zone) & 3 Others, Misc. Land Application No. 17236 of 2024 [2024] TZHC 7825 (4 September 2024; TanzLII) in support of the preposition. The applicant contended irreparable loss is demonstrated under paragraph 21 to 31 of the affidavit that is, the applicant has already seeded 43 acres and his family member are cultivating. Further that there is likelihood of loss of life due to gunshot threat, machetes and other forms from the 1st respondent to the applicant's family members. The applicant added that if the survey is completed and sale done by the 1st respondent, they will lose the land. On balance of convenience, the applicant submitted that the family members of late Gervas Sanga with total of 14 people depends on the farms for their living compared to the 1st respondent who has eight children all employed and wealth people. He referred to paragraph 35 of the counter affidavit that they were able to support the 1st respondent by giving TZS 65,000,000/= as opposed to his side where only two are educated and the remaining depending on farming and petty business. Concluding his submission, the applicant argued that they be allowed to use 43 acres

which has been seeded by them and 34 acres 5 be used by the 1st respondent as previously arranged. From the above prayed the application be granted. In rebuttal as expected, Mr. Suwi adopted the counter affidavit and conceded to the pre-conditions for the grant of orders for temporary injunction. He submitted that the applicant has not demonstrated existence of arguable issue because the plaint of the main case is not attached to the affidavit, that without showing the reliefs sought to be determined in that main case or attaching the plaint relating to that main case the first condition is not met. The case of *AF Fast Logistics Company Limited vs Mek One Industries Limited*, Misc. Civil Application No. 16995 of 2024 [2024] TZHC 7158 (12 August 2024; TanzLII) was cited in support. Counsel submitted all what the applicant termed as arguable issue are statements from the bar for failure to annex plaint to the affidavit. On whether the applicant will suffer irreparable loss, Mr. Suwi submitted, irreparable loss must be material loss, not every loss is irreparable to justify grant of the injunction. He stated in the affidavit and counter affidavit, it has not been explained if the 1st respondent is unable to compensate the applicant. Regarding survey and issuing certificate of right of occupancy, it was argued that this is remediable. 6 On paragraph 28 to 34, counsel said the loss is speculative. He referred to the case of *Z.A.S Investment Co. Ltd vs Equity Bank (T) Ltd & Another*, Misc. Commercial Application No. 9714 of 2024 [2024] TZHCComD 96 (30 May 2024; TanzLII) to see who was in possession of the land at the time of filing the case in court. Counsel added the 1st respondent has been in use since 1986 and has seeded the farm. Last is balance of convenience, the respondent's counsel referred to paragraph 15 of the counter affidavit and submitted that out of 84 only 45 that have been cleared, levelled and in use by the 1st respondent. That in case he is stopped to cultivate is the one to suffer more while the applicant has other means of survival. Further that the respondent depends much on the said part of the farm which the applicant has invaded and seed it. During rejoinder, the applicant submitted that existence of the main case is seen in the title of the case and the claim is reproduced under paragraphs 2 and 3 of the affidavit. He added there is no law requiring to attach the plaint to application of this nature. On irreparable loss, the applicant referred to paragraph 34 of the reply to counter affidavit on the kind of loss to be suffered. On balance 7 of convenience, it was stated the 1st respondent did not state when he entered the land. Having considered rival submissions, the issue for my determination is whether this application has merit. The phrase "temporary injunction" is not defined by the CPC and the Law of Interpretation Act [Cap 1 R: E 2019]. Black's Law Dictionary defines in terms of its purpose that is a temporary injunction is issued before or during trial to prevent an irreparable injury from accruing before the court has a chance to decide a case. Temporary injunction is an equitable relief for maintaining the status quo between the parties pending hearing and determination of an action in court. The decision to grant or refuse grant of order for temporary injunction is entirely in the discretion of the court. In *National Housing Corporation vs Peter Kassidi & Others*, Civil Application No. 243 of 2016 [2019] TZCA 153 (4 June 2019; TanzLII) the court stated; 'It bears reflecting that a temporary injunction is an equitable relief for maintaining the status quo between the parties pending the hearing and determination of an action in court. The remedy is in the nature of a prohibitory order granted at the discretion of the court against a party....' 8 Right so parties are in agreement that for temporary injunctive orders to be granted three pre-conditions must be established, one, existence of a serious question of facts or triable

issues; two, the possible existence of irreparable loss that needs to be protected by the court; and three, balance of convenience, the applicant is likely to suffer more significant hardship and mischief if the injunction is withheld. I will test each pre-condition and rule if it has been met by the applicant. Starting with existence of triable issue, the applicant submitted in the main case that there are three issues for determination that is allocation, size of the land and fraud. In reply, Mr. Suwi stated the plaintiff was not attached to the affidavit to see existence of the triable issue. In rejoinder it was submitted that, are stated under paragraphs 2 and 3 of the affidavit. Having considered the arguments, I agree with the respondent's counsel that case number of the main case was not pleaded in the affidavit, however there is no contest that there is main case pending before this court as between the parties. Mr. Suwi relied on the case of AF Fast Logistics Company Limited (supra) to build his point that failure to attach plaintiff makes existence of triable issue unproved. First 9 this is a decision of this court not binding upon me. I am influenced by the decision in the case of Baraka Steven vs The Republic, Criminal Appeal No. 541 of 2020 [2024] TZCA 879 (12 September 2024; TanzLII) on the duty of the court to cross check with its record when another case relevant for determination of the matter before it is being mentioned by parties. In that regard the argument is only technical not affecting the application bearing that application of this nature cannot stand alone, it depends on existence of the main case. That apart, after going through the applicant's affidavit, some reliefs sought in the main suit are reproduced under paragraph 2 and 3 of the affidavit, declaration of ownership paragraph 2 and 3, allocation paragraph 6 and 7, forgery paragraph 16 of the affidavit. The averments are contested under paragraph 4, 6, and 8 of the counter affidavit. With the above demonstration the issue of attaching plaintiff to the affidavit crumbles. The question remains whether there is triable issue in the main case. It is the law that at the stage of hearing temporary injunction the court is not required to rule on the validity or otherwise of the contest including the attached document. Faced with similar issue, in Abdi Ally Salehe (supra) the court stated; 10 '... in deciding such applications, the Court is only to see a prima facie case, which is one such that it should appear on the record that there is a bonafide contest between the parties and serious questions to be tried. So, at this stage the court cannot prejudice the case of either party. It cannot record a finding on the main controversy involved in the suit; nor can genuineness of a document be gone into at this stage ...' In the case of this court in Colgate - Palmolive Company vs Zacharia Provision Store and 3 Others, Civil Case No. 1 of 1997, the, 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.' I subscribe to the above holding, from what is stated in the affidavit and controverted in the counter affidavit as explained above, I find there are real triable issue awaiting to be resolved by the court in Land Case No. 29491 of 2024. The first pre-condition is satisfied. 11 The second pre-condition is that the applicant must stand to suffer irreparable loss. The term "irreparable loss" was defined by the court of appeal in the case of Tanzania Ports Authority vs Pembe Flour Mills Ltd, Civil Application No. 78 of 2007 (unreported) cited in Enikon T. Ltd & Another vs Abeid S. Makai &

Others, Civil Application No. 452/18 of 2022 [2023] TZCA 17776 (25 October 2023; TanzLII) in the following manner; 'Irreparable loss must imply, among other things, loss which is irrecoverable in any form or manner, including damages or other monetary recompense.' The prominent author Sohani in his book titled Sohoni's Law of Injunction, Second Edition, 2003 at page 93 comments 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.' Here the applicant is expected to show that, unless the court intervenes by way of injunction, the applicant's duty is to demonstrate that his position will, in some way, be changed for worse, if the respondents' acts or omissions are left to run unabated. In this application irreparable loss is deponed under paragraphs 27 up to 30 of the affidavit, in that, the disputed land is being surveyed and processing registration without proper procedure, that the applicant is being threatened for death and that the applicant and his member are being removed in the land in which they have cultivated and have seeded. The averments are controverted under paragraph 15(a-e) of the counter affidavit. In the submission the applicant submitted that about 43 acres of land has been cultivated and seeded, that his 14 members who depends on agriculture are being removed in the farm. Another reason was that there is threat of loss of life to his family members. In response it was argued that it has not been submitted if the 1st respondent is not able to compensate. Other averments were said to be speculative with no proof. I have chosen to start with allegation of criminal nature that there is threat by the 1st respondent to the applicant family member through gun shoots and machete. These are serious allegations; however, it cannot be determined in a civil suit. It has to be resolved through criminal machinery for is the one mandated with duty of keeping security and safety of all citizens. Threat to life is criminalized under our penal laws, the applicant can resort to criminal machinery and not through civil avenue. Coming to cultivation of the land, the applicant stated his family members are cultivating and has seeded 43 acres in this new season. The 1st respondent raises counter argument that is the one who has been cultivating, particularly he said has taken even loan since 2020 for paddy farming. I have read the applicant's affidavit particularly paragraphs 9, 11 and 12 of the affidavit that the applicant has been using the suit land since allocation and those of the 1st respondent under paragraph 6 of the counter affidavit. Common to all is that the land was in care of Lifinus Nyakonzo up to 2020 but according to the 1st respondent as deponed under paragraph 6(e) the later was cultivating only four (4) acres. From the above, I have discovered that while the applicant said was using 50 acres, the respondent said he was using 4 acres through Lufinus Nyakonzo up to 2020. Averments under paragraph 28 and 30 that the applicant has cultivated and seeded has not been serious contested by the 1st respondent under paragraph 15 of the affidavit. Reading that paragraph, it all speaks about events of 2023/2024 which is not the case here. Scanning averment that the 1st respondent has taken loan from the bank one will learn that this piece of evidence is doubtful, it is not a bank loan statement which normally show payment scheduling scale, but a mere letter which was obtained after the case being filed in court which implied it was obtained purposely to pre-empt the application. Reading the affidavit, it reaffirms that the applicant has already put some investment in the disputed land by cultivating and

seedling the land. It has been stated, the 1st respondent is trying keep the applicant from entering the land, and in that sense, the order is to protect the applicant from interference with the on-going activities. That interference is what need be protected through the injunction order. After considering all what is deposed in the affidavit supporting the application and in the counter affidavit, the applicant is the one stand to lose compared to the 1st respondent who in not in use of the land. In the premises the second pre-condition is met. Third pre-condition is the balance of convenience; the primary consideration here is the maintenance of the status quo pending the determination of the action. The status quo is at the date of the filing of 15 the action. From what is deposed in the affidavit and counter affidavit, I am convinced, at the time of filing this application, the applicant was cultivating and has seeded part of the disputed area which is 43 acres as opposed to the 1st respondent who is now making efforts to remove and keep the applicant away from the land. In that sense, the applicant must be protected not more than the land he has cultivated but seedling may continue up to the cultivated land. From the above discussion, pre-conditions for granting an order of temporary injunction have been established in this application. Consequently, the application is granted and the order of temporary injunction issued as follows;

1. The respondents, their agents, workmen, assignee, successor or any other person working under their instruction are restrained from interfering with the property, trespassing, surveying, processing ownership registering or disposing the land in any way the whole land measuring 84 acres pending the determination of the Main Suit.
2. The applicant is allowed to use not more than the land he has cultivated (43 acres) but seedling may continue up to the whole land already cultivated. 16
3. The 1st respondent is allowed to use the land (34 acres) allocated in his names. V.M NONGWA JUDGE 23/12/2024 Dated and Delivered at Mbeya this 23th December 2024 in presence of the 1st Respondent, Mr. Kelvin Gamba for the applicant also holding brief of Samson Suwi for the 1st respondent and Ms. Edina Mwamlima for the 2nd to 6th respondent. V.M NONGWA JUDGE 17

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