

TANZANIA / JUDGMENT

exusper nemes baiki vs kirongo juu village council and 4 others

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA LAND DIVISION AT MOSHI
MISC. LAND CASE APPLICATION NO. 39 OF 2023 (Originating from Land Case No. 15 of 2023,
High Court of Tanzania at Moshi) EXUSPER NEMES BAIKI APPLICANT
VERSUS KIRONGO JUU VILLAGE COUNCIL 1ST RESPONDENT PREDIGANDA GENES
ALOYCE 2ND RESPONDENT AUGUSTINE DONASIAN OISO 3RD
RESPONDENT ROMBO DISTRICT COUNCIL 4TH RESPONDENT THE ATTORNEY
GENERAL 5TH RESPONDENT

RULING

15/01/2024 & 25/01/2024 SIMFUKWE, J. The applicant herein filed the instant application under section 68(c) and (e) and Order XXXVII Rule 1(a) and (b) of the Civil Procedure 1 Code, Cap 33 [R.E 2019] praying for the following ex parte and inter partes orders:

1. That, this application be marked to be of utmost urgency, and issue an order dispensing with serving Notice to the Respondents and the Applicant and or his Counsel be heard Ex-parte.
2. A temporary injunction to restrain the 1st, 2nd, 3rd and 4th Respondents and or their agents, employee or servants from continue (sic) trespassing by cutting trees or dealing with any activities onto the applicant's un-surveyed suit land measuring four
- (4) acres located at Kirongo Juu Village, Useri Division, at Rombo District in Kilimanjaro Region, owned by the applicant pending the determination of the main suit.
3. A temporary injunction to restrain the 1st and 4th Respondents or their agents, employees and or servants from continue (sic) opening public road or dealing with any activities onto the applicant's suit land measuring four (4) acres located at Kirongo Juu Village, Useri Division, at Rombo District in Kilimanjaro Region, as owned by the Applicant pending determination of the main suit.

4. Any other orders this Court may deem fit and just to grant. 2 The application was brought by way of chamber summons taken at the instance of the affidavit of the applicant Exusper Nemes Baiki. The application was ordered to be heard by way of written submissions. Mr. Alfred Sindato learned counsel argued the application for the applicant while Ms Khadija Matewele learned State Attorney contested the application for the respondents. Mr. Sindato started his submission by praying to adopt the applicant's affidavit to form part of his submission. He went on to submit that the applicant was praying for temporary injunction but since the temporary injunction cannot be issued against the Government, a declaratory order against the Government be issued in lieu of order of temporary injunction. He supported his prayer with the cases of *The Registered Trustees of the Moravian Church in Southern Tanzania versus Dar es salaam City Council and two Others*, Misc. Land Application No. 18 of 2021 (unreported) Hon. Masabo, J. and *AI Adawi Co. Ltd versus Tanzania Investment Bank and Another*, Misc. Civil Application No. 18 of 2021 (unreported), Hon. Kulita J. Mr. Sindato stated that this application has met all three criteria founded in the case of *ATILIO V. MBOWE* (1969) H.C.D 284 why a declaratory order should be granted. First, he referred to paragraph 4 and 5 of the 3 applicant's affidavit which show that there is a pending Land Case No. 15 of 2023 between the parties over serious question of ownership of land. That, paragraph 6 – 10 of the applicant's affidavit show reasons why declaratory order should be issued. He explained that, what has prompted the applicant to lodge this application is that the respondents are in a hurry of cutting trees and extracting stones over the suit land. Second, the pending Land case No. 15 of 2023 constitute a serious triable issue which demonstrate existence of prima facie case between the applicant and the respondents. Mr. Sindato buttressed his point by citing the case of *Colgate Palmolive v. Zacharia Provision Stores and Others*, Civil Case No. 1 of 1997 (unreported). Third, paragraph 6 – 10 of the applicant's affidavit show on balance of convenience that the applicant will suffer more than the respondents because the applicant has shown a long-time interest of occupation of the suit land through inheritance from his father. That, the applicant has shown greater hardship/loss anticipated to be suffered irreparably by the applicant by depleting unredeemable natural resources i.e. stones, trees, soil, flora and fauna, in case the declaratory order will not be issued by this court to halt those actions now continuing at the suit land. Otherwise, it will render the pending suit nugatory. 4 In her reply submission opposing the application, Ms Khadija Matewele, learned State Attorney adopted the counter affidavit of the respondents and contended that: First, there is no serious triable issue to be tried in the main case. Ms Khadija elaborated that the fact that there is a main case pending for hearing does not mean that there is a serious question to be tried in the main case. That, the applicant has failed to establish that there is a serious question to be tried in the main case because the applicant has never owned the disputed land as his land being near the disputed land does not make him the owner of the land. Thus, he is not entitled to any equitable relief. That, although the applicant insists that there is a prima facie case, that alone is not enough to move the court to grant an order for temporary injunction. Second, the applicant has not shown any irreparable loss which cannot be adequately compensated in damages. The learned counsel for the respondent

submitted that the applicant has not shown by any evidence nor in his affidavit any material fact that shows any loss that he is likely to suffer which cannot be compensated in damages. Ms Khadija alleged that it is settled in the case of T.A Kaare in which the court defined irreparable loss to mean: 5 “By irreparable injury it is not meant that there must be no physical possibility but merely that the injury would be material, for example, one that could not be adequately remedied by damages.” Further reference was made to the case of Cosmoss Properties Limited v. Exim Bank Tanzania Limited, Misc. Civil Application No. 584 of 2021 (unreported) at page 8 where the Court referred the case of American Cyanamid v. Ethicon Limited (1975) AC at page 396 which held that: “If damages in the measure recoverable at common law would be adequate remedied and if the 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.” Ms Khadija submitted further that as the disputed area is a public way even though the plaintiff will be the one to be declared the real owner of the area, he can be compensated by damages on the loss suffered which can merely be compensated. That, the plaintiff claimed in his plaint under page 4 roman (iii) and (iv) on the remedies, one of the reliefs claimed is specific damages on the loss of trees harvested and the stones to the tune 6 amount of money in Tanzanian shillings. Thus, the applicant cannot claim irreparable loss while he knows that he can be compensated on the losses. Third, balance of convenience. Ms Khadija submitted that as explained at paragraph 9 of the respondents’ counter affidavit that the disputed area is a public way, thus the restraining order or declaratory order when granted it will affect public interest as the villagers use the area as public road; compared to the applicant who complains against cutting trees. That, there is no building which has been extracted neither the applicant has ever shown how valuable are the said trees or current situation of the soil, flora and fauna. Concerning the psychological torture and panic attacks claimed in the affidavit of the applicant, Ms Khadija averred that there was no medical document report shown as evidence to support his claims. Thus, it was a mere assumption only in which any one can claim and the court is bound to reach its decision through the produced evidence. The learned State Attorney made a conclusion that this application is non meritorious as the three criteria from the case of ATILIO v. MBOWE (supra) are not met. She stressed that, there is unbroken chain of authorities that the court has to satisfy itself that all the three conditions have to coexist for the court to grant an order for temporary injunction or 7 declaratory order. She subscribed to the case of Emmanuel Ngatara Laizer v. Enjoro Village Council and 2 Others, Civil Application No. 29 of 2023, at page 8 and 9, High Court of Tanzania at Arusha in which my learned sister Hon. B. K. Phillip J, stated that: “In this application the applicant has managed to establish that there is a pending main case and the existence of prima facie case but has not managed to demonstrate that if the order for temporary injunction will not be granted, he will suffer irreparable loss that is the kind of loss that cannot be made good in anyway even by award of general damages or specific damages.” Ms Khadija prayed this court to find that this application lacks merit and thus dismiss it with costs. Having gone through the submissions of both parties, the affidavit and counter affidavit, the issue is Whether the applicant has established sufficient grounds for

the temporary injunction or declaratory order to be granted. section 68 (e) of the CPC provides that: “In order to prevent the ends of justice from being defeated the court may, subject to any rules in that behalf- 8

- (e) make such other interlocutory orders as may appear to the court to be just and convenient.” Order XXXVII Rule 1 (a) of the Civil Procedure Code, provides that:

1. Where in any suit it is proved by affidavit or otherwise-
 - (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 a reason of its continued use by any party to the suit, or wrongly sold in execution of a decree; or... the court may order temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienating, 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;” According to what has been submitted by both parties, there is no dispute that there is a pending Land case involving the same parties. Considering 9 the factors for granting temporary injunction or declaratory order as propounded in the case of Atilio v. Mbowe (supra), the first factor has been met as there is a pending matter. On the second factor Whether the court’s interference is necessary to protect the Applicant from irreparable loss; at paragraph 5 of the applicant’s affidavit it has been deponed that: “That, while the Land Case 15 of 2023 is pending in this court for determination I realised respondents striving swifly and quickly cutting trees to pave further opening of road and by extracting stones from the suit land.” Emphasis added The next issue is whether loss of trees and stones plus the land is irreparable in case the applicant succeeds in a main suit? Section 3 (1)
 - (a) to (o) of the Village Land Act, Cap 114 provides fundamental principles of the National Land Policy. The principles include: “3 (1) (g) to take into account that an interest in land has value and that value is taken into consideration in any transaction affecting that interest;
 - (h) to pay full, fair and prompt compensation to any person whose right of occupancy or recognised long-standing occupation or customary use of land is revoked or otherwise interfered with to their detriment by the State 10 under this Act or is acquired under the Land Acquisition Act;” Emphasis added Under the quoted provision of the Village Land Act, interference of use of land by the State is subject to compensation and the National Land Policy recognizes that an interest in land has value and the law requires that value to be taken into consideration in any transaction affecting that interest. Thus, in case the applicant is found to have an interest in the land used to pave further opening of the road by cutting trees and extracting stones, his loss of that particular land is not irreparable. The land, trees and stones have value which can easily be compensated by the State. Therefore, the second factor for granting temporary injunction has not been met in this case. On the last factor of balance of convenience, as I have noted herein above, the applicant has noted in his affidavit that the respondents are cutting trees to pave further opening of the road by extracting stones from the suit land. Ms Khadija Matewele learned State Attorney arguing

the issue of balance of convenience submitted that as explained at paragraph 9 of the respondents' counter affidavit, the disputed area is a public way. Thus, the restraining order of declaratory order if granted, it will affect public interest as the villagers use the area as a public road. I concur with the learned State Attorney that, the villagers will suffer more than the applicant who can easily be compensated in case the main case is decided in his favour. It is on the basis of the fact that the applicant has failed to establish the three factors of granting temporary injunction, that I dismiss this application without costs. It is so ordered. DATED and DELIVERED at Moshi this 25th day of January 2024. X S. H. SIMFUKWE JUDGE Signed by: S. H. SIMFUKWE 25/01/2024 12

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