

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA BUKOBA SUB- REGISTRY AT
BUKOB A MISCELLANEOUS CIVIL APPLICATION NO. 359 OF 2024 (Arising from High Court of
Tanzania Civil Case No. 27743/2023) MATHIAS RWEYEMAMU.....
APPLICANT VERSUS AIRETH MUNISL..... 1st RESPONDENT MUSSA
PATRICK.....2HD RESPONDENT JQRAM
IFUNYA.....3rd RESPONDENT CATRES RWE GASIRA.....4TM RESPONDENT
JOVIN RUTAINURWA.....5th RESPONDENT HAMID
M3OVU.....6th RESPONDENT

RULING

19/04/2024 & 2.4/04/2024 El. NGIGWANA, J This ruling is in respect of the application brought by the applicant herein under certificate of urgency and by way of chamber summons made under Order XXXVII Rule 1(a), 2 (1), (2) and (4) of the Civil Procedure Act, [Cap.33 R.E 2019], seeking for the following orders;

- (i) That, this court be pleased to issue temporary injunction order against all respondents, their workers, agents and any related person from entering into the land of the applicant and carrying any activity of i building or entering, damaging or alienating, or causing suffering loss for value for wrongful use and trespass or stay in the applicant's premises at Plot No.274 Block "C" Kagondo, Kagondo ward, Bukoba Municipality surveyed and un-surveyed, pending hearing and determination of the main suit. (H) Costs of this application be paid by all respondents. The application is supported by an affidavit sworn by the applicant herein and is vehemently opposed through two counter affidavits; the first was sworn by the 5th respondent while the second was sworn by Mr. Dastan Mujaki, the learned counsel for the respondents. When the application came for hearing, the applicant appeared in person, unrepresented whereas the respondents were represented by Mr. Dastan Mujaki, learned advocate. The application was heard orally. The applicant prayed to adopt the affidavit supporting the application to form part of his submission. In his submission, he reiterated the contents of the founding affidavit. The same is to the effect that In 2023, the applicant has filed the main suit to wit; Civil Case No. 27743 of 2023 before this court seeking for damages for tortious liabilities maliciously committed by the respondents in the applicants landed 2 properties Plot No.274 Block "C" Kagondo, Kagondo Ward, Kagondo Municipality.

In the year 2009, the applicant purchased the whole land at Kanayirenge Kagondo Karunguru Kagondo ward, Bukoba Municipal, with forest of eucalyptus trees and pine trees from Mr. Edward T.K. Blasio and made all necessary preparations for building the school project worth TZS 900,000,000/=. The founding affidavit is further to the effect that in 2020, the 4th respondent conspired with Mr. T.K Blasio, the vendor to the applicant to alienate the applicant's land by way of surveying and dispossession to the Municipal Council but the moves were restrained by the DLHT for Kagera whereas, on 29/05/2013, through Application No. 146 of 2012, Bukoba Municipal Council and others were adjudged and restrained from entering the said land. It is also stated in the affidavit that at all material time, nowhere any of the respondent acquired any right of ownership or possession of the applicant's land after Bukoba Municipal Council with her employees, workers and their agents had adjudged in judgment in rem by a judgment and decree of the competent tribunal. The applicant further contended that from 24th day of August 2023, the respondents employed massive of builders and engineers to build buildings 3 in the applicant's land whereas, the actions and omissions committed by all respondents jointly and severally amount to civil wrongs of which the applicant has a prima facie case and there is likely hood to win the main suit and the respondents who did not possess or own the land will never get compensations to satisfy the applicant, if the prayer is not granted. The applicant also averred in the affidavit that he has used much time and energy serving respondents with the tribunal decree, judgments and orders at the building site but the respondents had been adamant to respect the court order, as a result, the applicant filed Civil suit No.9 of 2023 in the Resident Magistrates' Court of Bukoba at Bukoba and applied for temporary injunction vide Civil Application No.7 of 2023, but were both ended up being dismissed for want of jurisdiction. The applicant's affidavit is also to the effect that on 21/09/2023, the 5th respondent received the judgment and decree of the Resident Magistrate court but never stopped entering and building into the applicant's land. In his oral submission, the applicant stated that the High court has discretional power to issue temporary injunction order before hearing application for leave to apply for prerogative orders. To support his stance, 4 the applicant cited the case of Vidyadhar Girdharal Chavda versus the Director of Immigration Services & Others [1995] TLR 125. The applicant went on stating that as per the case of T.A. Kaare versus General Manager Mara Cooperative Union (1984) Ltd [1984] TLR 17, before granting a discretionary interlocutory injunction, the court should consider; (a) whether there is a bonafide contest between the parties, (b) On which side, in the event of the plaintiff's success will be the balance of convenience if the injunction does not issue, bearing in mind the principle of retaining immovable property in status quo and, (c) Whether there is an occasion to protect either of the parties from injury known as irreparable before his right can be established. He also cited the case of Henry Lyimo Ma tee versus Eliabu E. Matee [1991] TLR 93 whereby Eliabu Matee filed a suit in the Resident Magistrate Court against Henry Lyimo but also successfully prayed for temporary closure of the business in which Henry Lyimo was involved, pending final disposal the suit, and when Henry Lyimo made an application to the High Court for revision, his application was dismissed for being devoid of merit. He added that, in the case at hand, ownership of the land is not disputed, thus he prayed this court to restore his land

to him. To bolster his position, s he cited the case of Tahafif Mini Super Market versus B.P. Tanzania Ltd [1992] TLR 189 where the Court held that; considering the public importance of services rendered, the disputed premises should immediately be restored to the applicant. He went on submitting that, regardless the developments made in his land, the respondents are trespassers and as per the case of Frank Safari Mchuma versus Shaibu Ally Shemdolwa

[1998] TLR trespass is actionable parse without proof of actual loss or damage. The applicant also made reference to the case of Victor Robert Mkwavi versus Juma Omary, Civil Appeal No.222 of 2019, CAT (unreported) To counter the application, Mr. Dastan Mujaki prayed to adopt the counter affidavits contesting the application to form part of his submission and reiterated their contents. He submitted and argued that, the applicant had never had a cause of action against Bukoba Municipal Council, the right owner the land which is alleged by the applicant to have been trespassed into by the respondents. He wondered how the respondents could be sued instead of suing Bukoba Municipal Council or without joining Bukoba Municipality in the suit. He added that injunctive order cannot be issued unless the applicant satisfies 6 the court that the conditions for granting temporary injunction have been met. It was his further submission that the applicant has failed to demonstrate that there is a *prima facie* case between him and the respondents and that, if the application is not granted, he will suffer irreparable loss which cannot be remedied in monetary terms. After considering the Applicant's affidavit, counter affidavits and submissions from both sides, the court has found that the issue to determine in this matter is whether the application deserves to be granted. Before reaching farz it is very important to know the objective of interlocutory injunction. Its objective was articulated in case of American Cyanamid versus Ethicon Ltd (1975) AC 396 as follows "The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty 7 were resolved in the defendant's favour at trial. The court must weigh one need against another and determine where 'the balance of convenience' lies" This application was brought under Order XXXVII Rule 1(a), 2 (1), (2) and

- (4) of. the Civil Procedure Act, [Cap.33 R.E 2019] which provide that; "1; - Where in any suit it is provided 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 for suffering loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree; 2 (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the

commencement of the suit and either before or after judgment, apply to the court for temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right: Provided that, no application shall be made for a temporary injunction where the defendant is the Attorney General but, in such case, the plaintiff may apply to the court for an order declaratory of the rights of the parties. 8

- (2) In case of disobedience or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained as a civil prisoner for a term not exceeding six months, unless in the meantime the court directs his release. 4, The court shall in all cases, before granting an injunction, direct notice of application for the same to be given to the opposite party, except where it appears that the giving of such notice would cause undue delay and that the object of granting the injunction, would thereby be defeated" At the outset, I would like to put clear that the granting or refusal of a temporary injunction, which is an interlocutory order, is an exercise of judicial discretion which must be exercised judiciously. See *Sargent versus Patel*
- (1949) 16 E.A.C.A 63). The conditions governing grant of temporary injunction in our jurisdiction were well laid in the famous case of *Attilio versus Mbowe* (supra) where It was stated as follows:-
- (i) There must be a serious question to be tried on the facts alleged, and the probability that the plaintiff will be entitled to the relief prayed. 9 (ii) The applicant stands to suffer irreparable loss requiring the courts intervention before the applicant's legal right is established^ (Hi) On the balance of convenience, there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendant/respondent from granting of it. In the light of the afore-stated principles, I now turn to the facts of the application. According to the main suit to wit; Civil Case No. 27743 of 2023 which was referred in the first paragraph of the applicant's affidavit, instituted by way of plaint, the first defendant who is the 1st respondent in this application is natural person and employee of Bukoba Municipal Council. The 2nd and 3rd defendants who are 2nd and 3rd respondents in this application are leaders; Councilor and Street chairman respectively of the locality where the land claimed by the applicant situate, the 4th defendant who is the 4th respondent in this application is also an employee of Bukoba Municipal while the 6th defendant who is the 6th respondent in this application is the supervisor of all activities of Bukoba Municipal Council. Paragraph 8 of the affidavit supporting that application is to the effect that from 24th day of August 2023, the respondents employed massive of builders and engineers to build buildings in the applicant's land. On the other hand, in Paragraph 6 of the joint counter affidavit by the 1st, 2nd, 3rd, 4th and 6th respondents is to the effect that they entered and carried their employer's activities into their employer's land while Paragraph 7 of the 5th respondent's counter affidavit is to the effect that he had never employed any one, let alone

massive builders and engineers to build anything in Kagondo or on the applicant's land. It is not in dispute that Bukoba Municipal had already constructed Kyamigege Secondary School in the land which is alleged by the applicant to have been trespassed by the respondents. It is a well-established principle that each case must be looked and decided on its own circumstances. This is the year 2024, and the respondents are not using or occupying the land which the applicant is alleging that it belongs to him, but also the school constructed thereon is not the private property of the respondents, thus the order (if issued) In my view, will not be executable. It should be noted that this is not an application for leave to apply for prerogative orders or an application for restoration of land but an application for injunctive order. Therefore the court must be satisfied that the fore stated three conditions have been met before exercising its discretion of issuing the injunctive order. ii Considering the circumstances of this application, it is my considered view that the totality of the facts does not disclose that there is an arguable case between the applicant and the respondents. In the case of Abdi Ally Salehe versus Isac Care Unit Limited & 2 others (Supra), addressing the conditions to be met before granting application for temporary injunction, the court of Appeal of Tanzania held that; " Once the court finds that there is a prima facie case, it should then go on to investigate whether the applicant stands to suffer irreparable loss, not capable of being atoned for by way of damages. The Applicant is expected to show that, unless the court intervenes by way of injunction, his position in some way be changed for the worse; that he will suffer damage as a consequence of the plaintiffs action or omission provided that the threatened damage is serious, not trivial or minor, illusory, insignificant or technical only. The risk must be in respect of a future damage" In light of the foregoing, and guided by the hereinabove decision, it is the finding of this court that since the first condition had not been met, there is no need whatsoever to test whether the last two conditions were met. In 12 the result, this application is accordingly dismissed. No order as to costs entered. Dated at Bukoba this 24th day April 2024 E. L. N1 JUDGE 24/04/2024. Ruling delivered this 24th day of April 2024 in the presence of Mr. Dastan Mujaki, learned advocate for the respondents, Ms. Queen Koba, B/C but in the absence of the applicant. 24/04/2024. 13

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