

TANZANIA / JUDGMENT

peter machege makolo vs babati town council the attorney general

2023 tzhc 21692 9 october 2023

COURT
TZHCDECIDED
9 October 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF
MANYARA AT BABATI MISC. CIVIL APPLICATION NO. 28 OF 2023 PETER MACHEGE
MAKOLO.....APPLICANT VERSUS BABATI TOWN
COUNCIL..... 1...RESPONDENT ATTORNEY GENERAL
^...RESPONDENT

RULING

25th September & 5th October, 2023 Kahyoza, 3.: Peter Machege Makolo instituted the instant application seeking this Court to maintain of the status quo by restraining the respondent from entering onto the leased premises situated at Babati lake shore pending expiration of 90 days to file a suit and an application for temporary injunction. Babati Town Council opposed the application by filing the Counter affidavit. The issue is whether there is justification for this Court to issue an injunction order before the expiry of ninety days' notice of intention to sue. Peter Machege Makolo and Babati Town Council executed a lease agreement whereby the former agreed to lease the latter's premises for ten years. On allegation that Peter Machege Makolo defaulted to honour the contract, Babati Town Council sought to evict. Peter Machege Makolo issued a ninety days' statutory notice of his intention to sue Babati Town Council and the Attorney General. Before the expiry of statutory notice, Peter Machege Makolo filed the instant application seeking this Court order parties to maintain the status quo in anticipatory of the suit. Peter Machege Makolo filed an application under certificate of urgency but the parties resolved to argue it by way of written submissions. Parties complied with the schedule to file written submissions. Peter Machege Makolo's intention to approach this Court, was to protect his contractual right before he could institute legal proceedings against the defendants. I passionately read rival submissions, where Peter Machege Makolo, the applicant submitted that he had a good cause for this Court to issue an injunction. He argued that he proved the grounds of awarding an injunction order as stated in the famous case of *Atilio V. Mbowe* (1969) HCD 286. The Court held in *Atilio V. Mbowe* that- "(a) an applicant must show a prima facie case with a probability of success;

- (b) In an interlocutory injunction, the applicant must show that unless injunctive orders are granted he will suffer irreparable harm which would not be adequately compensated for by damages; and
- (c) And if in doubt in any of the above conditions the court will decide then on a balance."
- Babati Town Council and the Attorney General argued that Peter Machege Makolo did not establish; one, a prima facie case i.e he has a case worth consideration and likelihood of succeeding, two, that he stands to suffer irreparable loss which cannot be adequately compensated in damages; and three, that he stands to suffer great hardship and mischief if the application is not granted. The applicant and the respondents are at one with that to succeed, the applicant for a person applying for temporally injunction should establish guiding principles in the case of *Atilio V. Mbowe* (supra). The task of this Court is to find out whether the applicant has established the principles. Has the applicant established the prima facie with the probability of success? The applicant contended that he proved the prima facie case through the notice of intention to sue. The notice of intention to sue proved existence of serious question to be tried. 3 The respondents submitted jointly that the applicant did not establish a prima facie case. They contended that to establish a prima facie case, the applicant was required to demonstrate that triable(s) between him and the 1st respondent. They contended that the paragraphs 7 and 13 of the applicant's affidavit are devoid of merit and do not establish the existence of triable issue. Having heard the rival submissions, I am in agreement with both parties that an applicant for temporary injunction in the form of *mareva* injunction, should establish a prima facie case. He should establish that there is serious triable issue. The applicant contended that the first respondent has breached the contract by seeking to evict him against the wishes of the contract. Allegation of violation of contract is a serious triable issue. I am on the view that the applicant has established that there is a serious triable issue. I will restrain from considering the applicant's chances of success. I find the first issue determined in the applicant's favour. Is the applicant's anticipated loss irreparable? It is established that in an interlocutory injunction, the applicant must show that unless injunctive orders are granted he will suffer irreparable harm which would not be adequately compensated for by damages. The applicant position is that he will suffer irreparable loss as he is paying workers or employees who are not productive, he had a stock of perishables such meat and vegetables which went bad for staying for long period. He added that he incurred costs to repair restaurants buildings and pavements, expecting to revamp costs from the long contract. The respondents submitted that the applicant did not demonstrate that the kind of injury to be suffered cannot be atoned through general damages. They concluded that the applicant's allegation does not meet the test. To say the least, the applicant did not convince me that he stood to suffer irreparable loss if the application is not granted. The loss he will suffer is for loss of perishable goods which can be compensated in monetary terms. Another anticipated loss is the costs of repairing the restaurant building and the pavements to attract customers. Costs of repair are quantifiable and be compensated in monetary terms. Thus, I am of the firm view that the applicant has failed to adduce evidence that he stood to suffer irreparable

loss which cannot be adequately compensated by award of general damages. In American Cyanamid Co. V. Ethicon Ltd [1975] 1 All ER 504 at p.509 Lord Diplock stated- "... The object of the temporary injunction is to protect the plaintiff against injury by violation of his rights for which could not be adequately compensated in damages recoverable the action if the uncertainty were resolved in his favour on the trial.... "(at p.509) Does the balance of conveniences tilt in favour of issuing an injunction? The applicant's advocates argued in favour of an injunctive order that that the applicant stood to suffer greater hardship and mischief due to the breach of contract than the respondent. He argued that the applicant indicated in the affidavit efforts which he incurred to prepare the business environment and materials which would be used in conducting the same. The respondents submitted that the first respondent has already evicted the applicant and leased the suit premises to another person. The applicant did not oppose in his rejoinder that the respondents' contention that he has already been evicted and the premises leased to another person. It is unfortunate, that the respondents took steps to evict the applicant during the pendency of the application for maintaining the status quo. I find it a waste of time to determine the application temporary injunction when the substratum is no longer in existence. I condemn the respondents' act of taking action to evict the applicant when there was still pending an application for seeking to stay the eviction. It is only a person who has no respect to the court due process who would act like the respondents in the present case. It is a mockery to justice. I refrain from determining the application as it has been overtaken by events but in the circumstance of this case, I award the applicant costs of this application. The application is marked overtaken by events. I order accordingly. Judge 09/10/2023 Court: Ruling delivered in the absence of the parties duly notified. Ms. Ombeni bench clerk present. J. R. Kahyoza Judge 9/10/2023

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