

TANZANIA / JUDGMENT

RULING Roman Catholic Peramiho vs

COURT
TANZLII

DECIDED
21 November 2024

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA SONGEA
SUB-REGISTRY AT SONGEA MISCELLANEOUS LAND CASE APPLICATION NO. 26592 OF 2024
(Originating from Land Case No. 28210 of 2023) THE REGISTERED TRUSTEES OF SAINT
BENEDICT’S ABBEY OF PERAMIHO APPLICANT VERSUS FABIAN
MHAGAMA 1ST RESPONDENT CHRISTANDUS MHAGAMA
..... 2ND RESPONDENT JULIUS MHAGAMA
..... 3RD RESPONDENT PETER MHAGAMA
..... 4TH RESPONDENT

RULING

13th & 21st November, 2024. KAWISHE, J.: The applicant herein above named, filed this application by way of chamber summons made under the provision of section 68 (c) & (e), Order XXXVII, Rule 1 (b) & (4), Order XLIII, Rule 2 of the Civil Procedure Code (Cap. 33, R.E 2019) and any other enabling provision of the law. The applicant is praying for an injunction order restraining the 1 respondents, their agents and whoever in their name from entering, cutting down trees, cultivating and whatsoever kind of using or dealing with the suit land Farm No. 133 located at Likingo Area, Mdunduwalo Village within Songea District with Certificate of Title No. 5684-MBYLR pending determination of Land Case No. 28210 of 2023 which is pending before this court. The application is supported by an affidavit sworn by Augustin Japhet Mbilinyi, OSB one of the trustees of the applicant. The affidavit stated the reasons why prayers made in the chamber summons should be granted. Upon being served, the respondents filed a joint counter affidavit stating the reasons why the prayers made by the applicant should not be granted. The facts of this application as they can be deciphered from the pleadings filed by both parties are simple and straightforward. The applicant is the plaintiff in Land Case No. 28210 of 2023 which is pending before this court. The defendants are the first, second, third and fourth respondents respectively. According to the facts given by the applicant, the disputed land measuring 316.657 hectares, has been used by the applicant since 1994 and in 1995, the applicant managed to get a Certificate of Occupancy with Title No. 5684-MBYLR. That in October, 2023, about 69 acres of the disputed land were invaded by the 2 respondents by cultivating, building huts for residential purpose and restraining the applicant from using the same. As a result, the applicant filed Land Case No 28210 of 2023. Also, the facts show that the respondents restrained the applicant from enjoying his full utilization of the disputed land including using it for agricultural activities. From the stated acts

of the respondents, the applicant has preferred this application. The applicant's facts were vehemently disputed by the respondents. According to the respondents, Land Case No. 28210 of 2023 is not yet determined by this court to warrant the applicant to claim that she is the lawful owner of the disputed land. When the matter was called for the hearing, the applicant was advocated by Mr. Vicent Kassale and Mr. Lazaro Simba, both learned advocates. The respondents were represented by Mr. Mosses Ndunguru, learned advocate. The hearing of the application was by way of oral submission. When invited to make their submissions, Mr. Lazaro Simba was the first to take the floor. He started by praying for the affidavit and the prayer sought in the chamber summons to be adopted to form part of his submission. He submitted that, injunction orders are granted by the court on its discretionary powers and that powers have to be exercised in accordance to the law. He stated that, the grounds for this application are found at paragraphs 2, 5, 6, 7, 8 and 9 of the affidavit sworn in support of the application. Mr. Simba restated the principles for the grant of temporary injunction and prayed for this court to be guided by the case of *Atilio vs. Mbowe* (1969) HCD 284 and *Abdi Ally Salehe vs. Asac Care Unit Ltd and 2 Others*, Civil Revision No. 3 of 2012 (unreported), in granting temporary injunction in this application. He restated the guiding principles to be the existence of *prima facie* case, that the court's interference is necessary to protect the applicant from an irreparable injury and the balance of convenience that there will be greater hardship and mischief suffered by the applicant from the withholding of the injunction than will be suffered by the respondent from the granting of it. Mr. Simba contended that, at paragraph two of the applicant's affidavit it has been averred that there is a case pending before this court, which is Land Case No. 28210 of 2023, in which the applicant is the plaintiff and the respondents are defendants. That in the existing case, the plaintiff is complaining on the respondents' trespass in a piece of land (Farm No. 133 situated at Likingo Area within Songea District) measuring 316.657 hectares owned by the applicant in this application via Certificate Title No. 5684-MBYLR of 1995 a copy of which is an annexure to the affidavit sworn in support of the application, the fact which is not disputed by the respondents in their joint counter affidavit. Moreover, he argued that, the court must warn itself in dealing with the matter by not going into the merits of the main case rather it must ascertain if there is a *prima facie* case. To cement that stance, he referred to the book titled '*Mulla, the Code of Civil Procedure* 16th Edition Vol. IV and the case of *Kibo Match Group Ltd vs. HS Impex Ltd*

(2001) TLR 152 where it was stated that the applicant has to show that there is *prima facie* case pending in court. On the condition of irreparable injury, he contended that, this court has to intervene by issuing an injunction order for the protection of the applicant from the loss which cannot be atoned by monetary or by way of damages if the pending suit will be decided in favour of the applicant. He insisted that, if the prayer sought in this application will not be granted, the applicant will suffer a serious irreparable injury as stated in the applicant's affidavit under paragraphs 7, 8 and 9 that, the applicant has made some preparation for cultivation of the disputed land in the upcoming farming season. He added that, the act of the respondents invading into the disputed land leads to the violation of peace. He further averred that the respondents have been continuously invading into the applicant's land since 2023. That, they have grabbed 69 acres which were used by the

applicant for cultivation and in this year, the respondents have grabbed another 69 acres which have been prepared by the applicant without considering the cost spent in preparing the land. He insisted for the prayers sought to be granted to avoid the loss to be occasioned to the applicant. Furthermore, Mr. Simba submitted that, before issuing an injunction order, the court must look on the balance of convenience taking into consideration on the irreparable loss that the applicant will suffer if this application will not be granted as compared to the respondents if the application will be granted. To bolster his argument, he referred to the case of Abdi Ally Salehe (supra) and prayed for the court to consider other reasons in making its decision such as the conduct of the parties, delay, acquiescence and lack of clean hands since the application for an injunction order derives its origin from the principles of equity. Lastly, he prayed that, for the sake of keeping peace and love among the parties, each party must remain in the land used in the last agricultural season. Thus, the 69 acres prepared by the applicant in the agricultural season of 2023/2024 be used by the respondents and the other newly prepared 69 acres be used by the applicant and the 6 respondents be restrained from invading on it. He prayed for the application to be granted. Replying to the submission made by the applicant's advocate, Mr. Moses Ndunguru, the respondents' learned advocate, initially prayed for the joint counter affidavit sworn by the respondents to be adopted to form part of his submission. He appreciated the applicant's learned advocate on principles given in the case of Atilio vs. Mbowe (supra) which guide courts in granting application for injunction order. Besides, he argued that, the application is made under Order XXXVII, Rule 1(b) of the Civil Procedure Code (supra) but the applicant's affidavit and the submission made by the learned counsel there is nowhere stated that the respondents have threatened to dispose or remove the disputed property. That paragraph 7 and 8 has put it clearly that in October, 2023 the respondents invaded the suit land by restraining the applicant to use her cleared and prepared another 69 acres. He argued that, the fact that the applicant prepared the other 69 acres of land is new since it was not deposed in the affidavit sworn in support of the application. That was the foundation of the application. He stated that, nowhere in the affidavit it was stated that there was other 69 acres prepared by the applicant after the respondents invading the 69 acres by cultivating, building huts, and restraining the applicant from using the disputed land. 7 He insisted that, submission of an advocate during hearing is not evidence and what is required is to give explanation on the facts deposed in the affidavit. Moreover, Mr. Ndunguru submitted that, from the principles developed in the case of Atilio vs. Mbowe (supra), for an injunction order to be granted, there must be a serious question to be tried by the court and the applicant is required to prove that, there is a probability that he/she will succeed in the pending case. He added that, though there is a pending case before this court between the two parties, the applicant has failed to demonstrate that there is high probability that she will be entitled to the reliefs prayed in the main suit. Thus, he has failed to meet the first test. In the second test, that the applicant must prove that irreparable loss will be occasioned if an order for injunction will not be granted. That, injunction order is granted where necessary in order to prevent irreparable loss as it was stated in the case of Noor Mohamed Jan

Mohamed vs. Kassamali Virji Madhani (1952) 19 EACA 8, but the applicant's counsel submission and the affidavit sworn in support of the application does not demonstrate the irreparable loss which cannot be compensated by monetary means. He submitted that, the applicant's 8 claim that, respondents have unlawfully denied the applicant's right of enjoyment of the suit land does not mean that there is irreparable loss. In respect to the third test of balance of inconvenience, he argued that the applicant in this application is praying for this court to restrain the respondents, their agents and whoever in their name from entering, cutting down trees, cultivating and whatsoever kind of using or dealing with the suit land but the applicant's affidavit shows that the respondents are in the suit land. That, the order of restraining them from entering into the suit land is overtaken by events since the 69 acres has been used by the respondents. He added that, if the prayers sought in this application are granted, the respondents will suffer more since they are the ones using the 69 acres for cultivation. That, if restrained from entering and cultivating the 69 acres will not have a place to cultivate, they are the ones who will suffer irreparable loss and not the applicant. Lastly, he prayed for this application to be dismissed. Mr. Kassale rejoined by insisting that, wrong citation of the enabling provision is not fatal and an application would have been made even without citing any provision since what is considered is the power of the court to grant the prayers sought. That this court has powers to grant the prayers made under the chamber summons. In addition, he argued that, in the chamber summons the applicant stated that, the 9 application is made together with any other enabling law. She has not handcuffed herself to the provisions cited in the chamber summons. With regard to the 69 acres that the applicant sought for an injunction order, Mr. Kassale stated that the respondent's counsel has failed to construe what has been stated under paragraph eight of the affidavit sworn in support of the application. That in the 2023/2024 farming season, the respondents invaded into the applicant's 69 acres. Thereafter, the applicant left that piece of land and prepared another 69 acres in which the respondents are invading by cultivating and building residential huts. He further rejoined that, even if such facts were not clearly amplified in the affidavit, the chamber summons states that, the application will be supported by an affidavit sworn by the applicant together with other facts to be adduced at the hearing and it was well stated in the submission in chief. Rejoining on the respondent's stance that the applicant has failed to show that there is high chance of succeeding in the main suit, Mr. Kassale argued that, it is not a legal requirement that the applicant must prove that there is a high probability of succeeding in the main case. He added that, doing so will make the court to determine the main case but in this application the court should not go into the merits of the main case. He contended that, the fact that the applicant has a certificate of 10 title of the disputed land since 1995 shows that there is a prima facie case. Mr. Kassale contended further that; the respondents' acts of restraining the applicant from enjoying her rights in the disputed land she has been using since 1994 proves that there will be an irreparable loss which cannot be atoned for by way of monetary compensation. On the submission made by the respondent's counsel that the application has been overtaken by event for the reason that the respondents are already using 69 acres, Mr. Kassale rejoined that,

paragraph 8 of the applicant's affidavit stated clearly that the invaded land was used by the applicant in the 2023/2024 agricultural season. He submitted that the assertions made by the respondents' counsel was due to misinterpretation of paragraph 8 of the affidavit sworn in support of this application. He insisted that, this application will serve the applicant to continue using the 69 acres used in 2023/2024 season which the respondents are trespassing on it. That, the application is not overtaken by event. He unfolded that the respondents' counsel argument that, the respondents will remain with no piece of land for cultivation is baseless since they have other 69 acres which were invaded in the 2023/2024 and are still used by the respondents for agricultural purpose. That, the respondent will continue to enjoy the use of the 69 acres if the 11 application will not be granted. It was his view, that the respondents will be allowed to continue trespassing on the newly prepared 69 acres whereas the applicant will suffer an irreparable loss. He prayed for the application to be allowed. The position of the law with regard to temporary injunction is clear. As rightly submitted by Mr. Simba, the learned counsel for the applicant, granting or not granting temporary injunction is in the discretionary powers of the court. But such powers have to be exercised judiciously. See the decision of this court in *Tanganyika Game Fishing & Photographic Ltd vs. The Director of Wildlife & Two Others*, Miscellaneous Civil Cause No. 42 of 1998 (unreported). Order XXXVII Rule 1 (b) of the Civil Procedure Code (supra) to which this application has been preferred, gives conditions upon which temporary injunction may be granted. It includes among others, the proof that there is the existence of the suit, proof that the property in dispute is in danger of being wasted, damaged, or alienated by any party to the suit or suffering loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree. That requirement of the law has been embraced by court in a number of decisions including the renowned case of *Atilio vs. Mbowe* (supra) which has been referred to by the learned advocates from both side in 12 their submissions. The case accentuated the three tests to be considered before issuing temporary injunction. It was held that: "The plaintiff has in effect alleged a trespass and is asking for temporary injunction to restrain the continuance of that trespass pending the determination of the suit. It is generally agreed that here are three conditions which must be satisfied before such an injunction can be issued:- (i) there must be serious question to be tried on the facts alleged, and a probability that the plaintiff will be entitled to the relief prayed; (ii) that the Court's interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established, and (iii) that on the balance there will be greater hardship and mischief suffered by the plaintiff from the withholding of the injunction than will be suffered by the defendant from the granting of it." From the above excerpt it is clear that, for the court to grant the order for temporary injunction, the applicant must establish the existence of a serious question to be tried by the court on the facts alleged by the party and a probability that the applicant will be entitled to the relief prayed, also that if the order is not issued then the applicant will suffer an irreparable loss compared to the respondent. On the first condition of existence of a prima facie case, it is not in dispute that there is a pending suit before this court, Land Case No. 28210 of 2023. The applicant's

counsel in their submission stated that the court is called upon in the main suit to determine and rule out as to 13 who is the lawful owner of the suit property between the applicant and the respondents. The counsel was of the view that, the applicant was able to show to this court that there is a prima facie case warranting the determination of this court. The respondents' learned counsel agreed that, there is a case pending before this court between the parties. It is undisputed that there is a pending suit before this court. What was pointed out by the applicant's counsel sufficiently established serious issue to be determined by the court. From the submissions made, I wish to borrow the wisdom of Mapigano, J, (as he then was) in Colgate - Palmolive Company vs. Zacharia Provision store & others Commercial case No. 1 of 1997, (unreported) which were cited in approval in Kibo Match Group Limited vs. HS Implex Limited

- (2001) TLR 113, provide a nuanced basis in determining whether the first criterion has been met. In this case, Justice Mapigano stated that: "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 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 a likelihood of the suit succeeding." Considering the position stated in the excerpt, while I am alive that I should not venture into the merits of the case 14 prematurely, the dispute over ownership requires court intervention. See the case of Abdi Ally Salehe vs. Asac Care Unit Ltd and 2 Others, (supra). That being the case, the applicant has managed to prove that there is existence of a prima facie case warranting the determination of this court to adjudicate on the issue of ownership of the suit land. The first condition therefore is met. Regarding the second condition on irreparable injury, it has been submitted by the applicant's counsel that in the 2023/2024 agricultural season the respondents invaded 69 acres of the applicant's land which led to Land Case No. 28210 of 2023. Thereafter, the applicant prepared other 69 acres for her own use pending determination of the suit in which the applicant is claiming that the respondents have invaded on it in the 2023/2024 agricultural season. The injunction order is sought in respect to the second portion of 69 acres on which the applicant has prepared to use in the coming agricultural season. As stated above, in this application, the applicant's counsel has proved that there is a prima facie case in a pending Land Case No. 28210 of 2023 in which the legality over the property needs to be determined. It becomes obvious that if an injunction order will not be issued the applicant will remain without land for cultivation while the 15 respondents will be enjoying the use of the disputed land taking into consideration that the applicant has been using the disputed land since
1994. This test has been celebrated in a plethora of cases. In the case of Hotel Tilapia Ltd vs. Tanzania Revenue Authority, Commercial Case No. 2 of 2000 (unreported). It was stated that: "... The object of the temporary injunction is to protect the plaintiff against injury by violation of his right for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favour on the trial..." The

quotation above gives the position that the essence of a temporary injunction is to protect the plaintiff against the injury by violation of his rights. The applicant's counsel submitted that the respondents invaded the 69 acres prepared for the agricultural season for 2023/2024. The applicant left it to the respondents and prepared another 69 acres which the respondents have invaded again. The applicant submitted further that in order to maintain peace, while waiting for the determination of the main suit, the respondents keep using the first prepared 69 acres and leave the newly prepared 69 acres to the applicant. In my view, I find the respondents' learned counsel assertion that the respondents will suffer greater loss since they will remain without land for cultivation if the application is granted is baseless. I am holding so on the reason that, they invaded the 69 acres which they used in the last agricultural 16 season which the applicant is willing to leave for them pending the determination of the suit. Therefore, I find that the second condition is also met. On the last condition on balance of convenience, the question here is who is going to suffer greater hardship and mischief if the interim injunction is granted or not granted. I have considered the decision in the case of General Tyre EA Ltd vs. HSBC Bank PLC [2006] TLR 60, that, the court should balance the danger of granting and or not granting temporary injunction. The reason put forward in the first two conditions proves that the applicant will suffer more than the respondents if the application is not granted. The respondents already have 69 acres of land within the disputed land which was used in the last agricultural season but the land that was used by the applicant in the last agricultural season is also grabbed by the respondents. In the upshot, I find that the three conditions set in the case of Atilio vs. Mbowe (supra) have been met by the applicant. Subsequently, I grant the application for temporary injunction restraining the respondents, their agents and whoever in their name from entering, cutting down trees, cultivating and whatsoever kind of using or dealing with the suit land, Farm No. 133 located at Likingo Area, Mdunduwalo Village within Songea District with Certificate of Title 17 No. 5684-MBYLR pending determination of Land Case No. 28210 of 2023 which is pending before this court. Costs shall follow the events in the main suit. It is so ordered. DATED and DELIVERED at SONGEA this 21st day of November, 2024. E. L. KAWISHE JUDGE 21/11/2024 COURT: Ruling delivered in the presence of Mr. Vicent Kasale learned counsel for the applicant and in the presence of the 1st Respondent, Fabian Mhagama, the 2nd Respondent, Christandus Mhagama and the 4th Respondent, Peter Mhagama and in absence of the 3rd respondent. E. L. KAWISHE JUDGE 21/11/2024 18

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