IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

MISC. LAND APPLICATION NO. 08 OF 2021

SHIGELA MALIGANYA ..... APPLICANT

VERSUS

JOHN JOSEPH NYAMHANI ..... 1ST RESPONDENT

MANENO JOSEPH NYAMHANI ..... 2ND RESPONDENT

LAURENT JOSEPH NYAMHANI ..... 3RD RESPONDENT

RULING

1st, & 30th July, 2021

ISMAIL, J.

This is an application for injunctive orders, preferred by the applicant. He seeks to move the Court to issue a temporary injunction, restraining the respondents from carrying out farming activities in a 380-acre piece of land that is the subject of contention by the parties in Land Case No. 1 of 2021, pending in this Court. Supporting the application is the applicant's own affidavit in which grounds for the prayer are set out. Key among the

applicant's averments are the contents of paragraphs 4 and 6 in which it is alleged that the respondents have encroached on the suit land, and are carrying out farming activities, and that they have dug big trenches which have damaged the soil that have hampered the applicant's activities.

The application has been contested by the respondents. Besides denying that the applicant owns the purported tracts of land, the respondents contended that the estimation made by the applicant is mere speculation that is not supported by any evidence. These disputations are found in the counter-affidavit sworn by Susan N. Gisabu, the respondents' counsel.

In his submission in chief, the applicant asserted that he bought 380 acres of the disputed land in 1997. He contended that the said land was bought from the respondent's clan and that, subsequent thereto, he mobilized some farm implements including tractors and began farming activities. It was his contention that the respondents' encroachment has curtailed the applicant's exclusive ownership and peaceful enjoyment of the land by engaging in activities that are destructive in nature.

Reciting principles that govern granting of injunctive powers, as enunciated in ***Atillio v. Mbowe*** (1969) HCD 284, the applicant argued that

there is a question to be tried by the Court with respect to the dispute on ownership of the disputed land. It was the applicant's further contention that the harm inflicted to the applicant's farming activities call for the Court's intervention. The applicant's take is that, on the balance of convenience, he is the likeliest of the parties to suffer if the injunctive order is not granted.

The respondents' rejoinder began by decrying the applicant's surreptitious inclusion of the issue of acquisition of the land in 1997 from the respondents' clan. They contended that these issues were not pleaded in the sworn affidavit. They prayed that the same be given less weight. That aside, the respondents' counsel was in sync with the applicant's counsel with respect to the principles that govern issuance of injunctive orders. The respondents contend that the applicant has failed to prove that there is a serious question to move the Court to grant an order of temporary injunction. It is the respondents' argument that the applicant has failed to conform to principle that requires the parties to be bound by their pleadings, as accentuated in ***Charles Richard Kombe t/a Building v. Evarani Mtungi & Others***, CAT-Civil Appeal No. 38 of 2012 (unreported).

On whether the applicant stands to suffer an irreparable loss, the respondents contend that none has been demonstrated in the affidavit or

submission filed by the applicant. On this the respondents referred me to the decision of this Court in ***Jimmy Brown Mwalugelo v. Rose Miago Asea & Others***, HC-Misc. Land Application No. 940 of 2017 (unreported). With respect to balance of convenience the respondents' take is that the applicant has failed to demonstrate that balance of convenience requires that the Court intervenes. The respondents argued that, in the absence of the current status of the land in dispute, granting the injunction will only serve to nullify the ownership status, while injunction is intended to maintain status quo. They maintained that the application has failed the test and prayed that the same be dismissed with costs.

In rejoinder, the applicant maintained that conditions set for grant of injunction have been met, and that the fact that there is a serious issue to be tried means that he derives interest in the matter. On the irreparable loss, the applicant argued that loss to be suffered is quite substantial and irreparable. With regards to balance of convenience, the contention is that the same tilts in the applicant's favour. The applicant further contended that the status of the disputed land has been stated in paragraphs 4 and 6. He reiterated his prayer for an order of injunction.

The profound question derived from the pleadings and submissions is whether this application is meritorious.

The law is settled, that a temporary injunctive order is grantable upon satisfaction by the court that key conditions for its grant have been fulfilled. Its issuance is aimed at preventing an irreparable loss or injury from accruing, before the court has a chance to decide the main contestation between the parties (see Black's Law Dictionary, 8th ed., pg. 800). As such, a temporary injunction is a conservatory restraint that is intended to maintain the current state of affairs, as the disputants tussle each other in the pending substantive matter. The court will, therefor, only grant it upon satisfaction that its applicant has a concluded right capable of being addressed through the said order. This position was underscored in the Indian case of ***Agricultural Produce Market Committee v. Girdharbhai Ramjibhai Chhaniyara***, AIR 1997 SC 2674, in which the Supreme Court held:

> *"a temporary injunction can be granted only if the person seeking injunction has a concluded right, capable of being enforced by way of injunction."*

In this country, grant of a temporary injunction is predicated upon the applicant meeting the conditions set out in the celebrated decision in ***Atilio v. Mbowe*** (1969) HCD 284. The principles in the ***Atilio v. Mbowe,*** as

splendidly emphasized in the subsequent decisions of this Court and the Court of Appeal, is that all of those conditions must be cumulatively met before such grant can be considered. The most accomplished guidance on circumstances under which this interlocutory relief can be granted was set in ***Abdi Ally Salehe v. Asac Care Unit Ltd & 2 Others***, CAT-Civil Revision No. 3 of 2012, the Court of Appeal of Tanzania (Massati, J.A.) held:

> *"The object of this equitable remedy is to preserve the pre-dispute state until the trial or until a named day or further order. 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.*
>
> *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. There, the applicant is expected to show that, unless the court intervenes by way of injunction, his position will in some way be changed for worse; that he will suffer damage as a consequence of the plaintiff's action*

or omission, provided that the threatened damage is serious, not trivial, minor, illusory, insignificant or technical only. The risk must be in respect of a future damage (see ***Richard Kuloba Principles of Injunctions*** *(OUP) 1981).*

And on the question of balance of convenience, what it means is that, before granting or refusing the injunction, the court may have to decide whether the plaintiff will suffer greater injury if the injunction is refused that the defendant will suffer if it granted."

See also: the decision in ***Anastasia Lucian Kibela Makoye & 2 Others v. Veronica Lucian Kibela Makoye & 4 Others***, CAT-Civil Appeal No. 46 of 2011 (unreported).

Mr. Mwanaupanga has submitted that there is a matter that is pending in this Court in which issues pertaining to ownership and the alleged trespass are at stake. This is a fact that has not been contested by the Ms. Gisabu, when she addressed the Court on the application. It implies, therefore, that there is a fair question for determination that awaits determination by this Court. This is what is meant by prima facie case. This position has been accentuated in ***Colgate Palmolive v. Zacharia Provision Stores & Others***, Civil Appeal No. 1 of 1997 (unreported) in which it was held that

there must be a fair question for determination as a precondition for grant of injunction.

(See also: ***Kibo Match Group Ltd v. H.S. Impex Ltd*** (2001) TLR 152).

The applicant has averred in paragraph 8, that his chances of success in the pending suit are overwhelming. Though this averment did not feature in the submission, I wish to remark here and now, that the position, as it currently obtains, is to the effect that the applicant is not under any obligation, at the stage of applying for restraint orders, to forecast the chances of success in his case. The new position, which represents an evolution of the law, has been emphasized by legal pundits. In ***Sarkar on the Code of Civil Procedure***, 10th ed., Vol.2 p.2011, learned author made the following commentary:

> *"In deciding application for interim injunction,* ***the court is to see only prima facie case, and not to record finding on the main controversy involved in the suit prejudging issue in the main suit****, in the latter event the order is liable to be set aside."* [Emphasis added]

With respect to irreparable loss, the established position is that a prayer for injunction should be refused where the applicant is unable to demonstrate that the injury to be suffered is irreparable. This was expressed by the Supreme Court of India in ***Best Sellers Retail India (P) Ltd. v. Aditya Nirla Nuvo Ltd.***, (2012) 6 SCC 792, wherein it was held:

> *"Yet, the settled principle of law is that even where prima facie is in favour of the plaintiff, the Court will refuse temporary injunction if the injury suffered on account of refusal of temporary injunction was not irreparable."*

The argument by the applicant is that the alleged trespass and activities carried out therein are damaging the soil by digging big trenches. The thinking by the applicant is that no amount of compensation would be an adequate recompense for the loss that may be suffered as a result of the depletion and the destruction that is allegedly going on. In my considered view, this contention makes sense. The structure of the land and its fertility are some of the intrinsic values which, if lost or damaged, are incapable of being atoned by way of damages. This is the form of irreparable loss which has been played down by the respondents' counsel. In my view, the damage allegedly brought about by the respondents' activities are serious, not trifling, minor, illusory, insignificant or technical only.

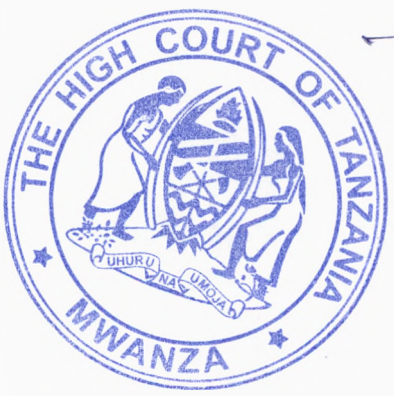
See: ***American Cynamid Co. v. Ethicon Ltd*** [1975] 1 All E.R. 504.

With respect to balance of convenience, I am also of the settled view that the balance of convenience, which is actually the balance of comparative loss caused to the applicant and the respondents, in case of not passing the order, tilts in the applicant's favour. The applicant's loss in case of dismissal of the application is far greater than respondents', should the application be granted.

In the upshot of all this, I am convinced that the applicant has presented a credible case worth of favourable consideration. Accordingly, I grant an order restraining the respondents from carrying out any farming activities in the suit land, pending final determination of pending proceedings in respect of Land Case No. 1 of 2021. Costs to be in the cause.

Order accordingly.

DATED at **MWANZA** this 30th day of July, 2021.



M.K. ISMAIL

JUDGE

Date: 02/08/2021

Coram: Hon. C. M. Tengwa, DR

Applicant: Mr. Mwanaupanga, Advocate

Respondent: Present

B/C: J. Mhina

Court:

Ruling delivered today in the presence of both sides.

C. M. Tengwa

DR

At Mwanza

30th July, 2021