IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

LAND DIVISION

MISC. LAND APPLICATION NO. 24 OF 2022

LADSLAUS DANFORD SHASHA..... APPLICANT

VERSUS

KASULU DISTRICT COUNCIL.....1st RESPONDENT

THE ATTORNEY GENERAL.....2nd RESPONDENT

RULING

20/09/2022 & 30/09/2022

MANYANDA, J.

The applicant, Ladslaus Danford Shasha is moving this Court under Order XXXVII of the Civil Procedure Code, [Cap. 33 R.E. 2019] for Mareva injunction against the Respondents pending expiration of the 90 days' statutory notice of intention to sue them.

The background of this matter as gleaned from the affidavit and counter affidavit is that the applicant owns a piece of a shamba measuring 20 acres on which he planted pine trees some matured and others still under nursery stage. He claims that the Respondents trespassed into his land since 2019 and started to destroy his trees by cutting them down. That

they have now built a hospital on it. They have neither paid him compensation and he does not know what procedure was followed by them. He is seeking interference by this Court restraining them from continuing with the trespass and destruction of the trees pending filing of a suit after expiration of the said notice.

The Respondents in their joint counter affidavit oppose the application averring that the suit land does not belong to the applicant. Moreover, all the trees have been cleared in the process of cleaning the surrounding premises of the already built and functioning public hospital at the suit land. The application is therefore overtaken by events. In addition, it is averred that the suit land was surveyed and valuated and compensation is pending because there is a dispute over its ownership between the applicant and two other persons namely, Jumanne Ruhongole and Ally Salum which is yet to be finally resolved.

When the application came for hearing, the applicant prosecuted his application unrepresented while the Respondents enjoyed representation service of Mr. Allan Shija, learned State Attorney.

Submitting in support of the application, the applicant been a layman had nothing useful to add to his affidavit other than saying that he was applying for injunction order to restrain the 1st Respondent from

trespassing into his land and destroying his trees without compensating him.

Mr. Allan Shija submitted on behalf of the Respondents arguing that the application has been overtaken by event because a hospital has already been constructed at the disputed land since 2020 and currently is in full use by the public. What the 1st Respondent is doing is clearing its surrounding environment. If there were trees, then the same have been already cut down as averred by the applicant. Hence, the application is overtaken by events. Moreover, the State Attorney argued that the application is untenable for failure to meet the conditions in the **Atilio vs Mbowe's case (supra)**.

The reasons he gave are that the land in dispute was surveyed in 2019 and valuated, however compensation payment is pending due to a dispute over ownership between the applicant and two other persons namely Jumanne Ruhongole and Ally Salum, which is yet resolved. Hence, no loss will be suffered by the applicant.

After their submissions, this Court probed the parties on the propriety of the application on the provision it has been brought, been, Order XXXVII of the CPC while there is no pending suit in Court. The applicant had nothing to say, he left it to the court to decide. Mr. Shija was of the view

that the application is unmaintainable because it has been brought under a wrong provision of the law. He prayed the same to be struck out with costs.

Let me start with the point of law that was raised by the Court **suo motto** that this application has been brought under a wrong provision of the law.

My perusal of the chamber summons reveals that the same has been preferred under Order XXXVII Rule 1 and Section 95 of the CPC. The same reads as follows:-

> *"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 of 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 or*
>
> *b) that the defendant threatens or intends to remove or dispose of his property with a view to defraud his creditors.*
>
> *the Court may by order grant temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, loss of value, removal or*

disposition of the property as the court thinks fit, ***until the disposal of the suit*** *or until further orders."* (emphasis added).

As it can be gleaned, the temporary injunction orders under Order XXXVII Rule 1 of the CPC are grantable where there is a suit pending in court. In this matter as conceded by the applicant, there is no pending suit in Court. Therefore, the application is wrongly pegged under Order XXXVII Rule 1 of the CPC because the application seeks an injunction order pending expiration of 90 days' notice to sue the Respondents also known as "Mareva injunction" which are orders granted in absence of a suit in court due to some legal impediments.

It follows therefore that the application is brought under wrong provisions of the law. Under the previous position of the law, I could have struck out the application as prayed by Mr. Allan Shija. However, with the coming into of force the amendments of the CPC via Act No. 8 of 2018 which introduced section 3A that now requires courts to facilitate just, expeditious, proportionate and affordable resolution of civil disputes by giving effect to these overriding objectives; commonly referred to as the oxygen principle, I find the defect is curable because this court has the power to grant both temporary injunction, pending determination of the

already filed suit and those pending an intended suit to be filed after elapse of the impending legal issue.

Bach to the arguments by the parties, in this matter, it has been argued that the application is overtaken by events because the hospital has already been constructed at the land in dispute and its surrounding cleared.

The applicant is contesting to prevent the 1st Respondent from destroying trees which he says in his affidavit that the same have already been cut down and attached photographs showing cut down trees.

In the circumstances I agree with the State Attorney that the application is already overtaken by events. It is averred in the affidavit that the 1st Respondent trespassed into the land in dispute in 2019 by entering in it surveying, cut down trees and in 2020 constructed a public hospital which now is in use.

This application was filed on 01/08/2022 intending to restrain the 1st Respondent from cutting down trees pending expiration of a 90 days' statutory notice of intention to sue the Respondents which was written on 11/07/2022.

A question is where was the applicant for all this period of about four (4) years. In my considered view, this application has been brought to this Court as an after thought, already overtaken by event.

In the circumstances I am right to follow the way my Brother Hon. Matuma, Judge, in the case of **Abdallah s/o Ramadhani Kindege vs Executive Director of Kigoma – Ujiji Municipal Council** (supra) cited by Mr. Allan Shija, to dismiss the application for been overtaken by event.

Moreover, even if it were not overtaken by events, as rightly argued by Mr. Allan Shija, the grant of Mareva injunction are untenable under the circumstances of the application because the conditions are not established as provided in the **Atilio vs. Mbowe's case (supra).**

In order for Mareva injunction, been a specie of temporary injunctions to be granted three conditions must be established namely:-

i. existence of a prima facie case.
ii. Interference is necessary to prevent irreparable loss that cannot be atoned by damages award
iii. Balance of convenience favouring grant of the orders than denying.

In this matter, it has been argued b Mr. Allan Shija that the land in dispute was surveyed, valuated however compensation has not been paid pending finalization of dispute over its ownership between the applicant and Jumanne Ruhongole and Ally Salum.

The applicant admits these facts and attached a copy of a judgment in respect of the dispute. It is Land Appeal No. 41 of 2015 of the District Land and Housing Tribunal for Kigoma in which though the applicant appear to have been declared a lawful owner of the land, however; the same didn't specify which land. Moreover, the applicant didn't tell whether there was no appeal, hence it annot be safely concluded that it is final.

About loss, there has been established that the land in dispute was valuated. This means the value of the land in dispute has been preserved. The value will be paid to a successful party. In case the applicant succeeds in his intended suit, then compensation in the established value will be paid. Hence there is no irreparable loss to him.

As to the balance of convenience, it has been argued by Mr. Allan Shija that a public hospital has already been constructed at the land in dispute and that the same is in full operation. The applicant concedes this fact. This means it is the Respondents who will be more inconvenienced than

the applicant, if injunctive order to restrain the Respondents and the public at large including the applicant himself, are prevented from using the hospital.

It is from the reasons I have stated above that I find this application lacking merits.

Consequently, I do hereby dismiss it with costs. Order accordingly.

Dated at Kigoma this 30th September, 2022.

F.K. MANYANDA,

JUDGE