

**IN THE HIGH COURT OF TANZANIA  
IN THE DISTRICT REGISTRY OF DODOMA  
AT DODOMA**

**MISC. LAND APPLICATION NO. 01 OF 2022**

**BATROMEO A. KAVISHE .....APPLICANT**

**VERSUS**

**1. ELIYUKO MMBAGA**

**2. DODOMA CITY COUNCIL**

**3. ATTORNEY GENERAL**

**..... RESPONDENTS**

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**RULING**

**11<sup>th</sup> & 24<sup>th</sup> April 2023**

**MDEMU, J.:**

This is an application for temporary injunction. The Applicant is seeking inter parties' orders under Order XXXVII, Rule 1(a) and section 68 (c) of the Civil Procedure Code, Cap. 33 as follows: -

- 1. That, Honourable Court be pleased to issue an order for temporary injunction restraining the first Respondent, their agent(s), servant(s), assignee(s) or whomsoever that will be acting for them from undergoing construction in the suit land to wit; Plot No. 445 Block C Swaswa-Ipagala within Dodoma City pending the hearing and determination of Land case No. 25 of 2021.*
- 2. Costs of this application be provided for.*

The application was supported by an affidavit of Mr. Batromeo A. Kavishe affirmed on 29<sup>th</sup> December 2021. It was contested by the counter affidavit of the Respondents. On 13<sup>th</sup> of January, 2022, this Court maintained *status in quo* in the suit premises exparte pending hearing of this application interparties. The matter proceeded by way of written submissions. The Applicant was represented by Mr. Leonard Haule, the second and third Respondents were represented by Ms. Jeniffer Kaaya, Senior State Attorney. The first Respondent didn't file counter affidavit.

Submitting in support of the application, Mr. Haule adopted prayers in the chamber summons together with the affidavit of the Applicant stating that, it provides in length what is being prayed by the Applicant. He therefore prayed to this Court to issue temporary injunction restraining the 1<sup>st</sup> Respondent, his agents, assignees, servants or whomsoever to undergo any construction works in plot No. 445 Block "C" Swaswa, Ipagala.

In reply, Ms. Kaaya adopted a joint counter affidavit of the second and third Respondents. She proceeded to submit that, this application is incompetent and unmaintainable in law for contravening the provisions of Order XXXVII, Rule 1(b) and (2) of the Civil Procedure Code, Cap. 33 which, among other things, prohibits temporary injunction to be issued against Government and its entities. She therefore said that, since the second and third Respondent are Government entities pursuant to section

16 of the Government Proceedings Act, Cap. 5, what was supposed to be prayed was declaratory rights of the parties. Supporting her argument, Ms. Kaaya cited the case of **Mwanza City Council vs. Alfred Wambura**, Civil Revision No. 1 of 2022 (unreported). She therefore prayed this application be struck out with costs.

Alternatively, she argued that, if the Court is of the view that the application is competent then the Applicant has not moved this Court to grant the orders prayed for because, in order to exercise such discretion, three conditions has to be fulfilled namely:- there must be a serious question to be tried on the fact alleged, probability that the plaintiff will be entitled to the relief prayed, the applicant stands to suffer irreparable loss requiring Court's intervention before the Applicant's legal rights is established and on the balance of convenience, there will be greater hardship and mischief suffered by the plaintiff from withholding the injunction than will be suffered by the Defendant from granting it.

She cited the cases of **Atilio vs. Mbowe** [1969] HCD 284, **Abdi Ally Salehe vs. Asac Care Unit Limited and Others**, Civil Revision No. 3 of 2012 (unreported) and **Cosmoss Property Limited vs. Exim Bank of Tanzania**, Miscellaneous Civil Appeal No. 584 of 2021 (unreported) to support her argument.

It was her submissions further that, the aforementioned conditions are not reflected neither in the affidavit of the Applicant nor in his submissions. She therefore prayed the application be dismissed with costs since the Applicant has not shown conditions necessary to warrant granting of temporary injunction.

Having carefully considered the parties' submissions filed in this Court and after going through the chamber summons, affidavit in support of application, counter affidavit in resistance thereof and the laws applicable, the issue for determination is whether the application has merits. As observed in the Chamber Summons, the enabling provisions is Order XXXVII, Rule 1 (a) (b) of the CPC which provides that:

*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 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 a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting,*

*damaging, alienation, sale, loss in value, removal or disposition of the property as the court thinks fit, until the disposal of the suit or until further orders:*

*Provided that, an order granting a temporary injunction shall not be made against the Government, **but the Court may, in lieu thereof, make an order declaratory of the rights of the parties** (emphasis is mine)*

In the application at hand, the learned Senior State Attorney resisted the application for the reason that, the law forbids an injunction to be granted against the Government as per order XXXVII, Rule 1(b) of the CPC. However, under the same provisions, she observed, the Court can make a declaratory order regarding the rights of the parties. I agree with her in this position.

In this application, it is crystal clear that, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are Government institutions as per section 16 of the Government Proceedings Act, Cap. 5 R.E 2019 as amended by section 26 of Act No. 1 of 2020. They were joined in this matter as necessary parties. The first Respondent is the one specifically responsible. See the Chamber summons. Therefore, I find this concern of the learned State Attorney to have no basis.

Back to the merits of the application, frankly speaking, the provisions cited to move this Court in this application have not established

factors which the Court will have to consider in granting the application for injunction. As rightly submitted by Ms. Kaaya, the landmark case on principles to follow in determination of temporary injunctions is the case of **Attilio vs. Mbowe** (supra). This case has been referred in several other cases. One of the cases is the case of **Abdi Salehe vs. Asac Care Unit Ltd and Others** (supra). Therefore, in determining this application, I will also be guided by the principles pronounced in the case of **Attilio** (supra) which are:

- 1. Whether there is a serious issue to be tried.*
- 2. Whether the Court's interference is necessary to protect the Applicant from irreparable loss.*
- 3. Whether on balance of convenience, there will be greater hardship and mischief that will be suffered by the Applicant from withholding the injunction than will be suffered by the Respondent from granting it.*

Starting with the first question, it is undisputed that, there is a pending case in respect of the suit property which is yet to be determined by the Court, that is, Land Case No. 25 of 2021. This suffice to say that, there is a matter to be determined. How serious the issue is and whether is arguable issue to be tried by the Court, is dependent on the contents of the evidence in an affidavit in support of the application.

As to the second principle that is, whether there will be irreparable loss and the third principle whether there will be greater hardship to be

suffered by the Applicant, the Applicant neither deposed in his affidavit nor in his submissions as rightly submitted by Ms. Kaaya. In that sense, the Applicant failed to prove the above two conditions. This renders his application to fail as it is settled law that, all three conditions must be met for the Court to exercise its discretion in granting injunction. In the case of **Christopher P. Chale vs. Commercial Bank of Africa**, Misc. Civil Application No. 635 of 2017 (unreported), it was held that:

*It is also the law that the conditions set out must all be met and so meeting one or two of the conditions will not be sufficient for the purpose of the Court exercising its discretion to grant an injunction.*

I gauged from the affidavit which the Applicant adopted, there is no even a single paragraph indicating that the Applicant is likely to suffer more compared to the Respondents if injunctive orders are not provided for as prayed. As such, conditions in **Atilio vs. Mbowe** (supra) must all be proved to exist and they are devoid in the instant application. Courts interference on the basis of a pendency of suit alone may not justify the granting of temporary injunction.

For reasons stated above, I find no merit in the application which is accordingly dismissed with costs.

It is so ordered.



Gerson J. Mdemu

JUDGE

24/04/2023

DATED at ~~DODOMA~~ this 24<sup>th</sup> day of April, 2023.



Gerson J. Mdemu

JUDGE

24/04/2023