

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. LAND APPLICATION NO. 119 OF 2017

ABDALLAH M. MALIK & 545 OTHERS.....APPLICANTS

VERSUS

ATTORNEY GENERAL & ANOTHER.....RESPONDENTS

Date of Last Order: 30/5/2017

Date of Judgment: 1/6/2017

RULING

MGONYA, J.

In response to the 546 Applicants' Application, which among others pray for an order:-

*"That this honorable court be pleased to make an order that **status quo** in respect of the Applicants' properties claimed to be on road reserve **be maintained** pending the hearing and determination of **an application for temporary injunction** to*

be filed after the expiry of 90 days Statutory Notice of Intension to sue the Government."

The Respondents through Mr. Benson Hosea the learned State Attorney rose to argue one point of Preliminary objection notice of which had earlier been filed. The point of objection is to the effect that:

● ***"The Application is incompetent for non citation of the enabling provision of the law."***

Submitting in elaboration of the point of objection, Mr. Hosea was brief and to the point. Firstly, he argued that there is no pending Suit before the court, hence there is no any provision to allow this court to grant injunctive orders without pending Suit before the court. In support of his submission, he has referred me to the decision of the Court of Appeal of Tanzania in the case of ***TANZANIA ELECTRIC SUPPLY COMPANY (TANESCO) VS. INEPENDENT POWER TANZANIA LIMITED (IPTL) AND TWO OTHERS, TLR (2000) 324.***

The learned State Attorney further contended that the provisions of ***SECTION 2 (3) OF THE JUDICATURE OF APPLICATION OF LAWS ACT (JALA) CAP. 358 [R.E 2002]*** cited by Applicants gives the court to apply the Rules of Common Law.

In the absence of relevance Rules of Common Law and Statutes of general application enforced in England on 22nd July 1920, this court is yet to be properly moved to grant the Application. He accordingly urged me to struck out the application with costs.

Mr. Mwelelwa the learned Advocate for the Applicants, was not moved in any way by the submission of Mr. Hosea. He vehemently resisted the preliminary objection contending that the Application is competently before the court.

In resisting the point of preliminary objection, the learned Advocate argued that the provisions cited of **Section 2 (3) of JALA, Cap. 358 [R. E. 2002]** gives power to this Honourable court to grant **interim orders** pending institution of the Suit. In support of his argument, he cited the case of **TANESCO (Supra)** to bring the point home.

In addition with transparent conviction, the learned counsel argued that the nature of the Application is not for monetary issues but for interim order pending institution of the Suit. He has also attacked his learned friend that, if he had those relevant rules of Common Law as he cited under **Section 2 (3) of JALA**, he could have cited them. It was further submitted that, failure to cite those

enabling provisions, the remedy is for the court to dismiss the Preliminary Objection with costs.

He accordingly convinced me to dismiss the point of preliminary objection with costs and the court to proceed with the hearing of this Application.

Before I embark to consider the rival arguments on the point of Preliminary Objection raised, it is important at this stage to restate portions of facts and law presented to court, portions of which are not disputed by both parties.

First, that the Civil Procedure Code Cap. 33 [R.E. 2002] herein to be referred as CPC is not exhaustive;

Second, that the High court has jurisdiction to grant an interim injunction orders pending institution of a Suit in the circumstances not covered by Order XXXVII of the CPC;

Third, this High Court has jurisdiction to apply relevant Rules of Common Law and Statutes of general application in force in England on the 22nd July, 1920 where the Code is silent; and

Finally, that the Highest Court of Land in the case of **TANZANIA ELECTRIC SUPPLY COMPANY (TANESCO) VS. INDEPENDENT POWER TANZANIA LTD (IPTL) AND 2 OTHERS (2002) TLR 324** has laid down the position of law regarding the applicability of the provision **Section 2(3) of the Judicature and Application of Law Act (JALA)** and the relevant Rules of Common Law, and statutes of general application force in England on 22nd July, 1920 where the Code is silent.

The above said however, I should hastily state that contentious and provocative issue revolves around the counsel lies on the interpretation of the following verdict of the court of Appeal of Tanzania in the case of **TANESCO** (supra). The said extract reads:-

*"(VI) The Civil Procedure cannot be said to be exhaustive. It is legitimate, therefore, to apply under **Section 2 (2) of the Judicative and Application of Laws Ordinance, relevant rules of Common law and statutes of general application in force in England on the twenty second day of July 1920 where the Code is silent.** So the High Court has jurisdiction in a proper case to grant an "interim injunction order" pending institution of a suit or in circumstances not covered by **Order XXXVII of the Code.** But decision on this point do not hold that a relief in the form of monetary judgment*

can be granted where there is no suit or before a suit is determined".

From the above extract, it appears that Mr. Hosea's interpretation that the Applicants through the phrase **"to apply under"**; according to his view, the Applicants were required to cite relevant Rules of Common Law and statutes of general application in force in England on 22nd July, 1920; in order to move the court to grant an interim injunction order pending institution of a suit in circumstances not covered by **Order XXXVII of the CPC and not citing Section 2 (3) of JALA.**

Mr. Mwelelwa's interpretation is that the phrase **"to apply"** according to him allows Applicants to cite **Section 2 (3) of JALA** which he said it grants powers of this court to grant interim **"injunction orders"** pending institution of a Suit not covered by **Order XXXVII of CPC.**

Now having pointed the above, it is not hard for me to conclude that the real legal battle of the interpretation on the quoted above passage lies on the phrases **"to apply "** or **"to apply under Section 2 (3) of JALA".**

Before I resolve the said controversy, I wish to state that this court has jurisdiction to issue an interim order where there is no pending suit. The issue is not surfacing in courts for the first time. In **Misc. Civil Case No. 117 of 1996, NICHOLAS NERE LEKULE VS. THE INDEPENDENT POWER (T) LTD AND THE ATTORNEY GENERAL** and **Misc. Civil Case No. 42 of 1998, TANGANYIKA GAME FISHING AND PHOTOGRAPHIC LTD VS. THE DIRECTOR OF WILDLIFE, THE ATTORNEY GENERAL AND MUANAUTA AND COMPANY (T) LTD**; My Brothers, **Kaji** and **Katiti J.J** respectively held that:-

"The court has jurisdiction to issue an interim order where there is no suit pending".

For clarity and view of what will subsequently be discussed even at the danger of making this ruling unnecessarily long, I wish to clear the atmosphere by stating that in England, orders of injunction where there is no Suit are what has come to be known as ***Mareva injunction***. The terminology has its roots in the name of one of the parties to the action in which the matter was detailed analysed; ***MAREVA CAMPANIA NAVIERA S.A VS. INTERNATIONAL BULL CARRIES S.A (1980) I ALL R.E. 213***. Therein, the court conceded that in England the orders were issued under **Section 25 (8) of the Judicature Act 1873**. This was consequently transferred to **Section**

45 of the Supreme Court of Judicature (Consolidation) Act 1925. The relevant provision states:-

*"A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to the court to **be just and convenient**"*

For the extract quoted source of contravention it is my settled interpretation thus **Section 2 (3) of the Judicature of Application of Laws Act** is a proper provision for this court to be moved for an order sought, suffice to call it an interim injunction order before institution of the main Suit. My reason for the same is that, since courts in England used to issue injunction orders before institution of the main Suit under **Section 25 (8) of the Judicature Act 1873**, and since that **Act was in force in England on 22/7/1920** and would appear to have been of general application in England at that time, I am pleased that under **Section 2 (3) of the JALA** in the circumstance of this case is also enabling provision to move the court on the order sought.

In addition to the provision of **Section 2 (3) JALA**, the Applicants have cited the provision of **Section 95 of CPC**. I am alive that **Section 95 of CPC** talks on inherent powers of the court. According to **MULLA CODE OF THE CIVIL PROCEDURE VOL. 1 (1ST EDITION) AT PAGE 942**, the learned author says:-

"The inherent powers are to be exercised by the court in very exceptional circumstances for which the Code lays down no procedure."

As the Civil Procedure Code Act does not profess to be exhaustive as to the Circumstances in which a temporary injunction issue, I find that where the ends of justice are in jeopardy or where the abuse of the process of the court is imminent, this court can be moved to use its inherent powers under **Section 95 of the Civil Procedure Code** in order to issue an interim order before institution of the main suit in order to arrest such an impending danger/situation.

All said and done, I entirely agree with the Applicant's Advocate that the application is competently before the court and therefore I find nothing of substance in the face of preliminary objection raised as it lack merit and it ought to be and it is **indeed dismissed**.

I make no order as to costs.

Consequently, the Application has to be heard on merit.

It is so ordered.

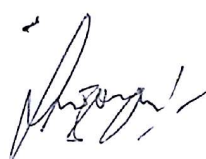

L. E. MGONYA

JUDGE

1/6/2017



COURT: Ruling is read before Advocate Innocent Mwalelwa and Advocate Idan Kitale for Applicants, Advocate Bahati Hosea SA and Benson SA for Respondents and Adventin B/c in my chamber today 1st of June, 2017.


L. E. MGONYA

JUDGE

1/6/2017

