

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

MISC LAND APPLICATION NO. 147 OF 2019

DOCTORE MALESA 1ST APPLICANT
NKADA JOSEPH 2ND APPLICANT
MARWA CHACHA 3RD APPLICANT
MRS MARY DISMASS 4TH APPLICANT

VERSUS

**PERMANENT SECRETARY,
MINISTRY OF LAND HOUSING AND HUMAN
SETTLEMENT 1ST RESPONDENT**
MWANZA CITY COUNCIL 2ND RESPONDENT
THE REGISTERED TRUSTEES BAKWATA 3RD RESPONDENT
THE ATTORNEY GENERAL 4TH RESPONDENT

RULING

11th November, 2019 & 5th March, 2020

M.M. SIYANI, J.

In terms of Order XXXVII Rule 1 (a) and 2 (1), section 68 (c) and 95 of the Civil Procedure Code Cap 33 RE 2002, the applicants herein one Doctore Malesa, Nkada Joseph, Marwa Chacha and Mrs Mary Dismas have moved the court on behalf of 46 others for temporary injunction to

restrain the respondents and their agents from alienating, occupying and damaging the disputed premises which comprises of Mbugani Primary School, Mbugani Serengeti Primary School and Mbugani Victoria Primary School, Mwanza pending determination of Land Case No. 18 of 2018 by this court. Through an affidavit filed to support their application, the applicants contended that the 2nd respondent has allocated the disputed lands including the school buildings to the 3rd respondent who in turn converted some of those buildings to the use other than public education and has been developing different structures without the wishes of the applicants. They stated that being residents of Mbugani ward since immemorial time, they contributed in realisation of the dreams of the former colonial masters and the father of the nation by laying the foundation stones for the benefit of education at their ward. As such the applicants believed that they have some rights over the premises in dispute.

In response, the 1st and 4th respondents apart from filling their counter affidavit, raised as well a point of a preliminary objection to the effect that the application is bad in law for contravening the proviso to order XXXVII of the Civil Procedure Act. When the application was called on 7th September, 2019 for hearing of the raised point of objection, the

applicants moved the court to allow parties dispose the point of preliminary objection by way of filing of written submissions. This ruling is therefore in respect of the said point of preliminary objection raised by the 1st and 4th respondents which was argued through filling of written submissions.

The point advanced by the 1st and 4th respondents to support the objection is that an order of injunction cannot be made against the Government, its departments or officers. They relied on the proviso to Order XXXVII Rule 1 of the Civil Procedure Code (supra). For easy of reference the above provision provides 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 a temporary injunction to restrain such act or 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 further orders. Provided that an order granting 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.
[Underlined emphasis supplied]

The respondents found support in their arguments from the decision of this court in **Estomy A. Baraka and Another Vs Commissioner for Lands and Human Settlements Development** [2003] TLR 29 which observed among other things that although temporary injunction may be awarded against the Government in proceedings for prerogative orders, the same cannot be granted in other proceedings as there are clear provisions of law prohibiting injunctions, both permanent and temporary, against the Government.

Replying the above arguments, the applicants contended that the application which has the aim of maintaining the status quo as distinguished from preventing the functions of the government, has been directed to all respondents and not only the 1st and 4th respondents. It was argued that granting of temporary injunction is nothing but purely the exercise of court's discretion which must be used

to ensure the rule bound and unfettered realisation of justice. Stressing their point, the applicant referred the book of **Principle of injunctions:** Nairobi, oxford University Press 1987 and argued that injunctions should always be granted for the purposes of preventing commission of a wrongful act; restrain breach of contract and to prevent the continuance of either the wrongful act or breach of contract. It was contended that leaving alone the Government doing whatever wrongful act at the expense of the citizen, was not the intention of the legislature. In view of the above, the applicants prayed the court to overrule the objection raised.

Having revisited what was submitted by the parties, it's clear that the provisions of the law under the proviso to Order XXXVII Rule 1 of the Civil Procedure Code do indeed prohibit the making of injunctions, be it interlocutory or permanent, against the Government and its departments or officers. In their submissions, like it was in the case of **Estomy A. Baraka and Another Vs Commissioner for Lands and Human Settlements Development**, the applicants despite recognising existence of the said provision insisted that this court should exercise its usual discretion to grant the injunction.

With due respect, courts of law are creatures of statutes. They derive their powers from the statutes. The wording under the proviso to Order XXXVII clearly limits the power of the court in granting temporary injunctions against the Government, its departments or officers. Such powers which could have otherwise been enjoyed in other proceedings, has been statutorily curtailed except for prerogative orders. In the circumstance, granting of temporary injunction in the presence of specific provision like order XXXVII of the Civil Procedure Code, cannot be said to be a discretion of the court notwithstanding that the instant application includes both the Government and entities other than the Government.

For the reason above, I find merits in the raised preliminary objection and the same is hereby sustained. Being preferred against the provision of Order XXXVII of the Civil Procedure Code, this application is bad in law and the same is accordingly dismissed with costs. It is so ordered.

DATED at MWANZA this 6th Day of March, 2020



M.M. SIYANI
JUDGE