

**IN THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION NO. 277 OF 2018
(Arising from Misc. Civil Application No. 262 of 2018)

RAMADHANI HAJI ABDULKARIM

(As Administrator of the Estate of the
late **HAJI ABDULKARIM** –Deceased)

}.....**APPLICANT**

VERSUS

DR. LUBERO BAKARI MVUNGI.....1ST RESPONDENT
AL HAJI ANZURUNI JUMANNE MUNGULA.....2ND RESPONDENT
ABEL SANGA T/A UNYAGALA AUCTION MART
AND COURT BROKERS.....3RD RESPONDENT

RULING

Date of the last Order 08th June, 2018
Date of Ruling 08th June 2018

R. K. SAMEJI, J.

The applicant herein has filed this Application under Sections 95, 68 (e) of the Civil Procedure Code, Cap 33 [R.E 2002] and Sections 2(1) and (3) of the Judicature and Application of Laws, Cap. 358 [R.E.2002] seeking for both ex-parte and inter-parties orders of this Court as follows:-

EX-PARTE

That, this Honourable Court be pleased to stay execution of the Decree dated 17th February 2005 in RM Civil Case No. 157 of 2000 pending determination of this Application inter-parties.

INTER- PARTIES

- (a) That, this Honourable Court be pleased to stay execution of the Decree dated 17th February 2005 in RM Civil Case No. 157 of 2000 pending determination of the Application for Revision i.e Misc. Civil Application No. 262 of 2018;*
- (b) The High Court be pleased to make such other interlocutory orders as may appear to the Court to be just and convenient;*
- (c) Costs of this Application be provided for; and*
- (d) Any other reliefs that the Honourable Court may deem fit and just to grant.*

It is on record that, though the applicant prayed for an *ex-parte* order, but for the interest of justice the Court was reluctant to hear the Application

ex-parte and it thus ordered the respondents to be served, summoned and the matter to be heard and determined *inter-parties*.

At the hearing of the Application inter-parties the applicant enjoyed services of Mr. Joseph Sang'udi, the learned Counsel, while the respondents were represented by Mr. Samson Mbamba, the learned Counsel.

Submitting in support of the Application Mr. Sang'udi prayed the Court to adopt the Affidavit in support of the Application and argued that, the Application arises from the decision of the Kinondoni Resident Magistrate Court issued in respect of *Misc. Civil Application No. 79 of 2018*, where the applicant filed an objection proceedings, but the same was dismissed after the respondents have filed preliminary objection, on the issue of jurisdiction, which was sustained and the Objection proceedings dismissed.

Mr. Sang'udi said that, subsequent thereto, they have decided to file a Revision Application, which is pending before this Court to challenge the decision of the Kinondoni Resident Magistrate Court, because the trial Magistrate in the course of determining the said preliminary objection he also discussed the merit of the case, the thing which, Sang'udi said, is

legally wrong. He said, the point of preliminary objection raised was only on the jurisdiction of the court to entertain the matter, but the trial Magistrate went on to discuss other matters. To buttress his point Mr. Sang'udi referred the Court to page 19 of the trial court's Ruling at paragraph 50 and also paragraph 55, where the trial court discussed powers of the court to entertain the applicant's Application on objection proceedings.

Mr. Sang'udi also submitted that, the applicant was not a party to the original suit, but after he became aware with the execution of the Decree of the High Court he decided to file objection proceedings. Mr. Sang'udi insisted that, it was wrong for the trial court to discuss matters, which were not related with the preliminary objection raised. He thus submitted that, the Court be pleased to stay the execution of the said Decree pending the determination of the Application for Revision *i.e Misc. Civil Application No. 262 of 2018*. As such, Mr. Sang'udi prayed the Application herein to be granted with costs.

In response Mr. Mbamba started by informing the Court that, the Application before the Court is for the stay of execution of the Decree of

this Court issued by Hon. Arufani J, but the said Decree is not attached with the Application or even provided for by the Applicant for this Court to be aware on what exactly is asked to stay. Mr. Mbamba said, the Court cannot be requested to stay a Decree which is not aware of. Mr. Mbamba argued further that, the Kinondoni Resident Magistrate Court was only executing the Decree of the High Court and the Application which was considered by the trial Magistrate was only on an objection proceedings filed by the applicant. Mbamba argued further that, even the said Application is not attached hereto, but one can sense the same at page 2 of the trial court's Ruling. Mr. Mbamba said in that objection proceedings, the applicant was seeking for the orders of the Kinondoni Resident Magistrate Court to determine the rightful or the lawful owner of the premises Plot No. 446 & 447 Block 72 situated at Kinondoni area in Dar es Salaam.

Mr. Mbamba said, taking into account that, the issue of ownership of the said premises was already determined by the High Court before Hon. Mandia, J. the respondents raised the preliminary objection that, the Kinondoni Resident Magistrate Court has no jurisdiction to determine that

matter. Mr. Mbamba submitted further that, the other issue which was raised by the respondents was that, the Kinodnoni Resident Magistrate Court has no power under Order 21 Rule 57 (1) of the Civil Procedure Code, Cap. 33 [R.E. 2002] to investigate on the issue of ownership of the said premises after the High Court had already pronounced itself on the same. Mr. Mbamba spiritedly argued that, the applicant was inviting the Resident Magistrate Court to overrule the decision of the High Court, as the property in question were decreed or attached to the Decree issued by the High Court. Mr. Mbamba noted that, after considering the matter the trial court noted that it has no power to consider those matters that were already decided by the High Court. He further said, even the paragraphs highlighted by Mr. Sang'udi, the trial Magistrate was in the course of discussing the very same matter and it is not true that the trial Magistrate went out of the preliminary objection.

Mr. Mbamba also challenged the competence of the Application before the Court, He said, the stay of execution which the applicant is praying the Court to grant, is *pending the determination of a Revision Application*. He

said, in order for the Court to grant any interlocutory order there must be *pending the determination of a suit or an appeal which is before the Court.*

Amplifying further on this matter, Mr. Mbamba referred to Order 21 Rule 62 of the Civil Procedure Code and argued that, the said provision provides for the finality to the objection proceedings. He further argued that, a party to the objection proceedings cannot file an application to challenge the decision reached in respect of the objection proceedings. Mbamba contended further that, the only remedy which is available to such a party is to institute a suit, but not a revision or an appeal. Mbamba said, the applicant has followed a wrong route and if the Court will be tempted to grant the Application herein, it will be an exercise of court's powers and discretion in futility. To buttress his position he referred to the decisions of the Court of Appeal in **Martha Iswalwile Vicent Kahabi v Marietha Salehe and 3 Others**, MZA Civil Application No. 5 of 2012 at page 6 and **Richard Lazaro Swai v Pendo Richard Swai and 2 Others**, Civil Application No. 141 of 2011. Finally Mr. Mbamba prayed the Court to dismiss the Application with costs.

In rejoinder submission, Mr. Sang'udi argued that the Decree of the High Court referred to by Mr. Mbamba is not the subject matter of the Application. He said, the applicant herein is praying for the orders of this Court *to stay of the execution of the Eviction Order issued by the Kinondoni Resident Magistrate Court on 17th April 2018 in respect of Misc. Civil Application No. 157 of 2000.* Then, finally Mr. Sang'udi referred to the decision of the Court of Appeal in **East African Development Bank v Blueline Enterprises Limited**, Civil Application No. 35 of 2003 at page 5.

I have given a careful consideration to the arguments for and against the Application advanced by the learned Counsel for the parties. I am settled in my mind that, issues for my determination herein is *whether the Application before this Court is competent and meritorious to be entertained by this Court.*

It is my considered view that this matter should not detain this Court, as it is settled law in this Country that, an application which is incompetent cannot move the Court to grant the prayers sought in the Chamber Summons. There are multitudes of authorities on this matter.

It is clear from the submission by Mr. Sang'udi that there is a confusion on which specific Decree the applicant is praying this Court to stay the execution because ***in the prayers indicated by the applicant in the Chamber summons, though the applicant has indicated that, he prays the Court to stay execution of the Decree dated 17th February 2005, but he referred to RM Civil Case No. 157 of 2000.***

For the sake of clarity, I have endeavored to reproduce the first applicant's inter-parties' prayer which is couched in this style:-

*'That, this Honourable Court be pleased to stay execution of the **Decree dated 17th February 2005 in RM Civil Case No. 157 of 2000** pending determination of the Application for Revision i.e Misc. Civil Application No. 262 of 2018'.*

I must say it loud that, this is a bit confusing, because as per the Ruling of the Kinondoni Resident Magistrate Court the **Decree dated 17th February 2005, which the applicant is referring to, above and indicated in the Chamber Summons was issued by the High Court, in Civil Case No. 66 of 2005** and not the Resident Magistrate Court as indicated herein.

To make matters worse, in his submission, Mr. Sang'udi informed the Court that, the stay of execution they have since prayed the Court to grant is for the stay of execution of ***the Eviction Order dated 17th April 2018 issued by the Kinodnoni Resident Magistrate Court in RM, Civil Case No. 157 of 2000.*** However, the Eviction Order referred to by Mr. Sang'udi is nowhere featuring in the Chamber Summons. In the circumstance, I feel no remorse in saying that, I need not be detained by Mr. Sang'udi's obvious confusion and misconception of both, the law and fact. It is also clear that, all these defects have as well depicts negligence and lack of seriousness on the part of the applicant and the Application is completely an abuse of court processes.

It is also on record that, though the applicant is praying for the stay of the Decree dated 17th February 2005, but the same is not attached to the Application to enable the Court to see and satisfy itself with the same. In the case of the Court of Appeal of the **East African Development Bank v Blueline Enterprises Limited**, (supra) submitted by Mr. Sang'udi himself, at pages 5-6 the Court of Appeal categorically held that:-

*“It hardly needs to be emphasized that **both logic and common sense demand that the Court should be seized with the decision by way of judgement, ruling or order which is the subject matter of stay of execution.** This is so in order to enable the Court to see and satisfy itself of the application before it. It would not make any sense at all for the Court to order stay of execution of a judgement, ruling or order which the Court has not seen.* [Emphasis added].

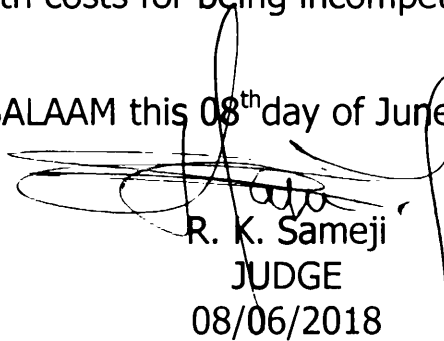
In the case at hand, there is no dispute that the Decree indicated in the Chamber Summons is not attached. Therefore, the above decision of the superior court of the land is binding on this Court and there is no way this Court can ignore the same and proceed to grant this incomplete and confusing Application.

It is therefore my respectful view that, there is considerable merit in Mr. Mbamba’s submission that, the applicant’s Application is incompetent and has not properly moved this Court to grant the prayer sought in the Chamber summons. In my view, the defects discussed herein above suffices to dispose of the matter and I feel that it is not necessary to dwell


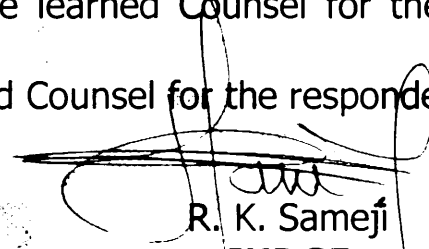
on discussing other issues raised by Mr. Mbamba on further competency of this Application.

In the event, I declare that the *Misc. Civil Application No. 277 of 2018* is hereby struck out with costs for being incompetent. It is so ordered.

DATED at DAR ES SALAAM this 08th day of June 2018.


R. K. Sameji
JUDGE
08/06/2018

COURT- the Ruling delivered in Court Chambers in the presence of Mr. Joseph Sang'udi, the learned Counsel for the Applicant and Mr. Samson Mbamba, the learned Counsel for the respondents.



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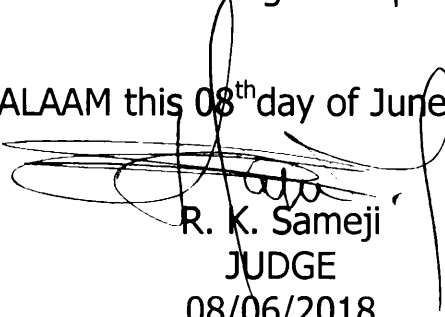
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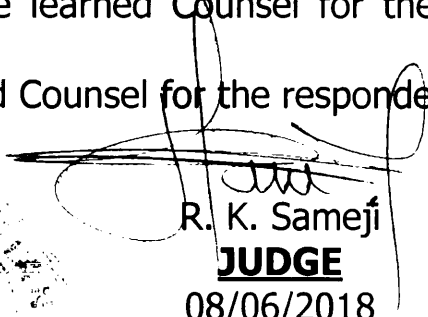
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