

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

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 544 OF 2019**

*(Arising from Misc. Civil Application No. 478 of 2019 of High Court of  
Tanzania at Dar es Salaam)*

**NG'WENA MWITA.....APPLICANT**

**VERSUS**

**AGNESS KIMANDA.....1<sup>ST</sup> RESPONDENT**

**S. L. ISANGI AUCTION MART AND**

**COURT BROKERS.....2<sup>ND</sup> RESPONDENT**

**RULING**

**Date of last Order:** 05/03/2020

**Date of Ruling:** 11/03/2020

**MLYAMBINA, J.**

The applicant is seeking for interim orders restraining the 1<sup>st</sup> respondent and 2<sup>nd</sup> respondent and their agents, servants from demarcating, selling and /or disposing of the disputed house located at Miame Street, Kome-Sengerema until the determination of the matter. The application has been preferred under *Order XXXVII Rule 1 (a) and 2 and Section 68 (c) and Section 95 of the Civil Procedure Code, Cap 33 (R.E. 2002)*.

The application has its genesis from the probate administration. As per the affidavit in support of the matter, the applicant was

appointed the administrator of the estate of her late husband Roby Chacha Matiko by the Kawe Primary Court of Kawe in Probate Cause No. 47 of 2012 on 9<sup>th</sup> March, 2012.

The supporting affidavit goes on to state that, some of the estate of the late Roby Chacha Matiko which falls within the hands of administrator is a house containing approximately 10 rooms situated at Kone Sengerema, Mtama Street in Mwanza.

The other reason in support of this application is that the applicant is under process to appeal to the court of appeal against the decision of this Court in Appeal No. 9 of 2019 delivered on 24<sup>th</sup> day of July, 2019.

It was deponed by the applicant that, on 25<sup>th</sup> day of September, 2019 the applicant filed an application for extension of time and leave to file certificate of points of law to the Court of Appeal which was registered as Misc. Civil Application No. 478/2019 in this Court.

Further, on 15<sup>th</sup> day of September, 2019 the applicant received an information by mobile phone from Mwanza to her tenants that the 1<sup>st</sup> and 2<sup>nd</sup> respondents without colour of rights brought a notice for sale at the house situate at Mtama "B" within Kome Sengerema in Mwanza. It required the applicant to leave from the said house in dispute within 14 days.

While the Appeal No. 9 of 2018 is under process and not reached to the end, the 1<sup>st</sup> respondent objected the application by filling a counter affidavit. In her paragraph 4 of the counter affidavit, the 1<sup>st</sup> respondent stated *inter alia* that the said house is not currently under the deceased estate but it is owned by one Mohamed Mahenga. She stated further that the house was sold by the 2<sup>nd</sup> respondent under the instruction of the Primary Court of Sengerema. Thus, it was after the applicant used about Tshs 12,300,000/= to give a deceased child named Francis Roby as his share from the estate to build the said house without any directives from Court.

The 1<sup>st</sup> respondent testified that the applicant is deliberately abusing the Court process by filling multiple cases in this Court while she is aware that the execution has been done already.

At the hearing both parties largely repeated what they stated in their affidavits. Of important, the applicant denied that the house has not been sold as there was an injunction order issued by the District Court of Kinondoni, Sengerema District Court and this High Court.

I have gone through the available records; I noted the following important facts for determination of this matter.

*One*, the suit property was auctioned by S.L. Isangi Auction Mart and Court Broker way back on 29/10/2018 at the tune of Tshs 8,000,000/= . The 1<sup>st</sup> respondent herein received Tshs 5,000,000/= out of the sale proceeds on 1<sup>st</sup> November, 2018.

*Two*, the District Court of Kinondoni at Kinondoni through Civil Revision No. 27 of 2017 issued an interim order of maintaining *status in quo* pending determination of the application. That order was issued on 19<sup>th</sup> November, 2018.

*Three*, this Court through the instant application issued an interim order restraining the respondents and their agents from demarcating, selling and /or disposing of the disputed house pending determination of this application. That was on 23/10/2019.

*Four*, in the end of the trial of this application, the Court has noted that the interim orders issued by the Kinondoni District Court and the subsequent interim orders were issued after the suit property was already disposed of to another person by the order of the Court. It follows therefore clear that the application for stay of execution has been over taken by events.

In any aspect, an application for stay of execution has to be filed before the expiration of time allowed for appealing an appealable


decree or order (*see Mohonge Kitege v. Issa Elias*, Civil application No. 5 of 2011).

Even if the application for stay is filed before the expiration of time to appeal, there must be sufficient reasons to grant it. In the premises of the above, this application is dismissed for lack of merits. Considering that the matter originates from probate cases, I order each party to bear her own costs. It is so ordered.



**Y. J. MLYAMBINA**  
**JUDGE**  
**11/03/2020**

Ruling delivered and dated 11<sup>th</sup> day of March, 2020 in the presence of both parties in persons.



**Y. J. MLYAMBINA**  
**JUDGE**  
**11/03/2020**