

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

AT DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 151 OF 2019

(ORIGINAL (PC) CIVIL APPEAL NO. 199 OF 2004)

PROSPER PETRO MUNISI (Legal Administrator of **PETER MUNISI**).....**APPLICANT**

VERSUS

1. YUNUS BAKARI MSHANA.....**1ST RESPONDENT**

2. KISHE AUCTION MART CO.

LTD. COURT BROKER.....**2ND RESPONDENT**

RULING

Date of Last Order:5/12/2019

Date of Ruling: 31/03/2020

S.M. KULITA, J.

By way of Chamber Summons the applicant filed this application under Order XXXVII, rule 1(a) of the Civil Procedure Code [Cap 33 RE 2002] supported by an Affidavit of the Applicant. In the application the Applicant is moving this Court to issue an order of temporary injunction restraining the respondents from executing the order/decreed of the Primary Court of Manzese/Sinza pending final determination of the intended appeal to the Court of Appeal of Tanzania at Dar es Salaam.

The brief facts of this application was that upon the demise of one Husna Peter, the 1st respondent, the husband of the said deceased Husna Peter applied before the Manzese/Sinza Primary Court in Probate and Administration Cause No. 77 of 2002 to be appointed an administrator of the estate of his deceased wife. The said application was objected by Peter Munisi who was the father of Husna Peter on the ground that the house situated at Kipawa in the city of Dar es Salaam which is in the name of the deceased and was included in the deceased's estate does not form part of the matrimonial property having been acquired by the deceased before she contracted marriage with the 1st respondent and even before the deceased converted to the Islamic faith, and further that Peter Munisi had contributed to the construction of the said house, hence he was entitled to inherit the house at Kipawa left by the deceased. The Primary Court held in favor of the 1st respondent on the ground that Peter Munisi being a non-moslem could not inherit from the estate of the deceased who professed Islam and the 1st respondent was appointed to be the administrator and the lawful heir of the deceased's estate.

Peter Munisi was dissatisfied with the decision of the Primary Court hence he appealed to Kinondoni District Court. The District Court found that the house in dispute was constructed before the deceased's marriage to the 1st respondent and before the deceased converted to Islam. The District Court also found that Peter Munisi had contributed to the construction of the disputed house and that Islamic law did not apply to such assets in the deceased's estate which were acquired before the deceased's marriage and before she became a moslem. The District Court allowed the appeal and

held that Peter Munisi was entitled to inherit one half share of the value of the disputed house while the other half would be inherited by the 1st respondent.

The 1st respondent was dissatisfied with the decision of the District Court and he appealed to the High Court. The High Court held that as the deceased was a professed moslem the deceased's estate is subject to Islamic Law and the distribution of the deceased's estate will be governed by Islamic Law. It is immaterial whether the property was acquired before the deceased converted to Islam so long as it was lawfully owned by the deceased at the time she passed away. So the High Court confirmed the findings of the Primary Court and allowed the appeal.

The decision of the High Court was delivered on 8/11/2012 after the death of PETER MUNISI who was the respondent in that appeal and who died on 28/8/2012 as per annexure "A" as stated in paragraph 2 of the Applicant's Affidavit. The Applicant in his Affidavit states that the family had no knowledge of the judgment of the High Court until later time and upon reading the judgement the family of the late PETER MUNISI was dissatisfied with the decision of the High Court and instructed their advocate who applied for the records of the case with a view of filing an appeal to the Court of Appeal of Tanzania and their advocate filed a Notice of Appeal to the Court of Appeal of Tanzania as per annexure "B" to the Applicant's Affidavit and the Notice of Appeal was lodged in the High Court of Tanzania, Dar es Salaam Registry on 7th day of December, 2012.

The Applicant in this application and 3 others were appointed as legal representatives of the Late PETER MUNISI. The applicant filed the application for leave to appeal to the Court of Appeal of Tanzania being Misc. Application No. 439 of 2014 and the same is still pending in this Court because the Court files are not available and the efforts to find the same proved futile and the applicant in paragraph 8 of his affidavit states that the 1st respondent is taking advantage of this and went to the primary court to execute the decree of the primary court and the Primary Court has now appointed a Court Broker who is the 2nd respondent in this application.

The applicant state in paragraph 11 of his Affidavit that the purpose of the intended appeal shall be defeated if the respondents are given chance to go on with the execution and so he prays this Court to grant an order of injunction.

On 23/5/2019 the respondents filed a Notice of Preliminary Objection on the point of law that this Court has no jurisdiction to hear an adjudicate this Application for injunction on account of the Notice of Appeal filed on 6th December, 2012 because after filing the Notice of Appeal it is the Court of Appeal now which has powers to deal with injunction, the High Court seized with the records of the matter.

The Preliminary objection was disposed of by way of written submission whereby the Applicant was represented by Ukwong'a Advocate while the respondents were represented by Elias Abel Msuya, Advocate.

In their submission the respondents' counsel stated that it is the trite law that once a person lodges a notice of appeal showing his/ her intention to

appeal to the Court of Appeal, the High Court ceases to have jurisdiction to entertain all other application inclusive of an application for injunction as is the case here, save for certain applications specifically provided for, such as leave to appeal or for provision of a certificate of law.

The respondents' counsel cited the case of **Aero Helicopter (T) Limited vs. F. N. Jansen [1990] TLR 142 at p. 145**. In that case it was held;

"It is to be remembered that the inherent power of the High Court under section 95 of the Code is exercisable where the law has made no provision governing the particular matter at hand..... I think that the High Court has such jurisdiction only so long as proceedings, of appeal to this Court have not been commenced. Once such proceedings have been commenced, I think that the inherent jurisdiction of the High Court over the matter ceases.

I held this view for two reasons; first, once appeal proceedings to this Court have been commenced, I think that such proceedings do not come within the ambit of section 2 of the Code as set out above. That is to say, in my view, they are proceedings of the Court of Appeal and not proceedings in the High Court to which, in terms of section 2, the provisions of the Code would apply. Therefore, the High Court could not properly apply section 95 of the Code for the simple reason that, in my opinion; the proceedings are no longer in that Court.

Secondly, once appeal proceedings have been commenced by filing notice of appeal to this court, the law makes specific provision,

relating to stay of execution by this Court, under rule 9(2)(b) of the Rules as reproduced above. So that there could no longer be excuse for saying that the High Court would exercise its inherent jurisdiction because the law has made no provision governing the matter."

The respondents' counsel went on submitting that the above position of the law has been consistently upheld in subsequent decisions of the Court. In the case of **Mohamed Enterprises Tanzania Limited vs. The Chief Harbour Manager and Tanzania Ports Authority, Civil Appeal No 24 of 2015, CAT at Dar es Salaam (unreported)** at page 11/12 it was held that;

"Once appeal proceedings to this Court have been commenced by filing notice of appeal, the High Court has no inherent jurisdiction under section 95 of the Civil Procedure Code to order stay of execution pending appeal to this Court. Unless there is a Court order, the notice of appeal would not cease to have effect."

The notice of appeal in this instant case has not been withdrawn as there is no formal order of the Court of Appeal to that effect; so it is presumably to be intact until this day. So this Court lacks jurisdiction to adjudicate the application for injunction because records of the matter are now with the Court of Appeal and the law provides special procedures of dealing with stay of execution and this is Rule II of the Court of Appeal Rules 2009 GN No. 368/2009 as amended. The respondents' Counsel pray that this application be struck out with costs.

In replying to the written submission by the respondents the learned counsel for the applicant submitted that they are aware that this Court upon filing of Notice of Appeal all the powers it had prior to the filing of Notice of Appeal vests in the Court of Appeal. It has been therefore their legal understanding that once Notice of Appeal is filed and pending, the High Court and the Courts subordinate thereto cease to have jurisdiction to entertain execution. Entertaining execution would imply interference into the appeal process. In the event that a subordinate Court interfere with the process of the appeal or has shown interest in interfering; they believe that the High Court has jurisdiction to issue injunction for the interest of justice since it is not lawful to execute the decree against a deceased person when his appeal process is still at the initial stage.

Having considered the submissions of the learned counsels of the parties the issue on this application is whether the High court have jurisdiction to grant an order of temporary injunction after a Notice of Appeal to the Court of Appeal have been filed.

I agree with Mr. Msuya's submission that after the institution of appeal, that is filing of the Notice of Appeal in the Court of Appeal against the judgment of the High Court, the High Court ceased to have jurisdiction on the proceedings unless the Notice of appeal is withdrawn by an order of the Court. Even the learned counsel for the applicant in his written submission agreed that they are aware that upon filing a Notice of Appeal all powers this Court it had prior to the filing of the Notice of Appeal vests in the Court of Appeal.

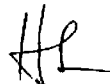
In the case of **Matsushita Electric Co. Ltd v. Charles George t/a C. G. Travers, Civil Application No. 71 of 2001 (Unreported)** it was stated that;

"Once a Notice of Appeal is filed under Rule 76 (now Rule 83(1) of the Rules) then this Court is seized of the matter in exclusion of the High Court except for applications specifically provided for, such as leave to appeal or provision of a certificate of law."

It is also the position in the case of **Aero Helicopter Limited v. F. N. Jensen(supra)** which was also relied upon by the learned counsel for the respondents in his submission that;

"Once appeal proceedings to this Court have been commenced by filing a Notice of Appeal, the High Court has no inherent jurisdiction under section 95 of the Code for the simple reason that the proceedings are no longer in the Court as required by section 2 of the Code."

Therefore, from the above reasoning, this Court sustain the objection and dismiss the application with costs.



S.M. KULITA

JUDGE

31/03/2020