

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA**

AT SHINYANGA

CRIMINAL REVISION NO. 01 OF 2021

MACHIBYA MAIGE.....APPLICANT

VERSUS

MISAN MAIGE

JUMANNE MAIGE

PILI MAIGE

.....RESPONDENTS

[Application from the Ruling of the District Court of Shinyanga]

(Hon. P.G Mushi.)

dated the 20th day of August,2020

in

Misc. Criminal Application No. 01 of 2020

RULING

1st & 12th March,2021.

MDEMU, J.:

This criminal revision has been initiated by the Applicant through his letter of complaint directed to the Judge In charge dated on 14th of October,2020.

In a nut shell, facts as can be gathered from that letter are to the effect that, both parties are heirs of the late Maige Dotto and that through Probate Appeal No. 6/2018, one Seleli Dotto was appointed the

Administrator of the estates of the deceased. We are told further that, Seleli Dotto divided the deceased's estates to all heirs. According to the letter, the Respondents invaded the Applicant's share of land and following that invasion, the Applicant instituted criminal case No. 1/2020 at Itwangi Primary Court. The Respondents were found guilty. They then appealed through Criminal Appeal No. 6/2020 in the District Court of Shinyanga.

While that appeal was pending, the Respondents instituted in the same court, Misc. Criminal Application No. 01/2020 seeking for injunction order restraining the Applicant herein from using or disturbing the Respondents herein from using the land in dispute pending determination of Criminal Appeal No. 6/2020. In reply to that application, the Applicant raised preliminary objections on points of law which were overruled and the injunction order was then granted on the same ruling. That was on 20th August, 2020. Aggrieved by that decision, the Applicant filed a letter of complaint to the High Court thus initiating this revision.

Following an effective service, this Application was scheduled for hearing on 1st March, 2021. Both parties appeared in person, unrepresented.

Submitting in support of the Application, the Applicant stated that, Itwangi Primary Court decided a Probate Cause that was already determined by the High Court on appeal. He went on stating that, through that Probate Cause, he, together with the Respondents were given their share on that land. The Applicant said further that, the Respondents sold theirs and then trespassed into his land. He added that, through criminal case No. 1/2020 at Itwangi Primary Court, the Respondents were found guilty of trespass and accordingly got convicted.

The Applicant went on saying that, the Respondents appealed to the District Court of Shinyanga and that, while the appeal was pending, they instituted a criminal application which is the subject of this revision. Furthermore, he stated that, it is in that criminal application the court granted injunction order restraining him from using his inherited share. It was the Applicant's contention that, the Court erred in allowing the Respondents to use his share of land and that, the court had no jurisdiction to deal with not only land matters in a criminal case but also to reopen probate cause. He then prayed for this court to nullify the ruling of the District Court in that criminal application.

In reply, the 1st Respondent one Misana Maige submitted much on administration of estates matters but, on issues subject of this revision he

submitted that, he together with other Respondents appealed against this decision in criminal case and filed application that led to this revision application. Finally, he observed that, the decision of the District Court on temporary injunction should remain undisturbed.

The second and third Respondents concurred with the first Respondent observation and had therefore nothing useful to add. That marked the end of both parties' submissions. I have earnestly gone through both parties' submissions together with the entire records available. The issue before me is whether the temporary injunction in Misc. Criminal Application No. 01/2020 of Shinyanga District Court was properly secured.

As I was perusing the untyped records, I came across the court's order dated 29th July, 2020 which was to the effect that, hearing of both Preliminary objections and the main application would take place on the same date that is, 30th July, 2020. On that hearing date, the records indicated that, the Applicant was recorded to have submitted on the preliminary objections only. The Respondents, while replying, submitted only on the main application for temporary injunction. He did not submit on the objection. The same scenario featured in the impugned ruling

which shows to determine both preliminary objections and the main application for temporary injunction.

It is trite law that, whenever a Preliminary objection is raised, the court should determine it first before hearing of the main case or application. This was also the position taken in the case of **Mount Meru Flowers Tanzania Limited v. Board Tanzania Limited, Civil Appeal No. 260 Of 2018** (unreported) as I quote hereunder; -

".....Counsel were ready to address the points of preliminary objection first, as is always the case when such point has been raised."

Again, in the case of **Shabani Amuri Sudi v. Kazumari Hamisi Mpala, Misc.Land Application NO.30 Of 2019** (unreported) was observed that; -

The legal procedure requires that, once a preliminary objection in an application or suit is raised, must first be determined prior to hearing of the application on merits.

With that position of the law, I am of the firm view that, the presiding magistrate misdirected himself in entertaining both preliminary

objections and the main case at the same time. As the record provide, the Applicant herein properly directed himself on hearing of the preliminary objection. He did not submit on the main application at all.


The Respondents on their part, submitted only on the main application without saying a word on the preliminary objection. The act of determining the main application by the presiding magistrate has actually prejudiced the Applicant herein as he fully directed himself arguing the preliminary objections and not the main application. He was thus unlawfully denied his right to be heard.

On the other hand, the records provide that, the Respondent applied for temporary injunction in Misc. Criminal Application No. 1/2020 through chamber summons supported by an affidavit. In the chamber summons, the Respondents moved the Court under Rule 8(1) of Civil Procedure (Appeals in proceedings originating in Primary Courts). The question is, can a provision of a Civil Procedure law be used to move applications of a criminal case? The answer is in the negative. Civil Procedure contain rules that govern how to attain rights of a civil nature only. With that note, a criminal application has to be moved through provisions of a Criminal Procedure law. Thus, it was wrong for the presiding magistrate to entertain an application that has wrongly moved the Court.

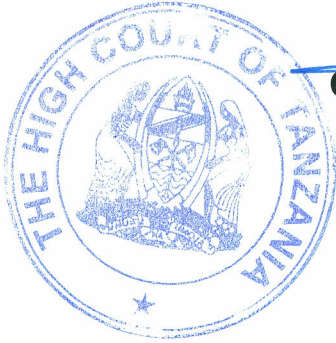
Lastly, is whether it was proper for the Respondents to seek injunction on land matters acquired through inheritance. I must admit that, my entire reading in criminal jurisprudence laws of procedure and decided cases, never came across any provision that allows one to seek such injunction in a criminal case. No wonder, this is the same position by the Respondents who are vividly seen to move a criminal court using civil procedure provision of the law. As a temporary injunction was in respect of land that was inherited following a probate cause decision, then I strongly believe that, the same is a civil matter which is to be governed by the civil procedure law.

All said and done, with that stand, I am pursued to hold that, temporary injunction procured through Misc. Criminal Application No. 01/2020 was improperly secured. Had the presiding magistrate properly guided himself on the nature of the application, he would have reached to that conclusion. On that note, I nullify the entire proceedings and ruling in Misc. Criminal Application No. 1/2020, and set aside the resultant orders.

Order accordingly.


Gerson J. Mdemu
JUDGE
12/03/2021

DATED at **SHINYANGA** this 12thday of March, 2021.



Gerson J. Mdemu
JUDGE
12/03/2021