

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
(IN THE DISTRICT REGISTRY OF MWANZA)
AT MWANZA

MISCELLANEOUS CIVIL APPLICATION NO. 125 OF 2021

(Arising from Misc. Land Application No. 38 of 2021 of the High Court at Mwanza.)

1. LWEMPISI GENERAL COMPANY LIMITED1ST APPLICANT
2. CHARLES KAHATANO LWEMPISI.....2ND APPLICANT
3. MUGANYIZI TIBARUNGI RUGAKO.....3RD APPLICANT
4. ESTHER CHARLES JOSEPH.....4TH APPLICANT

VERSUS

1. RICHRD JOSEPH KWEYAMBA RUGALABAMU..... RESPONDENT

RULING

Date of last Order: 12/10/2021
Date of Ruling: 15/03/2022

F. K. MANYANDA, J.

This is a ruling in respect of a preliminary objection held out by the Respondent to the hearing of this application which has been brought under certificate of urgency for staying execution of the ruling in Misc. Land Application No. 38 of 2021 pending determination of Land Review No. 02 of 2021 before this Honourable Court for review of the ruling.



The objection is based on two points of law namely,

- i. That this application is misconceived for citing the (sic) wrong provisions of the law; and*
- ii. That the order of this Honourable Court in Misc. Land Application No. 38 of 2021 sought to be impugned cannot be challenged by way of review.*

The Applicants filed in this Court this application under Order XXI Rule 24(1) and section 95 of the Civil Procedure Code [Cap. 33 R. E. 2019] hereafter referred to as "the CPC" for orders that:

EX PARTE

1. That this Honourable Court be pleased (sic) to stay the execution of the ruling in Misc. Land Application No. 38 of 2021 pending determination of Land Review No. 02 f 2021 before this this Honourable Court for review of the ruling.
2. Costs for this Application be borne by the Respondent.

INTER PARTIES

1. That this Honourable Court be pleased (sic) to stay the execution of the ruling in Misc. Land Application No. 38 of 2021 pending



determination of Land Review No. 02 f 2021 before this Honourable Court for review.

2. Costs for this Application be borne by the Respondent.
3. Any other reliefs/remedies this Honourable Court deem fit to grant.

Hearing of the objection was conducted by way of written submissions, while Mr. Patrick Suluba Kinyerero, learned Advocate filed the submissions for the Respondent, Abdallah Kessy Abdallah filed those of the Applicants'.

Supporting the first point of law in the preliminary objection, Mr. Kinyerero submitted that the application is incompetent for citing wrong provision of the law. He gave the reason that the application has been taken under Order XXI Rule 24 of the CPC which is not applicable to applications of this kind, the applicable one is Order XXI Rule 27.

The Counsel was of the views that the irregularity is fatal and incurable. He relied on the decision in the cases of **Chama cha Waalimu Tanzania vs. the Attorney General**, Civil Application No. 151 of 2008, **Jimmy Lugendo vs. CRDB Bank Ltd**, Civil Application No. 171 of 2017 and that of **John Bosco vs. Seif Joshua Malimbe**, Misc. Land Application No. 66 of 2019 (all unreported).



As regard to the second point, the Counsel submitted that the order of this Court in Misc. Land Application No. 38 of 2021 cannot be challenged by way of review the same been an interlocutory order because section 78(2) of the CPC bars reviews from interlocutory orders.

The Counsel gave a test for an interlocutory order provided in the case of **Bozson vs. Artincham Urban District Council** [1903]1 KB 547 but did not supply a copy thereof, therefore, this Court will not act on it. He prayed the objection to be sustained and the application struck out with costs.

On his side, Mr. Abdallah Kessy submitted opposing the preliminary objection by conceding in respect of the first point of law that it is true the application has been taken up on a wrong provision of law. The application has been made under Order XXI Rule 24 while the proper one is Order XXI Rule 27. However, the Counsel quickly pointed out that the anomaly is curable under the principle of overriding objective also known as the oxygen principle which was introduced by Act No. 8 of 2018. He cited the case of **Charles S. Kimambo vs. Clemence Leonard Kusudya and Another**, Civil Application No. 477/03/ of 2018

and the case of **Alliance One Tobacco and Another vs. Mwajuma Hamisi and Another**, Misc. Civil Application No. 803 of 2018.

As regard to the second point of objection, Mr. Abdallah Kessy submitted that the same lacks merit because the impugned application is for stay of execution not review. The Counsel was of the views that the objection tends to challenge a review which is before another judge of this Court, which is not proper. He prayed the objection to be overruled with costs.

Let me start with the first point of law in the preliminary objection. It has been argued for the objection by the Counsel for the Respondent and conceded to by the Applicant's Counsel that the application is taken up from a wrong provision of the law. The application is made under Order XXI Rule 24 of the CPC. I agree with the counsel for both sides that that provision is inapplicable in the circumstances of this matter, the applicable one is Order XXI Rule 27 of the CPC.

A question is whether the irregularity is salvageable under the principle of overriding objective also known as the oxygen principle. The Counsel for the Applicant answer is in affirmative while that of the Counsel for Respondent is in negative. The reason given by the Counsel for the Applicant is based on the wisdom of this Court in the case of **Alliance One Tobacco and Another vs. Mwajuma Hamisi and Another**



(supra) and the Court of Appeal in **Charles S. Kimambo vs. Clemence Leonard Kusudya and Another (supra)** that since it eradicated this technical hurdle in civil litigation where the court has power to grant the relief sought, therefore, even this court can do the same.

I have gone through the two provisions of the law and found that Order XXI Rule 24(1) of the CPC concern powers of this Court to stay execution of decrees to a court where the said decree was sent for execution pending application for stay in the court which issued the decree. It reads: -

"24(1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment debtor to apply to the court by which the decree was passed or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution or for any other order relating to the decree or execution which might have been made by such court of first instance or appellate court if execution had been issued thereby, or if application for execution had been made thereto."

On the other hand, Order XXI Rule 27 concern stay of execution of a decree pending finalization of a suit in court." It reads: -

"27. Where a suit is pending in any court against the holder of a decree of such court, on the part of the person against whom the decree was passed the court may, on such terms as to security or otherwise as it thinks fit, stay execution of the decree until the pending suit has been decided."

As it can be seen, in both scenarios the court has power to stay the execution. What does the law say in a situation where a party has cited a wrong provision of the law but the court has power to grant the order requested? The answer is the case of **Alliance One Tobacco and Another vs. Mwajuma Hamisi and Another (supra)**. In that case my brother Hon. Mlyambina stated as follows: -

Though dismissal of objection is likely to encourage laziness to lawyers in doing their homework prior to filing applications and so hamper the development of jurisprudence, I find the call made by the applicant adds more value in the administration of substantive justice. Upholding the raised preliminary objection is a punishment to the client for mistakes done by its counsel. Indeed, upholding of the preliminary objection will cause more wastage of time and resources to both litigants and to the court, multiplication of unnecessary cases, and over burdening litigants with unnecessary costs. Upholding the same objection will not solve the dispute of the parties. Indeed, the Court will be used as a vehicle of miscarriage of justice at the expenses of legal technicalities. It must be noted, however, that the imported wisdom of Rule 48 [of the Court of Appeal Rules 2009] into this Court is limited to circumstances where an



application has omitted to cite any specific provision of the law or has cited a wrong provision, but the jurisdiction to grant the order sought exists."

In another case of **Dangote Cement Limited Vs Nsk Oil And Gas Limited**, Misc. Commercial Application No. 08 of 2020, this Court (Hon. Magoiga, J.) said at page 14 to 17 as follows: -

The question I have to ask myself is whether failure to cite the relevant provisions of the law has the effect of striking out this application? I agree with the learned counsel for respondent that in the past this was fatal and incurable in all respects, even without citing any case law. However, with the introduction of overriding objective this is not the case both civil and criminal laws as amended requiring basically courts to focus on substantive justice."

The court went on stating further that: -

Whereas I entirely agree with the reasoning with my learned brother Hon. Mlyambina Judge, in the above case, nevertheless, I wish to add that, one, in my opinion, the jurisdiction to grant orders in any application is not conferred by the chambers summons but by the law, and this being a court of law, in my opinion, is presumed to know the law, hence, I am enjoined to overrule the objection irrespective of the failure to cite the specific provision of the law in the chamber summons so long as the jurisdiction to grant



the orders exist under section 283 of the Companies Act. Two, the argument that the court is not properly moved, in my opinion, is a technicality that we have engaged for years and yet in most cases we have failed to reach the yolk of the dispute between parties and miserably failed to determine the real controversy in issue at the expense of that technicality. Courts needs to be jealous of their jurisdiction granted by the Acts of Parliament or any law for that matter and deny any suggestion of undermining that jurisdiction."

I am in total agreement with my bother judges that this court should not be tied with legal technicalities when determining disputes. This is the invent of the Constitution of the United Republic of Tanzania, 1977 under article 107A(2)(e) that when deciding cases both civil and criminal courts should observe among others to dispense justice without being tied up with undue technical provisions which may obstruct dispensation of justice.

It on these reasons that I do hereby find that the first point in the preliminary objection as having no merit.


As regard to the second point of objection, the argument by the Counsel for the Respondent is that the order in Misc. Land Application No. 38 of 2021 is not subject to review because it is a specie of interlocutory



order. The Counsel for Applicant argued that this matter is not a review but a stay of execution the impugned decision. My understanding of the law is that among the tests for grant of a stay include chances of success of the pending matter in court. A question I have asked is whether at this stage it is safe to discuss matters in the review. The answer in my considered views is in negative. I say so because the matter before me is an application for stay not the review itself. At this stage the court only looks at triable issues in the matter without trying the matter itself. In such circumstances, the time has not yet come for this court to examine those criteria for review. To deal with such issues is to determine the review itself. I should not let the cat out of the box too early, Mr. Kinyerero may arm his bow but he is not allowed to fire it now.

To this end I also find the second point in the preliminary objection as none meritorious. Consequently, I do hereby overrule the preliminary objection. Costs in the course. It is so ordered.




F. K. MANYANDA
JUDGE
15/03/2022