

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**MISC. LAND APPLICATION NO. 22 OF 2022**

(Arising from Land Case No. 26 of 2017 and Execution Case No. 4 of  
2020 of the High Court of Tanzania at Moshi)

**MWANGA DISTRICT COUNCIL..... APPLICANT**

**Versus**

**ISLAMIC DEVELOPMENT FOUNDATION.....1<sup>st</sup>RESPONDENT**

**VILLAGE COUNCIL MASUMBENI.....2<sup>nd</sup> RESPONDENT**

**GEORGE EFEKIE MFWANGAVO.....3<sup>rd</sup> RESPONDENT**

**RULING**

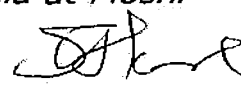
*19/07/2022 & 18/8/2022*

**SIMFUKWE J.**

The applicant Mwanga District Council filed the instant application under certificate of urgency under **Order XXI, Rule 57 (1) and (2) and section 95 of the Civil Procedure Code. Cap 33 R.E 2019 (CPC)** praying for the following orders:

**EX-PARTE**

- 1. That, this Honourable Court be pleased to investigate and waive the decision and judgment of the High Court of Tanzania at Moshi*

  
Page 1 of 12

*Registry and also investigate the Application for Execution No. 04/2020 and waive all its orders, whereby the Applicant's seven (7) acres of Masumbeni Primary School located at Ward of Kifula, has been acquired unlawfully by the 1<sup>st</sup> Respondent. The Applicant who is rightful owner of disputed land was not party to the said case including the Application for execution hence lose the right to be heard.*

- 2. Costs of this application to take its course.*
- 3. Any other relief(s) as this Honourable Court deems just and fit to grant.*

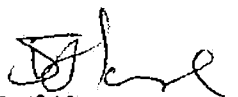
### **INTER-PARTES**

- 1. That, this honourable Court be pleased to investigate and waive the decision and judgment of the High Court of Tanzania, at Moshi Registry and also investigate the execution order in execution No. 04/2020 and waive all orders, whereby Applicant's seven (7) acres of Masumbeni Primary School located at Kifula Ward has been acquired unlawfully by the 1<sup>st</sup> Respondent.*
- 2. Costs of this application be provided.*
- 3. Any other relief(s) as this Honourable Court deems just and fit to grant.*

The application was supported by the affidavit sworn by Ms Mwajuma Abasy Nasombe the District Executive Director of Mwanga District Council.

Mr. Ngereka Miraji learned counsel for the 1<sup>st</sup> Respondent raised the following preliminary objections on point of law:

1. That the application is incurably defective for being time barred.



2. That the application is incurably defective for failure to issue a ninety (90) days' notice before suing the 1<sup>st</sup> Respondent and joining the Attorney General who is the proper party to the suit.
3. The application is defective as the Applicant is seeking before this Honourable Court to waive the decision made by the Judge of this Court and the decision made by the Deputy Registrar contrary to the Order and rules cited.
4. That the application is incurably defective as the Applicant's remedy is misplaced since was not a party to the suit before.
5. That the affidavit is incurably defective which upon expunging of the offensive paragraphs the remaining one cannot stand.

The preliminary objections were argued orally, whereas Mr. Edwin Lusa learned State Attorney represented the applicant and Mr. Ngereka Miraji learned counsel argued the preliminary objections for the 1<sup>st</sup> Respondent.

In support of the 2<sup>nd</sup> preliminary objections, Mr. Ngereka submitted among other things that the applicant is suing Islamic Development Foundation, Village Council of Masumbeni and George Efekie Mfwangavo. That, since the second respondent is a local Government entity, for it to be a party, a 90 days' notice was to be issued and the Attorney General should have been joined. Failure to adhere to that procedure, contravenes **section 25 of Act No. 1 of 2020, Written Laws (Miscellaneous Amendment) Act of 2020**, which amends the **Government Proceedings Act** which provides that:

*"...All suits against the Government shall upon the expiry of the notice period, be brought against the government, ministry,*

*government department, local government authority, executive agency, public corporation, parastatal organisation or public company, that is alleged to have committed the civil wrong, on which the civil suit is based, the Attorney General shall be joined as a necessary party."*

Mr. Ngereka also cited subsection (4) which provides that non-joinder of the Attorney General shall vitiate proceedings of any suit.

The learned counsel for the 1<sup>st</sup> Respondent submitted further that since Masumbeni Village Council is a local government entity, 90 days' notice should have been issued and the Attorney General should have been joined as a party. That, since no notice was issued and the Attorney General was not joined, this application is incompetent for contravening the mandatory provisions of the law. Mr. Ngereka prayed that the application should be dismissed with costs.

On the 1<sup>st</sup> preliminary objection, Mr. Ngereka contended that counting from the date when judgment was delivered on 31<sup>st</sup> October 2019 up to 19<sup>th</sup> May, 2022 when this application was filed, in a simple calculation almost two years and seven months had passed. Reference was made to **Order XXI Rule 57 (1) (2) and section 95 of the Civil Procedure Code Cap 33, R.E 2019** and item 21 to the Schedule of the Law of Limitation Act which prescribes a time limit of 60 days for applications which has no specific prescribed time. That, the instant application was filed after two years and seven months, thus it should be dismissed with costs.

On the 3<sup>rd</sup> preliminary objection, it was submitted that the applicant is trying to ride two horses at a time contrary to the law and procedures.

Mr. Ngereka opined that this application carries two unrelated prayers. The first prayer is to investigate and waive the judgment of the High Court. The second prayer is to investigate the application for execution No. 4/2020 which was determined by the Deputy Registrar. He was of the view that the application is unmaintainable before this court because the decision made by a judge has its own way of being challenged; and the decision made by the Deputy Registrar has its own way of being challenged. He concluded that the instant application has no merit and that it should be dismissed with costs.

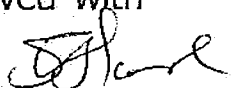
The learned counsel for the 1<sup>st</sup> respondent withdrew the 4<sup>th</sup> and 5<sup>th</sup> preliminary objections.

In his reply, Mr. Edwin Lusa learned State Attorney on the outset submitted that the raised preliminary objections are not qualified to be termed as preliminary objections. He said that it was well settled in the case of **Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors Company Ltd [1969] EA 696**; *that a preliminary objection must consist a point of law, it must be purely on point of law and that it should not be a mixture of law and evidence or facts.*

Mr. Lusa cited the case of **Shose Sinare vs Stanbic Bank Tanzania Ltd and Another, Civil Appeal No.89 of 2020**, CAT at page 19 of the judgment where it was held that:

*"Where a preliminary objection raised contains more than a point of law, say law and facts, it must fail."*

Basing on the above cited case, Mr. Lusa was of the view that the three preliminary objections raised in this case are containing law, facts and evidence. That, the issue that the 2<sup>nd</sup> respondent was not served with



Page 5 of 12

notice needs evidence. The issue whether the applicant was aware of Civil Case No. 26 of 2017 also needs evidence, so as to satisfy that the applicant should have filed the application within 60 days.

Without prejudice to his introduction, Mr. Lusa started by replying the 2<sup>nd</sup> preliminary objection that the learned counsel for the 1<sup>st</sup> respondent failed to submit on the raised preliminary objection as he confused between the 2<sup>nd</sup> respondent and the 1<sup>st</sup> respondent being served with 90 days' notice.

It was the opinion of Mr. Lusa that applications against the Government do not require 90 days' notice as the same are not suits. He commented that **section 25 of Written Laws (Miscellaneous Amendment) Act No. 1 of 2020** which amends the **Government Proceedings Act** refers to the suits against the Government. He averred that whether notice was served or not needs evidence. Thus, the second preliminary objection has no merit and should be dismissed with costs.


In reply to the 1<sup>st</sup> preliminary objection which is to the effect that this application was filed out of time; Mr. Lusa submitted that it's a matter of evidence to establish as to whether the applicant was aware of the judgment in Civil Case No. 26 of 2017 which was between the 1<sup>st</sup> respondent, 2<sup>nd</sup> respondent and 3<sup>rd</sup> respondent. That, the applicant was not a party to the mentioned suit and there is no evidence showing that the 1<sup>st</sup> respondent notified the applicant about the judgment of the court. The learned counsel contended that since this issue needs evidence, it should have been raised during the hearing of the application. He stated further that their application is within time and he prayed that the 1<sup>st</sup> preliminary objection be dismissed with costs.

Responding to the 3<sup>rd</sup> preliminary objection, Mr. Lusa submitted that their application is maintainable as it has been brought under **Order XXI Rule 57** which confers powers to the court to investigate court's order and issue necessary orders. That, that's where a party who was not a party who has interest on a suit, can make an application to protect its interests. Mr. Lusa subscribed to the case of **Equity Bank (T) Ltd vs Prosper Rweyendera and 2 Others, Misc. Land Case Application No. 356 of 2021**, HC Land Division, in which the Court after making investigation gave necessary order at page 7 of the ruling, 2<sup>nd</sup> paragraph that:

*"Consequently, the application is granted. I hereby declare that the landed property on Plot No. 230. Block D, registered under Certificate of Occupancy on title No. 171054, located at Sinza Area, in Kinondoni Municipal, Dar es Salaam is wholly released from attachment. It is ordered that the same be released and excluded from attachment In Execution No. 79 of 2020."*

In conclusion, Mr. Lusa submitted that their prayers have merit and the court has powers to hear and determine the same. That, it is a matter of facts and evidence which have to be argued during the hearing of the application to ascertain whether this application has merit or not. Thus, the preliminary objection is premature as it goes to the root of the applicant's application. Therefore, the three raised preliminary objections have no merit. Mr. Lusa prayed that the same should be dismissed and the matter be heard for interests of justice.

In his rejoinder Mr. Ngereka submitted among other things that points raised in this case are purely point of law as the same do not need evidence. Thus, the submission of the learned State Attorney is misplaced.



Page 7 of 12

On the issue of notice, Mr. Ngereka stated that the law is very clear that notice should be issued to the Attorney General and the Attorney General was supposed to be joined as a necessary party. That, the consequences of not joining the Attorney General are stated under **section 25 (4) of Act No. 1 of 2020.**

Regarding the allegation that the law mentions suits by the government and not applications, it was contended that the learned State Attorney did not state the difference between suits and applications.

Concerning the objection that this application is time barred, Mr. Ngereka stated that failure by the learned State Attorney to state when the application was supposed to be filed, that fact remains unchallenged. He said that the cited case of **Equity Bank (T) Ltd** (supra) is distinguishable as the same is applicable where the application is valid and filed within time. That, in the cited case, the applicant was seeking orders against the decision of the Deputy Registrar, unlike in the instant case in which the applicant is seeking orders against the decision of the Judge and the Deputy Registrar.

In addition, Mr. Ngereka averred that the learned State Attorney was submitting as if he was arguing the application instead of the preliminary objection. He prayed this application to be dismissed with costs.

Having summarised parties' submissions, I now turn to the merits of the raised objections.

On the first ground of objection, Mr. Ngereka argued that this application is time barred. It was stated that since there is no specific time prescribed to file this application, then as per **Item 21 of the schedule of Law of Limitation Act**, this application was supposed to be filed within 60 days,

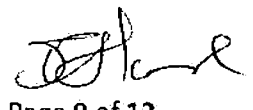


but it was filed after two years and seven months. In rebuttal, Mr. Lusa argued that the raised objection does not deserve to be point of objection on the reason that it's a matter of evidence to establish as to whether the applicant was aware of the judgment in Civil Case No. 26 of 2017 which was between the 1<sup>st</sup> respondent, 2<sup>nd</sup> respondent and 3<sup>rd</sup> respondent. That, the applicant was not a party to the mentioned suit and there is no evidence showing that the 1<sup>st</sup> respondent notified the applicant about the judgment of the court.

As rightly submitted by Mr. Ngereka, the time limit which covered this matter is 60 days. The learned State Attorney did not state when they became aware of the decisions in Land Case No. 26/2017 and Execution No. 4/2020. In the absence of that fact, an adverse inference is drawn against the applicant that this matter was filed out of time and apart from the attached copies of the impugned decisions, no further evidence is required to prove that the matter was filed out of the prescribed 60 days.

On the second ground of objection that the application is incurably defective for failure to issue 90 days' Notice and failure to join the Attorney General. That, since the second respondent is a local government entity then the Attorney General ought to be joined as a party. Mr. Lusa argued that this application is not a suit which requires 90 days' notice. He also claimed that this objection does not deserve to be a preliminary objection since it requires evidence.

Mr. Ngereka cited **Section 25 of Written Laws Miscellaneous Amendment Act of 2020** which amends **Government Proceedings Act**, and requires 90 days' notice to be filed. The issue is whether an application is a suit. In the case of **JUNACO (T) LTD and Another vs**

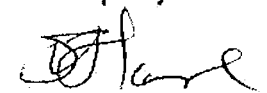


**Harel Mallac Tanzania Limited, Civil Application No.473/16 of 2016** at page 11, the Court of Appeal held that:

*"...but only wish to state in brief that proceedings amount to a suit because the term has generally been defined to be "a very comprehensive one and **is said to apply to any proceedings in a court of justice by which an individual pursues a remedy which the law affords him.** The mode of proceedings may be various; but if the right is litigated between the parties in the court of justice the proceeding is a suit..."*Emphasis added

I fully subscribe to the above authority and I am of considered opinion that this application falls within the ambit of the suit since the rights of the 2<sup>nd</sup> respondent are at stake. Thus, the Attorney General should have been joined in this application. In the absence of the Attorney General, the Village Executive Officer of Masumbeni Village who has been appearing for the 2<sup>nd</sup> respondent, lacks locus to address the court. Also, 90 days' notice was supposed to be issued as required by the law as far as the 2<sup>nd</sup> respondent is concerned. The applicant did not attach a copy of notice if any. Failure to attach notice renders this application incompetent and no evidence is required to prove the same.

On the third ground of objection, it was argued for the 1<sup>st</sup> respondent that the applicant is trying to ride two horses at a time. He wants this court to challenge the decision of this court and at the same times tries to challenge execution of a decree of this court. Thus, this application is untenable before this court. That the decision of a Judge has the way of challenging it as prescribed by the laws and the decision of the Deputy

  
Page 10 of 12

Registrar has a way of challenging it. In opposition, Mr. Lusa stated that this application is maintainable since **Order XXI rule 57(1) of the CPC** gives power to this court to investigate court's order and issue necessary orders. **Order XXI Rule 57 (1) of the CPC** provides that:


*"57. (1) Where any claim is preferred to, or any objection is made to the attachment of any property **attached in execution of a decree** on the ground that such property is not liable to such attachment, **the court shall proceed to investigate the claim or objection** with the like power as regards the examination of the claimant or objector and in all other respects, as if he was a party to the suit:*

*Provided that no such investigation shall be made where the court considers that the claim or objection was designedly or unnecessarily delayed."*Emphasis added

I have keenly read the above quoted enabling provision, the same confers powers on this court to investigate claims or objections against attachment of any property attached in execution of a decree and not otherwise. The prayers placed before this court to investigate and waive the decision of **Hon. Mkapa J** are not tenable as rightly submitted by Mr. Ngereka. No such authority is conferred on this court.

On the basis of the above findings, this court is of settled opinion that this application is misplaced and frivolous. I therefore uphold the objections raised and dismiss this application with costs.

It is so ordered.



Page 11 of 12

Dated and delivered at Moshi this 18<sup>th</sup> day of August, 2022.

