

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MOROGORO DISTRICT REGISTRY)**

AT MOROGORO

MISC. CIVIL APPLICATION NO. 48 OF 2022

(Arising from Land Case No. 21 of 2022)

MADUKI EDWARD SOZI.....APPLICANT

VERSUS

SME IMPACT FUND TANZANIA LTD..... 1ST RESPONDENT

GREEN LIFE MICROFINANCE LTD.....2ND RESPONDENT

R U L I N G

19th & 20th October, 2022

CHABA, J.

The applicant, Maduki Edward Sozi filed a Chamber Summons under sections 95, 68 (c) and (e) and Order XXXVII (1) (a) and (b) (sic) of the Civil Procedure Code [R.E 2019] (sic) and any other enabling provisions of the law. The application has been preferred under a certificate of urgency and it is supported by an affidavit deposed by the applicant himself.

In essence, his main prayer is to the effect that this court is pleased to grant the Order of maintenance of *status quo* against the 2nd respondent in evicting the applicant in House Plot No. 439 Block C at Vibandani street situated at Ifakara in Kilombero District pending hearing of this application interparties.

On the other hand, the 2nd respondent, SME IMPACT FUND TANZANIA LTD filed a counter affidavit and a notice of preliminary objection on a point of law to the effect that:

- 1. The application contravenes the provision of Order XXXVII, Rule 1 (a) and (b) of the Civil Procedure Code [Cap. 33 R.E 2019].*

At the hearing of the preliminary objection on a point of law, the applicant was represented by the learned counsel Mr. Hekima Mwasipu and Mr. Rutatina and Alex Mbando, both learned counsels appeared for the 1st and 2nd respondents, respectively.

Arguing in support of preliminary objection on a point of law, Mr. Mbando at first, prayed to adopt the counter affidavit deposed by Mr. Rafael Mboya, the principal officer of the 2nd respondent. He then proceeded to argue that the applicant filed the instant application seeking for an interim order or temporary injunction so that he cannot be evicted from a house situated at Plot No. 439, Block "C" at Vibanda street within Ifakara, in the District of Kilombero pending determination of Land Case No. 21 of 2022 which is before this court.

The learned counsel went on submitting that the applicant violated the provisions of the law under Order XXXVII, Rule 1 (a) and (b) of the CPC because the law is clear that:

"1. Where in any suit it is proved by affidavit or otherwise:

*(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated **by any party to the suit** of or suffering loss*

of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree; or

(b) that the defendant threatens, or intends to remove or dispose of his property with a view to defraud his creditors,

the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of the property as the court thinks fit, until the disposal of the suit or until further orders: [Emphasis is mine].

Mr. Mbando continued to state that it came to his knowledge or attention that the orders sought by the applicant were directed upon the 2nd respondent who is not a party to the suit, registered as Land Case No. 21 of 2022. He submitted that the 2nd respondent is neither a party to the main suit nor a defendant. In his opinion, this application is *void ab initio* and the same has been preferred under wrong provisions of the law. On those grounds, Mr. Mbando prayed the court to dismiss the application with costs.

On his part, Mr. Rutatina, learned counsel for the 1st respondent joined hands with the counsel for the 2nd respondent. In addition, Mr. Rutatina accentuated that it is the established principle of law that an injunction may only be issued against a party to the suit and not to a stranger or third party. To reinforce his argument, he cited the Code of Civil Procedure by Mulla, 1st Edition Vol. 1 at page 230, where the law says:

"(7) Grounds: Rule 1

Temporary injunction may be granted by a Court in the following cases:

- (a) Where any property is dispute in a suit is in danger of being wasted, damaged or alienated **by any party to the suit**, or wrongfully sold in execution of a decree, or*
- (b) Where a defendant threatens, or intends to remove or disposed of his property with a view to defrauding his creditors, or*
- (c) Where a defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, or*
- (d) Where a defendant is about to commit a breach of contract, or other injury of any kind, or*
- (e) Where a court is of the opinion that the interest of justice so requires.*
[Emphasis is mine].

He further stressed that Order XXXVII, Rule 1 (a) is clear that a temporary injunction cannot be issued to a third party or a person who is not a party to the suit. However, when the learned advocate for the applicant, Mr. Hekima raised to respond to the arguments advanced by the learned advocate for the 2nd and 1st respondents, respectively, he submits that this application is proper before the court and the same has not been misconceived as submitted the counsels for the respondents.

He contended that the same meets all requirements as provided by the law under Order XXXVII, Rule 1 of the CPC (Supra) because the property in the equation is in danger. He highlighted that, the applicant deposed in his affidavit that the 2nd respondent is in the process of evicting the applicant. He further argued that the 2nd test requires that parties must be the same in the suit, but he insisted that since there is no definition of the term suit in

that order, therefore, the raised P.O has no merit. He added that, as this application is not the main suit, in the scenario of this matter the 2nd respondent has been properly sued.

He went on to argue that, as this court has inherent power to grant any order to meet the ends of justice, as shown in the chamber summons, he urged the court to act accordingly. He cited the case of **Abdallah Mariki and 545 others vs. AG**, Misc. Land Application No. 119 of 2017 at page 7 of the typed judgment. In this case, the court held *inter-alia* that the court may grant interim orders where there is no pending suit. Since the 2nd respondent is not a party to the case registered as Land Case No. 21 of 2022, that means there is no pending suit against him and the court may grant the orders sought by the applicant.

Regarding Order XXXVII, Rule 1 (a) and (b) of the CPC (**Supra**), Mr. Hekima contended that the same have been properly cited. With regards to the words used in the Code of CPC by Mulla, he underlined that the Code is used as permissive phrase. He submitted that the court has discretionary powers to grant or not. But to meet the end of justice, discretion must be exercised judiciously. He insisted that the sought interim Order can be issued by the court even though the 2nd respondent is a stranger or a third party.

He concluded that in Order XXXVII, Rule 1 (a) of the CPC (**Supra**), the word defendant has not been mentioned. Para (b) of Rule 1, Order XXXVII the word defendant is mentioned. Since the instant application mentioned the names of the respondents, in his view, the terms *respondent and*

defendant are not the same. He stressed that to equate the two terms, to him is ridiculous. He finally, prayed the court to dismiss the application.

In rejoinder, Mr. Mbando reiterated what he submitted in chief. He further submitted that, the instant application is a creature of the main suit as the same stemmed therefrom and the provisions of the law cited relates to the main suit. As regards to the issue of inherent power, Mr. Mbando contended that the same has no place for one reason that the matter at hand involves preliminary objection on a point of law. In that view, the learned counsel submitted that this application is null and void. Regarding the case of **Abdallah M. Mariki** (Supra), the counsel contended that the case cannot be applied in the circumstance of this case as the same is irrelevant meanwhile the counsel for the applicant ought to have been cited proper provisions of the law and not otherwise. He submitted that the counsel for the applicant is trying to put this court on assumption that there is no main suit whereas the truth is that there is main suit, i.e., Land Case No. 21 of 2022.

Further, the counsel had the view that, this application cannot be separated from the main case. He prayed the court to dismiss the application with costs.

Mr. Rutatina re-joined that, the case of **Abdallah M. Mariki** (Supra) is distinguishable because it dealt with the issue of applicability of the common law principles when the matter in dispute is not covered under the CPC. He reminded this court that, whenever there is a specific provision of the law to move the court, then section 95 of the CPC cannot be invoked. Order XXXVII,

Rule 1 (a) and (b) covers the matter at hand. He finally prayed the court to uphold the preliminary objection.

Having summarised and considered rival submissions advanced by both parties and upon carefully gone through the application and the main case, Land Case No. 21 of 2022 in which the instant application stemmed, there is no dispute that the 2nd respondent is not a party to the main case in which this application stemmed. In other words, the 2nd respondent is a stranger and/or a third party to the suit. It is trite law that, the power to grant a temporary injunction is at the discretion of the court. This discretion, however, as correctly highlighted by the learned counsel for the applicant, must be exercised reasonably and on sound legal principles. It worth noting, however, that injunction should not be lightly granted as it adversely affects the other side. The grant of injunction is in the nature of equitable relief, and the court has to exercise it judiciously.

I understand that there are circumstances where the court has jurisdiction to issue an interim order where there is no suit pending before the court. But in the circumstance of this case, as hinted above, gauging from the parties' submissions, there can hardly be any dispute that there is a suit that is pending for determination (Land Case No. 21 of 2022), and it involves the parties herein, except the 2nd respondent.

I have further scanned the annexures in the affidavit deposed by the applicants and the controverted counter affidavit filed by the 1st and the 2nd respondents, respectively. What I have gathered from these pleadings is the fact that the house (a Godown or Ware House) which is the subject of this matter was sold through a public auction conducted on 14/01/202. Further,

I noted that there are some documents issued by the Land Registry at Dar es Salaam and Morogoro Region titled as Transfer, Mortgage, and Transfer under the power of sale dated 6th June 2022. My understanding is that the guaranteed collateral namely Plot No. 439, Block C situates at Vibandani street, the property owned by the applicant has been sold and the purchaser is the 2nd respondent in this application, but not joined as one of the parties in the main case for reasons better known by the applicant and perhaps his learned advocate. In my opinion, and considering the surrounding circumstance, it is hard to grant the orders sought by the applicant.

In the premises, and to the extent of my findings, I have found the points of preliminary objections raised by the counsel for the 2nd respondent have merits and it is hereby upheld.

In the upshot, this application which has been found contravening the provisions of Order XXXVII, Rule 1 (a) and (b) of the CPC as indicated herein above, is accordingly dismissed with costs. **I so order.**

DATED at MOROGORO this 20th day of October 2022.



M. J. Chaba

Judge

20/10/2022

