

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

MISCELLANEOUS CIVIL APPLICATION NO. 37 OF 2022

KISHEGENA TRANSPORT LIMITED.....APPELLANT

VERSUS

1. AZANIA BANK LIMITED

2. MABUNDA AUCTIONEER

MART CO.LTD

3. MEK ONE INDUSTRIES LTD

4. ATTONEY GENERAL RESPONDENT

.....RESPONDENTS

RULING

15th November & 5th December 2022

MASSAM, J.

This ruling is in respect of the application brought under the section 2 [3] of the Judicature and Application of laws Act Cap 358 R.E 2019 section 95 of the Civil Procedure Code Cap 33 R.E 2019. The applicant filed

this application under certificate of urgency with opinion that the application is extreme urgency that 1st, 2nd and 3rd respondent maliciously disposed by selling the disputed premises plot no. 41 block L Nyasubi plot no. 42 block L Nyasubi CT No. 17898 Nyasubi A House located on plot no 731 block Q despite being restrained by the District Land and Housing Tribunal for Kahama there in referred to Tribunal whereas the said disputed premises is for family resident and commercial activities which is owned by the applicant and the disputed premises has been maliciously disposed by way of unlawfully selling by the 1st 2nd and 3rd respondents respectively without valuation report apparently so he said if this application will not be heard and determined within shortest time possible the applicant suit which is to be instituted after the maturity of 90 days' notice will be rendered nugatory.

In his chamber summons applicant pray to exparte interim order restraining 1st 2nd and 3rd respondents her agents and or workmen from unlawful disposing by selling the disputed premises allocated on plot 41 block I Nyasubi, plot no 42 block L Nyasubi CT NO 17897 Nyasubi a house located on plot no 664 block 0 Nyasubi as well as house located on plot no. 731 block Q and also restrained any person to proceed with any activity

to the disputed premises pending maturity of 90 days' notice and institution of the main suit. Also interparties he pray to this court to grant temporary injunction restraining the 1st, 2nd and 3rd respondent her agents and workmen from unlawful disposing by selling the disputed premises on plot 41 Block L Nyasubi plot no. 42 block L Nyasubi CT no. 17897 Nyasubi A house located on plot no 664 block Q Nyasubi as well as plot no Q and also be restrained from any person to proceed with any activity to the disputed premises pending the institution hearing and a determination of the main suit and other orders as honourable court may deem fit convenient and just to grant.

The applicant's application is supported by an affidavit sworn by Hamad kishegena, the Director of the applicant. The application is opposed by the respondents who filed a counter Affidavit sworn by Suleiman Mohamed Awadhi the Managing Director of the 3rd respondent in this application.

When this application was fixed for hearing, the applicant was represented by the learned counsel Mr. Evodius Rwangobe whereas the 1st and 4th respondent was represented by Mr George Kalenda State Attorney who assisted by Mr. Musa Mpogole State Attorney and 3rd respondents were

represented by Mr Geoffrey Tully the learned counsel, the 2rd respondent was absent but there was proof of service that he was served.

Before hearing of this application, the counsel for 1st and 4th respondent brought a notice of preliminary objection on point of law to the effect that (i) the application is incompetent for contravention of order XXXV11 proviso to rule 1 (a) and (b) of CPC which directs that temporary injunction should not be made against the Government, so he prayed the said application to be struck out for want of merit.

Submitting in support of the preliminary objection the learned counsel for the 1st respondent and 4th respondent averred that the said application is incompetent as contravene the order XXXV11 proviso to rule 1 [a] and [b] of the law as it did not allow the temporary injunction against Government but allow declaratory order of the rights of the parties.

He added that Azania bank Ltd is a Public Company which Government as majority share as supported with applicant in para 10 of his affidavit.

Also he said that Government Proceedings Act section 16 as amended in Written Law Miscellaneous Amendment Act No. 1 2020

Section 26 introduce subsection 4 of Section 16 of Government Proceeding Act which said that for the purpose of Section 3 the word Government shall include a Government, Ministry, Local Government Authority, Independent Department, Executive Agency, Public Corporation, Parastatal Organization or Public Corporation, Parastatal Organization, or Public Company established Government under any Written laws to which Government is a majority shareholder, so Azania is Public Company which Government has majority shareholder, so it was not right for the applicant to bring the said prayer to the court as the right of parties required to be declared where there was a suit instituted to the court as elaborated in the case of **Mwanza city council Vs. Alfred Wambura** Civil Revision no 1 of 2022 High Court Mwanza in page 15 para 1 and 2 also page no 16 para 2 which said that without existence of pending suit rights of parties cannot be determined.

He added by stating that in this present application there was no pending case so he pray this court to allow 1st respondent to exercise his powers by disposing the restrained premises.

In his reply to the raised preliminary objection Mr. Evodious Rwangobe advocate for applicant said that he brought mareva application thus why he brought it under section 2[3] of JALA.

He added that mareva injunction is interim injunction prohibiting potential defendant in criminal or civil proceedings from dispatching assets, so this does not require the existence of suit in the court as elaborated in the case of **Bish Tanzania Ltd Vs National Housing Corporation** High court of Dar es salaam in Misc.Land Application no 14 of 2022 in page no 3 para 4 the court granted mareva injunction and the Government was the party.

Also he said that in this matter a big complain was the sell procedure which conducted against the law thus why they filed this application, to seek for court intervention.

Again, he added that in order XXXVII [1] of CPC there was a word **shall** but in the proviso there was a word may, and according to that proviso Masabo, J in Miscellaneous land application no 18 of 2021, in the case of Registered **Trustee of the Moravian Church in Southern Tanzania Vs Dar es Salaam City Council and two others** did grant the said application as per order xxxv11 rule 1 which was against Government.

He added by starting that respondent cited the case of **Mwanza city** (supra) but in their side has in view that the said case is distinguishable, in

the said case the court was dealing with the revision to the decision from Nyamagana District court,so he insisted that his application to be allowed and the preliminary objection to be dismissed with costs and the matter be heard on merit.

In his rejoinder Mr Kalenda S/A said that there was no doubt that application before this court was mareva which was brought under Section 2 [3] of JALA and the gist of that subsection is to give jurisdiction to High court to exercise of conformity with written law, because this application was brought under order xxxv11 of CPC so section 2(3) of JALA will become redundant.So according to the said reason above the case of **Bish Tanzania vs National Housing Corporation** is distinguishable.

In his counter of the issue who will suffer if this court will grant of this application he stated that the respondent will be the one who will suffer as elaborated in the case of **Christopher P Chale Vs Commercial bank of Commerce**, in Misc. Civil Application no 635 of 2017 in page no 8 para 1.

He added by saying that in this case 1st respondent will suffer irreparable loss if the injunction will be granted because 1st respondent is a bank doing landing money business, so will suffer more as he was already

give the money and he is restrained to sell the said property to recover his money, so he prays to this court to allow his Preliminary Objection.

Again he stated that the case of **The Registered Trustees of the Moravian church in Southern Tanzania vs. Dar es salaam City Council and Two Others**, the application was granted because there was a pending matter in the court. So in all cases of **Registered Trustee and The Mwanza city council** all was granted because there was a pending case before the court where the rights of parties were supposed to be determined there, but in this case no pending matter is before this court so the application before this court has no merit. So he is praying to this court the preliminary objection be allowed and the application be dismissed with costs .

From what was stated above for and against the parties the duty of this court is to **determine whether the raised preliminary objection has merit.**

In the first point of objections the respondent claims that the application is incompetent for contravention of order XXXV11 proviso to rule 1 [a] and [b] of CPC which did not allow temporary injunction against the Government as the rights of parties determined where there was a

pending matter to the court, to cement his argument he cited the case of **Mwanza City Council Vs. Alfred Wambura** Civil Revision No. 1 of 2022 High Court Mwanza .

In replying the same the applicant said that it is not mandatory to have a pending case before the court in order for the court to grant the temporary injunction as his application is a *mareva* application to support his submission he cited the case of **Bish Tanzania Limited Vs. National Housing Corporation and two others** (*supra*).

This court is in support with the submission from the applicant's that in the said **Bish's** case the court could not grant the said application where there was no pending matter but this court after perused on the applicant's chamber summons and affidavit as well as applicants' submission this court finds out that applicants show the expressly intention to institute a case against the Government and further some steps have been taken to do so.

In this present case applicant issued 90 days statutory notice of intention to sue the 1st respondent and the same was served to the 4th respondent this fact was given under paragraph 13 of the applicant's affidavit which contains that information.

Also this court has no objection that the law is very clear that the application of this nature can be allowed by the court in situation like the one which elaborated in the case of **Registered Trustees of Calvary Assembles of God [CAG] Steel Pipes Limited** Misc. Land case application no 677 Of 2019 High Court of Dar es Salaam.

In this application this court finds that the applicant establish the facts that he issued the intention to sue Government and he further took some steps of serving them as elaborated in the case of **Salvatory Toyi and 5 others Vs. Uvinza District Council and Another** Misc. Land Application no 72 of 2020 High Court of Kigoma.

So according to that this court finds that the said information is justifiable and convenient to allow the reliefs sought as the applicant has satisfied this court that the preliminary objection raised by the respondent has no merit as he was already file the notice to sue Government and already served them and he intend to institute a suit against government after the lapse of the issued notice of 90 days.

In the issue of who will suffer the irreparable loss if the application granted this court finds just to be well discussed in hearing of this application on merit.

In upshot, since the preliminary objection has no merit, the respondent preliminary objection is hereby overruled, so let the application be heard on merit.

No order for costs regarding the nature of the case and relationship between the parties.

It is so ordered.

DATED at SHINYANGA this 5th day of December, 2022.




R.B. Massam
JUDGE
5/12/2022