

IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

MISC. LAND APPLICATION NO. 01 OF 2023

(Originated from Misc. Application No. 13 of 2023 District Land and Housing Tribunal for Mlele at Katavi and Land Application No. 19 of 2022 in District Land and Housing Tribunal for Mlele)

STEPHANO ^S/_O MASHINYELI AND 7 OTHERSAPPLICANTS

VERSUS

CHENGE ^S/_O SAMSON MACHENGE AND 2 OTHERSREPOENDENTS

RULING

28th February, 2023 &

2nd March, 2023

A.A. MRISHA, J.

This application for Reference was made under Section 77 of the Civil Procedure Code Cap 33 R.E. 2019(the CPC), Order XIX, Rule 3(1) and Section 95 of the CPC and any other enabling provision of laws. The application was filed under Certificate of Urgency and the application was

supported by an affidavit of Lucas Luvanda, counsel for the applicants in which the applicants were seeking to move this Court for the following inter alia:-

- 1. That, this Honorable court be pleased to make a reference on the order granted by the Land and Housing Tribunal of Mlele at Katavi (the trial tribunal) before Honorable Gregory K. Rugalema on 7th December, 2022 in Misc. Application No 13 of 2022, originating from the Land Application No. 19 of 2022, which requires the applicants and their agents acting on the applicants' behalf to stop entering and doing any activities in the disputed land.*
- 2. Any other Orders this Honorable Court may deem just to grant.*

The background to this application is, briefly that the applicants, who were the respondents in the Misc. Application No. 13 of 2022 and Land Application No. 19 of 2022 before the trial tribunal, filed an application before the said tribunal for a temporary injunction. The application was heard ex-parte and on 7th December, 2022 the trial tribunal granted an

interim injunction against the respondents which restrain the applicants and their agents to enter and do any activities in the disputed land.

Subsequently upon being dissatisfied by the said decision, on 13th January, 2023 the applicants knocked the doors of this court with a view of challenging the order of the trial court which was delivered in favour of the respondents.

During the hearing of this application the applicants were represented by Mr. Lucas Luvanda, learned counsel, while Mr. Mathias Budodi, learned counsel represented the respondents. Mr. Luvanda addressed the Court and he argued that the application of restrained order was heard improperly contrary to the section which was used to apply the said application. The restrained order was made under Order XXXVII, Rule 1(a) of the CPC. Further he argued that the law provides the criteria for temporary injunction to be ordered, that is when the disputed matter is in danger of being wasted, damaged, or alienated by any party to the suit or suffering loss of value by reason of its continued use by any part to the suit, or wrongly sold in execution of a decree.

The counsel argued that the above-mentioned criteria were not tailored to the case at hand. The land in dispute was used by the applicants to cultivate since November, 2022, they cultivate rice and waiting to sow the rice. Thus, the said land was not in a position to be destroyed, loose value or be sold; therefore, the order issued by the trial tribunal does not fall under Order XXXVII, Rule 1(a) of the CPC.

While maintaining that the order of restrain is contrary with the provision of the law, Mr. Luvanda argued that the proper provision for respondents to apply for restraining order is Order XXXVII, Rule 4 of Civil Procedure Code and instead of using Order XXXVII Rule 1(a) of the CPC. He said no reasonable ground was revealed by the trial tribunal as to why the application was heard *exparte*. He buttress his argument by referring the case of **Hash Energy T. Ltd v. Ricol Co. Ltd and 3 Others** (2016) TLSO 340 at page 342; in which held it was held that:

*"The applicant sought for both *exparte* and *inter-parte* interim orders; however, upon careful consideration the Court was of the view that justice would be served better upon hearing of both parties accordingly".*

Mr. Luvanda urged that the conduct of Chairman to hear the application *ex parte* is contrary to the decision mentioned above.

Lastly, the learned counsel for the applicants' pressed that the restraining order was made to weaken applicant's wealth; the order was made on 7th December, 2022 while the main case was scheduled for mention on 15th February, 2023. He said the applicants spent their money to prepare the farms and sow the rice, hence restraining them to enter and weed their farms will cause the rice to be destroyed. He submitted by praying this court to strike out the order and let the applicants be allowed to enter to their farms pending determination of the main suit.

In reply the submission of the applicants, counsel for the respondents strongly resisted the application and submitted that the application has no merits and it is incompetent; hence he prayed this court to dismiss the application.

He referred the case of **Joseph Ntongwisangu and Another vs The Principal Secretary, Minister of Finance and another**, Civil Reference No. 10 of 2005 CAT Dar es Salaam (Unreported) at paragraph 4 of page 4.

The Court held that:

"In a situation where the application proceeds to a hearing on merit and in such hearing the application is found to be not only incompetent but also lacking in merit, it must be dismissed".

For the above case, the counsel for respondents decided to show how the application is incompetent before the court. He submitted that the order which was made on 7th December, 2022 by Honorable Gregory Rugalema the Chairman of the trial tribunal was an interlocutory order as it does not conclusively determine the main case.

He referred the case of **Godwin Bernard Kagaruki v. The Hon. President of United Republic of Tanzania and 5 Others**, Civil Appeal No. 270 of 2020 and stated that this position was made after the amendment of all sections governing Revision, Appeal and Review; specifically, to sections 72(2), 78(2) and 79(2) of the CPC; though reference was not mentioned, thus for purposive interpretation of the statute, reference is also prohibited to appeal against interlocutory order.

He further argued that the order challenged by the applicants by way of reference is an interlocutory order pending hearing inter-partes and the

trial tribunal scheduled for hearing the main case on 15th February, 2023; hence, he submitted, filing this application is an abuse of Court process.

Regarding Order XXXVII Rule 4 of CPC, the learned counsel for the respondent submitted that the provision of the law allows the case to be heard ex parte when the courts see it necessary to order ex parte. He prayed this court to adopt the respondent's counter affidavit which explains the reasons of hearing the application ex parte, to be part of his submission. He referred paragraphs 3, 4 and 6 of the counter affidavit.

Additionally, counsel for the respondent contended that Mr. Lucas Luvanda who is a counsel for applicants sworn an affidavit of this application contrary to the principle delivered by Court of Appeal in the case of **Tanzania Breweries Ltd v. Herman Bildad Minja**, Civil Application No. 11/18 of 2018 at page 13 which cited the case of **Lalago Cotton Ginnery and Oil Mills Company Ltd v. The Loans and Advocates Realization Trust (LART)**, Civil Application No. 80 of 2020 (Unreported), where the Court said: -

"An advocate can swear and file an affidavit in proceedings in which he appears for his client, but on

matters which are in the advocate's personal knowledge only, for example, he can swear an affidavit to state that he appeared earlier in the proceedings for his client and that he personally knew what transpired during proceedings"

According to him, Mr. Luvanda neither appears to the both applications nor he had personal knowledge on Misc. Application No. 13 of 2022 and Application No. 19 of 2022 which are subject to this Reference. Also, there is no paragraphs which mention that he was instructed to handle those two cases, moreover he verified the facts stated in the affidavit are to the best of his knowledge. In this point, the respondent's counsel submitted that an affidavit sworn by the applicant's counsel is defective and therefore the application is defective too.

He further contended that the applicant's counsel did not insert the name sworn in the Jurat; according to him, that omission is contrary to section 10 and 1st Schedule of Oath and Declarations Act, Cap 34 [R.E. 2019]. He added that failure to mention name in the Jurat is incurably defective. To buttress his point, he referred the case of **Zuberi Mussa v. Shinyanga**

Town Council, Civil Application No. 100 of 2004 Court of Appeal, Mwanza, at page 12 and 16.

Furthermore, he contended that the reference is an administrative right; it is the court itself which can refer the matter to the superior Court; hence it is ambiguous for the applicant to file this application.

In rejoinder, Mr. Luvanda contended that, the case of **Godwin Benard Kagaruki** (supra) referred by the counsel for the respondent is distinguishable as it does not present similar situation to the current application. In strong opinion, the counsel said that an affidavit sworn is apposite; the case was heard exparte even the applicants did not appear in the trial tribunal court.

After a careful consideration of the submission of the learned counsel for both parties, the issue before me is whether this Court can revise the order made by District Land and Housing Tribunal.

As stated earlier this application is brought under section 77, Order XIX, Rule 3(1) and Section 95 of the CPC. The section provides as follow:

"Subject to such conditions and limitations as may be prescribed, any court may state a case

and refer the same for opinion of the High Court and the and the High Court may make such order thereon as it thinks fit."

Rule 3(1) of Order XIX, CPC provides: -

"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted".

And section 95 of the CPC which is also cited as enabling provision, provides as follows: -

"Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or prevent abuse of the process of the court".

Reading the provisions quoted above, one would find that they refer to the reference from lower court to the High Court. The question that follows is whether a decision rendered by Chairman of the trial tribunal can be

challenged? The answer to this question is no. Except where the law clearly states otherwise, a decision or order rendered by the Chairman of Land and Housing Tribunal is an order of restraining the applicants from entering into the disputed land to do any activities until determination of the main suit; the main suit was fixed for mention on 15/02/2023 the date already passed.

It was therefore incorrect for the Applicants to move this court under section 77, Order XIX Rule 3(1) and section 95 of the Civil Procedure Code, for the purpose of calling its own records in order to draw up a statement of facts of the case and matters to be determined by the court, because the order of the Tribunal does not determine the matter into finality (interlocutory).

Hence, I agree with the learned counsel for the respondents that the current application emanates from the ruling of the trial tribunal which did not conclusively determine the main case before it. In the Order sought to be impugned it was ordered that, the applicants were restrained to enter into the disputed land and do any activities until determination of the main case. Since the applicants seek to refer the matter to the High Court which was not conclusively determined, it offends the principle of "***nature of the***

order test". The test adopted by the decision of the Privy Council in **Bozson v. Altrincham Urban Council** (1913) 1KB 948 where Lord Alvestone stated thus:

"It seems to me that the real test for determining this question ought to be this: Does the Judgment or order, as made, finally dispose of the rights of the parties? If it does then I think it ought to be treated as a final order, but if it does not, it is then, in my opinion, an interlocutory order".

Likewise, there is a chain of authorities of the Court of Appeal to that effect. For instance, in the case of **Murtaza Ally Mangungu v. The Returning Officer for Kilwa and 2 others**, Civil Application No. 80 of 2016 (unreported) it was clearly stated that

"...an interlocutory or preliminary decision or order is not appealable and that a party aggrieved by an interlocutory decision or order has to wait until the final outcome of the case and dissatisfied appeal against all points including the ones made in interlocutory decision or order".

See also **Peter Noel Kingamkore v. Tropical Pesticides Research**, Civil Application No. 2 of 2009, **JUNACO (T) Ltd and Another v. Harel Mallac Tanzania Limited**, Civil Application No. 473/16 of 2016 and **Baco and Ayubu Trading Co. Ltd v. Permanent Secretary Ministry of Defence and National Service and 2 others**, Civil Application No. 211/16 of 2017. Even in the matter under consideration, given the fact that the order sought to be referred does not finally determine the rights of the parties; it is clearly an interlocutory one. It is an interim order pending the determination of the main case.

That said, I find that this application is misconceived and it has no merit. Accordingly, I proceed to dismiss it with costs.




A.A. MRISHA
JUDGE
02/03/2023

Dated at Sumbawanga this 2nd day of March, 2023.




A.A. MRISHA
JUDGE
02/03/2023

Date - 02/03/2023

Coram - Hon. K.M Saguda – Ag. DR

Applicants - Present

For Applicants - Absent

1st Respondent - Present

2nd Respondent - Present

3rd Respondent - Absent

B/C - A.K. Sichilima – PRMA

Court: The ruling had been delivered this 2nd day of March, 2023 in the presence of fifth applicant while in the absence of seven others, however in the presence of 1st and 2nd respondent whereas in the absence of the 3rd respondent. Also in a presence of B/C Sichilima.




K.M Saguda
Ag. Deputy Registrar
02/03/2023