

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

MISC. CIVIL APPLICATION NO. 44 OF 2022

(Arising from Civil Appeal No. 24 of 2022)

BETWEEN

PETER NUNDIAPPLICANT

VERSUS

LUCIA MNANKA CHACHA.....RESPONDENT

RULING

31st January & 3rd February 2023

M. L. KOMBA, J.:

The applicant has filed this application seeking this court to lift the ex-parte temporary injunction order which restrained him from using for business, seven (7) grain milling machines, one retail shop and seven (7) cattle situated at Sirari within Tarime District in Mara Region pending hearing and determination of Civil Appeal No. 24 of 2022. The application has been brought by way of chamber summons made under Section 95 of Cap, 33 R.E 2002 under certificate of urgency.

Gist of this application is that, respondent filled Misc. Application No. 9 of 2022 in Resident Magistrate court of Musoma seeking custody of children and division of Matrimonial assets. Moreover, she applied and was granted **ex-parte injunction order** preventing the applicant from using assets as

narrated in previous paragraph. The applicant was dissatisfied by ex- parte order hence this application.

During the hearing of this application, the applicant was represented by Mr. Cosmas Tuthuru while the respondent was enjoying the service of Mr. Edson Philipo both learned advocates. Before the matter proceed to the hearing Mr. Philipo raised preliminary objection on four grounds that;

- (a) That the applicant's application is time barred.*
- (b) That the applicant's application is pre mature before this court.*
- (c) That the applicant's application has not been attached with the order.*
- (d) That the applicant's application is incompetent for being raised from interlocutory order.*

As it is the tradition of the court when there is a preliminary objection, the same has to be determined first (see the case of **Khaji Abubakar Athumani vs Daudi Lyakugile TA D.C Aluminium& Another**, Civil Appeal N086 of 2018, CAT at Mwanza), parties consented to determine the Preliminary objection as raised.

When given time to argue on preliminary objection, Mr. Philipo dropped two grounds and proceed with only two grounds, (a) and (d). He said the application has no enabling provision and therefore the Law of Limitation,

Cap 89 should take charge. He refers this court to Paragraph 21 of 3rd schedule which is to the effect that any application which has no limitation in any written law, the limitation is 60 days. He submitted that the application is time barred as the ruling which has order subject to the application was delivered on 16 September, 2022 and the application by the applicant was filed on 28 November, 2022 which is 13 days more. It was his submission that applicant was supposed to apply for the extension of time before filing the application.

On the fourth ground it was his submission that the injunction order was issued by the Resident Magistrate Court and it is interlocutory one which does not determine right of parties as decided in the case of **University of Dar es salaam vs. Silvester Syprian and 210 others**, 1998 TLR at 175. Mr. Philipo further refer this court to the case of **FINCA Tanzania Ltd vs. Shaban Said Maganga**, Civil Appeal No. 16 of 2021 HC Musoma where high Court decline to entertain application where the lower court did not finalize the case. He further submitted that there is main suit which is Civil Case No. 9 of 2022 at Resident Magistrate court which will determine the matter in finality. Mr. Philipo averred that in application No. 12 of 2022 the court only maintain status quo and that both parties will not suffer if

the status quo will be maintained and the action attempted by applicant has been warned under section 70 of CPC. Counsel prayed for dismissal of the application with costs.

Arguing against preliminary objection, Mr. Tuthuru said both two grounds on objection as raised by the respondent are not purely point of law, they are facts which need evidence and that in order to determine whether the application is time barred this court need to peruse civil appeal No. 24 of 2022 which is not before me.

It was Mr. Tuthuru submission that it is discretion of the court to grant application when one party is injured as was in the case of **Kibo Matches Group vs It.S Impex Ltd** 2001 TLR at 152. He submitted further that the application traces its root in civil appeal No. 24 of 2022 which was filed in October, 2022 and the application was filed on 28 November, 2022 and therefore the application is within time.

Mr. Tuthuru denied his application to be based on interlocutory order claiming that the suit is rooted from matrimonial issues therefore section 80 (1) of Law of Marriage Act is applicable that any party has right of appeal against decision/order of the court and cemented that the order

injured one party and this court should use its discretion and pray if the application is meritorious the court should grant.

In rejoinder, Mr. Philipo informed the court that the order which the applicant is challenging and pray for it be lifted was issued ex parte which can be challenged at the same court which issued it, he added further that the order is interlocutory which did not finalize the case. About the appeal No. 24 of 2022 he said the same was not attached to application so the applicant cannot hide on appeal while counting time to file application as order which he is applying to be lifted and the copy attached to application originated from ruling delivered on 16th September 2022.

Mr. Philipo was in disagreement on the use of section 80 of Cap 29 on the ground that the order given by trial court does not determine the matter as it is interlocutory.

I have keenly followed the submissions advanced by both parties on preliminary objection. The issue for determination before this court is whether the preliminary Objection is meritorious.

Starting with the second point of objection, it is on record that the Resident Magistrate court issued ex-parte injunctive order to restrain applicant from

utilizing assets claimed to belong to both of them (applicant and respondent). So far as the order was ex-parte, instead of filing application to lift the said order, the best way was to apply to set aside the said order to the same court where the applicant could explain importance of continuing utilizing the assets in issue rather than confronting this court. Lifting of the said order is like reversing the ex-parte hearing and order which is not the duty of the higher court, ex-parte order can be reversed by the same court which issued the same.

As rightly presented by Mr. Philipo, The order which is subject to this application and later on objection is an interlocutory one, it did not finalize the matter. Misc. Application No. 9 of 2022 is pending in Resident Magistrate court, therefore the applicant can still exercise his right to be heard at the same court and adduce his reasons against the order of the court. This court cannot interfere lower court's jurisdiction and decide on a matter which is not determined in finality, see **FINCA Tanzania Ltd vs. Shaban Said Maganga(supra)**. Applicant informed the court that his application is backed by section 80 of Cap 29. For easy of reference the section reads as follows;

80.-(1) Any person aggrieved by any decision or order of a court of a resident magistrate, a district court or a primary court in a matrimonial proceeding may appeal therefrom to the High Court.

The section as cited by the applicant is inapplicable in the case at hand because the section gives right of appeal while before this court, is an application to lift an interlocutory order. I am aware that its discretion of this court to grant prayers as was in **Kibo Match group case** (supra) but discretion should be exercised judiciously. Going with above cited provision of law, if need be, and if the matter was determined in finality, the right channel could be an appeal.

Besides, on the first point of objection, the applicant is applying for this court to lift orders which was delivered on 16 September, 2022 the same was attached to application. So far as the application did not cite enabling provision, the sections of Cap 89 are applicable. The limitation of action like the one at hand is sixty days which started to count after ruling was issued, that is, from 16th September, 2022. Counting days from the date of ruling up to 28th November, 2022 when the application is filled is more than 60 days, and therefore the application is timed barred. This court is not convinced that the application arose from civil appeal No. 24 of 2022 as prayers in it originated from the ruling.

In the upshot, I find the application is incompetent to the extent as analyzed herein. Consequently, I uphold the preliminary objection and dismiss the application with costs.

It is so ordered.



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M. L. KOMBA

JUDGE

03 February, 2023