

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
ARUSHA DISTRICT REGISTRY
AT ARUSHA**

MISC. LAND APPLICATION NO. 33 OF 2023

(C/F Land Case No. 10 of 2023 High Court of Tanzania at Arusha)

**ELIMELECK FRANCIS MCHALLO (As Administrator of the
Estate of the late JANETH FRANCIS MCHALLO) APPLICANT**

VERSUS

LAWRENCE SIMON MCHALLO 1ST RESPONDENT

VICKY LAWRENCE MCHALLO 2ND RESPONDENT

ADOLF ANTHONY MSELE 3RD RESPONDENT

ADELINA ADOLPH MSELE 4TH RESPONDENT

FIRST WORLD INVESTMENT COURT BROKER 5TH RESPONDENT

RULING

4th May & 16th June, 2023

GWAE, J.

The Applicant has filed this application under Order XXXVII Rule (1) (a) and (4), section 68 (e) and section 95 of the Civil Procedure Code, Cap 33, R. E, 2019 (CPC). He is seeking the following reliefs;

1. That, this Court be pleased to issue temporary injunction order restraining the respondents or their employees, agents workers and any other person working under their instruction from interfering the two houses located on unsurveyed land at

Kambi ya fisi area Ngarenaro ward in Arusha bordered in North and East by Febronia Kimaro, South Sophia Okashi, and West Mambo; including trespassing into and undertake any activity or deal with the land in any manner whatsoever and disposing of the disputed land or interfering it in any manner pending hearing and determination of the Land Case No.19./2023 pending in this honourable court.

2. That, this Court be pleased to issue temporary injunction order restraining/suspending the sale by public auction of the disputed property pending hearing and determination of the Land Case no. 10 of 2023 pending in this Court.
3. Costs of the application be provided.
4. Any other relief that this Court may deem fit to grant.

This application is supported by the affidavit dully sworn by the applicant in which he deponed that, he is a biological son of the late Francis Mchallo and Janeth Francis Mchallo who died on 12th November 2005 and 16th March, 2021 respectively. That, after the death of his father, the applicant's late mother petitioned for grant of letters of administration of the estate her later husband, Francis Mchallo and was appointed an administratrix by Arusha Urban Primary Court on 22nd day of May 2007 vide Probate and Administration Cause No. 101 of 2007. The applicant's affidavit is further to the effect that, following the demise of his mother, he petitioned and was

duly appointed by Arusha Urban Primary Court to administer her estate vide Probate Cause No. 157 of 2021.

He also deponed that, his late mother met her demise before she had not distributed the estates of his late father including the disputed land which she co-owned with her late husband since 1990s when they bought the same from their neighbour one Mzee Elias Marcos. And that, there is a document titled "SHAHADA YA UMILIKI" confirming applicant's late mother ownership of the suit property, and that, the late applicant's parents had built their matrimonial house where they lived until their demise.

He also averred that, the 1st respondent is his blood brother who had fraudulently made documents showing that he is the lawful owner of the disputed land and that the 1st and 2nd respondent used the same to procure loan from the 3rd and 4th respondents but failed to pay the same. The 3rd and 4th respondents then filed a Civil Case No. 89 of 2017 at the Resident Magistrates' Court of Arusha at Arusha against the 1st and 2nd respondents which was decided *ex-parte* against them for non-appearance. They were ordered to pay Tshs. 167,986,827/= and upon execution, the applicant's late mom who was still alive by then, filed objection proceedings vide Misc. Civil Application No. 90 of 2018 at the Resident Magistrates' Court of Arusha. The

Objection was granted by the trial court, however, dissatisfied, the 3rd and 4th respondent appealed to the High Court of Tanzania at Arusha, which nullified the proceedings and the decision thereto. The Objection Proceedings was reverted back and started afresh in which it was eventually dismissed for want of merit. The RM's Court further ordered the execution process to continue. The applicant then decided to file Land Case No. 10 of 2023 before the court so that, he can establish ownership of the suit land and the current application in order that, the disputed property should not be disposed until final determination of the main case.

Contesting the application, the 3rd and 4th respondents filed a joint counter affidavit and disputed what has been deposed by the applicant requiring him to strict proof.

During hearing of this application, which was conducted by way of written submissions, Mr. George Stephen Njooka represented the applicant whereas the 3rd and 4th respondents' were jointly represented by Mr. Qamara Valerian assisted by Ikoda Kazzy, all advocates. Other respondents (1st, 2nd and 5th respondent) neither to file their submissions nor did they enter their appearance.

Supporting the application, Mr. Njooka submitted that, the applicant herein is the administrator of the late Janeth Francis Mchallo, his mother, who is the rightful owner of the suit land. He went on arguing that, the applicant's mother never took loan from the 3rd and 4th respondents except the 1st and 2nd respondent. Hence, satisfaction of the decree in favour of the 3rd respondent via Civil Case No. 89 of 2017 by attaching and sale of the suit land should be suspended until the final determination of the Land Case No. 10 of 2023. He referred this court to the case of **Atilio vs. Mbowe** (1969) HCD 284 where the following principles for granting temporary injunction were laid down, these were;

1. presence of serious question of facts or issue to be tried
2. Likelihood of the applicant to succeed;
3. Where court's interference is necessary to protect the applicant from irreparable loss before his legal right is established and
4. On balance of probabilities, there will be greater hardship and mischief suffered by the applicant from withholding the injunction than will be suffered by the respondents from granting it.

Starting with the first principle, Mr. Njooka submitted that, from the facts deposed from the applicant's affidavit, in Land Case No. 10 of 2023 pending before this Court, the applicant's late mother is the lawful owner of the disputed land. According to the applicant's counsel there is serious triable

of ownership of land, which requires the court's determination through the applicant's main case (Land Case no. 33 of 2023).

Regarding the 2nd principle, it was Mr. Njooka's submission that, court's interference is necessary to protect irreparable injury to the applicant before his right is established. He asserted that, Land Case No. 10 of 2023 was birthed under provisions of Order XXI Rule 62 of the CPC that, upon dismissal of the objection proceeding, the aggrieved party is entitled to file a fresh suit in a court with a competent jurisdiction in order to claim his title. Therefore, the only remedy for the applicant is to pray for the temporary injunction to protect the disputed property from being sold pending final determination of the main case.

Regarding the last principle, learned counsel submitted that, on the balance of probability, there will be greater hardship and mischief suffered by the applicant if the injunction is not granted than the respondents if the same is granted. Basing on the above arguments, he sought a court's order granting temporary injunction as prayed.

Opposing the application, Mr. Qamara started by pointing out that, the applicant has no legal standi to file this application because he is not the administrator of the estate of the late Francis Mchallo, his father. He argued

that, there is no proof that, disputed property is one among the estates of the late Janeth Mchallo. According to Mr. Qamara, the applicant is not proper person to file this application.

On merit, Mr. Qamara submitted that, jurisdiction of the court to grant temporary injunction is provided for under section 68 (c) and Order XXXVII Rule 1 of the CPC. Admitting the principles laid down in granting temporary injunction in **Atilio vs. Mbowe** (supra). However, he strongly stated that the applicant has not demonstrated the conditions set for grant of temporary injunction have been met in this application.

Mr. Qamara went on submitting that, according to the applicant, his parents are the co-owners of the disputed property which they allegedly bought from their neighbour one Mzee Elias Marcos in the 1990s. He added that, there is a document titled SHAHADA YA UMILIKI proving the ownership of the same. Nevertheless, there is ample proof that, it is the 1st respondent herein who is the rightful owner of the disputed area unlike the document titled "SHAHADA YA UMILIKI" which is not authentic as it was neither signed by ward members nor in the attestation clause.

Regarding the 2nd principle Mr. Qamara submitted that, the applicant has failed to substantiate irreparable loss that, he will suffer when the sought

injunction is not granted. He also contended that, since the applicant and the 1st respondent are blood related and the disputed land belonged to their late parents, it is the 3rd and 4th respondents who will suffer more irreparable loss than the applicant.

As to the third principle, it was learned counsel's averment that, the property in dispute was placed as collateral by the 1st and 2nd respondents for the loan from the 3rd and 4th respondents. He argued that, it is now more than six (6) years, thus, it is the 3rd and 4th respondent who stand to suffer greater hardship and mischief if the application is granted. He finally prayed that, the application be dismissed.

In his rejoinder, Mr. Njooka reiterated his earlier submission in relation for orders for the temporary injunction. Regarding applicant's competency, he submitted that, the disputed property belonged to both of the applicant's late parents as they jointly owned it from one Elisa Marcos back in 1990's. In the circumstances, it was a matrimonial asset, therefore upon demise of one spouse; the ownership automatically passes to the surviving spouse. He added that, since the applicant was appointed to administer the estate of his late mother, he is competent to sue on her behalf. Cementing his arguments, the applicant's counsel urged the court to refer to **Jumaa Abasi v. Hawa**

Abuu Seif, Miscellaneous Probate Appeal No. 14 of 2021, and **Tenende S. Mwakagiel vs. Edward Japhet Mbagala & Another**, Land Appeal No. 9 of 2013, (both unreported-H.C-Tanga).

After I have carefully gone through the parties' affidavits and their rival submissions the issue of determination is whether the applicant's application for temporary injunction is, in the circumstances, grantable. However, before embarking to the merit of the application, I find it pertinent to first determine the competency of the applicant in this application.

The 3rd and 4th respondent claim that, the applicant has no legal stand to file this application as administrator of his late mother's estate because the suit land was among the properties which upon her demise, she was still administering it as one of her late husband's estates. Without inventory showing that, the same was distributed to her, it was the argument of the 3rd and 4th respondent's counsel that, the applicant ought to have petitioned to administer the estate of his late father so as to have legal authority to prosecute for or against the suit property.

On the other hand, the applicant vividly asserts that, since the disputed property was jointly co-owned by the applicant's late parents, therefore, the right of survivorship applies to the remaining spouse upon the demise of the

other spouse. He maintained that, even though, the applicant's late mother was administratrix of the estate of her late husband including the property in dispute, even without inventory, the suit property is automatically survived by her. Hence, the applicant being an administrator of the estate of the late Janeth Francis, is a competent person to sue on her behalf.

Right to sue (*locus standi*) is a fundamental issue and central in every proceeding, therefore, the person suing has to demonstrate that he or she has right or capacity to bring an action or appear in court. In **Lujuna Shubi Ballonzi, Senior vs. Registered Trustees of Chama cha Mapinduzi** (1996) TLR 203 where this court (**Samatta, JK** as he then was stated that;

"In this country locus standi is governed by Common law. According to that law in order to maintain proceedings successfully, a plaintiff or applicant must show not only that the court has the power to determine the issue but also that he is entitled to bring the matter before the court."

Likewise, the Court of Appeal of Tanzania in **God Bless Jonathan Lema vs. Mussa Hamis Mkangaa and Others**, Civil Appeal No. 47 of 2012 (unreported) quoted with approval of the decision of the Malawian Supreme Court in **The Attorney General vs. Malawi Congress Party and Another**, Civil Appeal No. 32 of 1996 where it had this to say;

"Locus standi is a jurisdictional issue. It is a rule of equality that a person cannot maintain a suit or action unless he has an interest in the subject of it, that is to say, unless he stands in sufficiently close relation to it so as to give a right which requires prosecution or infringement of which he brings the action."

Applying the quoted judicial authorities to the objection canvassed by the 3rd and 4th respondent, from the outset, I strongly join hands with them in holding that, the applicant has no right (*locus standi*) to file this application against the respondents. I am of this holding due to the following reason, that, it is undisputed fact as gathered from the affidavits that, before her demise, the late Janeth Mchallo was still administering the estate of her late husband, Francis Mchallo vide Probate and Administration Cause No. 101 of 2007.

It follows therefore, such Probate and Administration Cause has not been closed as neither accounts nor inventory were pleaded and appended in this application. That, means the disputed property, two houses located on unsurveyed land at Kambi ya fisi area Ngarenaro ward in Arusha as a whole was not distributed to the late Janeth Mchallo for her to have ownership of the same. Therefore, the applicant herein cannot have direct

legal right to sue in respect of the suit property as the administrator of his late Janeth.

In the circumstances, that, though the applicant's late parents might have jointly acquired the property, the right of survivorship does not automatically pass from his late father to his late mother in the absence letters of administration of the estate of the late Francis Mchallo. I am of this view for an obvious reason that, according to the applicant's affidavit, the late Janeth Mchallo who stood as a legal representative of the deceased's estates did not distribute the properties including the suit land as depicted at Para. 5 of the applicant's affidavit which reads;

"That, the applicant's late mother did not distribute the properties of the late Francis Mchallo until her death on 16th March 2021. One of the said properties is the disputed land."

In the light of the above extracted paragraph, there was a requirement of petitioning for grant of letters of administration of the estate of the late Francis Mchallo immediately after the demise of the late Janeth who was and administratrix of the estate of her late husband. The Court of Appeal in **Leticia Mtani Ihonde vs. Adventina Valentina Masonyi** (Administratrix of the Estate of the late Buhacha Bartazari Kichinda), Civil Appeal No. 521 of

2021 (unreported) referring to its earlier decision in **Mr. Anjum Vical Saleem Abdi vs. Mrs. Naseem Akhtar Saleem Zangie**, Civil Appeal No. 73 of 2003 (unreported) held inter alia;

*"... the suit land or the matrimonial home or property as the trial High Court labelled it, formed part of the estate of the deceased following his death. Whether the deceased died testate or intestate, **its distribution to its beneficiary or beneficiaries/provided it was not disposed of by the deceased inter vivos, was governed by the laws of Probate and Administration of deceased estates....** Indeed, after the learned trial judge had annulled the earlier probate proceedings (and all the transactions made on the authority of the annulled granted probate), the only logical thing to have been done was to advise the parties to apply for probate letters of administration in a court of competent jurisdiction."*

The Court of Appeal then held that;

*"We are aware that the facts in the above case may differ from the instant case, however the principle pronounced in the above holding is clear and applicable in the present case, that where the husband has died the surviving spouse cannot seek distribution of matrimonial assets in a matrimonial cause, **and any claims or perceived rights***

thereto must be sought in a Probate and Administration cause. (Emphasis added)."

Subscribing to the authorities above, I therefore differ with the applicant's counsel contention that, the ownership of the disputed property automatically passed to the late Janeth Mchallo, the surviving spouse following the demise of her late husband.

I have traversed the decision in **Jumaa Abasi vs. Hawa Abuu Seif** (supra) and in **Juma Rahisi Manyange vs. Shekhe Fahisi** (1999) TLR 29 cited by Mr. Njoka. I am of the firm view that, the cited judicial precedents are distinguishable from the present matter before the court since in Jumaa's case the deceased left no child save only one wife and the suit plot denoted to be owned under "joint tenancy".

Equally, in Rahisi's case it was the widower who sold the matrimonial property whereas in the instant matter, the late Janeth was an administratrix of the estate of her late husband. However, she was yet to distribute the estate especially the suit land to those entitled including herself, the applicant, 1st respondent and other beneficiaries. In **Joseph Shumbusho vs. Mary Grace Tigerwa and two others**, Civil Appeal No. 183 of 2016 (unreported), the Court of Appeal held among other things;

"As legal representative of the deceased's estate, all the deceased's estates are vested to her all the powers over the deceased's estate as the deceased, would have, save that he is acting in a representative capacity as rightly submitted by the learned counsel for the appellant."

In the present matter since the late Janeth Mchallo petitioned for letters of administration of the estate of the late Francis Mchallo including the property in dispute. It was therefore proper, as rightly argued by the 3rd and 4th respondent's learned counsel, for the applicant, or any other interested party to petition for grant of letters of administration of the estate of the late Francis Mchallo. Then, a grantee of letters would proceed from where the late Janeth Mchallo ended so that, such probate could be finalised and closed. In that regard, the applicant cannot jump into his mother's shoes and proceed with administration of his father's estate including the suit property as among the estate of his late mother whose administration was concluded. Therefore, the grant of letters of administration to the applicant of the estates his mother was proper in other properties not enlisted in the former administration unlike the suit property.

With this point of objection raised by the counsel for the 3rd and 4th respondent, which I have sustained for the above stated reasons, I would

find no need to proceed with determination of the application on merit or otherwise since the issue of locus standi is a jurisdictional issue. Without the requisite right to bring an action against the respondents, the applicant's application, in my view, remains superfluous, misconceived and untenable before the eyes of the law.

Nevertheless, even by assuming that, the applicant has locus standi which is not the case, conversely, I would not be convinced if this application for temporary injunction is grantable on the following reasons;

1. The application is lacking merit or in other words, there is no likelihood of success of the main case. I have come to this conclusion after I have carefully examined the parties' affidavits and their annexures namely; a letter dated 22nd day of August 2015 written by chairman, Kambi ya Fisi Street-Arusha recognising the 3rd respondent as owner of the suit property. The said letter was followed by letter dated 21st October 2016, the 1st respondent's affidavit sworn on 22nd August 2015 plus survey map of the suit property. Hence, if the application, is substantively examined there is no arguable case rather than

entertaining unjustified use of technicalities by judgment debtor or his relatives


2. If this application is granted as sought, it is the 3rd and 4th respondent who shall suffer more irreparable loss than the applicant, heirs of the late Janeth and 1st respondent who are siblings. Therefore, they are persons whom are in a better position to discharge the suit property from encumbrances by repaying the loan plus interest taking into account that, there has been pendency of the matter since 2017 and that applicant and 1st respondent to the suit land.
3. There is a legal requirement to ensure that, the decree holders enjoy their fruits awarded by our courts instead of allowing flimsy reasons advanced by judgment debtors such as the 1st respondent and his blood relatives borne by the late Janeth Franci and the late Francis Mchallo. Hence, it is my considered view that if this application is granted, it is the 3rd and 4th respondent who shall suffer greater hardship and mischief than the applicant his relatives including the 1st respondent, his blood brother.

That, said and done this application is thus same is struck out with costs.

It is so ordered.

Dated and delivered this 16th day of June 2023.




M.R. GWAE
JUDGE