

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

MISC. CIVIL APPLICATION NO. 28 OF 2023

(Arising from the High Court of United Republic of Tanzania (Bukoba Registry) in Civil Case No. 06 of 2019)

**KAGERA EDUCATION PROMOTION CO-OPERATIVE
SOCIETY.....APPLICANT**

VERSUS

MORITIES COOPERATION LTD.....1ST RESPONDENT

CRDB BANK PLC.....2ND RESPONDENT

ACCURATE RECOVERY & AUCTIONS LTD.....3RD RESPONDENT

RULING

Date of last Order: 18.05.2023

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A.Y. Mwenda, J.:

Before this court is an Application for Temporary Injunction made under Order XXXVII Rule 2 (1) and Section 68(e) of the Civil Procedure Code, [Cap. 33 R.E 2019].

The Applicant seeks for an order of Temporary Injunction to restrain the 3rd Respondent and all of his agents from selling the Applicant's properties advertised without any statutory notice or justifiable reason pending the determination of the matter (pending) before the Court of Appeal of Tanzania involving the Applicant against the 1st and 2nd Respondents herein above.

This Application is supported by an Affidavit sworn by ELIUD CLEOFAS AMANI, the principal officer of the Applicant. After being served with the Application papers, the counsel for the 2nd and 3rd Respondents file a counter Affidavit. The same was accompanied with a Notice of preliminary objection which read as follows, that:

- 1. That, this Honorable Court has no jurisdiction to issue the sought injunction on the matter which is pending before the Court of Appeal arising from Civil Case No. 06 of 2019.*
- 2. That, the application is incompetent before this Hon. Court for being in violation of Order XXXVII, Rule 2(1) of the Civil Procedure Code, [Cap 33 R.E 2019] for being filed without any main suit pending. (sic)*

It is trite law that once a preliminary objection is raised, the same should be determined first before dealing with the main suit/application. This position is covered in various authorities of this court and the Court of Appeal. One of them is the case of KHAJI ABUBAKAR ATHUMANI Vs. DAUD LYKUGILE T/A D.C. ALUMINIUM AND MWANZA CITY COUNCIL, CIVIL APPEAL NO. 86 OF 2018, CAT, (unreported) where the Court, while citing the case of SHAHIDA ABDUL HASSANALI KASSAM VS. MAHEDI MOHAMED GULAMALI KANJI, CIVIL APPLICATION NO. 42 OF 1999 (unreported) held inter alia that:

"...the whole purpose of a preliminary objection is to make the court consider the first stage much earlier

before going into the merits of the application...so in a preliminary objection a party tells the court the existing circumstances do not give you jurisdiction. It cannot be gained said that the issue of jurisdiction has always to be determined first"

On that basis, the court invited the parties to the hearing of the preliminary points of objection. At the hearing of the same, the Applicant was represented by Mr. SCARIOUS BUKAGILE, learned counsel whilst the 2nd and 3rd respondent marshalled one Mr. ABEL EUSTARD RUGAMBWA, learned counsel. Otherwise, the 1st respondent stood by himself.

In support of the 1st preliminary point of objection, the learned counsel for the 2nd and 3rd respondent submitted that jurisdiction is important factor to every court. He said that at para 5 and 6 of the applicant's affidavit, it is clear that the ruling of Civil Case No. 6 of 2019 did not please him as such he applied for Revision before the court of appeal. On that basis, the learned counsel was of the view that the records of Civil Case No. 6 of 2019 is before the court of Appeal thus, once the case changes hands from the lower court to superior one, the lower court lacks jurisdiction to entertain any application emanating therefrom. To support this point, the learned counsel cited the case of MARY MAKOGERE V. REHEMA MFAKI, MISC. LAND APPLICATION NO. 180 OF 2021, HC (unreported) where the court while citing the case of TANESCO V. DOWANS HOLDINGS SA (COSTA RICA) AND

DOWANS TANZANIA LTD, CIVIL APPLICATION NO. 142 OF 2012 held that once a notice of appeal to the court of Appeal has been lodged, then this court's jurisdiction over the matter ceases. On that basis, the learned counsel was of the view that this application is incompetent and should be dismissed.

Regarding the 2nd point of objection, the learned counsel for the 2nd and 3rd respondents submitted that the present application contravenes Order XXXVII, Rule 2(1) of the Civil Procedure Code, Cap 33 RE 2019. According to him, this rule is applicable when there is a pending (main) suit. He said that since this application emanates from Civil Case No. 6 of 2019 which is already determined by Hon. Ngigwana, J on 30/6/2022, then this application lacks legs to stand on. The learned counsel concluded his submission with a prayer for this court's pleasure to sustain the raised points of objection.

In reply to the submissions by the learned counsel for the respondent, Mr. Scarious Bukagile submitted that this court is vested with jurisdiction to entertain this matter. The reasons for his stance was that the ruling in Civil Case No. 6 of 2019 was on technical grounds and according to him since the relief sought in the said case are yet to be granted then the said case is as if it is pending before this court. To support his stance he cited the case of YAHYA KHAMIS V. HAMIDA AND TWO OTHERS, CIVIL APPEAL NO. 225 OF 2018.

Regarding the 2nd point of objection, the learned counsel for the applicant submitted that they believe Civil Case No. 6 of 2019 is still pending, no wonder they have filed the present application under Order XXXVII Rule 2(1) of the Civil Procedure Code, Cap 33 RE 2019. Further to that, while citing the case of BEATUS ALPHONCE MTUI AND ANOTHER Vs. DIRECTOR OF MAPPING AND SURVEY AND 3 OTHERS, MISC. LAND APPLICATION NO. 10 OF 2011 HC, (unreported) at page 9, the learned counsel stressed that for interest of justice, the court may invoke Section 95 of the Civil Procedure Act and para 3 of Section 2 of JALA. In his concluding remarks, the learned counsel for the applicant prayed the preliminary points of objections to be overruled.

In rejoinder, the learned counsel for the respondents said that Civil Case No. 6 of 2019 was determined thus, it is no longer exist before this court. Further to that he said that the issue of ownership which the learned counsel for the applicant alleged it was not determine, does not exist in this court's registry. The learned counsel further rejoindered that by striking out Civil Case No. 6 of 2019, then the same is not pending in this court as Mr. Scarious, alleged. He said the only remedy available is for the applicant to refer this application to the court of Appeal.

The learned counsel for the respondent further rejoindered that the case of YAHYA HAMIS (supra) and BEATUS ALPHONCE MTUI (supra) cited by the learned counsel for the applicant are distinguishable.

To conclude his rejoinder, the learned counsel for the respondent reiterated to his previous prayer that the preliminary objections raised be sustained.

On his part the 1st respondent submitted that Civil Case No. 6 of 2019 is still pending before the court of Appeal. He then prayed the court to keenly go through the case of YAHYA HAMIS (supra) at page 15 and overrule the points of objections.

In reply to the submission by the 1st respondent, Mr. Rugambwa submitted that if Civil Case No. 6 of 2019 is still pending before court of Appeal then this court has no jurisdiction to entertain this application. He reiterated to previous prayer that the raised points of objection be sustained.

That marks the end of the summary of the submission by the parties and the duty that remains to the court is to determine the fate of said objections. Before doing that, it is pertinent to point out that preliminary objection consists of a point(s) of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose the suit or application. Examples is objection to the **jurisdiction of the court**, or a plea of limitation, or a submission that the parties are bound by contract giving rise to the suit to refer the dispute to arbitration. This position was stated in a famous case of MUKISA BISCUIT MANUFACTURING Co. Ltd VS. WEST END DISTRIBUTORS LTD [1969] EA 696 (CAN).

In the present matter, the points raised by the learned counsel for the 2nd and 3rd respondents are points of law touching jurisdiction of this court which fall under the ambit of the principles set in MUKISA BISCUIT (supra) that is why the court gave room to the parties to submit in that regard.

The applicant before this court is seeking for an order of temporary injunction. This order is a creature of statute which is order XXXVII OF CPC [Cap 33 RE 2019]. It is an order of the court that is valid for a duration of legal proceedings where the court orders a party to do or not to do something until the parties are heard in pending **trial/matter before it when there is an** emergency of some kind. In order for the court to issue a temporary injunction, the applicant must firstly, show that without the injunction irreparable harm will be caused and there are no other proper legal remedies available to deal with the issue [see STAROIL TANZANIA LIMITED V. ALCHEMIST TANZANIA TRADING DMC AND 1 ANOTHER, MISC. CIVIL APPLICATION NO. 302 OF 2021 HC, (unreported)] and secondly, show that there is a pending case.

With regard to the 1st point of objection, the court having gone through the application and accompanying affidavit is satisfied that there is substance in it. The applicant is seeking temporary injunction pending determination of the matter before the court of appeal. As it was submitted by Mr. Abel Rigambwa, this court has no powers to grant orders beyond its jurisdiction. It is important to note that one of the guiding principle to be met by the applicant in applications such as the

present one is there being a pending suit before the court. In the case of STAROIL TANZANIA LIMITED V. ALCHEMIST TANZANIA TRADING DMC AND 1 ANOTHER (supra) it was held:

"Is that the facts alleged there must be a serious question to be tried by the court and a probability that the plaintiff/applicant will be entitled to the relief prayed for the main suit."

From the foregoing principle, it is clear that firstly, there must be a main suit before the court (this court), and secondly, the court (this court) must assess the probability that the applicant will be entitled to reliefs prayed in the main suit/appeal. In the circumstances of this matter, both conditions are not met because the main appeal is before the court of appeal and as such this court cannot predict the outcome that the applicant will be granted relief(s) prayed.

As it was rightly submitted by Mr. Rugambwa, there is also no pending suit before this court because Civil Suit No. 6 of 2019 was strike out. Mr. Scarious was of the view that by striking it out the same is still pending before this court. With due respect, that is not the case. Striking out of the suit entail deleting it from the court's registry. In the case of BNC VVS. KILULU KISONGO, REVISION NO. 274 OF 2021, this court S.M. Maghimbi J, had this to say;

"...what is the meaning of striking out suit?. By striking out the application it means that all the orders that were previously passed by the court automatically cease to have any force. They cannot be enforced nor executed because they simply do not exist. To that end it means there is nothing before me to revise as the execution that this revision originated from is no longer in existence"

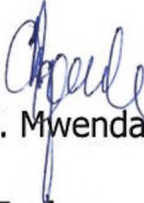
Based on the above authority, the striking out of Civil Suit No. 6 of 2019 entail it is deleted from this court's registry. Again, the law is clear that once notice of appeal is lodge before CAT, this court's jurisdiction ceases. This position was stated in the case of MARY MAKORARE VS. REHEMA MFAKI, MISC. LAND APPLICATION NO. 180 OF 2021. Mr. Scarious was of the view that the above authority is distinguishable because what is before the CAT is notice of motion and not the notice of appeal. I have considered the argument by the learned counsel but with respect I found that his stance is misinterpretation of the reasoning in the above case. This is so because what the court was emphasizing in the said case is that once any matter is before the CAT, this court cannot deal with it, the same way they have filed notice of motion before CAT which bars this court from entertaining any application such as the present one. On that basis I find merits in the 1st preliminary point of objection and it is sustained.

Since the 1st preliminary point of objection is sustained, the court found no reasons to discuss the 2nd preliminary point of objection.

That being said this application is dismissed. The applicant shall pay the 2nd and the 3rd respondent costs.

It is so ordered.





A.Y. Mwenda
Judge

18.05.2023

Ruling delivered in chamber under the seal of this court in the presence of Mr. Scarious Bukagile learned counsel for the applicant and in the presence of Mr. Abel Rugambwa learned counsel for the respondents.




A.Y. Mwenda
Judge

18.05.2023