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UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL CASE NO. 211 OF 2022

ABRAHAM SYKES..... PLAINTIFF

VERSUS

ARAF ALLY KLEIST SYKES.....1ST DEFENDANT

CNI SECURITY &PUBLIC CIVIL INVESTIGATION LTD.....2ND DEFENDANT

RULING

Date of last order: 04/09/2023

Date of Ruling: 06/09/2023

BEFORE: G.P. MALATA, J

This ruling is in respect to the points of law raised by the defendants during hearing and testimony by PW1, one Abraham Sykes, the plaintiff herein.

When this case came for hearing, both parties appeared represented by

counsels. Dr. Chacha Bhoke Murungu appeared for the plaintiff, whereas Mr. Jerome Msemwa learned counsel appeared for the 1st defendant and Mr. Ashiru Lugwisa learned counsel appeared for the 2nd defendant. In the course of PW1's testimony, the defendants' counsels raised points of law to the effect that;

1. The court has no jurisdiction to entertain the suit as the complaints therein touches violation of stay of execution granted by the court of appeal.
2. The court has no jurisdiction to entertain the suit encompassing ownership claims which are subject to appeal before the court of appeal.

Upon being satisfied that, the issues raised touches jurisdiction to hear the case, this court accommodated it and invited the parties to address.

Mr. Jerome Msemwa learned counsel for the plaintiff submitted that, the plaintiff herein had filed Land case no. 176 of 2018 against the first defendant claiming for ownership of landed property described as Plot no. 456 Block "F" Mbezi with title no 34182 Dar es Salaam as reflected in paragraph 4 of the amended plaint. The first defendant emerged the winner and the court declared him, the lawful owner of the said landed property.

Aggrieved thereof, the plaintiff herein appealed to the Court of Appeal against the decision in land case no. 176 of 2018. This is reflected in paragraph 10 of the plaint. Additionally, the plaintiff applied for stay of execution pending determination of the appeal before the Court of Appeal. It is alleged that, the defendants wrongfully evicted the plaintiff in the suit premises and trespassed to plaintiff's personal properties and maliciously damaging the said chattels.

In view thereof, the plaintiff filed the present suit claiming for tortious liability of trespass to goods and personal properties and malicious damages and wrongful eviction from the suit premises. He thus claimed for reliefs that, this court be pleased to order for;

- a. A declaratory order that the first and the second defendants have committed the tortious wrongful acts of trespass to goods and personal properties of the plaintiff and trespassed to the plaintiff residence on 1st November 2022.
- b. A declaratory order that the first and second defendants have wrongfully evicted without any court order of execution authorizing such eviction.

- c. A declaratory order that the first and second defendants have wrongfully and forcibly interfered with and physically and directly removed the plaintiff's motor vehicle (**Registration Number CFH, Make Toyota: Model Land Cruiser; Pearl White; Year of manufacturer: 2000: Chassis Number UZJ1000129331**) from the house and compound the plaintiff had been residing on 1st November 2022 without his consent or any court order to that effect;
- d. A declaratory order that as a result of trespass to goods and wrongful removal of properties of the plaintiff, first and second defendants have caused malicious damage to personal properties of the plaintiff and in particular defendants damaged the entrance gate of the house and motor vehicle of the plaintiff.
- e. Payment of sum of **TZS. 1,000,000,000/= (Tanzania Shillings One Billion Only)** as a general damage arising directly from the wrongful tortious acts of trespass and malicious destruction of personal properties of the plaintiff and the wrongful eviction of the plaintiff from the house, he had his residence.
- f. Payment of punitive damages a sum of **TZS 1,000,000,000 (Tanzania shillings One Billion Only)** as a direct result of the

blatant disregard to the pending appeal in the Court of Appeal of Tanzania challenging ownership of the house on Plot No. 456 Block "F", Mbezi Medium Density, Dar es salaam and for wrongful trespass, eviction and removal of the plaintiff's and his personal properties without his consent and any court order authorizing such conduct and actions of first and second defendant;

- g. Interest at a court rate of 7% on the decretal amount from the date of judgement to the date of final payment of the decretal sum.
- h. Permanent injunction against the first defendant and his servants or agents from illegally entering into the said house where the plaintiff's has his residence, and from unlawfully evicting the plaintiff and his servants or agents from the said house and compound.
- i. An order that the first and second defendants remove the entrance gate they have placed in the fence of the said house and replace it with the gate that had been fixed on the entrance by plaintiff before the causes of action arose.
- j. An order that the first and second defendants remove the insignia or emblem they have placed in the wall and entrance fence and remove

the chains and padlocks placed on the doors of the said house where the plaintiff had been residing; and,

k. Costs of this suit be paid by defendant.

l. Any other reliefs this court deems to grant.

Submitting in support of the first limb of preliminary objection Mr. Msemwa submitted that, as per paragraph 6 read together with paragraphs 9 and 10 and prayer a, b, c and d of the plaint speaks of unlawful eviction from the suit premises which is a violation of stay of execution issued by the court of appeal.

In furtherance of the point, he submitted that since there is a confirmation by the pleadings and PW1's testimony on the existence of the court of appeal stay of execution order. The plaintiff is complaining to have been unlawfully evicted which act is in violation of stay of execution issued by the court of appeal, then it goes without saying that any complaint arising therefrom ought to have been referred to the court of appeal, the issuing court.

Therefore, any complaint on violation of stay of execution order by the court of appeal tabled before this court is misplaced as this court has no jurisdiction to entertain it.

As to the second limb of preliminary objection, Mr. Jerome Msemwa submitted that, reading paragraphs 4, 8 (g) and paragraph 10, they all raise complaints touching ownership of the suit premises which has been dealt in Land case no. 176 of 2018. The first defendant was declared the lawful owner and the plaintiff herein was aggrieved, thus preferred an appeal to the court of appeal which is pending for hearing. Further, paragraph 14 speaks of denial of access to the suit premises and personal properties as a result the plaintiff through prayer "h" asked this court to issue permanent injunction against the defendant who in fact he is a lawful owner of the landed property in dispute by virtue of the decision in land case no. 176 of 2018.

Further, he submitted that, the prayer in paragraph "i" is to the effect that this court be pleased to order for removal of entrance gate which is fixed there the fence, the gate is part of the landed property in dispute, thus touches ownership of the structure of the house.

In submission to prayer "j" Mr. Msemwa stated that, one cannot talk of trespass without establishing ownership of property, in this case the claims in the plaint touches chattels and landed property. The landed property is subject to appeal before the court of appeal. Therefore, since there are

claims touching ownership of land of which this court has already decided and appealed against then this court has no jurisdiction to entertain such claims and order prayed.

In view thereof, anything touching ownership whether directly or indirectly is part of the proceedings in the court of appeal. Finally, he referred this court to the case of **Abraham Sykes vs. Araf Sykes**, Land Case no. 14 of 2022. As to the fate of the suit, Mr. Msemwa submitted that, it be struck out with costs.

Mr. Ashiru Lugwisa, learned counsel for the second defendant started his submission in support of the preliminary objection by subscribing to what Mr. Msemwa, learned counsel for the first defendant submitted. Additionally, he submitted that, the court is functus officio as the complained grievances touching ownership of the landed property had already been decided by this court in land case no. 176 of 2018. To cement his submission, he referred this court to the case of **Scholastica Benedict vs. Martin Benedict** (1993) TLR 1.

Further Mr. Lugwisa submitted that, this court cannot cherry-pick some issues and proceed with it for purposes of jurisdiction and leaving others

unsettled for want of jurisdiction. As such he prayed that, the whole case be struck out with costs.

Replying to the submission made by the defendants Dr. Chacha Bhoke Murungu learned counsel submitted that, this court has jurisdiction to determine the matter before it. The present suit is in respect of tort of wrongful acts of trespass and malicious damages to properties of the plaintiff.

To nourish the submission, he referred this court to the case of **Scan Tan Tour Limited vs. The Catholic Diocese of Mbulu**, Civil Appeal no. 78 of 2012 in which the Court of Appeal principled among others that, parties and the court are bound to the pleadings and prayers. He submitted that the defendants' submissions are out of context as the suit at hand talks about tortious liability as stated in paragraphs 6, 7 and 8 of the amended plaint. The tortious liability elucidated in the plaint is a tort of trespass and malicious damages to plaintiff's properties. There is no claims for ownership of land pleaded therein as such the submissions by the defendants are misplaced. The pleadings are inline with the reliefs sought in item (a)-(g) and (i) and (k), he submitted that other reliefs are just ancillary to substantive prayers stated in item a to (g) and (i) and (k).

In furtherance of his submission Dr. Murungu cited the case of **CRDB (1996) LTD vs, Boniface Chimya** [2003] TLR 413 in which the court of appeal held that trespass to take away goods is actionable per se and that the reliefs sought must be gathered from the substantive reliefs followed by the ancillary reliefs. He also submitted that what is pleaded in paragraph 10 of the plaint has nothing to do with what has been presented before the court of appeal.

Dr. Murungu submitted that, in case this case is found to be a replica to the claims in court of appeal then it will res sub judice of which the remedy is to stay it and not to struck it out.

As to the authorities cited by the defendants Dr. Murungu submitted that, the same are irrelevant to the issue at hand in the sense that they dealt with issues different from the ones at hand. Finally, he invited this court to dismiss the preliminary objections with an order of costs.

By way of rejoinder Mr. Msemwa echoed the position that, parties are bound by their own pleadings as presented by the plaintiff's counsel. He further submitted that, Dr. Murungu learned counsel for the plaintiff has vigorously failed to discuss issues number 1 on stay of execution. As such, prayed to be upheld unopposed. However, he reiterated to his submission in chief.

Mr. Lugwisa rejoined that a trespass cannot be maintained without ascertaining ownership of land. Anything directly or impliedly touching the landed property cannot be raised in this case as the same are at issue before the court of appeal. He also submitted that the issue of substantive or ancillary reliefs doesn't arise in this case as the plaintiff didn't differentiate. Further, he submitted that item (h) of the reliefs which seeks for permanent injunction cannot in any way be sought as an ancillary prayer and against the owner of the landed property. As on the *res subjudice* Mr. Lugwisa submitted that, the plaintiff's submission is out of legal context as for the *res subjudice* to apply there must be two pending cases by the same parties, subject matter and that must have been undecided.

In the present case, ownership of landed property has already been decided by this court and appealed against by the plaintiff herein, thus there is no *res subjudice* in the context. As such, prayed for striking out of the case with costs. Without wasting much time, I am in agreement with Mr. Ashiru Lugwisa's position on *res subjudice* as the law speaks by it itself.

Having carefully gone through the pleadings, PW1's testimony, preliminary objections and submissions for and against, this court gathered that; **one**, the plaintiff instituted land case no. 176 of 2018 against first defendant

claiming for ownership of land, **two**, on 8th December, 2021 this Court delivered judgement by declaring the first defendant lawful owner of the landed property, **three**, the plaintiff was aggrieved thereof and preferred an appeal to the court of appeal challenging declaration of ownership entered in favour of the first defendant, **four**, the plaintiff applied for stay of execution to court of appeal pending determination of the appeal which prayer was granted, **five**, the plaintiff was removed from the suit premises on 1st and 15th November, 2022, **six**, civil appeal no. 226 of 2022 lodged by the plaintiff in the court of appeal is yet to be determined, **seven**, the plaintiff is complaining about unlawfully evicted from the suit premises which belongs to the first defendant by virtue of the judgement in land case no. 176 of 2018 and **eight**, the plaintiff is seeking for orders, inter alia, declaration that he was unlawfully evicted, grant of permanent injunction against the first defendant from entering into the suit premises and unlawful eviction the plaintiff from the suit premises, removal of entrance gates placed in the fence of the suit premises, and that the first and second defendants trespassed to goods and properties of the plaintiff, **nine**, the claims touching trespass to goods, personal properties of the plaintiff and malicious damages were not pleaded and determined in land case no. 176

of 2018 save for matters touching ownership of landed property referred to as plot no. 456 block F with title number 34182 Mbezi Dar es Salaam, *ten*, issues touching trespass and malicious damages to properties by the defendant are not part of the proceedings before the court of appeal in civil appeal no. 226 of 2022 save for issues touching ownership of the said landed property.

In that regard, this court has been asked to determine on the points of law touching jurisdiction on whether this court can entertain the matter which encompass is issues pending for determination before the court of appeal in civil appeal no. 226 of 2022.

To start with, it is a settled law that, once notice of appeal has been preferred under Rule 83 of the Tanzania Court of Appeal Rules, R.E.2019, the High Court ceases to have jurisdiction to entertain the matter.

The above position is rooted from the court of appeal decision in **Tanzania Electricity Supply Company Ltd Vs. Dowans Tanzania Ltd and Another**, Civil Application No. 142 of 2012 (unreported)

"It is settled law in our jurisprudence, which is not disputed by counsel for the applicant, that the lodging of a notice of appeal

*in this Court against an appealable decree or order of the High Court, commences proceedings in the Court. **We are equally convinced that it has long been established law that once a notice of appeal has been duly lodged, the High Court ceases to have jurisdiction over the matter.**"*

Furthermore, as the proceedings has already been transferred to court of appeal, any party interested to make any application in respect to such proceedings has to do so in the court of appeal.

In case of an application for stay of execution, the same has to be applied in the court of appeal which is vested with such jurisdiction. This position is provided under Rule 11(3) of the Tanzania Court of Appeal Rules, R.E. 2019 which provides that, I quote;

*(3) In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 83, an appeal, shall not operate as a stay of execution of the decree or order appealed from nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree or order; **but the Court, may upon good cause shown, order stay of execution of such decree or order.***

(4) An application for stay of execution shall be made within fourteen days of service of the notice of execution on the applicant by the executing officer or from the date he is otherwise made aware of the existence of an application for execution.

Based on the above legal position, it is with no malingering of doubt that, any matter which has been finally determined by the High Court and appealed to the Court of appeal, the High court has no jurisdiction to re hear it.

Having so said and in response to the first limb of preliminary objection, I am of the settled position that, anything relating to complaint of violation of stay of execution made under Rule 11(3) of the Tanzania Court of Appeal Rules is not amenable by the High Court as it is not seized with jurisdiction.

In the present suit, the plaintiff is complaining about unlawful eviction by the defendants while there is an order by court of appeal staying execution of the decision in land case no.176 of 2018. Categorically PW1 testified that;

"I was aggrieved by the decision thereof, appealed to the court of appeal and applied for stay of execution. The court of appeal granted stay of execution."

The counsel for the plaintiff didn't comment on this issue to enable the court to have the views. In other words, he had nothing to submit in contravention of the defendants' submission.

In the event, I am inclined to agree with the submissions by the counsel for the defendants that, since the plaintiff has confirmed through his testimony and pleadings that, there was stay of execution granted by the court of appeal, the violation of the same has to be reported to the Court of Appeal which is seized with jurisdiction. Thus, the allegations of wrongful and unlawful eviction from the suit premises complained by the plaintiff as pleaded in paragraphs 6, 9,10,11, 13 and 15 and prayers (b), (e), (f) and (h) fall and amount to disobedience of stay order issued by the court of appeal.

As such, any complaint touching the said order falls within the court of appeal ambit. Other issues apart from, may be placed for determination by this court.

In the circumstances, I uphold the first limb of preliminary objection that, this court has no jurisdiction to entertain such claims.

This marks the end of discussion of the first limb of preliminary objection.

As to the second limb of preliminary objection, it is trite law that, where a matter has already been conclusively determined by the court of competent jurisdiction, then that court becomes *functus officio* to entertain any claim touching the same issue directly or indirectly ruled there in. This position is echoed by the court appeal decision in the landmark case of **Scolastica Benedict vs. Martin Benedict** (1993) TLR 1 where the court held that;

*"As a general rule, a primary court, like all other courts, **has no jurisdiction to overturn or set aside its own decisions as it becomes functus officio after making its decisions.**"*

The exception to above rule is that, such court can only do so by way of review or application to set aside *ex parte* decision.

In the present case, this court has gathered that, the plaintiff is complaining about wrongful and unlawful eviction from the suit premises. Further, the plaintiff claims to be granted permanent

injunction against the first defendant from entering into the suit premises and unlawful evicting him, removal of entrance gates placed in the fence of the suit premises.

In the opinion of this court, the prayers stated herein in prayers (b), (f), (h), (i) and (j) cannot be granted in favour of a person with no good title to the land. It is on that regard, the prayers fall within the issues which are about to be determined the court of appeal in civil appeal no 226 of 2022.

Further, this court cannot as per prayer (h) to the plaintiff issue permanent injunction restraining the declared owner of the suit premises by virtue of land case no. 176 of 2018 from entering into his house or prohibiting him from evicting his premises.

The submissions by Dr. Chacha Bhoke Murungu learned counsel for the plaintiff that, the claims and reliefs sought do not touch the issue of ownership of suit premises is misplaced as one cannot pray for such orders unless he is the lawful owner of the suit premises.

In view thereof, I am in agreement with the defendants' position that, the suit is a hybrid one containing pleadings and reliefs touching claims

and reliefs for; **one**, tort of trespass to properties, **two**, ownership of land subject for determination by the court of appeal and **three**, violation of stay of execution by the court of appeal.

This court cannot cherry-pick some reliefs for purposes of jurisdiction while leaving others undetermined for want of jurisdiction. The suit could have been tenable, if it raised claims for trespass to plaintiff's personal properties without connecting to ownership of the land premises and alleged violation of the stay of execution which are within the jurisdiction of the court of appeal.

In the event, I am persuaded to hold that, this court has no jurisdiction to entertain any claim touching direct or indirect on ownership of land as the same are within the jurisdiction of the Court of Appeal. In other words, this court became functus officio upon delivery of decision in land case no. 176 of 2018. **This marks the end of discussion of second limb of preliminary objection.**

Having said all what I wanted to say, I find the present suit to be incompetent for the aforesaid reasons. Consequently, I hereby struck out the suit with costs.

IT IS SO ORDERED

DATED at **DAR ES SALAAM** this 6th September, 2023.



A handwritten signature in black ink, appearing to read "G. P. MALATA", written over a horizontal line.

G. P. MALATA

JUDGE

06/09/2023

RULING delivered at **DAR ES SALAAM** in chamber this 6th September, 2023.



A handwritten signature in black ink, appearing to read "G. P. MALATA", written over a horizontal line.

G. P. MALATA

JUDGE

06/09/2023