

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LAND DIVISION
AT MOSHI**

MISC. LAND CASE APPLICATION NO. 28 OF 2023

(C/F Land Appeal No. 18 of 2023)

ELIZABETH ANDREA KAHULULE..... APPLICANT

VERSUS

LILIANI MASONGA MTEI (As administratrix of the
estate of the late HADIJA MSOMBA) **RESPONDENT**

RULING

18/09/2023 & 16/10/2023

SIMFUKWE, J.

The applicant herein seeks temporary injunction pending determination of Land Appeal No. 18 of 2023. The application was filed under certificate of urgency under **Order XXXVII rule 1** read together with **section 68(e) and 95 of the Civil Procedure Code**, [CAP 33 R.E 2022] and any other enabling provision of the law. In her amended Chamber summons, the applicant prayed for ex parte and inter partes orders as follows:

EX PARTE

- 1. This Honourable Court be pleased to grant an order for temporary injunction to restrain the Respondents, their*

agents, assigns (sic), servants or any person acting under them or under their instructions from interfering with enjoyment of the suit premises and stop making any development pending the hearing and final determination of the appeal by this Honourable Court inter parties, and that this Honourable Court be pleased to grant an order for maintainance of the status quo of the suited (sic) land pending the hearing and final determination of the appeal by this Honourable Court inter parties.

INTER PARTES

- 2. This Honourable Court be pleased to grant an order for temporary injunction to restrain the Respondents, their agents, assigns (sic), servants or any person acting under them or under their instructions from interfering with enjoyment of the suit premises and stop making any development pending the hearing and final determination of the appeal by this Honourable Court inter parties, and that this Honourable Court be pleased to grant an order for maintainance of the status quo of the suited (sic) land pending the hearing and final determination of the appeal by this Honourable Court.*
- 3. Any other relief/reliefs which this Honourable Court may deem fit to grant in conjunction the prayer made above due to the Respondents acts as stated hereunder in the Affidavit in support of this Application.*

The application was supported by an affidavit sworn by the applicant which was contested by the counter affidavit of the respondent.

The factual background of the application is that the applicant is the administratrix and heir of the estates of the late Andrea Kahulule Masimba. Among the properties of the deceased which the applicant herein claimed to belong to the late Andrea Kahulule Masimba is the plot situated at Kifaru madukani area, Kileo Ward, Mwanga District within Kilimanjaro region. The applicant averred in her affidavit that the said plot was invaded by the respondent herein. At paragraph 8 of the applicant's affidavit, it seems that the applicant was aggrieved with the decision of the District Land and Housing Tribunal. She opted to appeal before this court. Thus, the applicant filed the instant application for the court to issue temporary injunction pending determination of her appeal.

During the hearing, the application was heard viva voce. Both parties were unrepresented.

In her brief submission, the applicant adopted the contents of her affidavit to form part of her submission. She prayed for stop order to be issued against the respondent pending determination of her appeal.

On part of the respondent, in her short reply, she also prayed to adopt her counter affidavit. She said that, she has her vegetables (mnavu) at the disputed land.

In her rejoinder, the applicant submitted that after harvesting the said vegetables, the respondent should be restrained from cultivating the disputed land.

Having examined the parties' affidavits, the issue for determination is **whether the applicant has established the prescribed conditions for the temporary injunction to be granted.**

The applicant has moved this court under **Order XXXVII rule 1(a)(b), sections 68(e) and section 95 of the CPC.** The factors to be considered prior to granting temporary injunction have been established through case laws particularly the landmark case of **ATILIO VS MBOWE (1969) H.C.D 284.** The said factors are:

- 1. Whether there is a serious issue to be tried.*
- 2. Whether the court's interference is necessary to protect the applicant from irreparable loss.*
- 3. Whether on balance of convenience, there will be greater hardship and mischief that will be suffered by the applicant from withholding the injunction than will be suffered by the respondent from granting it.*

Starting with the first question on **whether there is a serious issue to be tried**, it is undisputed fact that there is a pending appeal which is yet to be determined by this Court which is Land Appeal No. 18 of 2023. Therefore, there is arguable issue to be tried by the Court.

Concerning the second issue on *whether the court's interference is necessary to protect the applicant from irreparable loss*; it should be noted that the applicant herein implored this court to issue temporary injunction pending determination of land appeal. It is settled law that, where there

is a pending appeal, the applicant is required to seek an order for stay of execution and not temporary injunction.

There is a difference between temporary injunction and stay of execution. The difference between the two, was elaborated in the case of **National Housing Corporation vs Peter Kassidi & Others** (Civil Application 243 of 2016) [2019] TZCA 153 Tanzlii at page 14 to 15, as follows:

"It bears reflecting that a temporary injunction is an equitable relief for maintaining the status quo between the parties pending the hearing and determination of an action in court. The remedy is in the nature of a prohibitory order granted at the discretion of the court against a party. On the other hand, while an order for stay of execution is also in the nature of prohibitory order, it is addressed to the court carrying out the execution to suspend or delay the enforcement of the decree concerned, pending hearing and determination of a proceeding, most certainly an appeal."

In another case of **Prada Enterprises Co. Limited vs Joyce Alex Khalid & Others** (Civil Application No.279/01 of 2020) [2023] TZCA 17468 Tanzlii at page 9 it was stated that:

*"Our examination of the record has revealed that it is crystal clear that the applicant is seeking a restraint order aimed at preventing the respondents from carrying out developments in the suit property which will alter the status quo. However, it is our view that this **Court is not vested with the powers to issue restraining orders in***

matters which come before it by way of appeal."

Emphasis added

On the basis of the above authority, I am inclined to say that the sought orders are ultra vires the court's powers, as the court sitting on appeal cannot issue temporary injunction. In the cited case of **Prada Enterprises Co. Limited** (supra) at page 11 the Court of Appeal held that:

*"There is no gainsaying that in the instant case, the applicant is inviting this Court to issue restraining or injunctive orders restraining the respondents from alienating, transferring, or in any manner altering the physical and legal status of a landed property described in Plot No. 182 Kunduchi Beach Area, Kinondoni Municipality. This is also amplified under para 12 of the supporting affidavit. However, as alluded to earlier on, this Court does not have powers to issue such injunctive orders in view of what we have discussed above and, therefore the relief sought is misplaced. **In circumstances, the proper cause of action was to seek for an order for stay of execution had there been an executable decree."***

(Emphasis added)

Borrowing the words of the Court of Appeal above, even in this case, considering the fact that the applicant herein implored this court to issue temporary injunction, this court is not vested with powers to issue such order pending determination of the appeal. She could have sought for an order of stay of execution if there is an executable decree.

Having resolved the second issue in the negative, there is no need of discussing the issue of balance of convenience.

In the event, I find this application misconceived. It is hereby dismissed forthwith. Considering the relationship between the parties, no order as to costs.

It is so ordered.

Dated and delivered at Moshi this 16th day of October 2023.



X

S. H. SIMFUKWE

JUDGE

Signed by: S. H. SIMFUKWE

16/10/2023