

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY**

AT MOSHI

MISC. CIVIL APPLICATION NO. 32 OF 2023

BETWEEN

CATHERINE KYAUKA NJAU APPLICANT

VERSUS

EMMANUEL PAUL KYAUKA NJAU

(As administrator of estate of the
late Paul Kyauka Njau)

1st RESPONDENT

HIACINTA PAUL KYAUKA NJAU

(As administrator of estate of the
late Mama Crescentia Kyauka).....

2ND RESPONDENT

RULING

13th & 27th October 2023.

A.P.KILIMI, J.:

The applicant hereinabove has brought this application through chamber summons supported by affidavit seeking an order for temporary to restrain the respondents and whoever acts under their instructions from evicting the applicant from the apartment on house No 17/18 'K' at Moshi and/or disposing off the said house pending the hearing and determination of probate and administration cause No. 5 of 2002. When this application was communicated to the respondents, in reply they filed a notice of preliminary objection to the effect that;

The application for temporary injunction is incompetent for want of main subsisting proceedings on which the application is based as against the relied law by the applicants, that is Order XXXVII and Section 68 of Cap 33 RE 2019.

At the hearing of the objection, the applicant was represented by Stella Simkoko learned advocate whereas the respondents enjoyed the service of Mr. Daniel Ngudungi learned advocate.

Submitting in supporting the above objection, Mr. Ngudungi argued that for the temporary injunction to stand there must be existence of pending suit or application. In this case there is no pending proceedings either in this court or in the court of appeal. The base of the application which was Probate and Administration cause No.5 of 2002 was already determined to its finality. In that case the administrator was appointed on 2004 followed with a series of applications for revocation brought by the applicant in the matter at hand and through application No. 34/2010 and No. 14/2014 which its decision was on 9th March 2016 decided that the probate cause no 5 was already determined by this court. The counsel further added that, from that decision

there is nothing pending to be determined hence the application for temporary injunction is misplaced.

Responding to the above, Ms. Simkoko contended that the preliminary objection is totally misconceived as the probate cause No. 5 of 2002 is still pending before this court. The decision of 2016 was based on application no 34/2010 and 14/2014 sought for revocation of administrator whereas the application was dismissed with other directive orders to the administrator. The order given in the consolidated applications has nothing to affect the finality of probate cause. Since the administrator not yet complete his duties of administration to transfer properties to the beneficiaries therefore the applicant still has room to apply in this court for an injunction to restrain the administrator to evict him in the house he resides therein.

The counsel for applicant further contended that, since the probate cause is not yet closed the applicant can seek for protection before the court basing on that probate cause. Also, she added since the order of transfer was not finally determined and the administrator's duties has not been discharged therefore his performance can be challenged in the main probate cause, thus the counsel prayed the objection be dismissed with costs.

In brief rejoinder the counsel for the respondents submitted that there is no pending case before this court. The role of the administrator is to distribute the properties to the heirs and in the decision of consolidated application no. 34/2010 and no. 14/2014 the judge ordered the administrator to complete his duties within 30 days. The applicant attempted to appeal so many times against the decision but failed therefore there is nothing pending before the court for them to seek an injunction.

I have dispassionately considered the submissions of both learned counsels, in my view, the issue to be determined by this court is whether the application is incompetent for want of main subsisting proceedings. It is a settled principle that for the application of temporary injunction to stand there must be triable pending suit/case before the court. See the case of **Atilio vs Mbowe** (1969) HCD 286 and **Barretto Haulliers (T) Ltd v Joseph E. Mwanyika & Another**, Misc. Civil Application No. 253 of 2016 (unreported), the court listed three conditions as follows:

- (i) There must be a serious question to be tried on the facts alleged, and a probability that the plaintiff will be entitled to the reliefs prayed;
- (ii) That the court's interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established, and

(iii) That on the balance there will be greater hardship and mischief suffered by the plaintiff from the withholding of the injunction than will be suffered by the defendant from the granting of it.

(iv)

Therefore, starting with the first requirement above, in my opinion it needs evidence for the court to ascertain whether there is triable pending case before the court of law or there is none. For foregoing facts, I am of considered view this preliminary objection fails to meet the test cherished in the celebrated case of **Mukisa Biscuit Manufacturing Company Ltd. vs West End Distributors Ltd.** (supra), wherein Sir Charles Newbold P. had this to say at page 701: -

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion."

[Emphasis added]

Moreover, in the case of **Shose Sinare vs Stanbic Bank Tanzania Ltd & Another** [2021] TZCA 476 (TANZLII) at page 12 the Court of Appeal had this to say:

"A preliminary objection must be free from facts calling for proof or requiring evidence to be adduced for its verification. Where a court needs to investigate such facts, such an issue cannot be raised as preliminary objection on a point of law. The court must therefore insist on the adoption of the proper procedure for entertain application for preliminary objections. It will treat as a preliminary objection only those points that are pure law, unstained by facts or evidence, especially disputed point of facts or evidence."

[Emphasis added]

From the above authority, I join hand with the counsel for the applicant that this preliminary objection is totally misconceived. In the premise and in support of the said principles above, I thus find this objection devoid of merit and consequently overruled with cost. In the circumstances no costs granted.

It is so ordered.

DATED at **MOSHI** this day of 27th October 2023.



X

JUDGE

Signed by: A. P. KILIMI

Court: - Ruling delivered by virtual today on 27th October, 2023 in the presence of Ms. Stella Simkoko learned advocate for Applicant and Mr. Daniel Ngudungi learned advocate for Respondent.

Sgd: A. P. KILIMI
JUDGE
27/10/2023