

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**DAR ES SALAAM DISTRICT REGISTRY**

**AT DAR ES SALAAM**

**MISC.CIVIL APPLICATION NO. 620 OF 2023**

**SAID RASHID HEMED ..... APPLICANT**

**VERSUS**

**NAHLA RASHID HEMED AND NAJLA RASHID HEMED (As  
administratrixes of the estate of the late RASHID HEMED  
KHALFAN) .....RESPONDENTS**

**RULING**

**MKWIZU, J: -**

Mr. Rashid Hemed Khalfan, died intestate on 4<sup>th</sup> December 2016 in Dar es salaam leaving surviving him six children, applicants, and respondents herein inclusive each having his own mother except for the respondents who are twins. The death of the deceased was followed by a petition for letters of administration by the applicant and his two brother through Probate and administration cause No. 460 of 2016 at Kinondoni Primary court. In the same year, Applicant's brother by the name of Hemed Rashid Hemed, file another probates No 465 of 2023 petitioning to administer the same estate. Following that state of affairs, the district Court of Kinondoni initiated a Civil Revisions suo moto after a complaint from the interested parties and quashed Probate administration No 465 of 2016 for being instituted during the pendency of Probate No 460 of 2016 and without citation. The probate No 460 of 2016 was thus ordered to proceed by first obtaining the family meeting minutes appointing the petitioners

administrators. The meeting was convened on 5/11/2017 by the applicant and his brothers. It seems , the respondent had again on their maternal side convened their meeting that proposed them administrator.

It was not until 14<sup>th</sup> September 2023,the applicant new from the respondents advocate that the letters of administration of the deceased estate has already been issued to the respondent herein through Probate No. 23 of 2021 leading to the dismissal of Probate No 460 of 2016.

It is further deposed that, through the granted letters of administration, the applicant were forcefully evicted from their fathers house located on Plot No 30 Block Msasani with Certificate No 100042 and respondent were registered a legal representative of the said property.

The applicant avers further that, the respondents are about to dispose of the house to third parties without regard to his interest as a lawful heir and beneficiary and that they are likely to sale, alienate and or deal with the property in a manner that is detrimental to his interest. He said, he was only made aware of the existence of the Probate No 43 of 2021 on 18<sup>th</sup> July 2023 the date his Probate cause was dismissed. He perused the file and obtain the dismissal order before he approached this court for an application for extension of time and revisions of the trial court's decision in Probate No 43 of 2021.

On 30<sup>th</sup> October, 2023 the applicant filed a chamber summons under sections 68 (e) and 95 as well as Order XXXVII rule 2 (1) and Order XXXVII Rule 1 (a) of the Civil Procedure Code, Cap 33 [ R.E 2019] seeking for temporary injunction restraining the Respondents, their workmen and/or agents, from disposing and /or alienating all that land described as plot no 30 Msasani Area bearing C.T No. 100042 pending hearing and

determination of the main suit supported by his affidavit. The application resisted by a counter affidavit of Magreth Joseph Maggebo, respondent's advocate.

The application was orally argued before the court on 22/11/2023, Mr. Othiambo Kobas was for the applicant while Ms Magreth Magebo Advocate was in court on behalf of the respondents. Considering the genesis of the matter, the parties were ordered together with the main application to also submit on the competent or otherwise of the application.

Submitting the application, Mr. Odhiambo Advocate said, for an injunction under Order XXXVII Rule 1(a) of the CPC to succeed, there must be a pending suit before the court. He said, the pending Misc Civil Cause No 586 of 2023 which is an application for extension of time within which to file an application for revision and subject to that prayer granted , application for revision is a competent suit for purposes of Order XXXVIII of the CPC .He called upon the court to find a proper definition of the word suit in the cases of **Tunu Mwapachu and 3 others V National Development Corporation and Another**, Civil Appeal No 155 of 2018( CA DSM); **Zedem Investment Limited and 2 Others V Equit Bank Tanzania Limited and 3 others**, Misc. Civil Application No 456 of 2020;**MSK Refinery Limited V TIB Development Bank Limited and Another**, Misc. Application No 307 of 2020 and **Yusuph Elitetera Lema And Another V Maria Elitetera Nkya** ,Misc. Land Case Application No 5 of 2022 ( All Unreported ).He obdurately submitted that the application is competent and proper before the court .

Submitting on the main application, Mr. Kobas restated the principles for the grant of temporary injunctions, enunciated in the famous case of **Otilia V Mbowe** ( 1968)HCD 284 which are existence of a serious issue to be tried, whether the courts interference is necessary to protect the applicant from irreparable loss and the third one is whether on the balance of inconvenience there will be a greater hardship and miss chief that will be suffered by the applicant from withholding the injunction than will be suffered by the respondent by not granting it. He contended that, in this application all the conditions were met. Making reference to paragraphs 8 and 9 of the affidavit, Mr Kobas posited that the applicant is complaining of being excluded from benefiting from his father's estate in probate case no 43 of 2021 which was instituted without his knowledge by his sisters during the pendency of probate and administration cause No 460 of 2016 which was instituted by him in the years 2016 and which was dismissed following a report of the respondents that they are already appointed administrators of the same estate.

He argued that application for extension of time within which to challenge the decision in Probate and Administration cause No 43 of 2021 raises seriously triable issues calling for the attention of the High Court .In that regard, he said, the applicant has successfully shown that there is a serious issue to be tried. He on this relied on the case of **Batromeo A Kavishe V. Eliyuko Mmbaga and others**, Misc. Land Application No. 1 of 2022 and **Yusuph Eriterera Lema** ( supra).

The applicants advocate was of the view that the second condition has been deponed in paragraph 14,15 and 16 of the affidavit in support of the application maintaining that the applicant has already suffered damages and is to suffer more as he has been already evicted from the contested

house which is the only estate of their deceased father, the house has been demolished and the respondents are likely to dispose, alienate or dispose to third parties without considering the applicant as one of the lawful heirs and beneficiary of the said estate and it will be difficult or impossible for him to recover his interest or shares to the estate should he be successful to the pending suit. Pointing out to the court a copy of the notice issued under section 78 (6) of the Land Registration Act attached to paragraph 13 of the reply to counter affidavit intending to remove the applicant's caveat to enable the respondent create a lien over the suit property without the applicant interest taken care of, he stressed that the court interference to protect the applicants interest is necessary.

On the balance of convenience, the applicant's counsel submitted that the respondents who are now registered as personal legal representative of the deceased have nothing to lose as their rights are fully protected while the applicant interest stands to suffer for good if the property is not protected. While taking cognizance of the respondents averment in paragraph 13 of the counter affidavit showing that the Tite deed itself is restrictive from transferring or disposing the property, he said that particular condition does not bar the respondent from creating a lien or mortgage over the property such as the one intended to be registered by the Registrar of Titles and does not bar them from entering into a long term lease and for that matter the applicants interest will not be safeguarded if injunction is not issued.

Ms Magreth, the respondent, had a very brief but focused submission in opposition. Having adopted the counter affidavit filed in court as party of her submission, she said, the applicant's submissions is misleading. And has not met all the conditions laid down in **Otilio V Mbowe( supra)**. She said, the first rule requires demonstration of likelihood of success on the merit of the main suit and that in the Law of limitation Act Cap 89 RE 2019 part one, preliminary provisions, a suit is defined as any proceedings of a civil nature instituted in any court but not include an appeal or application. She maintained that the application that the applicant relies on as a suit is under the law excluded from the statutory definition of a suit.

She went further to argue that the applicant has also failed to clearly state the injury that would be caused if the injunction order is not given , whether that injury would be an irreparable loss, and how he is to suffer more than the respondent in case the injunction is not granted. She stressed that the irreparable loss is a loss that cannot be repaired by any means and to her the loss if any, caused by the lien would not amount to an irreparable loss more so because the Title deed itself is so restrictive on sale, transfer and other things of the like.

In his short Rejoinder Mr Kobas was of the view that the definition provided for under the Law of limitation Act is limited to the time limit set for the actions and doesn't cover other proceedings. He maintained that according to the search report(annexure SRH8 to the affidavit the property is still in the name of the respondents as legal personal Representatives, no lease , caveat or any encumbrance registered. The injunction sought by the applicant is to restrain the respondent from entering into further transaction which may ultimately dispose of the

property such as the lien, as intended by the notice deposited and long term lease which can be entered into notwithstanding the caveat contained in the title deed. He on this referred the court on **Ally Khalfan Rubeya V Rose Mashimba and three others** , Land case No 355 of 2016, where her ladship Maghimbi J blessed a long term lease to be okay as it is not prohibited by the caveat.

I have considered the affidavit for and against the application and parties' submissions. There is no doubt that the Court's power to grant injunction is predicated upon the Applicant meeting the conditions set out in **Atilio V. Mbowe** (supra). There is no dispute from the advocates' submissions that a party seeking an order for a temporary injunction must meet the conditions laid down in the said case namely; existence of a prima facie case, that is bona fide contest between the parties and serious questions to be tried., demonstration that the Applicant stands to suffer irreparable loss requiring the courts intervention before the Applicants legal right is established and proof of greater hardship and mischief suffered by the Applicant if the injunction is not granted than the Respondent will suffer if the order is granted.

My duty here is to assess the reliefs sought in the suit and the claims made and see if they raised a serious question for determination by the court. The applicants prayer as indicated above is premised on Misc Civil application No 586 of 2023 marching two prayers for the courts determination namely extension of time to file revision and subject to the grant of the above application, revision of the district court's proceedings in Probate No 43 of 2021. The prayer in the chamber summons are partly drafted thus:

- 1. That this Honourable court be pleased to extend time within which the applicant may lodge his application for Revision against the records, Proceedings, ruling and orders of the Resident Magistrate Court of Kinondoni at Kinondoni Hon. F. S Kiswaga – SRM dated 15<sup>th</sup> September 2021 in Probate and Administration cause No 43 of 2021*
- 2. That upon grant of extension of time as per prayer(i) above, this honourable court be pleased to call for and examine the records, Proceedings, ruling and orders of the Resident Magistrate Court of Kinondoni in Probate and Administration cause No 43 of 2021 revise and quash the said proceedings and make such other order as it deems fit including restoration of deceased's property into the name of the deceased.*

As gleaned above, the first and an immediate application placed before the court is an application for extension of time. The question that has cropped my mind is whether such an application is a suit for purposes of ORDER XXXVII of the CPC. This takes me to the definition of the term 'suit'. According to the **Black's law Dictionary 8th Edition** on p. 1475 the term suit is defined to be.

*"Any proceeding by a party or parties against another in a court of law"*

The Court in **Tanzania Motor Services Ltd and others v. Mehar Singh t/a Thaker Singh**, Civil Appeal 115 of 2005 (unreported) adopted a wider definition of the word "suit" to include all proceedings where parties are asserting their rights which are disputed by their counterparts in a court of law. The definition in the **Encyclopaedic &**



**Commercial Dictionary, 2002 (Reprint)** at page 1831 adopted states:

*"The term "suit" is a very comprehensive one and is said to apply to any proceeding in a Court of Justice by which an individual pursues a remedy which the law affords him. The modes of proceedings may be various; but if the right is litigated between the parties in the Court of Justice the proceeding in (sic) is a suit".*

And in **BURAFEX Ltd (Formerly known as AMETAA Ltd) v Registrar of Titles**, Civil Appeal No. 235 of 2019, HCT at Dsm (Unreported) the term suit was defined to mean;

*"A suit is a proceeding of civil nature in various forms such as petition, application, appeal, review, revision or as referred in the Civil Procedure Code (supra) filed in a Court of Law between two or more parties for determination of rights and duties of such persons."*

In this application, the applicant is pursuing his rights over his fathers(deceased) asset that is being administered by the respondents without his involvement. This falls squarely on the above definition hence a suit for all intent and purpose of Order XXXVIII of the CPC. I am thus in support of the applicant's counsel submissions that under the circumstances, the applicant has managed to establish a triable issue that requires this court's determination.

The second principle requires establishment of irreparable loss by the applicant. The applicant has in paragraphs 14, 15 and 16 of his affidavits deposed what he claims to be irreparable loss if the application is withheld. The Respondent counsels disputes that Applicant stands to suffer any irreparable loss. She contends that the loss claimed is capable of atonement by an award of damages. It is settled law and the learned Advocates for both sides agree that courts will only grant injunctions if there is evidence that there will be irreparable loss which cannot be adequately compensated by award of general damages. The main element in this principle is the term irreparable loss defined in the case of **Kaare Vs. General Manager Mara Cooperation Union [1924] Ltd,** [1987] TLR1 7 as an injury which could not be adequately remedied by damages.

I have read the affidavits and revisited the parties' submissions, firstly, it evident that the applicant was once residing in the suit property before his eviction by the respondent. I have also considered the admitted facts that the right of occupancy of the property at issue itself restricts sale and any sort of disposition by the occupier. However, going by that averment, the restriction is only for 25 years after the grant of the occupancy, which is 14th March 2006, almost 18 years by now. I am of the feeling that if anything delays the proceedings in this case, the right of occupancy may become open for disposition. Again, the Title deed as it is does not restrict lien and long-term lease. As correctly submitted by the applicants counsel, the property is open for a long term lease which may extend to the expiration of the restricted 25 years rendering the title suitable for disposition at the applicants detriment. Given the nature of the

proceedings, parties relationship and the background of the matter, I consider the second principle established.

The last point is to see who, between the Applicant and the Respondent stands to suffer greater hardship if the order is not made and vice versa. The Applicant's counsel has invited the court to hold that it is the Applicant who stands to suffer more if the court declines the order sought. Two reasons were given on this point, that Applicant rights over the deceased property are not recognised by the respondent and that the respondents are currently the registered legal representative. The respondents counsel holds an opposing view.

I have weighted the parties submissions thoroughly and I am convinced that the applicant has managed to establish the balance of convenience in his favour. Any alienation by either long term lease or sale which will become due only in few years to come that is on the 25th years from 2006 will deprive the applicants his right, if any rendering the proceedings in the main application nugatory.

In the event, I find and hold that this is a fit case for temporary injunction. The application for temporary injunction is accordingly granted as prayed under Order XXXVII Rule 1(a) and section 68 (e) of the CPC. The Respondents, their workmen and/or agents, are hereby restrained from disposing and /or alienating all land described as plot no 30 Msasani Area bearing C.T No. 100042 pending hearing and determination of Application No 586 of 2023.

Cots to fall the event.



***E. Y Mkwizu***

***Judge***  
**8/12/2023**