

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

**TEMEKE SUB-REGISTRY**

**(ONE STOP JUDICIAL CENTRE)**

**AT TEMEKE**

**MISC. CIVIL APPLICATION No. 57 OF 2023**

*(Arising from PC Probate Appeal No. 38 of 2023, at the High Court of Tanzania. At Temeke  
One Stop Judicial Centre)*

**FATMA MOHAMED** (Administratrix of the Estate of

the late Mohamed Khamis Abdallah).....**APPLICANTS**

**VERSUS**

**ABDULLATIF MOHAMED HAMIS** (Administratrix of the Estate of the late Mohamed

Khamis Abdallah) .....**1<sup>ST</sup> RESPONDENT**

**RULING**

*13<sup>th</sup> November & 13<sup>th</sup> December, 2023*

**BARTHY, J.:**

This matter came before the court on the application by the applicant, seeking an order to maintain the status quo in respect of the property with certificate of title No. 56967 located at Plot No. 9 Block "A", Kariakoo, of Dar es Salaam City. The application was made with a view of restraining any disposition among others, pending the hearing of Probate Appeal No. 38 of 2023.

The applicant moved this court under section 2(3) of the Judicature and Application of Laws Act, Cap 358, R.E 2002 (to be referred to as

JALA), and section 3A (1)(2), 3B(1)(a), section 68(e), and 95 of the Civil Procedure Code, Cap 33, R.E 2019 (to be referred to as the Civil Procedure Code), supported by the affidavit of Fatuma Mohamed.

The respondent raised several preliminary objections, contesting the jurisdiction of this court and stating that the application was *res judicata* and *res sub-judice*. The objections were disposed of through written submissions. For easy reference the preliminary objections are reproduced below;

- 1. That, this honourable court has no jurisdiction to issue/grant an order of maintenance of status quo in consolidated PC Probate Appeal No. 26 and 27 of 2023 which are not pending before this honourable court and have already been decided by the subordinate court.*
- 2. That the cited provisions in the chamber summons do not clothe this honourable court with jurisdiction to grant the orders sought because the provisions of the Civil Procedure Code do not apply in the matters originating from Primary Courts.*
- 3. That, this application is res judicata. The matter of status quo concerning Plot No. 9 Block A with certificate of title No. 56967 was decided on 26<sup>th</sup> September 2023 before Honourable Judge Msafiri*

*in Misc. Land Application No. 577 of 2023, High Court Land Division Dar es Salaam.*

4. *That, the application is barred under section 8 of the Civil Procedure Code, Cap 33, R.E 2022. It is res subjudice to Misc. Land Application No. 577 of 2023 and order of the High Court Land Division Dar es Salaam dated 14<sup>th</sup> September 2023.*

Therefore, the respondent prayed for the application to be dismissed.

The respondent, in his submission, stated that the applicant's prayer to maintain the *status quo* against the court's order is untenable, as she should have instead requested a stay of execution. He further argued that, as the first limb of his preliminary objection, this court lacks jurisdiction to maintain the *status quo* on the landed property described with certificate title No. 56967 located at Plot No. 9, Block 'A' Kariakoo of Dar es Salaam city.

He emphasised that the said property was not included in the court's order in the consolidated Probate Appeal No. 26 and No. 27 of 2023; therefore, the court cannot issue an order for a property that is not in dispute.

Additionally, he mentioned that, according to the affidavit supporting the application, the application originates from consolidated Probate Appeal No. 26 and No. 27 of 2023, which were already been determined by the subordinate court and no matter against the two decisions is pending before this court. Thus, this court has no jurisdiction to issue an order over a matter that is not before it.

On the second limb of his objection, he argued that the applicant did not approach this court properly, as the application was based on provisions of law that do not apply to matters originating from the primary court. He further argued that the cited provisions do not clothe this court with jurisdiction to grant the orders sought, because the provisions of the Civil Procedure Code do not apply to matters originating from primary courts.

The reference was made to sections 3A(1)(2), 3B(1)(a), 68(e) and 95 of the Civil Procedure Code, which were said do not apply to matters originating from primary courts, as it was held in that case of **Agness Simbambili Gabba v. David Samson Gabba**, Civil Appeal No. 26 of 2008, Court of Appeal of Tanzania at Dar es Salaam.

He added that even the provision of section 2(3) of the JALA, does not give this court inherent powers to issue an order for the maintenance of the *status quo*. Since the inherent power of the court does not allow

the court to suspend the operation or execution of the decree or order of the court unless and until the applicant applies for an order to stay the execution.

Submitting on the third limb, the respondent argued that this application is *res judicata*. He stated that the matter revolves around Plot No. 9, Block A, with a certificate of title 56967, which was already determined before Honourable Judge Msafiri vide Misc. Land Application No. 577 of 2023, High Court Land Division Dar es Salaam. Therefore, this court is barred from determining the same matter.

The applicant further stated that the application is barred under section 8 of the Civil Procedure Code, Cap 33, R.E 2022, for being *res subjudice* to Misc. Land Application No. 577 of 2023 with the order of the High Court, Land Division dated 14<sup>th</sup> September 2023. The applicant was firm that this matter is *res-subjudice* as the former matter had not yet been determined by the court. The respondent prayed to this court to sustain the objections raised with costs.

In response to the respondent's argument, the applicant, on the first limb contended that, this application originates from PC Probate Appeal No. 38 of 2023, which is pending before this court, as reflected in the certificate of urgency and the contents of the affidavit. The error in the

affidavit is a *lapsus calami* (slip of the pen), which is curable and has nothing to do with the jurisdiction of the court.

On the argument that the landed property with certificate of title No. 56967 has not been mentioned in the court order, it was contended that, in the decision of Honourable Sanga, he specifically ordered the administrator to file an inventory and Form. No. 6 which requires showing distribution of the deceased estate; where the only estate of the deceased is the said landed property which the respondent intends to dispose for the second time.

Responding to the second limb that the cited provisions to move the court on this application do not clothe this court with the jurisdiction to try the matter. Again, the respondent claiming the proper application was supposed to be a stay of execution and not maintenance of *status quo*.

The applicant contended that the application before this court intends to halt the powers of the respondent who is the co-administrator to dispose of the landed property, which is the estate of the deceased pending the hearing of PC Civil Appeal No. 38 of 2023, present before this court.

It was her firm contention that the law governing probate matters is silent on the execution of its decree. As there was also no application for the execution of probate matter which was pending before the court,

which would have necessitated the applicant to lodge an application for a stay of execution. To buttress her argument, she cited the decision of the court of Uganda in the case of **Aupal Kokas Wilfred v. Aisu Popuras**, Misc. Application No. 052 of 2022, High Court of Uganda at Soroti where it was held that;

*"The general rule is that, courts should not order a stay where there is no evidence of an application for execution of decree"*

It was further stated that, in those circumstances, the applicant had to resort to lodge her application for maintenance of *status quo* pending the determination of the appeal.

It was respondent's contention that in our laws there is a lacuna; therefore, the high court is vested with inherent powers under section 68 and 95 of the Civil Procedure Code to determine the matter where there is no provision of law prescribed and to apply common law remedies under section 2(3) of JALA. Therefore, the above provisions enclote this court with jurisdiction.

The respondent made her rebuttal stating that the case of **Agness Gabba** (supra) is distinguishable in this matter; she then made reference to the case of **Aero Helicopter (T) Ltd v. F.N. Jansen** [1990] TLR 142.

The court in the said case held that the high court can assume inherent powers, where there is no provision of law governing a particular matter at hand. Also stated in the case of **CICO Company Ltd v. Herman Shayo**, Misc. Civil Application No. 12 of 2020 (unreported).

Addressing the third and fourth limbs that the application is *res - judicata* and *res subjudice* to Misc. Land application No. 577 of 2023 of High Court Land Division. The respondent rebutted stating that the principle of *res judicata* does not apply in the suit of procedural or interlocutory orders, unless the former application was determined on merit to avoid abuse of the court process.

She referred to the case of **FINCA Tanzania v. Leonard Korongo**, Misc Civil Application No. 5 of 2021, High Court of Tanzania at Musoma (unreported). She emphasized that the ruling of the court on Misc. Land Application No. 577 of 2023 did not determine matter on merit.

On the principle of *res subjudice*, it was her contention that the four conditions stated in the case of **Wengert Windrose Safaris (Tanzania) Ltd. v. The Minister for Natural Resources and Tourism and another**, Misc. Commercial Cause No. 89 of 2016, must all be fulfilled.

The respondent stressed that the two matters involved different parties and there is no matter simultaneously pending before any court of



concurrent jurisdiction. Therefore, the respondent prayed the objections raised should be sustained with costs.

In rejoinder submission the respondent retaliates what has stated in his submission in chief, hence I find no need to reproduce the same.

Having heard the differing arguments of both sides; I will group the preliminary objections raised in two limbs on the following category.

The first limb is centred on the point that this court lacked jurisdiction to grant an order of maintenance of the *status quo* in consolidated PC Probate Appeal No. 26 and 27 of 2023, which were not pending before this court and had already been decided by the subordinate court. Additionally, it was contended that the provisions cited by the applicant do not apply to matters originating from Primary Courts.

The second limb is focused on the argument that this application is *res judicata* and *res sub-judice*. As the matter had been decided before in Misc. Land Application No. 577 of 2023. Therefore, the respondent claiming the application is barred under section 8 and 9 of the Civil Procedure Code for being *res judicata and res-subjudice* to Misc. Land Application No. 577 of 2023.

Upon careful consideration of the submissions and arguments presented by both parties, the court makes the following findings:

On the limb of first category that this court lacks jurisdiction to try the application before this court on the strength that it originated from consolidated Probate Appeal No. 26 and No. 27 of 2023, which do not have any matter pending before this court.

Whereas, the applicant contended this application originates from PC Probate Appeal No. 38 of 2023, which is pending before this court as reflected in the certificate of urgency and the contents of the affidavit.

Having in mind the principle of the overriding objective, which requires courts to deal with cases justly, speedily, and have regard to substantive justice and not dwell on unnecessary technicalities. The principle was underlined in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph**, Civil Appeal No. 55 of 2017, Court of Appeal of Tanzania at Mwanza (unreported Judgment dated 10 October, 2018).

The court notes that the application originates from Probate Appeal No. 38 of 2023, which is pending before this court. The error in the affidavit is considered curable and does not affect the jurisdiction of the court.

On this limb, the respondent has also stated that the applicant was wrong to move this court for an application to maintain the *status quo* instead of seeking to stay execution of the decree. As the provisions cited

to move the court do not apply to this court on matters originating from the primary court as the Civil Procedure Code is not applicable.

The applicant's notion is that, there was no execution proceedings before the trial court to warrant staying the execution of the decree. Since there was no law to facilitate staying the decree as the respondent intends to dispose of the landed property related to the probate matter, then the applicant sought the court should invoke its inherent powers to maintain the *status quo* pending the determination of the appeal before this court.

In light of the arguments presented by both sides, I am inclined to concur with the respondent's submission that, according to our laws, once a party is appointed as the administrator/administratrix of the estate of the deceased, they are entitled to fulfill the duties associated with this role. These duties include collecting the assets of the deceased, settling the debts owed to creditors, and distributing the assets to the heirs/beneficiaries.

In the discharge of these responsibilities, there is no specific provision of the law that designates these duties as the execution of probate decree. This is because such duties are not carried out through an application to execute the decree of the trial court but rather, they are inherent in the responsibilities of the administrator/administratrix's office.

Therefore, as there is no provision of law governing the execution proceeding on probate matters, the party cannot apply for a stay in the execution of the decree of the probate matter pending before the court.

In these circumstances, I ascribe to the decision made in the case of **Aero Helicopter (T) Ltd v. F.N. Jansen** (supra) and come to the findings that this court possesses inherent powers under section 68 and 95 of the Civil Procedure Code, as well as section 2(3) of JALA, to address matters where no specific provisions apply. I therefore find that the court has the jurisdiction to try the matter. The objection on the first limb is devoid of merit and dismissed.

Turning to the last limb which is dwelt on the argument that this matter is *res judicata* and *res sub-judice* as it was already determined and disposed of in Misc. Land Application No. 577 of 2023, which is pending before the High Court Land Division.

The respondent contended that the matter did not involve the same parties, and it disposed of the main suit at preliminary stages which had an effect to disposing the application as well. Therefore, there is no matter pending before the court and the principles cannot apply in this matter.

It is not in dispute that Misc. Land Application No. 577 of 2023 was dismissed after the main suit was dismissed following the preliminary objection being sustained. Thus, the matter was not determined to its

finality for principle of *res judicata* to be applied. See the case of **Attorney General v. Dickson Paulo Sanga** (Civil Appeal 175 of 2020) [2020] TZCA 371. For easy reference the provisions of section 9 of the Civil Procedures Code dictates as follows;

*No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim **litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.***

[Emphasis is supplied].

Therefore, the principle of *res judicata* does not apply to procedural or interlocutory orders unless determined on merit to avoid abuse of court process.

Having established that Misc. Land Application No. 577 of 2023 was dismissed after the main suit was resolved on preliminary stages, as the principle of *res subjudice* apply directly and substantially in issue in a previously instituted suit involving the same parties, over the same cause

of action over the suit pending before the court of competent jurisdiction as provided under section 8 of the Civil Procedure Code.

In the present matter, the conditions for *res subjudice* are not fulfilled, as the matters involve different parties and are not simultaneously pending before any court of concurrent jurisdiction. These limbs of objections lack merit and are dismissed with court.

Having considered the arguments and submissions from both parties, the preliminary objections raised by the respondent are dismissed. The court affirms its jurisdiction to hear and determine the application for maintenance of the *status quo* pending the outcome of Probate Appeal No. 38 of 2023. With the nature of this matter, I give no order as to costs. It is so ordered.

**Dated** at **Dar es salaam** this 13<sup>th</sup> December, 2023.



A handwritten signature in blue ink, appearing to read "G.N. Barthy", is written over a horizontal line.

**G.N. BARTHY**

**JUDGE**