

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF MWANZA
AT MWANZA

MISC. LAND APPLICATION NO. 67 OF 2022

JOHN CHIMILE RUBAMBE APPLICANT

VERSUS

PENDO YONA MAJIGILE (*Administratrix of
the estate of the late MARIAM HAMISI YONA*)..... **RESPONDENT**

RULING

Feb. 7th & 10th, 2023

Morris, J

The respondent above, at the instance of the applicant, is being summoned to appear here and show cause why the caveat she entered on Plot No. 01, Block 'S' Rufiji Street, Mwanza should not be removed. Corollary to such prayer, the applicant pursues an order for removal of the said caveat along other court-discretionary remedies and costs. The application is supported and challenged by the applicant's affidavit and respondent's counter affidavit respectively. Further, the respondent has filed a notice of preliminary objection (PO) on two grounds, that;



1. The application suffers for failure to implead and/or join the necessary party, likely to cause denial of the fundamental constitutional right; and
2. The application is premature before the court.

Parties were respectively represented by Messrs. Antony K. Nasimire and Arsen Molland, learned advocates. I granted the prayer by both counsel for the PO to be argued by way of written submissions. The learned advocates religiously complied with the filing timeframe set by the Court. They are accordingly commended.

In brief, the history of this matter relates to Plot No. 01, Block 'S' Rufiji Street, Mwanza (herein, 'the suit land'). The suit land is registered under Certificate of Title No. 033018/76. The applicant was declared a lawful owner of the suit land through land application No. 160 of 2013 and land appeal No. 27 of 2020 by the District Land and Housing Tribunal for Mwanza (elsewhere, 'DLHT') and this Court respectively. In the two matters, the respondent above was a party in her own name and capacity not as an administratrix of the late Mariam Hamis Yona (as it appears in this application).

However, through High Court Land Case No. 05 of 2021, the respondent; in her capacity as administratrix of the late Mariam Hamis



Yona, sued the applicant and 6 other defendants. The suit was over alleged fraudulent transfer of the suit land. She was unsuccessful. Aggrieved, on September 22nd, 2021 she lodged a notice of appeal to the Court of Appeal (elsewhere, 'CAT'). The same is still pending.

Back to the present application: both learned advocates filed silver-tongued submissions for and against the PO. Nevertheless; and respectfully so, they overlooked one pertinent aspect. In the course of constituting the ruling, the Court observed one critical issue which could not permit delivery of the ruling without resolving it first. The same is engraved in the Court's mandate to or not to adjudicate the application. In other words, the disregarded issue is whether or not this Court enjoys requisite jurisdiction to grant the prayers in the chamber summons. In essence, the reliefs relate to the suit land subject of a pending appeal before the CAT.

The philosophy behind determination of this aspect first is not imaginary. It is due to a long settled legal principle. Courts are enjoined to determine their jurisdiction at the very outset. If the court proceeds without jurisdiction over a matter, the whole proceedings become a nullity. That is what case law envelops. See, for instance, ***Shabir Tayabali Essaji v Farida Seifudin Essaji***, CA civil appeal no. 180 of

2017 (unreported); and ***Fanuel Mantiri Ng'unda v Herman Mantiri Ng'unda & Others*** [1995] TLR 155.

The Court having raised the fore-discussed point *suo mottu*, and in view of ***Wegesa Joseph M. Nyamaisa v Chacha Muhogo***, CAT-Civil Appeal No. 161 of 2016; ***Margwe Erro & Others v Moshi Bahalulu***, CAT-Civil Appeal No. 111 of 2014; and ***God John Ndile v Steven Abraham Ndile and 2 Others***, HC-Land Appeal No. 45 of 2017 (all unreported), I invited the parties to address me on *whether or not the Court retains jurisdiction in the pendency of the Notice of Appeal in the Court of Appeal*.

It was the additional submissions of the applicant's counsel that undisputedly, the respondent filed a notice of appeal to the CAT against this Court's decision (Hon. Tiganga, J) in Land Case No. 5 of 2021. He also appreciated that such notice commences proceedings in the former Court thereby ousting the High Court's mandate over the matter. However, he was prompt to state that such general rule is not without exceptions. To him, the exceptions are: if the High Court is presiding over applications for; leave to appeal to CAT, certification as to the point of law and execution of decree where execution is not stayed by the CAT.



The foregoing concession on his part notwithstanding, Advocate Nasimire was categorical that the present application relates to removal of the caveat which is not part of or arising from proceedings in Land Case No. 5 of 2021. To him, so long as the applicant was declared the lawful owner of the suit property by DLHT and the High Court (application no. 160/2013 and appeal no.27/2020 respectively); and the respondent did not appeal thereafter; the Notice cropping from Land Case no 5 of 2021 is a total alien to the prayers sought in the current application. That is, the parties herein are not battling over ownership of the property but rather removal of the caveat from the Registry of Titles. So, to him, the court is vested with necessary jurisdiction.

On the part of the respondent, Advocate Molland contested the Court's jurisdiction. His main concern was the effect of this Court's decision in the subsequent CAT's proceedings and decision in the pending appeal (No. 193/2022). To him, the execution process resulting from the prospective CAT's decision is likely to be hampered by the removal of the caveat, for by the time the subject appellate court's decision is given, the property might have changed hands.



Mr. Molland added that the exceptions stated by the applicant's counsel do not include the gist of the present application. To him, the case against which the respondent appeals to the CAT relates to the suit property.

He also submitted that the Court should take judicial notice that both the Commissioner for Lands and Registrar of Titles have already issued the statutory notice and injunction over the property on 19th December 2022 and 27th December 2022 respectively. Hence, he reiterated his asseverations that this Court lacks jurisdiction to adjudicate the present application.

In line with parties' submissions, the Court maintains that the law is clear that the notice of appeal initiates the appeal to the Court of Appeal. See, ***Mwanaasha Seheye v Tanzania Corporation***, CA Civil Appeal No. 37 of 2003; and ***David Malili v Mwajuma Ramadhani***, CA Civil Appeal No. 119 of 2016 (both unreported). Further, the Court of Appeal has oftentimes ruled that, upon the notice of appeal being filed, the High Court's jurisdiction over the matter is ousted straightaway. I am guided by the holdings in, ***TANESCO v Dowans Holdings SA (Costa Rica) & Another***, CA Civil Application No. 142 of 2012; ***Exaud Gabriel Mmari v Yona Seti Ayo & 9 Others*** CA



Civil Appeal No. 91 of 2019; and ***Serenity on the Lake Ltd v Dorcus Martin Nyanda***, CA Civil Revision No.1 of 2019 (all unreported).

One would obviously enquire, *first*, the plexus between the pending appeal and the present application. Much as the two matters seem intrinsically independent of one another, to me, the effect of prayers sought in the present application is clearly interwoven in the pending appeal. The respondent's counsel shed some light on this aspect too. However, I will give the justification for this holding a brief while later.

Equally important in this connection is, *second*, the enquiry whether or not this Court's jurisdiction over the current suit is ousted by the notice of appeal filed in respect of separate proceedings. The counsel for the applicant argued that the ownership issue of the property stands finally settled by appeal no. 27/2020. Further, in the pending appeal the parties are not essentially the same.

With necessary respect to the foregoing counsel's view, I find that so long as the pending appeal concerns the respondent's dissatisfaction over the ownership of the suit premises; and the application herein seeks to meddle with equities in the same property; the outcome of this application will significantly form an integral part of parties' rights



which are still contested in the pending appeal. In essence, the subject matter of dispute in the said appeal was the same in DLHT application no. 160/2013 and High Court Land Appeal No. 27/2020. That is why, the decision in the case appealed against was determined on the basis of *res judicata* raised by the applicant herein.

For ease of elucidation, in the case of ***Pendo Yohana Majigile (administratrix of late Mariam Hamisi Yona) v The Registrar of Titles and Six Others*** (inclusive of applicant herein); High Court Land Case No. 5 of 2021 (unreported), the Court (Hon. Tiganga, J) is categorical at page 14 of the typed judgement that:

*'.. I find the subject matter in this case **is the same** with the subject matter which was in issue in Land Application **No.160/2013** and Land Appeal **No. 27/2020**. I also find **parties to be the same**, as though the plaintiff was sued in her personal capacity but, she was holding the land fetching the title from the person she is currently suing for in the capacity of administratrix of the estate in this case'* (bolding rendered for emphasis).

In the same vein, for example, if this Court were to order lifting/removal of the caveat over the suit land (as prayed herein); the advantaged party would be at liberty to transact over the said landed



property. Consequently, the victor in the pending appeal may find himself or herself in yet another litigation to realize the fruits of the decree on appeal. In so doing, the envisaged caveat-lifting process is undistinguishable to fueling endless litigation. Courts, in my considered view, are expected to be the flange or gate valve against such-like mushrooming of court cases.

Further, the responding parties in the pending appeal are seven (7). Hence, stakeholders over the suit property (depending on the outcome of the subject appeal) have diverse interest apart from that of the respondent. It is thus, to me, not right to generally argue that the ownership issue of the property is as dormant-settled as the desert sand. In other words, this the dispute in the pending appeal goes to the root of the contested stakes and equities in the property in the present application.

Moreover, the applicant herein; if the outcome of application no.160/2013 and appeal no. 27/2020 is the gauge to go by; is likely to suffer less by the outcome of the appeal for he already had the ascertainable judgement declaring him the owner of the suit land. I am mindful of the fact that, to date, the said decision has not been appealed against. As such, the applicant is in a far better position than



the rest of the litigants in the pending appeal whose fate is yet to be finally determined.

In addition, the Court is not naïve to the fact that the office of the Commissioner for Lands has already become aware “that there is disposition which is about to be effected...which has elements of fraud”. Consequently, the injunctive remedy has been entered in the Land Register effective December 2022. Hence, I accordingly take judicial notice of such preventive rectifications under section 59 (1) of the **Evidence Act**, Cap 6 R.E. 2022; and in view of **Commonwealth Shipping Representative v P and Q Branch Services** [1923] AC 1919; **Re Oxford Poor Rate Case** (1857)8 E & B 184; and **Burns v Edman** (1970) 2 QB 541; [1970]1 All ER 886.

Subsequently, the remedy sought in the present application is superfluous and seemingly illegitimate on two bases: one; it will not serve the applicant the intended objective. No transaction can be done on the property following the statutory injunction in the Register. Two; the orders herein will be intrusive into the legal mandate of the authority not present before this Court.



In the upshot, it is my steady finding that this Court has no jurisdiction to adjudicate over and/or award the prayers sought in the chamber summons because of the pendency of the Notice of and/or Appeal in the Court of Appeal. As this point sufficiently determines the application, I am inclined not to address the respondent-raised grounds of objection.

I, consequently, proceed to dismiss the application. In the circumstances of this matter, I make no order as to costs.

It is so ordered. Right of Appeal fully explained to the parties.



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C.K.K. Morris
Judge
February 10th, 2023

Ruling is delivered this **10th** day of **February 2023** in the presence of Advocate Molland for the respondent (who is also in attendance) and the Counsel who also held brief of Advocate Nasimire for the applicant.

A handwritten signature in blue ink, appearing to read "C.K.K. Morris".

C.K.K. Morris
Judge
February 10th, 2023

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