THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB-REGISTRY

AT MBEYA

MISC. CIVIL APPLICATION NO. 202 OF 2024

(Arising from Misc. Civil Appl. No. 26250 of 2023 and emanated from taxation No. 58 of 2022 Originated from judgement and order of the District Land and Housing Tribunal of Mbeya)

EPHRAIM ANYELWISYE KWAPINDOMO.....APPLICANT

VERSUS

SUMMER ESTATE LIMITED .....1ST RESPONDENT

HIGHLAND AUCTION MART LIMITED.....2ND RESPONDENT

RULING

13th February, & 6th March, 2024

KAWISHE, J.:

The applicant **Ephraim Anyelwisye Kwapindomo** filed a Misc. Civil Application No. 202 of 2024. The application was brought by chamber summons supported by an affidavit sworn by the applicant. The application was brought under section 68(e) of the Civil Procedure Code,

Cap. 33 R.E 2019. The application was for restraining order applying for the following orders-

(1) That this Honourable Court be pleased to issue an order restraining the respondents either by themselves or through their agents, servants or employees from implementing any auction as per notice dated 22nd November, 2023 or and stop any other further notice in writing or oral, relating to properties known as Plot No. 91 Block 9, Mwanjelwa Area, Mbeya Region against the applicant or their agents pending the hearing and determination of Misc. Civil Application 000026250 of 2023 before Hon. Judge Kawishe at High Court of Tanzania, Mbeya Registry.

(2) That may this Honourable Couret be pleased to grant status quo in respect of Applicants properties against the 1st respondent, its agents or any other person working under the instruction of the 1st respondent or all the respondents from auction relating to properties known as Plot No. 91 Block 9, Mwanjelwa Area, Mbeya Region against the applicant or their agents pending the hearing and determination of Misc. Civil Application 000026250 of 2023 before Hon. Judge Kawishe at High Court of Tanzania, Mbeya Registry.

(3) That this honourable court be pleased to declare the contradictory notices issued to the applicant on behalf of the 1st Respondent of the properties known as Plot No. 91 Block 9, Mwanjelwa Area, Mbeya Region un-procedural, unlawful, illegal and therefore null and void.

(4) Any other orders and directives as the Honourable court may deem proper and expedient to grant in the circumstances.

(5) That, for sake of advancement of justice, this Honourable Court be pleased to make an order and finding that there exist good causes for granting orders being sought herein.

(6) Costs of this application.

In response the 1st respondent and the 2nd respondent filed their joint counter affidavit, with a notice of preliminary objection, with the following grounds-

(1) That the application is bad in law for it is misconceived, misapprehended, and misapplication of this court cannot issue injunctive orders against execution process passed by inferior courts.

(2) That the affidavit is defective for containing hearsay, arguments, conclusions, opinions, emotions, feelings, impeaching trial tribunal credibility, and extraneous matters.

(3) That the application is bad in law for containing false statement contrary to s. 41(1) of the Advocate Act, Cap. 341 R.E. 2022.

(4) The application is bad in law for improper citation of parties as it was in the previous proceeding.

(5) That the application is bad and untenable in law for being an abuse of court process and forum shopping.

Therefore, as a matter of practice of the court once a Preliminary Objection (PO) is raised, the court would schedule the hearing of the substantive matter to allow the disposal of the PO first. In this case at hand the parties argued the raised grounds of the PO by the way of oral submission.

During the hearing of the PO, the respondents were represented by Mr. Mathayo Mbilinyi learned counsel while, the applicant enjoyed the service of Mr. Samson Suwi the learned counsel. Mr. Mbilinyi argued on the first ground of the PO that, the applicant filed his application under

section 63(e) and 95 of the CPC, while section 63 (e) is for interlocutory orders. He argued that, the matter is in the execution stage, there is no remedy of injunctive order including restraining order which can be issued by the court rather, the proper remedy is stay of execution. The learned counsel further submitted that orders cannot be used interchangeably. Mr. Mbilinyi cement his position by citing the following cases- **National Housing Corporation vs. Peter Kasidi and others**, Civil Application No. 243/2016 pg. 17 and 18; **Prada Enterprises Co. Ltd vs. Joyce Alex Khalid and 2 Others**, Civil Appeal No. 279/01 of 2020 pg. 9 to 11, and the case of **Otto Mark Mosha & Rowland August Mlay vs. Peter Alfred and Another**, Misc. Civil Appeal No. 28334/2023, which found out that, the two orders cannot be sought interchangeably.

Arguing the second ground of the PO, the learned counsel submitted that where an affidavit contains hearsay, arguments, opinions, emotions, conclusion, impeaching the tribunal and conclusions, those paragraphs have to be expunged and the court has to consider the remaining paragraphs. He argued that an affidavit should contain facts only. He referred those paragraphs as follows- paragraph seven of the applicant's affidavit used the word "amazement" which creates

emotions, paragraph nine, used the word "if" it is an opinion. He added that, mentioning the "Chuo Cha Kilimo Uyole" under paragraph 3, 8(a), (b) and 9 is extraneous. The matter in the trial tribunal did not involve Chuo cha Kilimo Uyole.

Mr. Mbilinyi submitting on the third ground of objection, averred that, the application contains false statement contrary to section 41(1) of the Advocates Act. He indicated that in the first paragraph of the applicant's affidavit, Ephraim Kwapindomo stated that he is the counsel for the applicant, he lied he is the counsel while the Wakili system does not recognise him as an advocate. He further alluded that, paragraph three of the applicant's affidavit also contains false information, that the appeal was withdrawn because the government declared the area to belong to the Chuo Cha Kilimo Uyole. He stressed that, the applicant withdrew the appeal due to the decision of the tribunal. The disputed area was bought by two persons, whereby the applicant was refunded his money by the 1st respondent hence, his counsel agreed with the applicant to withdraw his appeal from the High Court at Mbeya.

Mr. Mbilinyi also referred to paragraph seven of the applicant's affidavit stating that, it contains false information, that the applicant (Ephraim Kwapindomo) is the one who filed review and objection

proceedings. He asserted that, the person who filed objection is one Aoko Silas Mwita against Summer Estate and 7 others. He fortified his argument by citing the case of **Damas Assey and Flora D. Assey vs. Raymond Mgonda Paula and 8 Others**, Civil Appeal No. 32/17 of 2018 pg. 18**, Kidodi Sugar Estate & 5 Others vs. Laga Petroleum Ltd,** Civil Appeal No. 110 of 2009 pg. 4, **Rhoda Henry vs. Samwel S. Lyande and 9 Others**, Misc. Land Application No. 86 of 2021. The respondent counsel prays before this court to find the application meritless and strike it out with costs.

The learned counsel embarked on the fifth ground of the PO and stated that, the application is untenable in law for being in abuse of court process and forum shopping. That the applicant has filed the review to challenge the Bill of Costs in the District Land and Housing Tribunal (DLHT) at the same time he filed an application in this court. This is an abuse of the court process and forum shopping. He cited the case of **Sosthenes Bruno Dianarose Bruno vs. Flora Shauri,** Civil Appeal No. 249 of 2020 and the case of **JV Tangerm Construction Co. Ltd and Techno Combine Construction Ltd (Joint Venture) vs. Tanzania Ports Authority and the Attorney General,** Commercial Case No. 117 of 2015 to strengthen his argument.

The fourth ground of objection was withdrawn. The applicant prays this court to strike out the application for temporary injunction or restraining order with costs.

In reply the applicant's learned counsel, Mr. Samson Suwi in the first ground of the PO argued that, there is no prayer for injunctive orders rather, it is a prayer for stay of execution by auction. The term restrain is used to mean stay order and not injunctive order. The stay order tends to restrain to hold continuation of certain action. Thus, he insisted that this court has jurisdiction to entertain the instant application of stay of execution as in the case of **National Housing** (supra). He added that this application was brought under section 68(e) of the CPC and not under section 63 (e) as the respondents' counsel stated.

In the second ground of the PO, the learned counsel for the applicant concedes with what submitted by the respondents' counsel that the remedy to the offending paragraphs is to expunge them. He argued that, this court my expunge the mentioned paragraphs such as paragraph 7 of the applicant's affidavit, if the court finds that the mentioned paragraph contains what claimed is by the respondents' counsel. While referring to paragraph 9 the learned counsel commented

that the use of the word Chuo Cha Kilimo Uyole is less concerned hence, the paragraph to be expunged. The counsel argued that this PO requires evidence in order to determine whether the word Chuo Cha Kilimo Uyole was concerned or not with the proceedings of the lower court. This court has to refer to the proceedings, judgment or decree of the lower court. It is trite law that PO must be based on pure point of law which should not attract resorting to evidence to prove its existence, he cited the case of **Zito Kabwe vs. Board of Trustees CHADEMA and another,** Civil Case no. 207 of 2013.

Mr. Suwi replying to the third ground of PO, which was condemned for containing false statement, he submitted that such allegations do not qualify to be PO as it needs evidence to prove that if it is true or false. He continued by stating that, as the issue whether the applicant is an advocate or not as per paragraph 1, this court was invited to visit the website, the act of entering in the system is to search for evidence. He stressed that, the quoted section 41(1) of the Advocates Act by the respondents' counsel that it has been violated, the counsel submitted that the aforementioned Act used the word 'advocate' and not the 'counsel.' Thus, if the applicant referred himself as an advocate, the respondent's counsel should wait until the application at

hand is heard on merit to determine whether the word counsel means an advocate.

The learned counsel stated further that, the argument that the matter was withdrawn once declared by the government that the disputed land is owned by the Chuo cha Kilimo Uyole, that was withdrawn on the reason that the applicant was paid his money involves consulting the withdrawal order which is evidence. He submitted that all the points as mentioned under the third ground of objection require evidence. He attacked the mentioned cases of **Damas Assey** (supra), **Kidodi Sugar Estate**(supra) and **Samwel Lyandye** (supra) for being irrelevant to the instant application, that they were dealing with the main application.

Turning to the fifth ground of the PO that the application is defective because of abuse of court process and forum shopping, the counsel argued that, what is pending in the tribunal is review and what is before this court is application for extension of time to file reference. He cited Order VIII (1) of the Advocates Remuneration Order GN. 263 of 2015 which states that the jurisdiction to entertain reference application is vested to the High Court. He faulted the cited case of **Sostheness** (supra) as distinguishable in the instant application.

The applicant's counsel prays that, all the points of PO to be overruled for lack of merit, costs be ordered in the main case.

In rejoinder the respondents' learned counsel reiterated his submission in chief. Regarding the first point of PO, he stated that in the case of **National Housing** (supra), it differentiates order for injunction and order for stay of execution. He clarified that he meant section 68(e) and not section 63(e). He re-cited the case of **Prada Enterprises Co. Ltd** (supra) to strengthen his argument.

In the second ground he stated that the applicant's learned counsel agreed with him that the paragraphs which contain emotions, feelings and so forth to be expunged from the applicant's affidavit. He concretized his argument by stating that what is not allowed in the PO is not evidence rather the scrutiny of evidence.

Mr. Mbilinyi on the issue whether the word advocate means counsel, he argued that, the word 'advocate' and 'counsel' are two words and synonymous.

Mr. Mbilinyi reacted on the issue of misusing court process by stating that, what is prohibited is opening all the matters at once and referred to the case of **JV Tangerm** (supra).

Finally, the learned counsel prays that the objections to be sustained with costs.

Having gone through the parties' submissions, before I embark on the delibarations of the raised grounds of PO, there was an issue raised by the respondents' counsel that the applicant counsel cited section 63(e) and 95 of the Civil Procedure Code. He insisted that the cited sections are for interlocutory orders and inherent powers of the court. The applicant's learned counsel stated that, the application was brought under section 68(e) of the CPC. Having gone through the court records it is clearly shown that the application was brought under section 68(e) of the CPC. Therefore, it is evident that the application was not brought under section 63(e) as stated by the respondents' counsel.

In determining the first ground of the preliminary objection that the application is misconceived, misapprehended and misapplied as this court cannot issue injunctive orders against execution process ordered by inferior court. It was argued that one cannot apply for injunctive order at this stage rather, he should apply for stay of execution. It is the submission of the respondents' learned counsel that the applicant has to apply for stay of execution and not for injunctive order. On his side the applicant's learned counsel argued that he was seeking for stay of

execution order and not for injunctive order as stated by the respondents' counsel.

The word used by the applicant as shown in the chamber summons at paragraph one that this honourable court be pleased to issue an order restraining the respondents, the applicant counsel stated that those words mean stay of execution. The applicant filed his chamber summons vide section 68(e) of the CPC, which states as follows-

> *Section 68; In order to prevent the ends of justice from being defeated the court may, subject to any rules in that behalf-*
>
> *(a) not applicable*
>
> *(b) not applicable*
>
> *(c) not applicable*
>
> *(d) not applicable*
>
> *(e) make such other interlocutory orders as may appear to the court to be just and convenient.*

Basing on the above referred section as cited by the applicant's counsel, this court has the power to make an interlocutory order and the temporary injunction is the specie of the interlocutory orders. The issue is whether at this stage this court has powers to issue an interlocutory order.

Both learned counsels argued that the proper way is to file stay of execution and not injunctive orders. Therefore, in that aspect there is no

dispute. The same was held in the cited cases by the respondents' counsel, see the case of **National Housing Corporation** (supra), **Prada Enterprises Co. Ltd** (supra) at page 10 of the court cited the case of **Domina Kaganiki vs. Farida F. Mbaraka and 5 Others**, Civil Application No. 156 of 2014 (unreported), where the court stated-

> *".... Stay of execution is geared towards suspending operation of judgment already entered pending the hearing of an appeal. It is clear that the two applications are quite distinct and they serve different purposes. Further, the application to restrain as shown above is not the domain of this court. This court has no powers to issue restraining orders to a matter which comes by a way of an appeal....".*

Borrowing the reasoning from the above cited cases, the issue to be determined is whether the "words" used by the applicant's learned counsel and the section referred was the proper way to file this application of stay of execution. In view of the foregoing, I am convinced that this matter unquestionably concerns, in its tenour and spirit, a prayer for injunctive relief against the execution process that was passed by the DLHT. It is a trite of law that wrong citation or failure to cite proper provisions of law renders the application incompetent. This was held in the case of **China Henan International Co-operation Group vs. Salvand Regasira** [2006] TLR 220, it was held that-

"The omission to cite the proper provision of the rule relating to reference or citing a wrong and inapplicable rule in support of the application is not a technicality falling within the scope and purview of Article 107A (2) (e) of The Constitution of United Republic of Tanzania".

Despite the fact that, recently there are plethora of cases, that when there is improper citation of provision of the law in the document one may amend it, thus it is no longer fatal. This is due to the introduction of the overriding objective (oxygen principle) under section 3A(1) and (2) of the Criminal Procedure Code, Cap. 33 R.E 2019 which was enacted through section 6 of the Written Laws (Misc. Amendment) Act, No.8 of 2018. It requires courts to focus on substantive justice in making decisions instead of dwelling on technicalities. Thus, in my opinion even though the principle is there but it applies when the defects do not go to the root of the case. The applicant cited wrong provision and prayed for inapplicable orders in the matter at hand which makes the affidavit defective. See the case of **Sophia Festo (Administratrix of the estate of the late Festo Mselia) vs. CRDB Bank Ltd & Another** (Land Case 9 of 2020) [2022] TZHC 10741 (31 May 2022) where the learned Judge stated that the law is clear that every application must be supported by affidavit as per Order XLIII Rule 2 of the Civil Procedure Code, Cap 33 [R.E.2002] which provides that,

"Every application to the Court made under this Code shall, unless otherwise provided, be made by a chamber summons supportedby affidavit".

It was his view that, "*an affidavit is the heart of every application and such application must be properly made in line with the provision of the law. It should also be noted that an affidavit is substitute of oral evidence. The practice and even the provisions of the law requires that an affidavit must comply with all legal requirements.*"

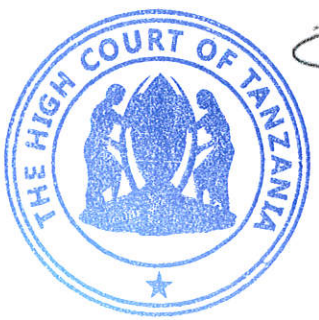
I concur with the reasoning of the learned judge in the case of **Sophia Festo** (supra) that the application should have complied with the legal requirements. Also, see the case of **Uledi Hassan Abdallah vs. Murji Hasnein Mohamed**, Civil Appeal No. 2 Of 2012 [Unreported]. The court in **Zito Zuberi Kabwe vs. The Board of Trustees, Chama Cha Democrasia Na Maendeleo and Another,** Civil Case No. 270 of 2013 HC at Dar es Saalaam, (Unreported) pg. 37.

In concluding this deliberation, I would like to refer to the holding of the Court of Appeal **in National Housing Corporation vs. Peter Kassidi & Others** (Civil Application 243 of 2016) [2019] TZCA 153 (4 June 2019) where the Court differentiated between temporary injunction and order of stay of execution stating-

"Taking into account the difference between the two orders in terms of their respective object as well as the party against whom each one may be made, we are firm that they constitute two distinct and exclusive judicial processes which cannot be invoked interchangeably or in the alternative."

From that reasoning of the Court of Appeal, I am inclined to what was submitted by the respondents' learned counsel that the section cited and the words used do not refer to stay of execution rather refers to the injunctive orders. Therefore, the proper provision to be applied was Order XXXIX Rule 5 of the CPC which provide for the order of stay of execution by the appellate court. I think, the order of stay of execution would have been not only proper but also more efficacious. For that reason, the application is defective for wrong citation and for improper application made by the applicant in this court. Therefore, the first ground of the preliminary objection is upheld and sustained thus, there is no need of determining the rest of the grounds as the first ground has disposed the whole application. Consequently, the application is incompetent before this court hence, struck out without costs. Order accordingly.

Dated at **MBEYA** this 6th day of March, 2024.

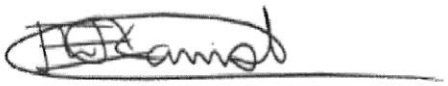


E.L. KAWISHE

JUDGE

Court: Ruling delivered in chambers this 6th day of March, 2024 in the presence of the applicant present in person and in the presence of Mr.

Michael John Mwaipasi learned advocate holding for Mr. Mbilinyi counsel for the respondents and in the presence of the 2nd respondent Mr. Fulco Mlelwa.



E.L. KAWISHE

JUDGE