

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB – REGISTRY OF MOSHI
AT MOSHI**

MISCELLANEOUS CIVIL APPLICATION NO. 32 OF 2023

BETWEEN

CATHERINE PAUL KYAUKA NJAU.....APPLICANT

Versus

EMMANUEL PAUL KYAUKA

(As the administrator of the estate
of the Late Paul Kyauka Njau).....

1st RESPONDENT

HIACINTA PAUL KYAUKA

(as the administrator of the estate
of the Late Mama Crescentia Kyauka).....

2nd RESPONDENT

RULING

12th December 2023 & 26th February, 2024

A.P.KILIMI, J.:

This ruling is on an application for temporary injunction filed by the applicant under Order XXXVII Rule 1(a), 2 (1) and Section 68 (c), (e) of the Civil Procedure Code [Cap 33 R.E. 2019]. Therein the applicant is praying this court to issue an interim injunction order to restrain the respondents and whoever acts under their instruction from:

1. Evicting the Applicant from the apartment on the house on Plot No. 17/18 'K' at Moshi or disposing off the House on Plot No. 17/18 'K' at Moshi pending the hearing and determination of the Probate and Administration Cause No. 5 of 2002 before this court inter-parties.

2. Cost of the application be in the cause and any other orders this Court may deem fit to grant.

This application is supported by the affidavit duly sworn by Ms. Stella Simkoko a learned advocate, who also appeared in this matter full time for the applicant. The same was challenged by the respondents through the service of Mr. Daniel Haule Ngudungi learned advocate.

Before I go any further, I find it necessary to state a brief background of the cases the parties had till the present matter as follows; The first respondent and another Febronia Paul Kyauka (deceased) were appointed by this court to be the administrator of the estate of the late Paul Kyauka Njau who died interstate on 17/2/2002. Later the applicant and one Joseph Paul Kyauka lodged in this court Probate and Administration Application No. 34 of 2010 and No. 14 of 2014 which were later consolidated, against the first respondent by then his co- administrator had passed away, therein they sought an order for revocation of the appointment of the first respondent because he was willfully omitted to exhibit an inventory account which was not proportionally distributed among the beneficiaries. This Court on 9/3/2016 before (Mwingwa, J as he then was) decided in favour of the respondents dismissing the application and ordered the administrator to

proceed with the distribution of estate to the beneficiaries. Thereafter, the administration by the first respondent was impeded with cases filed by his opponent at the court of appeal, and the last one is Civil Application No. 247/05 OF 2020 which was decided on 18th July 2023 dismissing second applicant prayer.

When this came for hearing it was agreed be argued by way of written submissions, both counsels complied with the schedule and I applaud them for extensive submission, however, I will refer to them in due course when the need arises for purpose of prayers above sought.

As stated above this is the prayer for temporary injunction, thus, it is a trite law that in order for application of this nature to be granted by the court the following factors must be satisfied **First;** the applicant must demonstrate to the satisfaction of the court that there exists a serious triable issue between him and the defendant and the probability that he will be entitled to the relief prayed. **Second;** he must demonstrate that the court's interference is necessary to protect the plaintiff from suffering an irreparable loss. And, **third;** that on the balance of convenience, he is likely to suffer

greater hardship and mischief if the injunction is withheld. (See **Atilio vs Mbowe** [1969] HCD 284.

Starting with first the factor, Ms. Simkoko in support of application submitted in this regard that, facts stated at paragraph 10, 11 and 12 of her affidavit are proof that there is before this court a Probate and Administration Cause No. 5 of 2002 which has not been closed. For that reason she argued that the applicant intends to challenge the distribution and her eviction from the house hence sufficient proof that there is a pending legal proceeding with prospects of reliefs to the applicant. The learned counsel contended that in proving whether there is a serious question for determination by the court it is not conclusive evidence which is required but rather the facts as disclosed in the plaint and affidavit. To support her contention she cited the case of **Salimu Mbaruku Mohamedi T/A Maarifa English Mediam Pre & Primary School vs. Registered Trustees of Islamic Culture School**, Misc. Land Application No. 633 of 2021.

Ms. Simkoko further submitted that since transfer of ownership is incomplete for whatever reason, the Respondents have no locus to evict the Applicant from the apartment. Also added that if there are rights of the

beneficiaries to be determined in Probate and Administration Cause No. 5 of 2002 then matters should be preserved in status quo irrespective of their prospects of success.

Insisting that probate proceedings is still subsisting, Ms. Simkoko argued that the accounts of estate if any are subject to be challenged and that to prove that the probate cause is not yet closed, there is no order of the court which has been issued to that effect. She argued that a matter is finalized and the court becomes *functus officio* by an order and that absence of an order closing the Probate case means the same is not yet closed. She supported her argument with the case of **Kamundi vs. Republic** (1973) E.A 540.

Responding as to whether the applicant has established existence of a *prima facie case*, it was Mr. Ngudugi's contention that what the applicant alleged in the affidavit that there is a prima facie case which is Probate and Administration Cause No. 5 of 2002 which has not been closed and that she intends to challenge therein the distribution of the assets and her eviction from the house in Plot No. 17/18 was incorrect. He further said the applicant being a party in the Consolidated Probate and Administration Cause No. 34

of 2010 and No. 14 of 2014 where she unsuccessfully after challenging that there was uneven distribution of the deceased assets in the main Probate and Administration Cause No. 5 of 2002, the matter was adjudicated upon by this court and had never been challenged to date.

It was further in Mr. Ngudungi's submission that the administrator did successfully comply with the court's order by filing inventory of the estate with respect to the undistributed Mazinde – Tanga house which was filed in this court on 8th April, 2016. He therefore argued that due to that fact the administrator was discharged from his duty and the probate matter was closed. He thus maintained that there is no prima facie case in this court pending determination hence he argued that the application is not maintainable.

In her rejoinder, Ms. Simkoko maintain the position stated in the case of **T.A. Kaare vs General Manager Mara Cooperative Union (1984) Ltd (1987) TZHC 8 (TANZLII)** that in determining an application for injunction the issue is not whether the suit holds forth bright prospects of success or how the suit ought to be decided at the hearing of the case but whether there is substantial question to be inquired into and whether

matters should not be preserved in status quo until the final determination of the suit.

Having gone through the submissions above, and what has been averred in paragraph 10, 11 na 12 of the applicant's counsel affidavit which the applicant is insisting prove of the existing Probate and Administration Cause No. 5 of 2002 which has not been closed. First, in respect to what have been averred in paragraph 10 of the said affidavit, I have scanned it acutely and its reply in counter affidavit of the respondent side at paragraph 8, I am settled no harassment or force was used to settle the matter filed at the court of appeal be withdrawn. This is evidenced by the applicant himself affidavit in annexure CPKN5 which shows it was strictly consensus of one Joseph Paul Kyauka to withdraw the matter at the court.

In respect to the remaining paragraph 11 and 12, I have consider those land cases as it was annexed in the applicant's counsel affidavit as annexure 5B, their decision shows as rightly averred by the respondent counsel's counter affidavit at paragraph 9 that Land Case No. 213 of 2009 was dismissed for want of locus and Land Case Appeal No. 26 of 2009 was

allowed on ground that the pending probate proceedings which were pending in court should terminate first.

Nevertheless, be that as it may, the above in my view since no proceeding existing which the applicant is contending cannot be taken that there are a triable issue before this court. The fact that the applicant is saying she intends to challenge the distribution and her eviction from the house, in my considered opinion is not sufficient proof that there is a pending legal proceeding establishing prima facie case as the law requires. However, I have considered the remaining facts deposed on the applicant's affidavit in my view themselves cannot warrant to satisfy this court that are enough to be the issues pending for determination by the court. Therefore, I am settled the principle in **Salimu Mbaruku Mohamedi T/A Maarifa English Mediam Pre & Primary School vs. Registered Trustees of Islamic Culture School** (supra). cannot apply under the circumstances of this case.

In respect to the Consolidated Probate and Administration Cause No. 34 of 2010 and No. 14 of 2014 which was decided by this court on 9/03/2016 as said above the same ordered the first respondent as administrator to accomplish the remained properties be distributed. Despite the fact the

respondents say he filed the inventory on the same year of delivering the said Judgment. In my considered opinion, since there was a court judgment issued the said order of completion, and taking the nature of the case which entails the Administrator to execute the order directed to him by the court, I am settled that the said circumstances cannot be taken that there is a pending prima facie case before the court.

I am aware that probate proceeding is closed upon filing final accounts, therefore since in this matter what remained was execution of the order. Therefore, like any other execution, any objector of the administration of estate, could have moved the court under remedies available in law, such as objection proceeding etc. and not for applying for this order as if there is a live pending matter. If none is done by objector, in my view there is no triable issue in the eyes of law when administrator or executor is exercising his legal duty.

In view of my reasoning above, I think, this court cannot be affected by feelings of the parties, instead should use its discretion according to the facts and evidence. I am persuaded by my learned Sister Masabo, J. in **Richard William Matibu vs CRDB Plc and 2 Others** [2023] TZHC

16901 (TANZLII) when she referred the observation of the court in **Charles D. Msumari & 83 others vs The Director of Tanzania Harbours Authority**, Civil Appeal No. 18 of 1997 which insistently stated that:

*"Courts cannot grant injunction simply because they think it is convenient to do so. Convenience is not our business. Our business is doing justice to the parties. They only exercise this discretion sparingly and only to protect rights or prevent injury according to the stated principles. The courts should not be overwhelmed by sentiments, however lofty or mere high driving allegations of the applicants such as that the denial of the relief will be ruinous and cause hardship to them and their families without substantiating the same. **They have to show that they have a right in the main suit which ought to be protected or there is an injury (real or threatened) which ought to be prevented by an interim injunction and that if that was not done, they would suffer irreparable injury and not one which can possibly be repaired.**"*

[Emphasis added]

In the circumstances, I am constrained not to believe the submission by the applicant that situation said warrant to establish triable case, this is

because even if the administrator has filed inventory and final account to my view, that alone cannot oust the jurisdiction of the court in revoking or stopping the probate that has been granted if the objection is filed. For instance, the law is auspicious clear, any aggrieved person with interest to the proper administration of the estate may apply before the court for revocation of grants or removal of the executors. For ease of reference the Probate and Administration of Estates Act, Chapter 352 at section 49 (2) provides;

"49(2) Where it is satisfied that the due and proper administration of the estate and the interests of the persons beneficially entitled thereto so require, the High Court may suspend or remove an executor or administrator (other than the Administrator-General or the Public Trustee) and provide for the succession of another person to the office of such executor or administrator who may cease to hold office, and for the vesting in such person of any property belonging to the estate."

In view of the above perceptives, all cases referred by the applicant did not have the similar circumstances as this matter at hand, hence are sturdily

distinguishable. Having said as above, I am settled this important factor for granting temporary injunction fail accordingly.

Coming to the next test for granting this application, in respect to whether applicant has suffered irreparable damages. I am mindful irreparable loss is the one which cannot be adequately compensated by award of general damages if the injunction is withheld. (See **Hotel Tilapia Ltd vs Tanzania Revenue Authority**, Commercial Case No. 2 of 2000 HC and **Christopher P Chale vs Commercial Bank of Africa**, Misc. Civil Application No 635 Of 2017 HC Dsm (both unreported) to mention few.

Interpreting the principle irreparable injury **Sarkar on Code of Civil Procedure**, Ninth Edition, 2000 at page 1997 had this to say:-

"By irreparable injury it is not meant that there must be no physical possibility of repairing the injury all that is meant is that the injury would be a material one, and one which could not be adequately remedied by damages"

On the balance of convenience the learned author stated that:-

"Where the plaintiffs are likely to suffer irreparable injury in case the injunction is refused and balance of convenience also lies in their favour they are entitled to grant an interim injunction"

Submitting to support this application in this regard, Ms. Simkoko stated that in this case there is an irreparable injury as stated under paragraph 14 (c) of the affidavit which is not quantifiable hence the court is duty bound to protect the Applicant from such shame. And in respect to balance of convenience she referred paragraph 14(e) of her affidavit and stated on a balance of convenience the applicant will suffer more as she will have to lease a residential premise because as per the accounts it is indicated that the applicant has been allocated a sawmill. She was of the view that the second respondent on the other hand would not suffer any loss as she has never been in occupation of the said house.

Contesting the above, Mr. Ngudungi contended that, the applicant has failed to show how she will be affected if injunction is not granted as she does not stay in Tanzania and that the premises which she craves injunction for is a property allocated to other heirs who are still suffering for over 17

years, the period which the applicant filed in court multiple applications unsuccessfully. Thus, the counsel maintained that the applicant has failed to prove the second principle for this court to exercise its discretion power to grant an order for injunction.

Submitting on whether the applicant has proved the balance of convenient, Mr. Ngudungi stated that the applicant has failed to meet the third condition by failing to show as to how the balance of convenience will be on her favour. It was his further submission that the applicant has already been allocated with her share of inheritance in the estate and she leased it, he contended that allowing her to stay in the premise is to deprive other heirs' interest for over 17 years because of the applicant's endless litigation in courts.

I have considered the abovementioned applicant's counsel affidavit, I have considered that the applicant also has been already allocated her estate by the respondents as administrator, this was also acknowledged by the applicant's counsel herself at paragraph 14 (e), however, I have taking regard this is the distribution of the estate by the administrator, I am of the view that this cannot be said to be irreparable loss because it can be compensated

by monetary terms or his properties. Hence, the Applicant has not met the threshold for this principle to be established.

In respect to balance of convenience, I have considered the circumstances of this matter and the evaluation of facts done above, I think I should not labour much on establishing this factor for granting temporary injunction, this is because as said above the applicant has failed to show that is likely to suffer more so that I can hold that balance of convenience is favorable of her if the application is granted. Nonetheless, since the two above tests was not proved by the applicant the same make even proving of this futile, this is because in order to secure an order for temporary injunction the Applicant has to establish in whole the three co-existing requisites (see the case of **Tanzania Breweries Limited versus Kibo Breweries Limited and Another** (1998) EA 341.

Before I conclude, I think it is important to remind parties in this matter that this is a probate matter where heirs are still contesting deceased properties since the year 2002 when their father died intestate, more than twenty years. Heirs' ought to know, there is no everlasting administration of estate, thus, so far so good each heir if has got his/her share, administration

of estate should come to an end, and heirs should proceed from where they bequeathed.

For the foregoing reasons, I find this application is devoid of merit. I therefore hereby accordingly dismiss it. From the nature of the parties' dispute, I order that they shall bear their own costs.

It is so ordered

DATED at **MOSHI** this 26th day of February, 2024.



X

JUDGE

Signed by: A. P. KILIMI

Court: - Ruling delivered today on 26th day of February, 2024 in the presence of Mr. Daniel Ngudungi advocate for Respondents, also holding brief of Ms. Stella Simkoko learned advocate for the Applicant.

Sgd: A. P. KILIMI
JUDGE
26/02/2024

Court: - Right of Appeal duly explained.

Sgd: A. P. KILIMI
JUDGE
26/02/2024