

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
THE SUB-REGISTRY OF MWANZA
AT MWANZA
MISC LAND APPLICATION NO. 9562 OF 2024**

CHARLES KAHATANO LWEMPISIAPPLICANT

VERSUS

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| <p>1. NATIONAL BANK OF COMMERCE</p> <p>2. ACCURATE RECOVERY & AUCTION LTD</p> <p>3. PETER LUIS DAMIAN</p> <p>4. CFN MWANZA LIMITED</p> <p>5. MASS & ASSOCIATES COMPANY LTD</p> | } | <p>..... RESPONDENTS</p> |
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RULING

05th & 11th June 2024

CHUMA, J.

By chamber summons the Applicant Charles Kahatano Lwempisi has filed this application under a certificate of urgency seeking the following orders;

- i. Temporary injunction to restore the original state of the applicant in the house with a certificate of title no. 033025/102 LO No. 202920, Plot No. 86 Block "S" Located at Nyerere Road Nyamagana District, Mwanza pending the hearing and determination of the main suit

- ii. Order to maintain status quo ante of the party's pending determination of the main suit
- iii. Costs to follow the event
- iv. Any other relief this court deems just to grant

The application is contested by joint counter affidavit of the 3rd and 4th respondents filed on 04/06/2024 together with the notice of preliminary objection on points of law that this application is bad in law for contravening Order VIII B rule 23 of the **Civil Procedure Code**, Cap. 33 R.E 2019 (the CPC) for want of an application to depart from scheduling order and that the application is *res judicata*.

When the matter came for hearing of preliminary objection the applicant was represented by Abdallah Kessy, learned advocate whereas Dr. Mwaiondola, learned advocate represented the 3rd and 4th respondents.

In his submission, Dr. Mwaiondola argued on the first point of objection that the application is bad in law for contravening Order VIII Rule 23 of CPC for want of an application to depart from the scheduling order. That, the instant application arose from Land case No 31/2023 in which its scheduling order was conducted on 7/11/2023 where the applicant's

subsequent application was not reserved. Thus, bringing this application without court leave offends Order VIII Rule 23 of CPC. He further argued that before this application the applicant filed Misc. Application No. 25652 of 2023 and the respondents raised a similar concern and its decision was issued on 8/4/2024 by dismissing the application before Hon Kamana J and that they brought similar application for the second time without court leave. He argued that this alone suffices to dismiss the instant application.

On the second point of objection, Dr Mwaiondola argued that this application is *res judicata* and this court is functus officio. He argued on this point that the applicant lodged Misc. Land application No. 53/2023 seeking a temporary injunction and the application was dismissed before this court. Then he brought another Misc. Civil application No. 25652/2023 seeking similar relief where the application was also dismissed before Hon. Kamana J. on 8/4/2024. That, for the third time, the applicant is before this court seeking similar relief of temporary injunction or maintenance of status quo. He argued that the rules of *res judicata* bar a similar decided matter to be entertained again as per section 9 of CPC. Thus, being so the entire application is an abuse of the court process and functus officio. He supported his argument with the case of **Petrolux Services Stations Ltd vs. NMB**

Bank PLC and another Misc Land application No 86/2020 (unreported).

He therefore prayed this application be dismissed with cost.

In response, Mr. Abdallah Kessy argued by starting with the first point of preliminary objection that, the allegation of Dr Mwaisondola is baseless because the scheduling order dated 7/11/2023 before Hon Kamana J. among others he addressed the court to reserve the right for further application considering the nature of the case. He prayed this court to revisit the court order dated 7/11/2023. Also, regarding the decision dated 8/4/2024, Mr. Kessy argued that the same was on a different issue which is different from the present one that what was prayed before was maintenance of the status quo but the present application is on maintenance of the status quo ante. He went further to state that in application no. 25652 of 2023 the court did not deal on the merit of that application but rather dealt with the objections. The court was misdirected that is why they never sought a court leave to depart from the scheduling order because he was recorded in the application to reserve the right of subsequent application considering the nature of the main suit.

Mr. Kessy further stated that, even in the present application this court has been misled that application no. 25652 of 2023 was dismissed while the same was struck out. It was his submission that this application is not bad in law as submitted by Dr Mwaisondola hence there was no need to seek court leave to file this application as during the Final Pre-trial Conference the right for subsequent application was reserved.

Reverting to the second point of objection, Mr. Kessy strongly challenged it for the reasons that first, the application is not *res judicata* because for it to be so as per Section 9 of CPC there must be an issue that has been subsequently raised, and has been heard and finally decided by the court. He added that in the cited application No. 25652 of 2023, the main issue was status quo maintenance, and in the present application the main issue is status quo ante maintenance. And application No 53/2023 the issue was to maintain the status quo. Between application no 25652/2023 and application no 53/2023 none of them has been heard and determined on merit but all those applications ended on preliminaries and all were struck out not dismissed therefore Application which has been struck out allows one to bring again the application unlike when the same is dismissed. And that even the cited case of Petrolux (*supra*) is distinguishable here because the

relief sought in that case was that which was previously sought but in their case their reliefs were never sought before and no decision was ever issued by the court hence no abuse of court process as alleged by Dr Maisondola. This court cannot stand to be functus Officio because their prayer was never sought before and it's his prayer that the raised preliminary objection be held devoid of merit and be dismissed with cost.

In his rejoinder Dr. Mwaisondola argued that the instant application No. 9556 of 2024 is preferred under Order XXXVII Rule I (a) and 2 (1) and section 68(e) and 95 of CPC while Misc application No. 25652 of 2023 also was made under similar provisions of law. Also, Misc Application No. 53 of 2023 was brought under similar provisions, and in all those applications the reliefs sought were on the temporary injunction. Though Mr. Kessy insisted on status quo ante in the instant application to differentiate with the prior application he argued that the scheduling order of 7/11/2023 does not reveal the reserved right of further application. And his submission that Hon Kamana, J was misled means the decision there is questionable. Moreover, Dr Mwaisondola admitted Mr. Kessy's point that application No. 25652 of 2023 was struck out. He finally invited this court to dismiss the application in issue.

Taking into account the arguments for and against the raised objections from both parties and my careful perusal of records, the issue to be determined is whether the objections are meritable.

Going through the court's record, on 7/11/2023 in original case No. 31 of 2023 Mr. Kessy who appeared for the Plaintiff recorded thus, I quote;

*"We propose speed track 2. We will have not less than 5 witnesses. We will have exhibits and hence we reserve the right to file **additional documents**" [Underscoring is mine]*

The above quoted proceedings dated 7/11/2023 it is quite clear that the right for subsequent proceedings was not reserved as submitted by Mr.Kessy advocate for the applicant. As the right for subsequent application was not reserved, the applicant is prevented from lodging further applications without court leave as per the dictate of **Order VIII B rule 23** of the CPC. The referred order reads that;

"Where a scheduling conference order is made, no departure from or amendment of such order shall be allowed unless the court is satisfied that such departure or amendment is necessary for the interests of justice and the party in favor of who such departure or amendment is made shall bear the

costs of such departure or amendment unless the court directs otherwise”

The record further reveals that in the decision dated 8/4/2024, this court struck out the application on the ground that such an application was supposed to be preceded by an order to depart from the scheduling order. Even if the decision was not final as submitted by Mr. Kessy but by bringing a similar application without first seeking an order for departure from the scheduling order as decided by this court on 8/4/2024 in Misc. Application No. 25652 of 2023, that in my view amounts to an abuse of court process as submitted by Dr Mwaiondola Learned counsel for the respondent.

In fine and as a whole the raised preliminary objection is meritorious and sustained. I therefore proceed to dismiss the instant application with costs.

DATED at MWANZA this 11th day of June 2024



W.M. CHUMA

JUDGE

Ruling delivered in court before Mr.Abdallah Kessy Learned counsel the applicant and Mr.Iche Mwakila Learned counsel for third and fourth respondents who also holds brief of Dr Mwaisondola Learned counsel for first second and firth respondents this 11th day of June 2024.



W.M. CHUMA

JUDGE