

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
DODOMA DISTRICT REGISTRY
AT DODOMA**

MISCELLANEOUS LAND APPLICATION NO. 89 OF 2023

**ALVIN BECKHAM JILIWA.....APPLICANT
VERSUS**

**1. MAUREEN GEORGE MBOWE }
2. AGUSTINO SAFELI ASUMWISYE }.....RESPONDENTS**

RULING

Date of Last Order: 14th March 2024.

Date of Ruling: 15th March 2024.

MASABO, J:-

This is a ruling in respect of the preliminary point of law filed by the respondents challenging the competence of the application. The applicant had filed the present application under Order XXXVII Rule 1(a) and (b) of the Civil Procedure Code Cap. 33 R.E 2019 praying for a temporary injunction restraining the respondents, their employees, servants, workmen and person acting under their instructions from selling a matrimonial house situated on Plot No. 10, Block 6 Area C, Dodoma City and Plot No. 1, Block N Area D Mlimwa East in Dodoma City, which I shall conveniently refer to as the suit premise.

The gist of his application as discerned from the applicant's affidavit filed in this court in support of his application, is the respondents' intention to sell the suit premises. He is not amused by the sale as the suit premise is a matrimonial asset jointly acquired and owned by him and his wife who is the

first respondent herein. Upon being served with the application the respondent filed a counter affidavit accompanied by a preliminary objection that the application is legally incompetent.

The preliminary objection was scheduled for hearing on 20th February 2024 on which date the applicant defaulted appearance. In the interest of justice, the hearing was rescheduled to date but he has once again defaulted appearance. The default appearance prompted the respondent's counsel, Mr. Benedict Calist, to pray for an *ex parte* order, a prayer which I granted and allowed him to proceed with the hearing *ex parte* the applicant.

Addressing the court in support of his objection, Mr. Calist submitted that, the present application is incompetent because being an application for an injunction it ought to have been preceded by a main suit but to the contrary, there is none in court. Supporting his submission with the case of **Atilio v Mbowe** (1969) HCD 284, he submitted that the requirement that an application for injunction be preceded by a main suit is a mandatory legal requirement. It is one of the three tests set out in the case of **Atilio v Mbowe** (supra) as prerequisites for an order for temporary injunction. He submitted further that, as per this case, for an application for an injunction to sail there must be a serious question to be tried between the parties in a case pending in court and a high probability that the applicant will be successful. Also, it must be established that the court interference is necessary to protect an irreparable injury bound to occur if the injunction is

not granted. And, lastly, on the balance of probabilities, the applicant stands to suffer more than the respondent if the injunction is not granted.

In the absence of any of these prerequisites, the application cannot sail. He added that these tests are also embedded in Order XXXVII Rule 1(a) and (b) of the Civil Procedure Code, Cap 33 R.E. 2019 under which the present application has been brought. Therefore, since there is no pending suit between the parties, the application cannot succeed as, implicitly, as there are no serious triable issues between the parties. Having submitted so, he rested his submission and prayed that the application be dismissed with costs.

I have carefully considered the submission by Mr. Callist. This being a preliminary objection, it is apposite, I think, to start with the concept of preliminary objection as expounded in the landmark case of **Mukisa Biscuit Manufactures Ltd. v. West End Distributors Ltd** [1969] E.A. 696 and cited with approval by the Court of Appeal in a plethora of cases including in the case of **Karata Ernest and Others vs Attorney General**, Civil Revision No. 10 of 2010 [2010] TZCA 30 TanzLII, **Gaspar Peter vs Mtwara Urban Water Supply Authority (MTUWASA)** (Civil Appeal 35 of 2017) [2019] TZCA 28 TanzLII.; **Mount Meru Flowers Tanzania Ltd vs Box Board Tanzania Ltd** (Civil Appeal 260 of 2018) [2019] TZCA 434 TanzLII and in **Ali Shabani & Others vs Tanzania National Roads Agency (TANROADS) & Another** (Civil Appeal 261 of 2020) [2021] TZCA 243 TanzLII.

In **Mukisa Biscuit Manufactures Ltd. v. West End Distributors Ltd**

(supra) the court stated that:-

preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion." [Emphasis added].

And in **Mount Meru Flowers Tanzania Ltd vs Box Board Tanzania Ltd**

(supra), the Court of Appeal of Tanzania having endorsed the decision in **Mukisa Biscuit Manufactures Ltd. v. West End Distributors Ltd (supra)** and its previous decision in **Karata Ernest and Others vs Attorney General (supra)** it instructively stated that:

It is therefore expected that a matter raised as a point of preliminary objection should conform to and have qualities of what used to be a demurrer. The foregoing definition even gives us an instance of a preliminary objection, in our view, such as when a plaintiff does not disclose a cause of action to enable the plaintiff to state his claim and the defendant to prepare his defence. In **Karata Ernest and Others (supra)** more examples were listed down, and we reproduce the relevant part;

"At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists of a point of law which has been pleaded, or which arise by dear implication out of the pleadings". Obvious examples include, objection to

the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal has been lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from etc"

Being guided by this principle, I have asked myself whether the point raised by the respondents' counsel is within the purview of the principle above. In the end, I have entertained a negative answer because, as much as I am aware that a preliminary objection cannot be raised from an abstract, it cannot, as per the principle above, be entertained where there are facts requiring evidence to ascertain. The question that counsel herein has invited this court to determine, to wit, whether there is a pending case between the parties and where there is a serious issue between them is, certainly, a factual issue and requires evidence to establish. Thus, it cannot be competently entertained and determined at the stage of preliminary objection else, this court would risk determining the application prematurely.

Even the submission in support of the objection strongly suggests so. The three prerequisites set out in **Atilio v Mbowe** (supra) and which the counsel has sought to rely on in support of his submission is, but a demonstration that his point was prematurely raised as the three prerequisites apply to the determination of the merit of the application.

That said, I refrain from entertaining the point raised by the counsel as it does not qualify as a preliminary point of law and for that reason, I overrule it.

DATED and **DELIVERED** at **DODOMA** this 15th day of March 2023.



A handwritten signature in blue ink, consisting of a stylized, cursive script that appears to be "J.L. Masabo".

J.L. MASABO

JUDGE