IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

MISC. LAND APPLICATION No. 437 of 2019
(Arising from Land Case No. 83 of 2019)

ABDALLAH LAZARO IDDY & 18 OTHERS.....APPLICANTS

VERSUS

GRESIMO KALUGABA.....RESPONDENT

RULING

OPIYO, J.

The above 19 applicants, led by Abdallah Lazaro Iddy are seeking for an injunction order, to restrain the respondent, his agents, workmen and or any other person acting under his instructions, from demolishing and or doing any activities into the suit land, located at Vikawe Bondeni, Pangani Ward, Kibaha District in the Coastal Region, pending the hearing and final determination of the main suit which is land case No. 83/2019. The application is brought under Order XXXVII Rule 1 the Civil Procedure Code, Cap 33 R.E 2019 and supported by the Applicants' joint affidavit.

In appreciation of the factual background of the present application as appear in the records at hand, which is to the effect that, the respondent herein above one Gresmo Kalugaba was involved in a land dispute over the suit vide Land Application No. 50 of 2010. The Judgment over the said suit was delivered by the District Land and Housing Tribunal of Kibaha District

on 31st January 2012, declaring the respondent as the lawful owner of the suit land. In 2013, the respondent who was the judgment creditor in Land Application No. 50 of 2010 filed an application for execution of the decree vide Misc. Application No. 35 of 2013 at the same tribunal which passed the decree. The execution was granted. While executing the decree, it is said that the respondent went to enforce the same in the applicants' land situated at Kimele area, Mpinga Ward, Bagamoyo District. The applicants thereafter successfully filed objection proceedings at Kibaha District Land and Housing Tribunal vide Misc. Land Application No. 248 of 2017. Consequently, the said land was released from the execution of the decree arising from the Land Application No. 50 of 2010. The respondent however went on with the execution of his decree despite the decision given in Misc. Land Application No 248 of 2017; as a result, the applicants' houses built in the suit land were demolished in 10th June 2019. Following that event, the applicants jointly lodged a land Case No. 83 of 2019 and subsequently this application praying for the orders stated herein above.

The application was heard through written submissions. Idd Mrema, learned counsel appeared for the Applicants while the respondent was represented by Erick Gebehard Mhimba.

Mr. Idd Mrema for the applicants, after praying for the joint affidavit of the applicants to be made part of his submissions, argued that, at the moment the suit land is in the hands of the respondent after he grabbed it from the applicants by illegal execution. He argued further that, the applicants are the owners of the disputed pieces of land. Each purchased from different people at different times, in which they erected residential houses and started their

life comfortably with their families until in the year 2017 when the respondent appeared on the suit land with his broker, NOLIC and Company, claiming to enforce a court Decree in the Land Application No. 50 of 2010 and Misc. Application No. 35 of 2016 respectively. Mr. Mrema maintained that, if the matter is left as it is, the respondent may dispose the entire land and if it changes hands will further complicate the matter. Therefore, the intervention of this court is needed at the highest degree to protect the interest of the applicants on the suit land before matters become worse. He argued that, the law is the law is clear that one can seek injunctive order if, the property which is the center of contention is in danger of being wasted, or wrongly sold in execution of a decree or change of its state for that matter. That is the situation in the present application. He therefore prayed for this application to be allowed.

In reply, Mr. Erick Gebehard Mhimba, learned counsel for the respondent after praying to adopt the counter affidavit of the respondent, maintained that, the instant application is totally an abuse of court process as the matter at hand has been overtaken by event. It should therefore, be dismissed with costs.

Mr. Mhimba continued to submit that, firstly, the court was not properly moved by the Applicants. This is the present application as per the Applicants' Chamber summons is moved under Order XXXVII Rule 1 of Civil Procedure Code, Cap 33, R.E. 2002. It should be noted that, Rule 1 of the said Order have sub provisions which are Rules 1(a) & (b). For unknown reason, the Applicants have left it to the court to decide and pick which sub-provision or sub-rule between the two is appropriate to consider for their

application. He insisted that, it is settled that failure or non-citation of specific sub provision of law is fatal in the eyes of law and renders the whole application incompetent (**China Henan International Corporation Group Vs. Salvand K.A Rwegasira [2006] TLR 220)**

On the basis of the above authorities, Mr. Mhimba insisted that, this application deserves to be struck out with costs.

Mr. Mhimba insisted further that the present application has also been overtaken by events. That, the respondent has already completed execution of his decree of the Land Application No. 50 of 2010 in which the dispute of ownership of about 12 acres located at Vikawe Bondeni within Kibaha District was finally determined by the District Land and Housing Tribunal for Kibaha on 31st January 2012. The land in dispute is under the ownership of the respondent. Therefore, injunction to the applicants against the respondent is as good as interfering with the peaceful enjoyment of the suit land by the respondent.

In his rejoinder submissions Mr. Mrema reiterated his submissions in chief and added that, in the case at hand the respondent (Defendant) have done acts falling in all the all sub-rules of rule 1 of Order XXXVII of Civil Procedure Code, CAP 33 R.E. 2019. He has demolished the applicants houses and is about to dispose the suit land, thus, invoking application of the whole rule, justifying non-specification of sub rule. Therefore, the court has been properly moved. In the end he prayed the application to be allowed.

Having gone through the submissions of the parties through their Advocates and also paid a visit on the records at hand, the chamber summons, the joint

affidavit and the counter affidavit attached to the application, the following are my findings as far as this application is concerned. I see the necessary of determining the competence of the application itself before going into its merit.

It is settled that when a party seeks any relief of the court through an application he or she ought to move the court with proper and correct enabling provisions of the law so invoked. By proper and correct provisions, it means the party has made a correct choice and citation of the provisions of the law used in the application. It also entails specifications of the sub provisions where applicable.

In the instant application it was argued by the respondent's counsel in his reply submissions that the applicants failed to move the court properly. The reasons being the failure of applicants' chamber summons to specify the provision which has been used as an enabling provision between Order XXXVII Rule 1(a) or (b) of the Civil Procedure Code cap 33 R.E 2002. The counsel for the applicants on the other hand maintained that, the choice not to specify the particular provision between Rule 1(a) and (b) of Order XXXVII was for the facts that the acts done by the respondent as far the suit land is concerned do fall in both of the said two sub-rules of rule 1.

It is with no doubt that, the two sub-rule of rule 1 above are independent from each other. Each covers specific conditions. Rule 1(a) caters for the protection of the property which is in danger of being wasted, damaged, alienated by any party to suit or the same is likely to suffer loss of value. Rule (1) (b) deals with desire to dispose or remove property with intent to deceive creditors. However, it is fortunate that, non-specification is no longer

an issue in wake of overriding principle, provided that the proper provision has been cited among the other wrong provisions. Therefore, as one other sub rule covers the situation, the application remains competent.

Turning to the merits of the application, the applicants pray for restraint order restraining the respondent, his agents, workmen and or any other person acting under his instructions, from demolishing and or doing any activities into the suit land, located at Vikawe Bondeni, Pangani Ward, Kibaha District in the Coastal Region, pending the hearing and final determination of the main suit which is land case No. 83/2019. This prayer is in contrast with their submission that their houses have already been demolished therefore what they are praying for is restraining possible disposal of the same. This means, what they applied for in the chamber summons have already been overtaken by events. The general rule is that; submission should always be in support of chamber summons. The court cannot grant a novel prayer invented during submissions that is not reflected in the chamber summons, after the one in the chamber summons seemingly being overtaken by events. The proper procedure was to withdraw this application and file a fresh one with new prayers. As that was not done, the only option for the court is to struck it out for being overtaken by events as there is no way it can stand. Consequently, the application is struck out for being overtaken by events.

M. P. OPIYO,

JUDGE

15/12/2020