

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

MISC. LAND APPLICATION NO. 640 OF 2020

(Arising from Application for execution No. 31 of 2020)

FARIDA F. KAGARUKI..... 1ST APPLICANT

FARID AHAMED MBARAK.....2ND APPLICANT

VERSUS

DOMINA KAGARUKI..... 1ST RESPONDENT

TANZANIA BUILDING AGENCY..... 2ND RESPONDENT

ELIUS MWAKALIGA 3RD RESPONDENT

THE COMMISSIONER FOR LANDS..... 4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL..... 5TH RESPONDENT

RULING

Date of Last Order: 12/7/2021

Date of Ruling: 16/07/2021

T. MWENEGOHA, J:

The applicants have moved this Court under the provisions of section 38 (1) & (2) of the Civil Procedure Code, Cap 33 R.E 2002 (henceforth the CPC) seeking for an order that execution proceedings in application for Execution No. 31 of 2020 arising from Land case No. 51 of 2004 and the court of Appeal judgment in Civil Appeal No. 60 of 2016 ordering the Commissioner for lands to resurvey and subdivide plots numbers 105 and 106 to Burundi/Kinondoni, Dar es salaam, is inexecutable in as much as the Commissioner for Lands is not a planning and surveying authority with



powers to resurvey and subdivide the land in Tanzania. The application is supported by an Affidavit of Rosan Mbwambo and was countered by the 1st respondent only, whereby his affidavit was sworn by Mr. Thomas Eustace Rwebangira, Advocate for the 1st respondent.

On 5th May, 2021 my predecessor, Hon. Judge Maghimbi asked the parties to address her on three issues: -

- i. Whether the application is time barred.
- ii. Whether this court have jurisdiction to entertain the matter.
- iii. Whether there is defect on the name of the parties.

Hon. Maghimbi being transferred to another working station, the matter was reassigned to me where it was scheduled for hearing on 12/7/2021. Upon being called for hearing, the applicant was represented by Mr. Hiram Hamza, learned Advocate and 1st respondent were represented by George Ngemela, also learned Advocate, while the 2nd and 3rd respondents was represented by Farajali Mwasanyamba, legal officer.

Before commencing with the hearing, parties addressed the questions raised by Hon. Maghimbi. In submitting the first issue, Mr. Ngemela told the Court that the application is time barred because its fights to stay execution no. 31/2020 which was filed on 20/05/2020 and was served to the applicant on 5/06/2020. He submitted that the Miscellaneous Land Application No. 640/2020 was filed on 10/11/2020. Therefore, the suit is time barred. It was Mr. Ngemela's argument that the law requires that any application in which time limitation is not prescribed, to be filed within 60 days, as provided under part three, item two of the law of Limitation Act. It was therefore his argument

argument that counting from 5/6/2020 the sixty days had already expired by 4/8/2020 and to the day of filing, this application was time barred for 150 days.

Proceeding to the second issue, Mr. Ngemela submitted that the application for stay of execution is unmaintainable as this Court has no jurisdiction or power to stop the order issued by Court of Appeal. He submitted that the application is seeking to vary an order by Court of Appeal in Civil Application No. 60 of 2016 which ordered the 5th respondent (who is the 4th in this application) to make a survey of plot no. 105 and 106 and subdivide them into 3 different plots to be declared inexecutable as the respondent has no authority to resurvey and subdivide the land as ordered. Mr. Ngemela provided that as this is Court of Appeal Order, this Court has no jurisdiction or power to stop such order issued by Court of Appeal.

On the last issue raised regarding the name of the parties, Mr. Ngemela submitted that the name of Farida F. Kagaruki was supposed to be Farida Mbarak, the party that appear in the previous records. He therefore prayed for dismissal of this application with costs.

In reply to the respondent's submission, the advocate for applicant, Mr. Hamza submitted that this application is referred under section 38 (1) and (2) of the CPC, from the wording of the provisions it clearly provides that this application is of an essence of objection proceedings. He submitted that the respondent therefore has misconceived it for an application of stay of execution. He provided that as this is an objection proceeding, the application should be treated as a suit. He pointed out that the marginal notes of S. 38 read as a suit to execution of a decree.



He contended further that the law of limitation on suits is found under Part one, Item 16 of the law of limitation schedule indicating that limitation of a suit is 12 years. Therefore, it was his submission that the matter is not time barred.

Replying on the second issue, it was Mr. Hamza's submission that this Court has jurisdiction to entertain the application because the enabling provision, section 38, gives this Court mandate to hear and determine any question, as it is executing court. In support of this argument, he cited the case of **INTERGRATED PROPERTY INVESTMENT AND ANOTHER V THE COMPANY OF HABITAT AND HOUSING IN AFRICA**, Miscellaneous Commercial Application No. 168 of 2020 where it was held that, the executing Court has jurisdiction in determining whether the decree sought to be executed is legal.

Submitting on the third issue, Mr. Hamza conceded that the name of the 1st applicant differs from the previous record and added that however, this is a clerical error that was committed by the counsel for the applicant. He proceeded to invite this Court to apply overriding objectives principle as provided by section 3A and 3B of CPC Revised edition 2019. It was therefore Mr. Hamza's prayer that this Court dismiss the objections and proceed with hearing of the application on merit.

In rejoinder, Mr. Ngemela submitted that on the objection proceeding, the case is usually filed by a third party and not a party to the case or from original proceedings. He added therefore that the perspective of objection proceeding is misconceived and reiterated his arguments that the application is time barred.

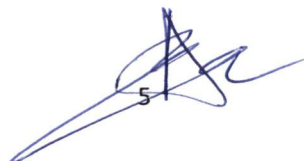
On the issue of jurisdiction, he submitted that overriding objectives cannot be applied blindly where there is mandatory requirement of the law. It was his conclusion that the application is incompetent and should be dismissed.

Having gone through the submissions of both parties, this Court finds the issues for determination to be:

- i. Whether the application is time barred.
- ii. Whether this court have jurisdiction to entertain this matter.
- iii. Whether there is defect on the name of the parties.

I will first determine the second issue on jurisdiction, since it touches the competence of this Court; in case this point has merits. If found otherwise, then I will proceed to determine the remaining issues.

Mr. Ngemela questioned the jurisdiction of this Court in determining the application arguing that this Court has no jurisdiction to grant the applicant's prayer for stay of execution of the Civil Application No. 60 of 2016 which ordered the 5th Respondent to make a resurvey of plot no. 105 and 106 and subdivided them and the Court to order that the Court of Appeal decision is inexecutable in as much 'as the Commissioner for Lands is not a planning and surveying authority with powers to resurvey and subdivide the land in Tanzania.' The reasons for Mr. Ngemela's reservations is due to the fact that this order is an order from Court of Appeal which this Court has no jurisdiction to vary. On the other hand, Mr. Hamza's views is that the court has been moved under section 38 of the CPC which gives this Court mandate to hear and determine any question as executing court.



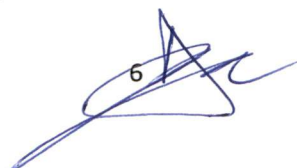
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The records in applicant's affidavit correctly reveals that this Court entered judgment in favor of the 2nd applicant herein in the Land case no. 51 of 2004. The respondent being dissatisfied with the said decision appealed to the Court of Appeal of Tanzania in Civil Appeal No. 60 of 2016 whereby the Court of Appeal reversed the judgment of this Court and ordered the Commissioner for land to resurvey Plot No. 105 and 106 Burundi/Kinondoni, Dar es salaam and subdivide the said the said plots into three equal plots for the applicants, 1st respondents and 3rd respondent. The facts that were undisputed to the respondents.

At this juncture, the Court has to agree with the reasons advanced by Mr. Ngemela that the order challenged here is no longer the order from this Court but rather an order from the Court of Appeal, which this Court has no jurisdiction to vary.

By the Doctrines of Stare Decisis and of Precedent, the Court of Appeal is a superior court in hierarchy to this Court. Moreover, the Court of Appeal reversed the decision of this Court; therefore, it is unprecedented that this Court can step in and correct Court of Appeal's findings against the appealed case (or any other case for that matter). In the case of **JUMUIYA YA WAFANYAKAZI TANZANIA V KIWANDA CHA UCHAPISHAJI CHA TAIFA (1988) TLR 146 (CA)**, His lordship Nyalali CJ (as he then was) had this to say,

*"I accept that a system of law requires a considerable degree of certainty and uniformity and that such certainty and uniformity would not exist if the courts were free to arrive at a decision without regard to any previous decision. I also accept that **subordinate courts are bound by the decisions of superior courts** and that*



a subordinate court of appeal should normally be bound by a previous decision of itself" (emphasis supplied).

The prayer that the applicant is inviting this court to make, that is to order that the decision of the Court of Appeal is inexecutable, is as good as challenging the decision of a superior court. From the foregoing I hold that this court has no jurisdiction to entertain this matter.

Had the decision intended to be challenged was of this court, this application would be proper. I agree with the applicant that this Court is executing Court, and had it been a matter of execution, then the Court would have no doubt in entertaining such, however, what we are asked is to quash and vary a decision of Court of Appeal, which we can't.

Since the issue of jurisdiction has been found merited, I see no need to labor much on the remaining issues. In the upshot, the application is hereby struck out. No order as to costs.

Dated at Dar-es-Salaam this 16th day of July, 2021


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