

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

MISC. LAND APPLICATION NO. 578 OF 2021

SEIF SELEMAN RASHID (As Administrator of the Estate of
ZUHURA SALUM HEMED **APPLICANT**

VERSUS

HALIMA SELAMANI RASHID (as Administratrix of the estate of
SELEMANI RASHID **RESPONDENT**

RULING

Date of Last Order: 17/11/2021

Date of Ruling: 02/12/2021

A. MSAFIRI, J

The applicant Seif Seleman Rashid brought this application under Order XXXIX Rule 5 (1) and (2) of the Civil Procedure Code Cap 33 R.E 2019. He seeks for Order of Stay of Execution of the decree in Land Case No. 32 of 2018, pending the hearing and determination of the intended appeal. The application is supported by an affidavit of the applicant. While filing her counter affidavit, the respondent also filed a Notice of preliminary objection to the effect that;

- i) The application is bad in law (unmaintainable) since the Respondent is not a Decree Holder, hence he cannot execute any decree.

Atts.

- ii) The application is pre-mature as there is no Execution of Decree in Land Case No. 32 of 2018.

The preliminary objection was heard orally whereby on the day of the hearing, the advocate for the applicant Mr. Steven Msuya submitted before the Court that the applicant has noted a preliminary objection raised by the respondent and he prays to withdraw the application. He prayed to withdraw the matter without costs as the parties are relatives.

Mr. Abdul Aziz, Counsel for the respondent vehemently opposed the prayers and submitted that it is trite law that once the preliminary objection is raised, the remedy available is to concede with it and not to withdraw the application. He stated further that since the applicant has noted that the application is defective, then he prayed for the same to be dismissed with costs. He argued that, the costs should be awarded to the respondent as she has incurred expenses in engaging and filing of the necessary documents.

In rejoinder, Mr. Msuya prayed to correct his prayer of withdrawal of the application and prayed for the same to be struck out without costs as the preliminary objection has not been heard on merit.

After hearing both parties, I have observed that the applicant has conceded to the preliminary objections raised by the respondent. It is trite law that once the Preliminary Objection has been raised, the party cannot withdraw the matter as it will amount to pre-empting the objection which has been raised.

Atts.

This position has been set in a number of authorities. It was the position set by the Court of Appeal in the case of **Noel Palangyo vs. Tanga Cement Co. Ltd**, Civil Application No. 4 of 2015 (CAT unreported), whereby the applicant in that case has conceded to the preliminary objection and sought to withdraw his application. The Court of Appeal held that;

"To grant a withdrawal is tantamount to pre-empt a preliminary objection. More so, the remedy of the incompetent application is to strike it out. As such the application is accordingly struck out"

Basing on the above position, I hereby struck out the application with costs.

It is so ordered.



A handwritten signature in blue ink, appearing to read "A. Msafiri", written over a horizontal line.

A. MSAFIRI,

JUDGE

02/12/2021