

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

MISC. APPLICATION NO. 37 OF 2022

(Arising from Land Revision No. 4 of 2022)

ALLY SHOMARI.....APPLICANT

VERSUS

JUMA SAID (Being Administrator of the
Estates of the late JUMA SAID)**1ST RESPONDENT**

MSOLOPA INVESTMENT CO. LTD.....2ND RESPONDENT

Date of last Order: 30.08.2022
Date of Ruling: 30.09.2022

RULING

V.L. MAKANI, J.

This is the ruling in respect of the preliminary objection raised by 1st respondent that:

- (a) *The application for injunction sought by the applicant is incompetent.*
- (b) *That this honourable court has no jurisdiction to entertain the application.*
- (c) *The application is misconceived.*

The matter proceeded by way of written submissions. Mr. Deusdedit M. Kalenga, Advocate from Tanzanite Attorneys drew and filed submissions on behalf of the 1st respondent. Mr. George Joseph Sang'udi drew and filed submission in reply on behalf of the applicant. The matter proceeded ex-parte against the 2nd respondent who never entered appearance despite being duly served.

Mr. Kalenga submitted on the first point of objection that, Order XXXVII Rule 1 (a), 2 (1) and section 68 (c) of the Civil Procedure Code, Cap 33 RE 2019 (the **CPC**) refer to orders upon a suit pending. He said that there is no suit pending in this court. That the application for revision cannot in any circumstances be equated to a suit. He said the proper application ought to have been stay of execution. He insisted that this application is improperly before this court.

On the second point of objection, Mr. Kalenga said that the applicant has preferred Civil Application No.55 of 2022 to the Court of Appeal of Tanzania and the same has been admitted. He said when a matter has been preferred to the Court of Appeal this court ceases to have jurisdiction over the same matter. That Rule 11 (3-7) of the Court of Appeal rules, 2019 gives room for aggrieved party to apply for all orders.

On the third point of preliminary objection, he said that the application for revision is full of unnecessary documents which proves nothing. That the applicant was served with the summons to appear before the Tribunal on execution hearing. That the applicant was aware of

the application as he was dully served. He said that the application at hand lacks merit.

In reply Mr. Sangúdi gave a brief background of the matter. He added that it is trite law that temporary injunction cannot be granted where there is no pending suit. He said that revision qualifies to be a suit as it is a proceeding that is determined by the courts of law. He relied on the case of **Celestine Samora Manase & 12 Others vs Tanzania Social Action Fund and Another, Civil Appeal No.318 of 2019 (CAT-DSM)** (unreported). He said that the High Court has been issuing injunctive orders pending determination of revision proceedings. That even the Court of Appeal has been doing so. He relied on the case of **Stephen Mafimbo vs. Madwary vs Udugu Hamidu Mgeni & Another, Civil Application No.71 of 2011** (unreported). He added that the respondents' view that the applicant could have filed an application for stay of execution rather than injunction is misconceived because the respondent has already started execution process. He said the application for injunction is therefore proper. He said that the first point of preliminary objection lacks merit.

On the second point of objection, Mr. Sang'undi said that the applicant filed Application No.55/17/2022 at the Court of Appeal of Tanzania for extension of time to file an appeal. That at the time of filing the present application there was no application for extension of time pending at the Court of Appeal of Tanzania. He added that the application for revision/injunction emanates from different decisions. That the application for revision/injunction emanates from challenging execution proceedings vide Misc. Application No.1377 of 2021 of the District Land and Housing Tribunal for Kinondoni (the **Tribunal**). However, he said, the application for extension of time emanates from challenging The High Court (Land Division) decision in Land appeal No.176 of 2019. He said that the subjects are different in that the subject for application of revision is Misc. Application No.1377/2021 from the Tribunal and the application for extension of time at the court of appeal is Land Appeal No.176 of 2016 from the High Court Land Division. He said even the prayers sought are different.

On the third point of objection, he said that respondent has failed to elaborate the gist of preliminary objection raised. That the attached copy of summons is an afterthought which cannot be relied by this

court. That the counsel for respondent has attached evidence in the written submission without leave of the court. That at the time there no room for discussing the merit of the application for revision. He prayed for the preliminary objections raised to be dismissed with costs.

The 1st respondent did not file rejoinder submissions.

Before giving its decision, the court sought clarification from the parties on the sequence of the matter as it was not clearly reflected in the submissions. Mr. Seng'udi said the application before the court is for temporary injunction pending the application for revision which is Land Revision No. 04 of 2022. He said the said application for revision emanates from Misc. Application No. 1377 of 2021 of the Tribunal in respect of execution proceedings. He admitted that there is Misc. Application No. 22 of 2022 before the Court of Appeal for extension of time to file leave to appeal to the Court of Appeal against the decision of Land Appeal No. 176 of 2019 (Hon. Maghimbi, J.).

On his side, Mr. Maginga who is also from Tanzanite Attorneys, said the applicant was granted leave to appeal to the Court of Appeal against the decision of this court in Land Appeal No. 176 of 2019 (Hon. Maghimbi, J). Since no application for leave was filed, they

decided to proceed with the application for execution at the Tribunal for which the application for revision emanates.

Having noted the clear version of the sequence of events, the main issue for consideration is whether the preliminary points of objection raised have merit. I shall start with the second point of preliminary objection that this court lacks jurisdiction to entertain the present application.

Mr. Kalange for the 1st respondent submitted that the applicant herein has preferred Civil application No.55/2022 to the Court of Appeal of and it has been admitted. On the other hand, Mr. Seng'undu for the applicant did not controvert the fact that the application for extension of time to file appeal was admitted, he was of the view that at the time of filing the present application, there was no pending application at the Court of Appeal. He also argued that the subject of the present application and that of the extension of time at Court of Appeal are different.

I have given a thorough thought about the application before this court vis a viz that before the Court of Appeal. It is not in dispute that the application for leave to appeal to the Court of Appeal emanates

from Land Appeal No. 176 of 2019 which is the subject of the Execution proceedings at the Tribunal, and which has given rise to the application for revision. In other words, the application at the Court of Appeal is in respect of the same subject matter as the one in revision and a decision in one would affect the other. The argument by Mr. Seng'udi that these are different matters is misconceived because these matters, the execution proceedings included, involve the same subject matter, that is, In that respect, the fact that there is an application for leave to appeal before the Court of Appeal it means this court therefore has no jurisdiction to entertain this application. In the case of **Kennedy Bekubula vs. Edwin Kajumulo, Civil Reference No.7 of 2021**, the Court cited with approval the case of **Matsushita Electric Co. (EA) Ltd vs. Charles Genge t/a G.G Traders, Civil Appeal No.71 of 2001 (CAT)** (unreported). The court further stated that:

".....once a notice of appeal is filed under Rule 76, then this court is seized of the matter in exclusion of the high court except for application specifically provided for such as leave to appeal, provision for a certificate on point of law or execution where there is no order of stay from this court"

In this present case Notice of Appeal by the applicant was filed on 10/06/2021 and a further application for leave to appeal to the Court

of Appeal. Indeed, the lapse by the applicant by not filing the application for leave resulted to the application for execution, but since this court have been ceased the jurisdiction on this matter, any other subsequent application such as revision, stay or otherwise shall not have the forum of this court, but the Court of Appeal. In the premise, this court has no jurisdiction to entertain this application for temporary injunction. Since this point disposes the application, I shall not dwell with the remaining points of objection.

In the circumstances, the second preliminary objection on the point of law is sustained and I proceed to dismiss this application with costs.

It is so ordered.



V.L. Makani
V.L. MAKANI
JUDGE
30/09/2022