

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

MISC. LAND APPLICATION No. 241 OF 2022

(Originating from Misc. Land Application No. 498 of 2021, which arose from Land Case
No. 126 of 2021)

RAYMOND FOCUS MLAYAPPLICANT

VERSUS

FURAHINI JOSEPH LEMA1ST RESPONDENT

RAWASI SECURITY SERVICE LTD.....2ND RESPONDENT

R U L I N G

Date of last Order:22/09/2022

Date of Ruling:30/09/2022

K. D. MHINA, J.

This Application is brought under Chamber Summons made under Section 114(1)(h) and (k) of the Penal Code, Cap. 16 (R. E. 2019) and Sections 68 and 95 of the Civil Procedure Code, Cap. 33 (R. E. 2019).

The orders being prayed are for this Court to;

- 1. Issue summons to the 5th and 6th respondents to compel them to appear in Court to show cause why the Court should not find them liable for contempt of Court.**

- 2. Issue an order for imprisonment of the 5th and 6th Respondents for six months for disobedience of this Court's Order dated 25th April 2022, which directed the 5th and 6th Respondent to vacate the Applicant premises immediately and further restrained the Respondents or any other acting/claiming on his behalf not to interfere with the suit premises Plot No. 548 Block "N" located at Mbezi Beach, Tangi Bovu in Kinondoni District within Dar es Salaam pending determination of Land Case No. 126 of 2021 on merits.**
- 3. To issue an order to compel the 5th and 6th Respondent to abide by and adhere to this Court's order dated 25th April 2022.**
- 4. Any reliefs which this Court deemed fit and just to grant.**
- 5. Costs for this Application.**

The Application is supported by an affidavit disposed of by Raymond Focus Mlay, the Applicant.

The Respondents confronted the Application with two notices of preliminary objection to thus effect that:-

- i. That the Application has been filed without permission of the Director of Public Prosecutions.
- ii. The Court's Jurisdiction has been seized following the filing of Revision No. 460/17 of 2022 in the Court of Appeal against the subject matter in this Application.

The objections were argued by way of oral submissions. The applicant was represented by Mr. Ndanu Emmanuel, learned counsel, while respondents by Mr. Godwin Mwapongo, also learned counsel.

Before venturing into the merits or demerits of the application, a brief factual background is necessary.

The Applicant in this application is the Plaintiff in Land Case No. 126 of 2021, which is currently pending for hearing before this Court. On the other hand, the respondents are among the 6th Defendants in the said land case.

Pending determination of Land Case No. 126 of 2021, the appellant lodged an Application (Misc. Land Application No. 498 of 2021). He sought an order of temporary injunctions to restrain the Respondents, their

employees, assignees, and workmen from acting or causing any interference to property in dispute.

This Court, on 25th April 2022, granted the Application and ordered that:

- i. "The 5th and 6th Respondents to vacate the dispute premise immediately;*
- ii. The respondent, or any other acting/claiming on his behalf not to interfere with the suit premises, plot No. 548 Block "N" located at Mbezi Beach Tangi Bovu in Kinondoni District pending determination of Land Case No. 126 of 2021 on merits".*

Following that decision, the applicant now approaches this Court to, o compel the respondent to adhere to the court order, to appear in court to show cause why the Court should not find them liable for contempt of Court, and three, to issue an order for imprisonment of the respondent for the term of six months.

At the hearing, Mr. Mwapongo, in support of the preliminary objection, submitted that the applicant had cited the provisions applicable in Criminal Proceedings in this application. The provisions cited were Section 114 (1) (h) and (k) of the Penal Code.

Therefore, he argued that under the National Prosecutions Act, the Director of Public Prosecutions (The DPP) Public Prosecutors or any other person(s) appointed or given permission by the DPP might conduct criminal trials.

He further argued that there was no evidence that Mr. Ndanu Emmanuel had even been appointed or permitted to conduct prosecution in this application. Equally, there was no application granted by this Court allowing him to conduct criminal trials.

On the remedy, he argued that since the application was brought without permission from the DPP, it should be struck out.

Regarding the second limb of the objection, Mr. Mwapongo submitted that the Respondents had lodged an Application for Revision (Civil Revision No. 460/17 of 2022) at the Court of Appeal against the decision which triggered this application.

He submitted that since the matter is already at the Court of Appeal, this Court ceased to have jurisdiction to proceed with this application.

To cement his position, he cited:-

- i. Acro Helicopter (T) Ltd vs. V. F. N Jensen (1990) TLR 142;**

- ii. **National Bank of Commerce vs. National Chicks Corporation Ltd and four others**, Consolidated Misc. Commercial causes No. 148 & 161 of 2015;
- iii. **Mtibwa Sugar Estate Ltd & 3 Others vs. Scova Engineering S.PA & Another**, Misc. Commercial Application No. 256 of 2016 and
- iv. **Sauda Juma Urassa vs. Coca-Cola Kwanza Ltd**, Civil Appeal No. 227 of 2018.

He concluded by submitting that in all four cited cases, the Court of Appeal of Tanzania insisted that when there is an action (a matter) at the Court of Appeal, lower courts cease to have jurisdiction except on matters of execution.

In reply, Mr. Emmanuel strongly objected to the grounds of preliminary objection.

On the first ground, he submitted that it does not contain a pure point of law as elaborated in **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] IEA 696**.

Further, he said the counsel for the respondents did not cite any provision of law to back up his submission, rather than mentioning the National Prosecution Act as the basis of his objection.

He went on by submitting further that, before this Court, he filed the Application for contempt of Court under Section 114 of the Penal Code. In that regard, the application is not criminal by its nature because criminal proceedings are governed by the Criminal Procedure Act and not the Penal Code.

Furthermore, contempt of court can even be initiated by the Court itself because it is normally committed against the Court. Therefore, the applicant was informing the Court of what had happened for the Court to take action. Thus, the Application is not a criminal proceeding that needs the Director of Public Prosecution to be involved.

On the second ground, Mr. Emmanuel submitted that the basis that the Court has no jurisdiction because of the mere fact of pendency of an application for revision at the Court of Appeal lacks merit. Even the cited cases were quite distinguishable with the circumstances of this application.

To elaborate further, Mr. Emmanuel submitted that, after this court granted orders for a temporary Injunction, the respondents applied for review. After being dissatisfied with the decision in review, respondents filed revision at the Court of Appeal. On the other hand, the application before this Court is for Contempt in respect of the respondent's refusal to comply with the temporary injunction. Therefore, the Application before this Court has nothing to do with the Revision at the Court of Appeal.

On the cases cited, Mr. Emmanuel submitted that both cases were distinguishable because all elaborated on the situation where the notice of appeal has been preferred to the Court of Appeal and not the application for revision,

Furthermore, appeal and revision are two distinct proceedings, and since no appeal was preferred to the Court of Appeal, the objection lacks merits.

In a short rejoinder, regarding the second limb of preliminary objection, Mr. Mwapongo submitted that the Court of Appeal could be approached in two ways. One by way of appeal, which is initiated by the notice, and two by way of revision which is not initiated by the notice.

The principle laid down in the cited cases is that the lower courts cease to have jurisdiction when there is a matter at the Court of Appeal.

On the first ground of preliminary objection, Mr. Mwapongo rejoined that the counsel for the applicant conceded that the application was preferred before this Court under the Penal Code, the Act which defines a public prosecutor.

He further submitted that the objection was a pure point of law because it raises an issue of locus of the applicant's counsel to lodge the Application. At the same time, he had not been granted a permit from the Director of Public Prosecutions to prosecute.

In determining this application, I find it opposite to start with the second ground of preliminary objection i.e

"The Courts' Jurisdiction has been seized following the filling of Revision No. 460/17 of 2022".

In this matter, it should be noted that there is no dispute that there is a pending application for revision (Civil Application No. 460/17 of 2022) at the Court of Appeal.

The dispute is on two issues:-

First, whether the application which is pending at the Court of Appeal and this application originated from the same proceeding.

Second, whether the pendency of Revision at the Court of Appeal ceases the jurisdiction of this Court.

The first sub-issue will not detain me long after considering the parties' arguments and the record.

After this Court granted interim injunctions against the respondent, they decided to apply for review. Following the dismissal of the review, each party decided to take its course. The Applicant filed this application for contempt of Court while the respondents lodged an application for revision at the Court of Appeal.

Therefore, what triggered these two applications, one at the Court of Appeal and two at this Court, is this Court's interim orders. The applicant wants the respondent to be found liable for contempt of Court for disobedience of the interim orders while the respondents still in pursuit to challenge the interim orders granted. Indeed, it is clear that the source of the application for Revision at the Court of Appeal and the Contempt of Court before this Court is the same.

Therefore, the argument by Mr. Emmanuel that the application before this Court has nothing to do with the application for revision at the Court of Appeal is a misconception.

On the second sub-issue, the tag of arguments was on whether the pendency of revision at the Court of Appeal ceases this Court's jurisdiction.

Mr. Emmanuel's stand was that both the cited cases deal with the pendency of notice or appeal at the Court of Appeal, not revision, and that revision and appeal are two distinct proceedings.

On the other hand, Mr. Mwapongo's stand was the principle laid down in the cited cases: when there is a matter at the Court of Appeal, the Lower Courts cease to have jurisdiction except in execution proceedings. This is because the Court of Appeal can be approached by way of appeal or revision.

The entry point in determining this application I quote the cited Court of Appeal decision of **Aero Helicopter Tanzania Ltd** (Supra), where the Court held that:-

".....once appeal proceeding to this Court, have been commenced, I think that such proceeding do not come within the ambit of Section Section 2 of the Code.

That is to say, in my view they are proceeding in the Court of Appeal and not the proceedings in the High Court to which, terms of Section 2 other and provisions of the Code would apply. Therefore, the High Court could not properly apply Section 95 of the Code for the simple reason that, in my opinion; the proceedings are no longer in Court."

In law, it is settled that a revision is not an alternative to the appeal process. The two remedies are different and should not be invoked in place or in substitution of another. See **Halais Pro-Chemie V Wella A.G** (1996) TLR 269

Though the proceedings are different, as rightly argued by Mr. Emmanuel, in my opinion, the same as when the process of appeal is initiated by the notice even in revision when the revision is commenced at the Court of Appeal, then this court ceased to have jurisdiction.

In **Shell Tanzania Ltd vs. Scandinavian Express Services Ltd**, Misc. Land Commercial Case No. 36 of 2005, High Court Commercial Division (Unreported), it was held that:

"By sheer logic, I think it is both undesirable and impossible for one court to grant orders to prevent the flouting of a matter which is

pending in a matter pending in another Court of concurrent Jurisdiction, let alone a court of Appeal.”

Therefore, in my view, proceeding with an application which is not an application for execution while the proceedings of revision are already commenced at the Court of Appeal is improper.

I am aware that Courts have the power to protect the sanctity of their decisions by way of Contempt but, in doing so, must be guided by the law. The law in this matter is quite clear that there is a matter at the Court of Appeal which makes this Court cease to have jurisdiction.

For the above reasons, I must uphold the second ground of preliminary objection that this Court expressly or inherently lacks jurisdiction to entertain this matter while there is a pending matter at the Court of Appeal.

Having held that this Court ceases to have jurisdiction, the first limb of objection is rendered redundant. I shall not, therefore, delve into considering it.

On the remedy available in this matter, I have the following: -

One, the Preliminary Objection was argued and decided on merits.

Two, the lack of jurisdiction in this matter is temporarily based on the pendency of revision at the Court of Appeal and depends on the result of that revision.

Therefore, in the circumstances, the proper remedy is to struck out the application and let the parties settle their scores first at the Court of Appeal.

Consequently, the application is struck out with costs.

It is so ordered.




K. D. MHINA
JUDGE
30/09/2022