

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 267 OF 2022

DOTO ISODA.....1ST APPLICANT

TEOFRIDA MBOGO (Administratrix of the estate

of the late **AMILIANA KISANGILO.....2ND APPLICANT**

GABCHANDA GIBUYA.....3RD APPLICANT

SUMBA SAI.....4TH APPLICANT

GWISU GUHUMA.....5TH APPLICANT

BARIAD LUKELA.....6TH APPLICANT

MINZA MAIGE7TH APPLICANT

MABUGA NYAMUHANGWA.....8TH APPLICANT

MARKO KIJA MAIGE9TH APPLICANT

VERSUS

AMBOGO ELLY AMBOGO.....1ST RESPONDENT

LONGIDO AUCTION MART & COURT BROKERS LTD.....2ND RESPONDENT

Date of last order: 24/10/2022

Date of ruling: 22/11/2022

RULING

I. ARUFANI, J.

The applicants hereinabove lodged in this court the present application under sections 68 (e) and 95, Order XXI Rule 57 (1), Order XXXVII Rule (1)

and Order XLIII Rule 2 of the Civil Procedure Code [CAP 33 R.E 2019] together with section 51 (1) of the Land Disputes Courts Act [CAP 216 R.E 2019] seeking for the following orders;

- 1. That this Honourable Court be pleased to uplift eviction order delivered on 11th May 2022 of judgment and decree in Land Case No. 35 of 2015 pending notice of appeal filed by the applicants to the Court of Appeal of Tanzania and conclusive determination of Civil Appeal No. 318 of 2021.*
- 2. Costs be provided for*
- 3. Any other order(s) as the honourable court deem proper to grant.*

After the respondents being served with the chamber summons and a joint affidavit of the applicants, the 1st respondent contested the application by filing in the court a counter affidavit accompanied with a notice of preliminary objection which consists of four points of preliminary objections. However, later on the counsel for the first respondent, Mr. Josephat Mabula learned advocate prayed to abandon the 1st, 3rd and 4th points of preliminary objection and prayed to argue only the 2nd point of preliminary objection which is to the effect that;

1. That this honourable court has no jurisdiction to entertain this application.

The applicants filed in the court their reply to the first respondents' counter affidavit and raised therein a preliminary objection on point of law to the effect that: -

1. The jurat of attestation is fatally defective.

The court also raised another point of law suo moto and directed the parties to address it whether it has been properly moved pursuant to the provisions of the law upon which the application is made. While the applicants appeared in the court unrepresented, the first respondent was represented by Mr. Josephat Mabula, learned advocate and the second respondents never appeared in the court. As the applicants are unrepresented the court ordered the afore stated points of law to be argued by way of written submission.

I will start with the point of preliminary objection argued by the counsel for the first respondent which states the court has no jurisdiction to entertain the present application. I will start with the stated point of preliminary objection because as stated in the case of **Fanuel Mantiri Ng'unda V.**

Herman Mantiri Ng'unda & Two Others, [1995] TLR 155 the issue of jurisdiction of a court or tribunal to entertain a matter is basic as it goes to the very root of the authority of a court or tribunal to adjudicate upon cases of different nature. When it is raised it has to be determined first before going to the merit of the matter.

The counsel for the first respondent stated in relation to the stated point of preliminary objection that, as there is a pending appeal before the Court of Appeal, then this court has no jurisdiction over the matter. To fortify his argument, he referred the court to the case of **William Mugurusi V. Stella Chamba** [2004] TLR 406 where it was held by the Court of Appeal that, once proceeding of appeal to the Court of Appeal has been commenced, the High Court cannot properly apply the Civil Procedure Code as the whole Civil Procedure Code is inapplicable. To bolster his stance, he referred the court to the case of **Aero Helicopter (T) Ltd V. F. N. Jansen** [1990] T.L.R 142 where it was held that: -

"Once appeal proceedings to this Court have been commenced by filing notice of appeal, High Court has no inherent jurisdiction under section 95 of the Civil Procedure Code to order stay of execution pending appeal to this court."

In reply the applicants stated in their joint written submission that, the objection raised by the first respondent lacks merits and should be overruled. The applicants conceded that there is a notice of appeal which they filed in the Court of Appeal on 5th May, 2017 and they have filed Civil Appeal No. 318 of 2021 in the Court of Appeal which is still pending there. The applicants argued they have preferred to lodge this application in the court to urge it to lift the order of eviction issued against them by the Deputy Registrar of this court because that order was issued while there was a notice of appeal and appeal already filed in the Court of Appeal.

They referred the court to the case of **Serenity on the Lake Ltd V. Dorcus Martin Nyanda** Civil Revision No. 1 of 2019 where the Court of Appeal quashed and set aside the order of staying execution issued by the Deputy Registrar after being found he had no jurisdiction to entertain the application for stay of execution. They submitted further that the court has jurisdiction to lift the eviction order issued by the Deputy Registrar because it was issued while there is already a notice of appeal and appeal filed in the Court of Appeal.

In rejoinder the counsel for the first respondent contended that the applicants' argument that the court should lift the eviction order because the

Deputy Registrar had no jurisdiction to issue the eviction order is a wrong understanding of the powers of the Deputy Registrar in determination of application for execution. He stated at the time when the order for execution was passed there was no any order for stay of execution which had been issued by the court or application for stay of execution which had been filed in any court.

He argued that, the law is very clear that an appeal shall not operate as a bar to execution and the fact that the applicants did not object the application for execution, their current claims are therefore baseless. He went on submitting that, the decision in the case of **Serenity on the Lake Ltd** (supra) is distinguishable from the matter at hand because the Deputy Registrar issued an order for stay of execution while there was a notice of appeal already lodged in the court of appeal of Tanzania. He stated in the instant matter the deputy registrar did not issue an order of stay of execution but she issued an eviction order.

The counsel for the first respondent reiterated his stance in his submission in chief that, the court has no jurisdiction to entertain the applicant's application as there is already a notice of appeal and appeal filed

in the Court of Appeal of Tanzania. At the end he prayed the application be dismissed with costs.

After going through the rival submissions from both sides the court has found the issue for determination here is whether the court has jurisdiction to entertain the present application. The court has found there is no dispute that the first respondent instituted Land Case No. 35 of 2015 in the court against the applicants claiming the applicants have trespassed onto his land measuring 200 acres situated at Misegese Village, Malinyi Ward within Ulanga District in Morogoro region. The applicants disputed the claims of the first respondent. After full trial, judgment was entered in favour of the first respondent and he was declared is a lawful owner of the land in dispute.

The court has found the first respondent filed in the court an application for execution against the applicants and on 11th May 2022 the court issued an order requiring the applicants to vacate from the disputed land, failure of which the second respondent was tasked to evict them from the suit premises. It is on record of the matter that, prior the execution had been ordered the applicants had lodged Misc. Land Application No. 341 of 2020 in the court seeking for an order of staying execution of the decree of the court but the said application was dismissed for want of jurisdiction.

In the instant application the applicants are praying for an order of the court to lift the eviction order issued by the court on 11th May 2022 pending determination of the appeal currently pending at the Court of Appeal. Paragraph 6 of the applicants' joint affidavit reads that;

"6. In the event of that eviction order proceeds, the applicants will suffer irreparable economic loss and hardship due to the fact that they have no any place for digging and run life unless the order prayed is granted the civil appeal will be rendered nugatory."

The facts deposed in the above quoted paragraph of the joint affidavit of the applicants shows the present application is just a replica of the application filed in the court as Misc. Land Case Application No. 341 of 2020 which was dismissed by the court for want of jurisdiction. Although in the afore mentioned application the applicants were seeking for an order of staying execution of decree of the court and in the instant application, they are seeking for an order of lifting the eviction order but still the court has no jurisdiction to entertain the present application.

The court has come to the stated finding after seeing there are plethora of authorities including the cases of **William Mugurusi** and **Aero Helicopter (T) Ltd** (supra) cited in the submission of the counsel for the

applicant where it was clearly stated that, once a proceeding has been commenced in the Court of Appeal, the High Court has no jurisdiction to do anything in relation to the matter which is pending in the Court of Appeal.

The court has found the applicants urged the court to lift the eviction order issued by the Deputy Registrar of this court on ground that the Deputy Registrar had no jurisdiction to grant the stated order due to the fact that there is a notice of appeal and appeal pending before the Court of Appeal. The court has considered the stated argument but find it is not true that the Deputy Registrar had no jurisdiction to issue the stated eviction order.

That is because the law and specifically Rule 11 (3) of the Court of Appeal Rules, Cap 141 R.E 2019 is very clear that as rightly argued by the counsel for the first respondent pendency of appeal proceedings in the Court of Appeal is not a bar for execution of a decree appealed against to proceed. For clarity purpose the cited provision of the law states as follows:

"In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 83, an appeal, shall not operate as a stay of execution of the decree or order appealed from nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree or order; but the Court, may upon

good cause shown, order stay of execution of such decree or order."

From the wording of the above quoted provision of the law it is apparent clear that pendency of a notice of appeal or appeal in the Court of Appeal is not a bar for execution of a decree to continue. If a party wants to stay execution of a decree which is being challenged in the Court of Appeal the party is required to apply for the stated order in the Court of Appeal and not in this court. In the premises the court has found that, even if the court would have found it has jurisdiction to entertain the present application but the court has found the Deputy Registrar of this court has not committed any wrong which can invite this court to lift the stated eviction order.

The court has gone through the case of **Serenity on the Lake Ltd** (supra) relied upon by the applicants to support their submission but find on the first place is supporting the position already stated hereinabove that, once a notice of appeal has been dully lodged in the Court of Appeal the High Court ceases to have jurisdiction over the matter. On the other hand, the court has found as rightly argued in the rejoinder of the counsel for the first respondent the said case is distinguishable from the present application because it was dealing with the powers of Deputy Registrar of the Labour

Court who by that time was not recognized in the definition of the Labour Court as provided under section 2 of the Labour Institutions Act No. 7 of 2004.

In the strength of all what I have stated hereinabove the court has found the point of preliminary objection raised by the first respondent, that this court lacks jurisdiction to entertain the present application is meritorious. The stated finding caused the court to come to the conclusion that the stated point of preliminary objection is sufficiently enough to dispose of this matter, hence there is no need of continuing to deal with the rest of the points of preliminary objections raised in the matter. In the event the point of preliminary objection raised by the first respondent that the court has no jurisdiction to entertain this application is hereby upheld and the application is struck out with costs. It is so ordered.

Dated at Dar es Salaam this 22nd day of November, 2022




I. Arufani

JUDGE

22/11/2022

Court:

Ruling delivered today 22nd day of November, 2022 in the presence of the 3rd, 6th and 9th applicants in person and in the absence of the rest of the applicants. Mr. Joseph Mbonimpa, learned advocate for the respondents is present. Right of appeal to the Court of Appeal if fully explained.



I. Arufani
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JUDGE

22/11/2022