

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

MISC. LAND CASE APPLICATION NO.11 OF 2022

(Arising from Execution Application No. 31 of 2020 and
Land Case No. 51 of 2004)

ELIUS A. MWAKALINGA.....APPLICANT

VERSUS

DOMINA KAGARUKI.....1ST RESPONDENT

FARIDA F. MBARAK.....2ND RESPONDENT

FARID AHMED MBARAK.....3RD RESPONDENT

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

THE TANZANIA BUILDING AGENCY.....5TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....6TH RESPONDENT

RULING

Date of Last Order: 30. 03.2022

Date of Judgment: 13.04.2022

T. N. MWENEGOHA, J

This application came under section 38(1) of the Civil Procedure Code, Cap 33, R.E 2019. The applicant prayed for the following orders;-

- a) The court be pleased to rule and order that, the directives by the Commissioner for Lands made vide his letter, dated 15th December, 2021 with reference No. LD/231730/07, requiring the applicant to surrender his certificate of title for the purpose of subdivision of

Plots No. 105 and 106 in execution of the Court of Appeal decision in Civil Appeal No. 60 of 2016 is illegal and ultra-vires.

- b) The court be pleased to rule and order that, the Commissioner for Lands directives for the applicant to surrender his certificate of title for the purpose of subdivision of Plots No. 105 and 106 in execution of the Court of Appeal decision in Civil Appeal No. 60 of 2016 is unlawful, because the Court of Appeal decision didn't revoke or nullify the applicant's title.
- c) The court be pleased to rule and order that, the Commissioner for Lands directives for the applicant to surrender his certificate of title to allow subdivision of Plots No. 105 and 106 is unlawful, because such surrender can only be made for the purpose of rectification of land register while in this case, there are no grounds in law to warrant rectification of register and no rectification of register was ordered by the Court of Appeal.
- d) The court be pleased to rule and order that, the Commissioner for Lands directives for the applicant to surrender his certificate of title for the purpose of subdivision of Plots No. 105 and 106 is unlawful, because it does not address the question of compensation for unexhausted improvements over the land by applicant.
- e) That, the Commissioner for Lands directives for the applicant to surrender his certificate of title is ultra-vires and therefore illegal because the commissioner for lands has no powers in law to order surrender of the certificate of title and grounds contained in the directive.
- f) The decree emanating from the court of appeal is not executable in law

- g) The step plan submitted by the 4th respondent to the Court to the extent that it seeks to subdivide the applicant's land and effect take away his title to the land is ultra-vires and unlawful.
- h) Costs of the application.
- i) And any other reliefs as this court may deem fit and just to grant.

However, the 1st respondent through her learned Advocate, George Ngemera objected the instant application to the effect that; -

1. The present application is an abuse of court process.
2. The court has no jurisdiction to entertain the matter.
3. The application is time barred.

The objections were argued by way of written submissions. Advocate George Ngemera appeared for the 1st respondent while the applicant was represented by Advocate Gaper Nyika.

The submissions of Mr. Ngemera in support of the 1st objection were that, in the case at hand, among the prayers and orders sought by the applicant are very similar to those made by the 2nd and 3rd respondents in the previous case, vide Misc. Land Application No. 640 of 2020. The applicant was also a party to that case as a 3rd respondent and he supported the said application.

The said case was decided by the court where it insisted that, it has no jurisdiction to entertain the matter and grant the reliefs prayed, hence the application was struck out. It is therefore an abuse of court process, for the applicant who was among the parties in the previous application and supported the same, to bring before the court, an application with similar

prayers which have already been decided in the previous case, filed by the 2nd and 3rd respondents.

Above all, all the prayers contained in the chamber summons seek to challenge the orders of the Court of Appeal of Tanzania, given in Civil Appeal No. 60 of 2016, with the view of quashing or varying the same. Therefore, this application is baseless and intends to prolong unnecessary litigation, contrary to what was observed in **Patrick Sanga vs Republic, Criminal Application no. 8 of 2011.**

On the 2nd objection, Mr. Ngemera maintained that, the prayers sought by the applicant are against the judgment of the Court of Appeal of Tanzania. The applicant has stated in his chamber summons that, the orders of the Court of Appeal are not executable. This court is bound to follow the said decision. Also, this court being the executing court has no jurisdiction to vary or modify the decree in question rather than enforcing it as stated in **Nkwabi Shingóma Lume vs Secretary General Chama cha Mapinduzi, Civil Appeal of Tanzania at Mwanza (unreported).**

Lastly, on the 3rd objection, it was argued that, the instant case is time barred as the applicant is seeking to stay the execution of proceedings No. 31 of 2020. This case was filed on the 20th May, 2020 and served to the applicant on the 5th June 2020. The order of the Court of appeal subject to execution was issued on the 13th June 2017. This application was supposed to be filed within 60 days as per item 21, Part III of the Schedule of the Law of Limitations Act, Cap 89 R.E 2019. However, the same was filed in the time for the instant application expired on the 13th of August 2017. Even if the time is counted from the date on institution

of the execution proceedings, the time has long expired since August 2020. So, the case is time barred as stated in **National Social Security Fund (NSSF) vs Joseph Philip Msami, Civil Application No. 75 of 2009, Court of Appeal of Tanzania at Dar Es Salaam, (unreported)**.

In reply, Mr. Nyika was of the view that, it is settled that, whether a step taken by a litigant in a matter is an abuse of court process or not is not a matter of law capable of being dealt with in a preliminary objection. It is so because in considering such issue the court will need to look at sets of facts which are said to constitute an abuse of court process. This was the position of court in **Mechmar Corporation (Malaysia) Behard (Liquidation) vs VIP Engineering and Marketing Limited and 3 Others, Civil Application No. 190 of 2013 (unreported)**.

As for the 2nd objection, the applicant was of the view that, the only prayers in the chamber summons which touch on what the Court of Appeal are prayer (f) and (g). He insisted that, these two prayers should be struck out from the chamber summons to allow the court to proceed with the rest of the prayers.

On the 3rd objection, that the application is time barred, the applicant's counsel submitted that, the object is devoid of merits. This application was triggered by the 4th respondent's letter of the 16th December, 2021. Therefore, the cause of action arose at the time when the respondent received the said letter and not prior to that. That the instant application was filed within time.

In his rejoinder, the 1st respondent's counsel insisted that, paragraphs (a), (f) and (g) of the chamber summons are challenging the execution of the order of the Court of Appeal and this court has no jurisdiction over the said matters. That, even if these prayers are struck out, the remaining prayers also revolve around the same issue and seek to challenge the same orders of the Court of Appeal, the best way is for this court to strike out the entire application as it lacks the jurisdiction to entertain matter and grant, the orders sought.

Having gone through the submissions of the parties through their respective counsels, the task ahead of me is to determine as to whether the objections by the 1st respondent have merit or not.

I will start with the 2nd objection which touches the jurisdiction of this court to entertain the matter and grant the prayers sought in the chamber summons. The counsel for the 1st respondent insisted that, the said prayers are not maintainable as owing to the decision of the court given over the same prayers in the previous case, vide Misc. Land Application No.640 of 2020.

Above all, the said prayers are intending to vary or alter the orders given by the Court of Appeal, in Civil Appeal No. 60 of 2016. The applicant on the other hand just insisted that, the only prayers appearing to interfere with the decision of the Court of Appeal are (f) and (g). The counsel for the applicant maintained further that, the remedy available is to strike out the two prayers to pave a way for the court to proceed with the determination of the remaining prayers.

I appreciate the arguments of both counsels in respect of the 2nd objection. It is obvious, basing on the nature of prayers as contained in the chamber summons, this court lacks the powers to entertain the matter. That is to say, this objection has merits as the same touches a very crucial point of law as far as administration of justice is concerned, **see Mukisa Biscuits Manufacturing Co. Ltd. Vs West End Distributors Ltd. (1969) EA.**


I have two reasons to sustain this objection. Firstly, as stated by the 1st respondent's counsel, the application by its nature intends to challenge the orders of the Court of Appeal of Tanzania. The applicant's counsel has admitted on that fact, though was of the view that, there are only two prayers (f) and (g) who appear to be challenging the orders of the court of appeal. To him, the said prayers if struck out, the court will have the powers to proceed with the determination of the application at hand. In my view, this argument by the applicant's counsel is misplaced. Even if those prayers are struck out, we still remain with the second problem that is the court to interfere with administrative duties of land authorities (commissioner for Lands).

Basically, the reason behind the instant application is the latter by commissioner for Lands, "annexure Em3", to the applicant and the 2nd respondents, requesting them to submit the original title for plots 105 & 106 for the purpose of effecting execution of the of the Land Case No. 51 of 2004. If this is the case, this court cannot interfere by the powers and functions of land commissioner with regard to the legality of the said directives.

If the same are illegal or ultra-vires, there is a proper court for the same to be declared so, not this court. In fact, the matter is purely an administrative in nature, not a land matter falling under the jurisdiction of this court. Hence, I would say that, this court truly, lacks the jurisdiction over the case at hand owing to the reasons I have given herein above. To that end, I will not proceed to discuss the remaining two objections, (1st & 3rd) as the findings of the 2nd objection are enough to dispose the entire application.

For the foregoing reasons, I struck out the application with costs.





T.N. MWENEGOHA.
JUDGE
13/04/2022