

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 658 OF 2021

BENEDICTO RWEIKIZA IJUMBA.....APPLICANT

VERSUS

ALEX MSAMA MWITA.....1ST RESPONDENT

BANK OF AFRICA (T) LIMITED.....2ND RESPONDENT

YUSUF SHABANI OMARY.....3RD RESPONDENT

Date of Last Order: 15/12/2021

Date of Ruling: 9/2/2022

RULING

MKAPA, J

The applicant Benedicto Rweikiza Ijumba, has lodged this application by way of chamber summons supported by applicant's sworn affidavit. The application has been preferred under the provisions of Order XXXVII, Rules 2 (1) and 4 and sections 68 (c), (e) and 95 of the Civil Procedure Code, (CPC) Cap 33 [R.E 2019]. Through the said application the applicant has moved this Court to issue an interim injunction order against the respondents restraining the respondents from evicting the applicant and his tenants in a house situated at Plot No. 62 Block 17 Makurumla Street Magomeni Area Kinondoni Municipality in Dar-Es-Salaam (the suit property) pending final determination of **Land Case No. 219 of 2021**. The 1st, 2nd and 3rd respondents opposed the application and filed separate counter affidavits sworn by Mr. Alex Msama Mwita, (1st respondent), Ms Elizabeth Muro (principal officer of



the 2nd respondent) and Yusuf Shaban Omary (3rd respondent). Thereafter, the 2nd and 3rd respondents raised preliminary points of objection on the following grounds;

- i. That the application is untenable in law to the extent that the application is against execution of a decree of this court in **Commercial Case No. of 2020** whose execution proceedings are pending at the High Court Commercial Division.
- ii. That this Court lacks the requisite jurisdiction to entertain this matter as it is moved to issue injunction order against the execution of the decree of the High Court Commercial Division in **Commercial Case No. 50 of 2020.**

At the hearing of the preliminary objection the applicant was represented by Mr. Augustine Kusalika learned advocate while Mr. Andrew Kanonyele learned advocate, represented the 1st respondent. Ms. Kavola Semu, also learned advocate appeared for and represented the 2nd respondent and the third respondent had the services of Mr. Silvanus Mayenga also learned advocate.

Before submitting on the preliminary objection, Mr. Kusalika made a prayer for an order for maintenance of *status quo* in respect of a house (subject matter of this suit) situated at Plot No. 62 block 17, Makurumla Street Magomeni Area, Kinondoni Municipality, Dar Es Salaam Region. That; the applicant was to be evicted on 27th November 2021 while the matter was still pending in this Court in **Land Case No. 219 of 2021** on the same property but different claim relief. The counsel for the 1st respondent did not object to the prayer. However, the counsels for the 2nd and 3rd respondents vehemently objected to the prayer to the effect



that, the prayer should not be granted as the preliminary objection raised touches on the issue of jurisdiction. Procedurally, I had to determine the preliminary objection first, before considering the application on its merits. Hence the prayer for *status quo* to be maintained was not accepted.

Submitting in support of the 1st preliminary objection Ms. Kavola submitted that this Court lacks jurisdiction to entertain the application as it is moved to issue a temporary injunction order against the execution decree issued by the High Court, Commercial Division with a concurrent jurisdiction in **Commercial Case No. 50 of 2020**. It was Ms. Kavola's further argument that, the applicant could have filed objection proceedings at the High Court Commercial Division which had issued an eviction order or file application for revision in the same Court rather than filing a fresh suit in this court (High Court, Land Division). It was Ms. Kavola's view that, since the execution proceedings were on going at the High Court Commercial Division and the applicant was not a party to **Commercial Case No. 50 of 2020**, filing this application tantamount to abuse of court processes. She finally prayed for the application to be struck out with costs.

Submitting in support of the second point of preliminary objection, it was Mr. Mayenga's counsel for the 3rd respondent submission that, indeed this court lacks the requisite jurisdiction in entertaining the instant application as argued by learned counsel for the 2nd respondent as the court is moved to issue a temporary injunction order against the execution of the decree of the High Court Commercial Division in **Commercial Case No. 50 of 2020**. Furthering his argument he referred to paragraph 5 of the applicant's affidavit which acknowledged

A handwritten signature in black ink, appearing to be 'B. S.', is located at the bottom right of the page.

the existence of **Commercial Case No. 50 of 2020** filed at the High Court Commercial Division from which the instant application stems. Mr. Mayenga went on submitting the fact that, all matters relating to execution ought to be dealt with the prosecution court. That, it is clear from the application and even the main suit, the applicant is claiming interest on the property situated at Makurumla Street Magomeni area, thus the court which ought to have dealt with the execution is the High Court Commercial Division. In support of his contention he cited the provisions of Order 21 Rule 57 (1) of the CPC which provides for means of challenging execution through filing of objection proceedings. He also joined hands with the counsel for the 2nd respondent the fact that, the filing of the instant application is nothing less than an abuse of court processes. He finally prayed for the application to be struck out for being vexatious.

Countering the submission by both counsel for the 2nd and 3rd respondents respectively, it was Mr. Kusalika's submission that, none of the 2nd and 3rd respondents' counsel demonstrated the nature of the judgment and decree of the **Commercial Case No. 50 of 2020** of the High Court Commercial Division. That; since the High Court Commercial Division entered a consent judgment between the 1st, 2nd and 3rd respondents herein, the compromise was not met between them.

He submitted further that, the applicant in the main suit (**Land Case No. 219 of 2021**) is challenging the decision of the consent judgment in order for it to be nullified as it was allegedly obtained fraudulently hence section 38 (1) (2) (3) and Order 21 Rule 57 (1) of the CPC referred to by the 2nd and 3rd respondents' counsels do not apply to the instant application. In support of his contention he relied on the case of

Mohamed Enterprises (T) Limited Vs. Masoud Mohamed Nasser (Civil Application No. 33 of 2012) where the Court of Appeal at page 16 held that;

"the only remedy for a person who wishes to challenge a compromise decree on the ground of fraud is to file a suit for setting aside the said decree."

It was his further argument that, the applicant is challenging the consent judgment entered between the 1st, 2nd and 3rd respondents and therefore this Court has jurisdiction to entertain it and not the High Court Commercial Division. He also cited the case of **Said Salim Bakhressa & Co. Vs VTP Engineering and Marketing Ltd, 1966 TLR 309**, in which the judgment had been obtained fraudulently and the execution was set aside.

He further submitted that both counsels' failed to demonstrate the nature of the dispute hence their submission is devoid of merit for lack of authority in support of their submissions. He prayed for the preliminary objection to be overruled with costs and the matter be determined on merit.

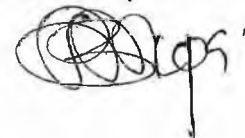
Re-joining the submission Ms. Kavola submitted that, the decree emanated from the consent judgment referred to by Mr. Kusalika counsel for the applicant is the one subject to execution. That, under the requirement of section 38 (1) of the CPC, execution can only be challenged at the same court from which the decree was issued. She challenged the cases referred to by Mr. Kusalika as distinguishable from the one at hand since parties who prayed for the said compromise decree to be set aside were the same when the decree was issued,



unlike in the instant case where the applicant was not a party to the suit (**Commercial Case No. 50 of 2020**) thus he cannot knock the door of another court to seek remedies which could have been obtained from the executing court. She maintained his stance that this court lacks jurisdiction and prayed for the application to be struck out.

On his part Mr. Mayenga re-joined and submitted that the submission by the applicant's counsel is an admission that the applicant is seeking to challenge and nullify the decision of the consent judgment. That; the decision in the case of **Mohamed Enterprises** (*supra*) specifically addressed the fact that a judge cannot reopen a matter which had been concluded and a decree drawn up by his fellow judge of the High Court. He reiterated his stance to the effect that, the remedy sought by the applicant could have been obtained at the executing court as per the provisions of Order 21 Rule 57 (1) of the CPC. As regards the case of Bakhressa (*supra*) Mr. Mayenga submitted that, it involved a dispute between the same parties and not a third party as in the case at hand. Responding to the issue of reliance on annexures he submitted that, the same is legally acceptable so long as the annexures have not been objected as to their contents nor credibility. He finally maintained that this application be struck out with costs.

Having heard the submissions of the learned counsel for the applicant and also that of the learned counsels for both the 1st, 2nd, and 3rd respondents respectively, the question to be determined is whether the preliminary points of objection raised by the 2nd and 3rd respondents' counsels have merit.



I find it necessary at this juncture to briefly state the necessary facts that led to the present application.

On 26th April 2016, the 1st respondent mortgaged his house situated at Plot No. 62 Block 17 Makurumla Street Magomeni Area, Kinondoni Municipality in Dar es Salaam ("the suit property") to the 2nd respondent. On 7th August 2019 as contended by the applicant in his sworn affidavit, the applicant purchased the suit property from the 1st respondent. Following a default by the 1st respondent to repay the loan amount the 2nd respondent instituted a suit at the High Court Commercial division, in **Commercial Case No. 50 of 2020** and a consent judgment was delivered on 5th July, 2021. The 3rd respondent herein (the 2nd defendant in **Commercial Case No. 50 of 2020**), promptly, filed for execution of decree against the 1st respondent herein on 12th October 2021 while attaching the suit property as part of the execution. The High Court Commercial Division made orders and appointed court broker to execute the decree which involved the 1st respondent to vacate the suit premises. This triggered the applicant to file the main suit (**Land Case No. 219 of 2021**) and this application.

As the suit property is part of the execution order given by the High Court Commercial Division with the same jurisdictional powers with this Court (High Court Land division), the question to be asked is whether this application is tenable before this Court. My answer is emphatically in the negative. I am saying so because the applicant has filed the instant application for interim injunction restraining the order of eviction to be executed on the suit property which was the subject matter in **Commercial Case No. 50 of 2020** of which the High Court Commercial Division which has the same jurisdictional power as this



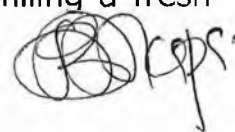
Court had already ordered execution of the decree on the said suit property.

Faced with similar situation in **Quality Centre Ltd & Another Vs. PriceWaterHouse Coopers (PWC) & 3 Others, Misc. Land Application No. 44 of 2019**, this Court (**S M Kulita J**) observed the following;

"The way I can see the nature of this application, this court cannot grant the order of maintaining status quo in respect of the suit property while the High Court Commercial Division has already made a decision for the same property. If the applicants are aggrieved with the decision of Commercial Court in respect of the suit premise, they have to seek for other remedies like knocking the door of the Court of Appeal, applying for review before the same court (Commercial Court) or the 1st applicant (Quality Centre Limited) who was not a party at Commercial Court filing on objection proceedings there at."

I am persuaded with the view taken by my learned brother

Kulita J; for the reason that, in the instant matter the suit property was the subject matter in Consent Judgment in **Commercial Case No. 50 of 2020** which the Court had ordered execution of the decree. Since the suit property is subject to the execution decree the appropriate remedy would have been for the applicant to knock the doors of the High Court Commercial Division and file objection proceedings rather than filling a fresh



suit in this court (High Court Land Division). **Order XXI Rule 57** of the CPC explicitly states that;

"57-(1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector and in all other respects, as if he was a party to the suit."

Guided by the above legal position, and for the reasons discussed above, I find the preliminary objection raised by the 2nd and 3rd respondents have merit and are hereby sustained. Consequently, the application is struck out. There shall be no order as to costs.

It is so ordered.

Dated and Delivered at Dar Es Salaam this 09th Day of February 2022.


S.B MKAPA
JUDGE
9/02/2022

