

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

MISC. LAND APPLICATION NO.277 OF 2021

(Originating from Land Appeal No.169 of 2019)

MERY MEHI MASONG..... APPLICANT

VERSUS

NATIONAL MICROFINANCE

BANK PLC.....1ST RESPONDENT

DOLPHIN GENERAL BUSINESS

ENTERPRISES COMPANY LIMITED.....2ND RESPONDENT

LEONARD DOMINICK RUBUYE.....3RD RESPONDENT

RUBUYE AGROBUSSINESS

COMPANY LIMITED.....4TH RESPONDENT

RUTH KAPAICO, CHIEF EXECUTIVE OFFICER

OF NATIONAL MICROFINANCE BANK PLC...5TH RESPONDENT

NASSORO SHABANI, MANAGING DIRECTOR

OF ADILI AUCTION MART LIMITED.....6TH RESPONDENT

YONO STANLEY KEVELA, MANAGING DIRECTOR

OF YONO AUCTION MART LIMITED.....7TH RESPONDENT

VICTOR KIKWASI, ADVOCATE

OF LAW ASSOCIATES.....8TH RESPONDENT

ROSAN MBWAMBO, MANAGING PARTNER

OF LAW ASSOCIATES.....9TH RESPONDENT

Date of Last Order: 24.02.2022
Date of Ruling: 21.03.2022

RULING

V.L. MAKANI, J

The applicant is MERY MEHI MASONG, and she is seeking for the following orders that:

1. *This Honourable court be pleased to issue a summons to the 5th, 6th and 7th respondents to appear in person and show cause as to why they should not be held in contempt for disobeying the lawful court order issued by honourable Judge F.K Manyanda on the 4th August 2020.*
2. *That this honourable court be pleased to issue a summons to the 8th and 9th respondents to appear in person and show cause as to why they should not be held in contempt for misleading the honourable court on the 19th April 2021.*
3. *That honourable Court be pleased to hold that the 5th 6th and 7th respondents has committed contempt of court by obeying the lawful order of the court issued by honourable Judge F.K Manyanda on 4th august 2020 and punish them in such manner as the honourable Court shall deem fit.*
4. *The honourable court be pleased to hold that the 8th and 9th respondents committed contempt of the court by misleading the honourable court on the 19th April 2021 and punish them in such a manner as the honourable court shall deem fit.*

5. *This honourable court order that all respondents be purge the contempt which has been committed by reversing and nullifying the unlawful action which was conducted on the 10th May 2021.*
6. *This Honourable court order all the respondents to henceforth obey and comply with the court order issued on the 4th august 2020 until and unless vacated by the honourable court.*
7. *This honourable court be pleased to issue any other orders as it may deem fit to grant.*
8. *Costs of and incidental to this application be borne by the respondents.*

The application is made under Order XXXVII Rule 2(2) and section 95 of the Civil Procedure Code CAP 33 RE 2019 (the **CPC**) and section 124 of the Penal Code CAP 16 RE 2019 (the **Penal Code**) and any other enabling provisions of the law.

The application is supported by affidavits sworn by the applicant in person, Musa Kiobya, Advocate and Zena Martin Mmasy, a housekeeper of the applicant. Advocate Victor Kikwasi filed counter affidavit in opposition on behalf of the 1st, 5th, 8th and 9th respondents. The remaining respondents did not file their counter-affidavits though they were duly served.

The matter proceeded by way of written submissions. Mr. Francis Stolla, Advocate drew and filed submissions on behalf of the applicant. Mr. Nsangizyo Zilahululu, Advocate drew and filed submissions in reply on behalf of the 1st, 5th, 8th and 9th respondents. The matter proceeded ex-parte against the rest of respondents.

Submitting in support of the application Mr. Stolla gave a brief background of the matter. He said that in this application he is guided by four issues:

The first issue is whether there was a court order. He said there was an order by this court issued on 4th August 2020. That the ruling in Misc. Application No.738 of 2019 delivered on 4th August, 2020 ordered temporary injunction restraining the 1st and 2nd respondents and their agents from auctioning or transfer in any manner the applicant's matrimonial properties situated Makambako Township and Tegeta, Kinondoni, Dar es Salaam.

The second issue he said is whether the respondents has contravened and disobeyed the said order. On this he argued that there was an auction which took place on 8th May 2021 and 10th May 2021 while

there was an order for injunction still pending. He said the auction was by the 7th respondent under the instruction of the 1st respondent in respect of the applicant's matrimonial properties namely, Plot 100, Block B, Mji Mwema area, Makambako Township, Plot 302 Block E, Plot 314 and Plot 302 Block E situated at Mwembetogwa Makambako area and Plots 100 and 98 Block B, Majengo Makambako Township while an order for injunction was still pending. (the **suit properties**).

That the 2 and 6th respondents threatened to auction the suit properties while the 7th respondent went on with the auction. He said the 2nd, 6th and 7th respondents having failed to file their counter affidavits means that they are not in disputes with the claims against them while the 1st, 5th, 8th and 9th respondents have not denied the fact that auction was conducted on that dates after the said order was made. He thus said, the act of instructing the 7th respondent to auction the suit properties was disobedience of the lawful order of the court. that at the time of auctioning there was no other order which unfastened the previous order. Counsel relied on the case of **Zein Mohamed Bahroon vs. Reli Assets Holding Company Ltd (RAHCO)**, Land application No.307 of 2017 (HC-Land Division)(unreported).

On the third issue of whether the respondents wilfully disobeyed the lawful orders, Mr. Stolla said the order was granted lawfully by the court with the condition until final determination of Land Case No.132 of 2019. That it is not disputed by respondents knowing the court order as evidenced by the counter affidavit sworn by Victor Kikwasi in particular paragraph 7 who agreed on the existence of the order and the Land Case No.132 of 2019 is still underway. That it is not disputed by the respondents to have known the existence of the court order which was not restrictive to 6 months limitation as per Order XXXVII of the CPC but the condition imposed by this court was an order of injunction awaiting hearing and determination of Land Case No.132 of 2019 to its finality. That the injunctive order dated 4th August 2020 still existed and Land Case No.132 of 2019 is still undecided.

Regarding the issue of the deserved punishment, Counsel said that it is not in dispute that the 1st, 2nd, 5th, 6th, 7th, 8th and 9th respondents proceeded to act in total disrespect of the court's order dated 4th August 2020. That the said respondents committed contempt of the court by disobeying the lawful order issued by Hon. Judge Manyanda on 4th August 2020 and to hold the 8th and 9th respondents committed to contempt of court by misleading the court on the 19th April 2021.

He said in that regard, the applicant has shown sufficient reasons to move the court not to proceed to pass the appropriate order. He further relied on the case of **Zein Mohamed Bahroon** (supra). Counsel prayed for this court to order the 1st, 2nd, 5th, 6th, 7th, 8th and 9th respondents to purge the contempt which has been committed by reversing and nullifying the unlawful action which was conducted on the 10th May 2021 and the court to order all respondents to obey and comply with the court order issued on 4th August 2020 until vacated by this court.

In reply Mr. Nsangizyo Zilahululu, prayed to adopt the contents of of the affidavit of Victor Kikwasi for the 8th respondent. He also adopted the four issues raised by the applicant. Counsel said that the present application is an abuse of the court process since the alleged pending Land Case No.132 of 2019 was withdrawn on 19/05/2021. He said the withdrawal of the said Land Case No. 132 of 2019 was before filing of this application. He said that the order issued in Land Application No.738 of 2019 has never been varied. That the withdrawal of Land Case No.132 of 2019 put the existence of the order in Misc. application No.738 of 2019 to an end. That the order in Misc. Land Application

No.738 of 2019 did not mean to exist pending determination of Land Case No.169 of 2019, otherwise the order would have said so.

Regarding the first issue submitted by the applicant's counsel, Mr. Zilahululu reiterated the above submissions and added that by virtue of Order XXXVII Rule 3 of the CPC the Order in Misc. Land Application No.738 of 2019 is no longer existence. That the CPC provide six months in which temporary injunction can exist. That the proviso to Order XXXVII Rule 3 allows extension of the period for a further six months. He said that the first six months lapsed on February 2021, the second six months lapsed on August 2021. Counsel said that no extension has ever been sought and granted.

On the second and third issues, Counsel reiterated the submissions on the first issue that no lawful order of the court has been disobeyed by either of the respondents because the existence of the Order in Misc. Land application No.738 of 2019 came to an end following withdrawal of Land Case No.132 of 2019. He added that the complaint by the applicant being criminal needs the applicant proof beyond reasonable doubt. He pointed out that neither in the affidavit nor in the submissions does it show that the applicant proved who and how

the alleged order was disobeyed. He said the applicant needs to present evidence satisfying the court that the complained auction was conducted and the suit premises were sold at the alleged auction. That none of the two has been proved. He said that since there are several respondents in the present application, a proof of the auction and sale of the suit premises alone is not sufficient to establish liability of all respondents rather the involvement of each respondent which the applicant has failed to prove. He concluded that since the applicant has failed to prove one and/or all the issues then the application ought to be dismissed with costs.

In rejoinder, Mr. Stolla said that in the Land Case No.132 of 2019 there was no any order for injunction restraining the 1st and 2nd respondents along side their agents or people acting on their behalf from auctioning or disposing the suit properties. Despite that he said, it was an error that does not change the reality of which the respondents were bound to obey. He said that in that case the parties were not the same as in the current suit. He said that the same order originated from land case No.169 of 2019. That the errors are merely clerical which can be corrected. He added that Hon. Judge Manyanda has never dealt with Land Case No.132 of 2019 while application

No.738 of 2019 clearly originates from Land Case No.169 of 2019 in which the respondents cannot escape from being punished. He insisted that Order XXXVII Rule 3 of the CPC cannot be applied since the order itself was directing to survive until final determination of the suit. That necessary steps were not exhausted by the respondents before demolition of the applicants building. He said that the 2nd ,6th and 7th respondent's failure to file counter affidavit presupposes that they do not oppose the application. Counsel further reiterated his prayers in the main submission.

The main issue for determination is whether this application has merit.

First and foremost, I wish to clear the issue which the applicants Counsel claim to be a clerical error, that is, whether Misc. Application No.738 of 2019 originate from Land Case No. 169 of 2019 or Land Case No.132 of 2019. Going through the records it is apparent that Misc. Land application No.738 of 2019 originates from Land Case No.132 of 2019. The present application originates from Land Case No. 169 of 2019. The argument by Mr. Stolla that there was a clerical error when Hon. Judge Manyanda recorded the order is misplaced. In respect thereof, the order of this court in Misc. Land Application No.

728 of 2019 by Hon. Judge Manyanda, was correct that the injunction order was pending determination of Land Case No.132 of 2019.

Back to the merit of this application, it is now not in dispute that temporary injunction in Land application No.738 of 2019 was issued pending determination of Land Case No.132 of 2019. The said order was issued under Order XXXVII Rule 1 (a) and rule 4 of the CPC.

According to Rule 3 of Order XXXVII the order of temporary injunction is a judicial notice meant to last only for 6 months and the court may extend such period upon application by the party. Rule 3 to Order XXXVII of the CPC provides:

"In addition to such terms as the keeping of an account and giving security, the court may by order grant injunction under rule 1 or rule 2 and such order shall be in force for a period specified by the court, but not exceeding six months:

Provided that, the court granting the injunction may, from time to time extend such period for a further period which in the aggregate shall not exceed one year, upon being satisfied, on the application of the holder of such court that the applicant has diligently been taking steps to settle the matter complained of and such extension sought is in the interest of justice, necessary or desirable."

Both Counsel for the applicant and respondents in this application are not disputing the fact that the applicant has never at any time attempted to apply for the court to extend time for the order of temporary injunction issued in Misc. Land Application No.738 of 2019. What Advocate Stolla for the applicant is trying to defend is that the temporary injunction in Misc. Land Application No.738 of 2019 which was issued pending the final determination of Land Case No.132 of 2019, which is allegedly Land Case No.169 of 2019 was still operative at the time of the alleged auction.

In my considered view, this is not the position. Firstly, Mr. Stolla has not told this court how Land Case 132 of 2019 changed and is now Land Case No. 169 Of 2019. In his main submissions Mr. Stolla has all along being referring the injunctive Order in Misc. Land 738 of 2019 as originating from Land Case No. 132 of 2019. Even the annexures to the affidavit of Mussa Kiobya reflect that the affidavit, ruling and drawn order of the court in Misc. Land Application 738 of 2019 originates from Land Case No. 132 of 2019. No issue was raised to the fact that there was a clerical error and that Land Case No. 132 of 2019 changed to Land Case No. 169 of 2019. This argument was only raised by Mr. Stolla in the rejoinder submissions when Mr. Zilahululu

raised the issue that Land Case No. 132 of 2019 was withdrawn and hence the death of the injunctive order in Misc. Land Application No. 738 of 2019. In any case, it is a known practice of the court that reference numbers of suits filed in court do not change out of the blues. For instance, even where the Court of Appeal orders a re-trial the the High Court file upon its return would still bear the same reference number. So, where there is a totally different reference number in a suit it means that the previous suit was either withdrawn, dismissed or struck out. In the circumstances, the issue that the case changed number is kind of a strange phenomenon in the known court procedure unless there was an order to that effect. The court took a judicial notice and checked its record and found that Land Case No. 132 of 2019 was indeed withdrawn on 19/05/2021 before this application was filed on 11/06/2021. In that respect therefore, the injunctive order in Misc. Land Application No. 738 of 2019 did not survive it was invalidated by the withdrawal of the main suit. In view thereof, there was no order that was disobeyed as argued by the applicant and therefore this application has no merit.

Further, and without prejudice to the above, the wording of Order XXVII Rule 3 of the CPC is very clear and in mandatory terms that the

order of temporary injunction shall be in force for the period specified by the court but not exceeding six months. The statement *pending determination of the main suit relied* upon by Mr. Stolla is conditional to the renewal of the order of injunction upon expiry of six months which in aggregate shall not exceed one year (proviso to Rule 3 of Order XXXVII of the CPC). In other words, Order XXXVII Rule 3 of the CPC provides that the order of injunction shall be in force for only 6 months, and upon application the court shall extend the period to another six months and shall not exceed one year. Failure to make an application for extension of the life span of the injunctive order renders the said order inoperative. Thus, even if we had agreed with Mr. Stolla that Misc. Land Application No. 738 of 2019 originates from Land Case No. 169 of 2019 and therefore relates to this application, still the injunctive order in Misc. Land Application No. 738 of 2019 would not be operative for failure by the applicant to apply for extension of its life span in court after the expiry of the first six months. In that respect, there was therefore no order to restrain the respondents in dealing with the suit properties unless the applicant so applied to the court, in which case the applicant never bothered to apply for extension of the injunctive order. In the result any alleged auction of the suit property by respondents was not contempt of the

court as there was no valid order by the court at the alleged time of auctioning.

Subsequently, and for the reasons explained above, the prayers by the applicant in the chamber summons cannot stand and the application is dismissed with costs for lack of merit.

It is so ordered.


V.L. MAKANI
JUDGE
21/03/2022

