

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

**MISC.LAND APPLICATION NO. 55 OF 2022**

**MLLATIE RICHIE ASSEY.....APPLICANT**

**VERSUS**

**JACKLINE HAMASON GHIKAS.....1<sup>ST</sup> RESPONDENT  
REGISTRAR OF TITLES.....2<sup>ND</sup> RESPONDENT**

Date of Last Order: 12.04.2022  
Date of Ruling: 06.06.2022

**RULING**

**V.L. MAKANI, J**

This is the ruling in respect of the preliminary objection raised by the  
1<sup>st</sup> respondent that:

- 1. This honourable Court has no jurisdiction to entertain the matter.*
- 2. The application is frivolous in law for contravening the order of the court dated 07/01/2022.*

The objections were argued orally by Mr. N. Nkonko, Advocate for the  
1<sup>st</sup> respondent, and Mr. Novatus M. Mhanga, Advocate for the  
applicant.

Mr. Nkonko on the first point of objection said that the applicant in his affidavit at paragraph (12) (d) declared that there is no order for stay. That the affidavit was sworn on 10/02/2022 and filed on 17/02/2022. On the date of filing the applicant was of the knowledge that the Court of Appeal on 11/02/2022 had stayed the execution of decree of Kisumu court. He said that by the order of court of appeal which emanates from Kisumu court, which is subject of this court, it would be prejudicial for this court to proceed with this application as the pending appeal would be nugatory or this court would be seen to be taking the powers of the Court of Appeal. He said the order of the court is annexed to the counter affidavit of the respondent. He said that it is a matter of practice and law that where there is a matter before the Court of Appeal, the lower court ceases to have jurisdiction to entertain any matter which is subject of the appeal at the Court of Appeal which has ordered stay. He argued the court to strike out this application until adjudication of the matter pending at the Court of Appeal.

On the second limb of objection, Mr. Nkonko said that there was Misc. Land application No.750 of 2021. That, as rightly sworn by the applicant in the affidavit there was an objection raised *suo motto* on

07/01/2022. The objection, he said, was whether the application was properly filed as to the joinder of necessary party. He said, Counsel Mr. Hurbart, conceded to the issue and withdrew the matter. He said the applicant has filed this application without observing the order of the court of joining the Attorney General. That failure to join him renders the application incompetent. That under section 6 (4) of the Government Proceedings Act as amended, the Attorney General shall be joined as a necessary party where government is at issue. He said the Registrar of Titles is a department of the Ministry of Lands and therefore filing an application without joining the Attorney General is contrary to section 6 (3) of the Government proceedings Act. That the non-joinder vitiates the proceedings. He relied on a number of cases, one being that of **Wambura Maswe Karera & 5 others vs the village Council of Mori, Civil case No.5/2020 (HC-Musoma)** (unreported). He said that it is mandatory that the Attorney General has to be impleaded. He prayed for the application to be struck out for failure to join the necessary party to the proceedings.

In reply, Mr. Mhanga said this court has jurisdiction to entertain this application because jurisdiction is the creature of statute as vested

under section 78 (4) of the Land Registration Act, CAP 334 RE 2019. He said the section gives this court power to summon whoever has entered caveat to show cause why the caveat should not be removed or otherwise and that is subject to owner of the estate. He said the applicant is the owner of the estate by virtue of **Annexure MRA-1** of the affidavit which is the Certificate of Title bearing the name of the applicant. He said since it is the 1<sup>st</sup> respondent who has entered the caveat against the applicant's property, the applicant has thus exercised his right for an order that the caveat be removed. He said the order of stay by the Court of Appeal relates to judgment and decree of the High Court in Matrimonial Appeal No.53 of 2021. That the said order does not relate to the removal of the said caveat. That existence of the said order for stay does not oust the jurisdiction of this court to entertain present application. That the order is not final but ex-parte pending hearing inter-partes. He said the affidavit to this application was sworn on 10/02/2022 and the order of the Court of Appeal was issued on 11/02/2022 and it was ex-parte. He reiterated that the stay order does not oust this court from entertaining the application. He relied on the case of **Elizabeth Jeremia vs. Mohamed Salum Mahdi, Execution No.47 of 2021 (HC-DSM)** (unreported)

Mr. Mhanga argued further that, the issue before Court of Appeal is matrimonial matters and does not relate to the caveat which has been filed by the 1<sup>st</sup> respondent, therefore this court has jurisdiction to entertain this application.

On the second limb of objection, Mr. Mhanga said that the order of this court in Misc. Land application No.750 of 2021 has been attached to the affidavit as **Annexure MRA-7**. It states that the application has been withdrawn with leave to refile. That the order does not state that the Attorney General should be joined as a party or that there was non-joinder of the Attorney General. He said that joinder of Attorney General has always been on suits against the government but the matter before this court is an application and not a suit. That as per Order IV rule 1 (1) of the Civil Procedure Code Cap 33 RE 2019 (the **CPC**) a suit has to be instituted by a way of plaint. That the matter at hand is an application by Chamber Summons supported by an affidavit and therefore it is not a suit. He said the Attorney General, is not a necessary party. He said if applications require the joining of the Attorney General, then Government Proceedings Act would have expressly stated so. He said it could have been worse if the Registrar

of Titles was not made a party. He said that the Court of Appeal in the case of **Ngerengere estates Co Ltd vs Edina William Sitta, Civil Appeal No. 2019/2016 (CAT-DSM)** (unreported), nullified the proceedings of the High Court for failure to join the Registrar of Titles. He said that all decisions cited by Mr. Nkonko are distinguishable because they are all based on suits and not applications. He said that all the cited cases are not binding in this court as they are all from the High Court. He added that if the court finds it prudent to join Attorney General it has discretion to do so but the same falls short of what is to be considered as preliminary objection. He prayed for the preliminary objections to be dismissed with costs.

In rejoinder, Mr. Nkonko reiterated his main submissions and emphasized that the interest of the 1<sup>st</sup> respondent is matrimonial as she is alleging that the suit property is matrimonial property then this court has no jurisdiction to entertain the matter. He said that the case of **Elizabeth Jeremiah** (supra) supports the first limb of objection. He said that the matter under consideration by the Court of Appeal is matrimonial property which is also under the caveat by the 1<sup>st</sup> respondent. He said in the same decision page 5 paragraph 2 the

High Court was of the view that it cannot proceed until the application for stay is decided by the Court of Appeal. He said that joining of the Attorney General is mandatory under section 6 (4) of the Government Proceedings Act.

I have listened to Counsel for the parties, and I have also gone through the affidavit, counter-affidavit, reply to the counter-affidavit and the cases cited herein. The main point for consideration is whether the preliminary points of objection raised by the 1<sup>st</sup> respondent have merit.

On the first point of objection, Mr. Nkonko contended that this court has no jurisdiction to entertain the application at hand. He based his argument on the fact that the property subject of the caveat described as Plot No.170, Block G with certificate of Title No. 48174 (the **suit property**) is the same property in which its execution was stayed by the Court of Appeal of Tanzania in an ex-parte hearing pending the hearing inter-partes, namely Civil Application No. 656/01 of 2021. On that basis he said this court has no jurisdiction to entertain this matter until final adjudication of the application by the Court of Appeal. Mr. Mhanga for the applicant was of the view that

the matter at hand is different from the one pending one at the Court of Appeal, that the latter is matrimonial while the former is a caveat on the suit property.

I have given due consideration to the matter, and as correctly said by Mr Nkonko this court lacks jurisdiction to entertain the matter at hand. This is based on the fact that the matter pending at the Court of Appeal is in respect of the very same suit property subject of the application at hand. **How?** The matter started as a Matrimonial Cause No.07/2019 at the Resident Magistrates Court of Dar es Salaam at Kisutu. On 22/02/2021 the said court decreed among others, for the 1<sup>st</sup> respondent herein to forthwith vacate from the suit property. Being dissatisfied with the decision, the 1<sup>st</sup> respondent herein preferred an appeal referenced Matrimonial Appeal No.53 of 2021 at the High Court of Tanzania, Dar es Salaam District Registry. The appeal was dismissed on 12/11/2021. The 1<sup>st</sup> respondent was adamant and she proceeded to file an application for stay of execution at the Court of Appeal vide Civil Application No.656/01 of 2021. The said application for stay of execution by the applicant at the Court of Appeal is in respect of the suit property. The application was granted ex-parte on 11/02/2022 pending the hearing of the application inter-partes. From



that chain of events, it is clear that the suit property is one of the main issue for contention throughout the proceedings by the parties herein. That in the application at hand the applicant is praying among other things for the court to summon the 1<sup>st</sup> respondent to show cause why the caveat she filed with the 2<sup>nd</sup> respondent in respect of the suit property should not be removed. Now, if the caveat is removed, it is clear that the applicant would be at liberty to deal with the suit property in any manner, including execution by vacating the 1<sup>st</sup> respondent from the suit property. In this way, the pending application for stay of execution by the 1<sup>st</sup> respondent at the Court of Appeal would be rendered nugatory. For that reason, this court cannot interrupt proceedings regarding the same subject matter and have already moved to the Court of Appeal. For that reason this court lacks jurisdiction to entertain the matter at hand.

Mr. Mhanga argued that the matter before the Court of Appeal is a matrimonial while in this present court the application relates to a caveat in respect of the suit property. Indeed, the matter before the Court of Appeal is a matrimonial matter but the main issue of controversy, as said above, relates to the same suit property subject of this application and also subject of the application for stay at the

that before the Court of Appeal. It would therefore be absurd, for this court to deal with a matter whose subject matter is before the Court of Appeal and there is already an order for stay.

Further, it should be noted that this court has concurrent jurisdiction with High Court Dar es Salaam registry whose decision the 1<sup>st</sup> respondent has filed a Notice of Appeal. So once the Notice of Appeal was filed then the jurisdiction of this court and that of High Court Dar es Salaam registry which was based on the same subject matter ceased. In the case of **Kennedy Bekubula vs. Edwin Kajumulo, Civil Reference No.7 of 2021**, the Court cited with approval the case of **Matsushita Electric Co. (EA) Ltd vs. Charles Genge t/a G.G Traders**, Civil Appeal No.71 of 2001 (CAT) (unreported). The court further stated that:

*".....once a notice of appeal is filed under Rule 76, then this court is seized of the matter in exclusion of the high court except for application specifically provided for such as leave to appeal, provision for a certificate on point of law or execution where there is no order of stay from this court"*

In this present case there is an order for stay pending hearing inter-parties, subsequently, this court has no jurisdiction to entertain the matter at hand. The first point of objection is therefore meritorious.

Having established that this court has no jurisdiction to entertain the application, I find no pressing need to consider the other point of preliminary objection raised.

In the premises, the application is hereby struck out for want of jurisdiction. There shall be no order as to costs.

It is so ordered.



*V.L. Makani*

**V.L. MAKANI  
JUDGE  
06/06/2022**