

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

MISCELLANEOUS LAND APPLICATION NO. 383 OF 2021

HALIMA DAUDI APPLICANT

VERSUS

KILALA MUSSA PEYU 1ST RESPONDENT

YUSUPH OMARI MSUMARI 2ND RESPONDENT

Date of last Order: 24/05/2022

Date of Ruling: 08/07/2022

RULING

I. ARUFANI, J

The applicant filed in this court the instant application seeking for temporary injunction order to restrain the respondents, their agent or workmen from selling the premises described as Plot No. 15 Block 'C' with Certificate of Title No. 48873 situated at Mbezi area within Kinondoni Municipality in Dar es Salaam. The application is supported by the affidavit of the applicant. Upon the respondents being served with the application the first respondent filed in this court a notice of preliminary objection that;

- 1. The application is un maintainable by contravening mandatory provision of the law.*

At the hearing of the above stated point of preliminary objection the applicant was represented by Mr. Robert Oteyo, Advocate, and while the first respondent appeared in the court unrepresented, the second respondent was represented by Ms. Rose Tito, under power of attorney donated to her by the second respondent. The court ordered the raised point of preliminary objection to be argued by way of written submission.

In supporting the raised point of preliminary objection, the first respondent argued in his written submission that, the application is serious unmaintainable as it is contravening the provision of Order XXXVII of the Civil Procedure Code Cap 33 R.E 2019 which requires and insist that the order of temporary injunction like the one the applicant is seeking from the court is supposed to last until the disposal of the suit or until further orders of the court. To support his submission, he cited in his submission the above cited provision of the law.

He argued that, the application at hand is contravening the cited provision of the law because there is no any pending suit disclosed in the application of the applicant. He stated that shows the applicant has failed to establish a prima facie case to support her application. He referred the court to the cases of **Hash Energy Tanzania Limited V. Richol Company Limited & Three Others**, [2016] TLS LR 340 and **Attilio V. Mbowe**, [1969] HCD no. 284 where the court laid down the principles

governing grant of temporary injunction. It is in line of the above stated reason the first respondent prayed the court to dismiss the applicant's application with costs.

In his reply the counsel for the applicant argued that, it is a trite law that matters of evidence cannot be argued as a point of preliminary objection. He argued that, after extensively going through the submission of the first respondent he has found the point of preliminary objection raised by the first respondent cannot be determined at this stage. He stated that is because the raised point of preliminary objection is a point of law mixed with the facts which are yet to be proved. He referred the court to the case of case of **Mukisa Biscuits Manufacturing Company Ltd V. West End Distributors Ltd** [1969] EA 696 where what constitutes preliminary objection was defined.

He went on arguing that, where a preliminary objection is raised either on the basis of disputed facts which would require extrinsic evidence to be led by parties at a full trial or where even if allowed, it cannot dispose of the whole suit then it cannot be sustained. He supported his argument with the case of **Mussanga Ng'andwa V. Chief Japhet Wanzag and 8 Others**, (2006) TLR 351 where it was stated that, preliminary objection cannot be raised, if any fact has not been ascertained. He submitted that the applicant filed in this court the plaint

dated 29th July, 2021 which was registered as Land Case No. 119 of 2021 and was accompanied with the present application which was registered as Misc. Land Case Application No. 383 of 2021 seeking for an order of temporary injunction pending determination of the stated main case.

In his rejoinder the first respondent stated the applicant has failed completely to comply with legal requirement in filing the present application in the court. He stated that, he has discovered the applicant has decided to file a fresh suit in the court instead of filing appeal against the decision of the Resident Magistrates Court of Dar es Salaam at Kisumu issued in Misc. Civil Application No. 92 of 2020 which originated from Civil Case No. 128 of 2012 and Execution No. 55 of 2019.

He argued that, after Misc. Civil Application No. 92 of 2020 filed in the Resident Magistrates Court of Dar es Salaam at Kisumu being dismissed he was expecting the applicant would have appealed against that decision but to his surprise the applicant has filed the instant application in this court. He referred the court to the case of **Singita Trading Store (EA) Limited V. Commissioner General**, Civil Appeal No. 57 of 2020 where it was stated that, parties are not permitted to begin a fresh litigation because of new views they may entertain or new version which they can present to show what should be a proper apprehension by the court of legal result. He submitted that, the position of the law stated in the above

referred case has been honoured by courts for purpose of avoiding endless litigation and unnecessary costs between the parties. He based on the above stated facts to urge the court to dismiss the application in its entirety with costs.

After considering the submission from the counsel for the parties the court has found the issue for determination in the matter at hand is whether the point of law raised by the first respondent is meritorious. The court has found as stated at the outset of this ruling and submitted by both sides it is undisputed fact that the application at hand is seeking for an order of temporary injunction to restrain the respondents, their agents or workmen from selling the premises described as Plot No. 15 Block 'C' with Certificate of Title No. 48873 situated at Mbezi area within Kinondoni Municipality in Dar es Salaam.

It is also true as rightly argued by the first respondent that the applicant has not stated anywhere being in the chamber summons or affidavit supporting the application the order of temporary injunction is seeking from the court to restrain the respondents from selling the suit premises is being sought pending determination of which matter pending in this court. The court has found the applicant has just given history of other matters filed in the Resident Magistrate's Court of Dar es Salaam at Kisumu without indicating anywhere in the chamber summons or affidavit

supporting the application which matter is pending determination in this court stated in the chamber summons.

The court has found the applicant ought to have demonstrated which main suit is pending determination in this court because as provided under Order XXXVII Rule 1 (b) of the CPC the order of temporary injunction once issued is supposed to last until the disposal of the suit or until further orders of the court. The similar position was stated by Kuloba in his Book titled **Principle of injunction** (1987) at page 3 that, a temporary injunction is a provisional order to restrain the doing of a certain act or to require a certain state of affairs to be altered for the time being either until the trial of the suit or until further order, or until a new date.

Now the question is whether there is a suit pending determination in this court upon which an order of temporary injunction can be granted to restrain the respondents, their agents or workmen from selling the suit premises to await its determination. The court has found that, although pendency of the alleged main suit in the court is not indicated anywhere being in the chamber summons or in the affidavit supporting the application but the court has found the issue as to whether there is a main suit pending in this court as argued by the applicant in his written submission or not is an issue which cannot be determined without

requiring the parties to adduce evidence to prove or disprove pendency of the alleged main suit in the court.

If there is such a requirement of evidence to be adduced to ascertain or establish pendency or non-pendency of the alleged main suit in the court, then it is crystal clear that, as rightly argued by the counsel for the applicant and in view of the definition of the term preliminary objection given in the case of **Mukisa Biscuits Manufacturing Co. Limited** (supra) the point raised by the first respondent cannot qualify to be a preliminary objection.

The court has found that, despite the fact that determination of the raised point of preliminary objection may require evidence to be adduced to the court to ascertain the same but the court has found that, as rightly stated in the submission in reply to the submission in chief of the first respondent there is a Land Case No. 119 of 2021 pending determination of this court filed in the court by the applicant. The court has also been of the view that, the first respondent is very much aware of the mentioned land case as he has even filed his written statement of defence in the mentioned land case.

Under that circumstances the court has found the preliminary objection raised by the first respondent in the application at hand is without justifiable cause as he is very much aware that there is a main

suit pending in this court. In the premises and without wasting more time of the court to deal with this matter the court has found the point of preliminary objection raised by the first respondent in the application is lacking merit and deserve to be overruled. Consequently, the point of preliminary objection raised by the first respondent is hereby overruled in its entirety for being devoid of merit and the costs to follow the event. It is so ordered.

Dated at Dar es Salaam this 08th day of July, 2022



I. Arufani

JUDGE

08/07/2022

Court:

Ruling delivered today 08th day of July, 2022 in the presence of Mr. Robert Charles Oteyo, learned advocate for the applicant and in the presence of the first respondent in person and in the presence of Ms. Rose Tito, under power of attorney donated to her by the second respondent. Right of appeal to the Court of Appeal is fully explained.



I. Arufani

JUDGE

08/07/2022