

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS LAND CASE APPLICATION NO.653 OF 2021

AHMED SADALLA JUMA

(Suing as the Administrator and Legal Personal Representative of the Estate

of the Late **HAMISI ALI @ HAMIS ALLY**) **APPLICANT**

VERSUS

KAISI HAMISI.....**1ST RESPONDENT**

ZAITUNI HAMIS ALI.....**2ND RESPONDENT**

JOSHUA ELIAS MWAITUKA t/a FOSTERS AUCTIONEERS

AND GENERAL TRADERS LTD.....**3RD RESPONDENT**

RULING

Date of last Order: 10/06/2022

Date of Ruling: 23/06/2022

Masoud, J.

The applicant moved this court under numerous provisions of law. They are section 68(c) and (e), section 95, Order XXI, R. 24(1) and (2) and Rules 27, 56, 57, 58, and 59 of the Civil Procedure Code Cap 33 R.E 2019, and section 51 (1) of the Land Disputes Courts Act, Cap 216 R.E 2019. He wanted this court to vacate its orders or lift them and set aside the said orders in

Execution No. 57 of 2019 entered by this court as per Hon. W.A. Hamza, Deputy Registrar, pending determination of Land Review No.595 of 2021, Land Review No.431 of 2021 and Execution No. 22 of 2021 and investigate and ascertain possession, interest and ownership of the property in dispute or source of the money complained of.

The application is supported by the affidavit of the applicant. It is opposed by the first respondent who filed a counter affidavit and a notice of preliminary objection. The preliminary point of objection had it that the application is bad in law, defective and improperly before the court for being preferred and brought under wrong provisions of the Law.

The applicant appeared in person whereas the respondent enjoyed the legal service of Mr. Derick Paschal Kahigi, Advocate.

On the 14/4/2022 the court ordered the hearing of the preliminary objection and the application to be conducted simultaneously by way of filing written submissions. The order was dutifully complied with by both sides. Since it is a rule of practice that preliminary points of law must be disposed of first, I had to deal with the preliminary objection raised before considering the merit of the substantive application. The understanding was that in the event

the objection did not finally determine the application, I would have to proceed to deal with the merits of the application.

Submitting in support of the preliminary objection, Mr. Kahigi for the first respondent argued that, none of the provisions cited by the applicant, gives this court powers to grant the orders sought in the application. The provisions were wrongly cited by the applicant. The case of **Joseph John vs Chandrakant Shamji Shah, Civil Application No.7/2001**. CAT at Arusha (unreported) was referred in support. In this case, the Court of Appeal at page 6 of its typed judgment held that:

"It is a trite Law that if a party fails to cite a specific provision of the law upon which his/her application is based and/ or cites a wrong provision of the law, the matter becomes incompetent as the Court will not have been properly moved"

Mr. Kahigi submitted further that the court also cannot use its inherent powers to interfere with the decision of the Deputy Registrar in Execution No. 57/2019 arising from Land Case No. 115/2010, while there is a specific provision under the law which provides the manner through which the court

can interfere with the decision of the executing court. Mr. Kahigi finalized his submission praying the court to struck out this application with costs.

In reply the applicant submitted that, there is no preliminary objection in the eyes of the law, that failure of the first respondent to mention specific provisions to be used in moving the court to entertain the application at hand means that the alleged preliminary objection is misconceived and misapplied. However, the applicant maintained that, wrong citation is no longer a point of preliminary objection by virtue of the overriding objective principle.

To cement his argument, he referred this court to the case of **Bruno Charles Matalu & Another vs Ndala Hospital**, Labour Application No. 20 of 2018 where the court held that such defect does not prejudice the respondent nor cause any miscarriage of justice.

In his rejoinder the Advocate for the respondent reiterated what he stated in his submission in chief, and added that due to the fact that the applicant never submitted on the other issues raised in his submission in chief, the

court had to draw the inference that he conceded to the raised concern and proceed to dismiss the application with costs.

Having gone through the rival submissions the main issue for determination is whether the objection is meritorious.

In view of the objection raised and the rival arguments that ensued, I had to critically consider the enabling provisions specified in the chamber summons against the backdrop of several reliefs sought and the affidavit supporting the entire application. Looking at the enabling provisions cited by the Applicant, I found myself in a difficult position to understand clearly the relief(s) sought by the applicant as he filed his application using numerous provisions of law which serve different purposes.

In a nutshell, under section 68(c) and (e) and the cited subsections, the court is empowered to grant a temporary injunction and in case of disobedience commit the person guilty thereof as a civil prisoner and order that his property be attached and sold or make such other interlocutory orders as may appear to the court to be just and convenient, Order XXI, R.24 (1) and (2) deals with stay of execution whenever the decree is sent to

another court for execution from the court which passed the decree, and O.XXI Rules 27 deals with stay of execution pending determination of a suit between decree holder and judgment debtor. Further, Order XXI, R.56 deals with determination of attachment of the property in execution where the decree holder defaults appearance in court and the court is unable to proceed with the determination of the application for execution. Moreover, Order XXI, Rules 57, 58, and 59 deals with objection proceedings in execution process.

From the above-mentioned provisions there is nothing which empowers this court to vacate its orders already granted by the deputy registrar in execution application as required by the applicant in one of the several reliefs sought. Section 51 (1) of the Cap. 216 and sections 95 of the Civil Procedure Code does not as well grant powers to the court to grant specific prayers in the application.

With the above in mind, my perusal of the affidavit supporting the application left me in no doubt that it does not fully address the requirements of the numerous provisions under which the application was brought. It only

catered for the history behind, and on the basis of which, the application was seemingly preferred. I could not see clearly the connection between the affidavit and the enabling provisions cited. I could not thus appreciate that the court has indeed been properly moved under the cited provisions. It was by and large not clear as to what reliefs and under what law the court may determine the matter on merit.

As regard to the application of the overriding principle as submitted by the Applicant, it cannot be applied blindly against the mandatory of the procedural law which go to the very foundation of the case. See the case of **Mondorosi Village Council And 2 Others Vs Tanzania Breweries Limited & 4 Others** Civil Appeal No. 66 Of 2017. In the case of **SGS Societe Generate De Surveillance SA & Another Vs V. I. P Engineering and Marketing Limited & Another**, Civil Appeal No. 124 of 2017 the Court of Appeal had this to say: -


"It should be noted that the overriding objective principle was not meant to enable parties to circumvent the mandatory rules of the court to turn blind to the mandatory provisions of the procedural law which goes to the foundation of the case."

On the strength of the position of the law stated in the cases cited hereinabove, I am satisfied that the principle of overriding objective cannot in the circumstances apply to rescue the application. Doing so is tantamount to ignoring the said defects that go to the very root of the matter.

In the upshot and for the foregoing reasons, the application is incompetent before the court. It is accordingly struck out with costs.

It is so ordered.

Dated at Dar es Salaam this 23rd day of June 2022.


B.S. Masoud
Judge

