

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPLICATION NO. 780 OF 2022

*(Arising from Execution Application No.1 of 2018 Originating from Land Case
No. 162 of 2016)*

SAUDA MAALIM LAURENT..... APPLICANT

VERSUS

EXIM BANK TANZANIA LIMITED 1ST RESPONDENT

JOSHUA MWITUKA t/a FOSTER AUCTION 2ND RESPONDENT

FABIAN JOHN FIMBO 3RD RESPONDENT

RULING

Date of last Order: 27.02.2023

Date of Ruling: 02.03.2023

A.Z. MGEYEKWA, J

The applicants' Application is brought sections 68 (e) & 98 (1) and (2), Order XXI Rule 99 of the Civil Procedure Code, Cap. 33 [R.E 2019]. The Application is premised on the grounds appearing on the Chamber Summons together with the supporting affidavit of Sauda Maalim Laurent, the applicant sworn on 5th December, 2022 which he averred that the applicant is the legal wife

of the second respondent they were evicted from the matrimonial house without any prior notice.

The Application is contested. The respondents filed separate counter affidavits. The affidavit of Ms. Agnes Kinemo, learned counsel for the first respondent was sworn on 14th December, 2022. The counter affidavit of third respondent Fabian John Fimbo sworn on 15th December, 2022 and all of them forcefully resisted the Application and urged this Court to dismiss it with costs.

When the matter was called for hearing on 7th February, 2023, the applicant enlisted the legal service of Mr. Godwin Godlove, learned counsel. Mr. Seni Malimi represented the 3rd respondent also holding brief for Mr. Mnyele, learned counsel for the 1st respondent. The 2nd respondent was duly being served to appear in court but he opted not to show appearance, therefore the matter proceeded ex parte against him. The counsel for the applicant urged this Court to argue the appeal by way of written submissions. By the Court's consent, all counsels complied with the Court order.

Mr Godlove, argued the application on behalf of the Applicant. The learned counsel for the applicant began to narrate the genesis of the matter at hand which I am not going to reproduce in this Application. Submitting in support

of the application, the applicant's counsel stated that there is a pending Land Case No.312 of 2022 whereas this Court is moved to exercise its power to determine the rights of the parties over the suit land. He added that the respondents have illegally evicted the applicant, hence the applicant is prejudiced against her right to be heard. He said that the applicant was not a party to the case which resulted in the respondents' right to deal with her landed property. He urged this Court to allow the applicant to be heard since he has become a victim of the incident which she was not a party to it.

He added that the applicant has never benefited from the loan taken. Mr. Godlove contended that the second respondent knew the procedure of eviction that, the notice of eviction has to be served to the evictee within 14 days, but he did not do so. In his view, the second respondent's act was contrary to Rule 21 (2) of the Court Brokers and Process servers (Appointment, Remuneration, and Disciplinary) Rules of 2017. He claimed that the applicants were evicted on 25.11.2022 two days before the date when they issued the eviction order.

On the balance of convenience, the learned counsel for the applicant continued to argue that if the repossession is refused then the applicant will remain homeless. He stated that the suit land was acquired by the applicant and his husband. To support his submission, he referred this Court to the

applicant's affidavit particularly paragraphs 2, 3, and 12. Mr. Godlove went on to submit that the balance of convenience is in the favour of the applicant because if she will not succeed in the main case, the respondent still reserves to deal with the property. He valiantly argued that the parties to the mortgage which was created resulted in the sale of the matrimonial property hence the applicant's rights of being consented was infringed. To support his submission he referred this Court to section 59 (1) of the Law of Marriage Act, Cap.29 [R.E 2019] and section 139 (3), (b) of the Land Act, Cap. 33 [R.E 2019].

In conclusion, the learned counsel for the applicant urged this Court to issue a repossession order.

Responding, Mr. Mnyele forcefully opposed the application. From the outset, Mr. Mnyele argued that the application is not tenable before this Court and is out to be dismissed. He contended that the application is brought under section 68 (e) Rule 98 (1) and (2) and 99 of the CPC but section 68 is cited out of context because the prayers sought by the applicant relate to the execution of the decree. He added that once a decree of the Court has been fully executed, nothing remains pending in Court so no interlocutory orders can be applied for.

The learned counsel for the first counsel went on to submit that the application is brought under Order XXI Rule 98 (1) (2) and 99 of the Civil Procedure Code Cap.33 [R.E 2019], and the application arises from Execution Application No.1 of 2018, thus, Land Case No. 312 of 2022 is not part of proceedings in Execution No. 1 of 2018 is wrong and makes the prayers not tenable. He stated that Order XXI Rule 99 of the Civil Procedure Code Cap.33 which relates to giving possession not restoring someone in the house pending the determination of a suit.

The learned counsel for the 1st respondent spiritedly argued that as per the Order XXI Rule 99 of the Civil Procedure Code Cap. 33 [R.E 2019] in order to succeed the applicant must satisfy the Court that, he is in possession of the property on his account or the account of some other person other than the judgment debtor. He contended that according to the applicant affidavit she was staying in the house as a wife of the judgment debtor who was a registered owner of the property that means, the property was not in her possession on her own account.

Mr. Mnyele contended that the execution of the decree and eventual eviction was done by the Court and in accordance with the law as amply demonstrated in the counter affidavit of the 3rd respondent. He valiantly

argued that it is sad the applicant is trying to move the Court to give orders in contravention of the lawful Court process.

In conclusion, the learned counsel for the 1st respondent prayed for the Application to be dismissed with costs.

Responding, Mr. Malimi, the learned counsel for the 3rd respondent began to narrate the genesis of this application which I am not going to reproduce. Mr. Malimi contended that the application is predicted under section 68 (e) and Order XXI Rules 98 (1) and (2) and 99 of the Civil Procedure Code Cap. 33 [R.E 2019], and his view, this Court is wrongly been moved.

In his rejoinder, the learned counsel for the applicant reiterated his submission in chief. He added that the 1st and 3rd respondents misconceived the whole context of the application and the submission file by the applicant. He started to narrate the genesis of the matter which I am not going to reproduce. He insisted that the applicant filed the instant application when she was still residing in the suit premises. Mr. Godlove insisted that the applicant was condemned unheard.

The learned counsel for the applicant insisted that the applicant is the legal wife of Mr. Mabruk Omari Mohamed and participate in acquisition of the suit property. He added that the applicant was compelled to file an objection proceedings under Order XXI Rule 57, 58 and 59 of the Civil Procedure Code

Cap. 33 [R.E 2019] but she lost hence she lodged a fresh suit as per Order XXI Rule 62 of the Civil Procedure Code Cap. 33 [R.E 2019] and the same is pending before this Court.

Having heard the submission of all counsels for and against the application, this Court will determine whether the application is meritorious.

I have read the Application, the applicants want to move this Court under section 68 (e) and Order XXI Rules 98 (1) and (2) and 99 of the Civil Procedure Code Cap. 33 [R.E2019] to summon the respondent to appear and answer the claims of forcefully dispossessing the applicant from the landed property registered as Plot No. 27, Block 57 with Certificate of Title No. CT 36724 is located at Kariakoo Area in DSM. The applicant also wants this Court to investigate the claims of the applicant and when satisfied issue an order to the applicant to be restored in her residential matrimonial home.

As rightly pointed out by the counsel for the 3rd respondent, the cited section 68 (e) of the Civil Procedure Code Cap.33 [R.E 2019] is cited out of context. Contrary to what Ms. Godlove has stated in his rejoinder that the leave is craved to prevent the ends of justice from being defeated hence issue an interlocutory order. Reading section 68 (e) of the Civil Procedure Code Cap.33 [R.E 2019, it is clear that the essence of this section is to move the

Court to grant interlocutory orders as may appear to the Court to be just and convenient. In the situation at hand the applicant was not a party to the main suit which rendered this court to proceed with eviction. Again, there is nowhere in the applicant's affidavit where the applicant stated that she is the owner of the suit premises. As rightly pointed out by Mr. Mnyele the applicant acknowledged that she is the wife of Mabouk Omar Mohamed, the registered owner of the property, it is obvious that the suit property was not in her possession. Thus, the Application at hand is not related to the temporary injunction. It is worth noting that at this juncture, the issue of a temporary injunction is inapplicable.

The applicant has submitted in length that the applicant had a right to consent under section 59 (1) and (2) of the Law of Marriage Act, Cap.29 [R.E 2019], this means he wants this Court to challenge its own decision. I am saying so because the applicant's application originates from the execution of the decree of this Court and the facts in the instant application show that the 2nd respondent was evicted from the suit premises by the order of this Court on 19th August, 2022. There is no dispute that the applicant is evicted from the suit premises. This is also confirmed by the counsel for the applicant in his submission and rejoinder to the 1st respondent's reply that the applicant is evicted from her matrimonial house. What is disputed is the time when the

applicant was evicted. Reading the records it is clear that eviction was done on 24th November, 2022 and the applicant filed the instant Application on 5th December, 2020 after being evicted from the suit premises.

Based on the above findings, it is my considered view that, since execution has been carried out, this Court cannot undo it by issuing a repossession order as requested by Godwin, counsel for the applicant.

Moreover, the issue of the right to be heard cannot apply to the matter at hand. I say so because the records clearly show that the applicant was evicted from the suit premises on 24th November, 2022 and she lodged the instant Application on 5th December, 2022 a lapse of approximately 12 days from the date when she was evicted. The Court of Appeal of Tanzania in **Juto Ally Versus Lucaskomba & Aloyce Msafiri Musika**, Civil Application No. 84 of 2017 held that:-

*".... **We are firm of the view that since execution has been carried out, we cannot make an order to stay it and that if it caused substantial loss to the applicant, there is no order that can undo that.**"[Emphasis added]*

Applying the above holding in the matter at hand, it is clear that since the execution was carried out thus, this Court cannot repossess her in the said house. This Court is *functus officio* since the same Court cannot nullify an

order which emanates from its own decision, as it has no jurisdiction to do so, especially after the execution has already taken place.

Having reached the above finding, I deem it superfluous to address the other area of controversy doing so will be an academic exercise.

In the upshot, and given all that I have pointed out and discussed above, it is without any doubt that the Application before this Court is misconceived and above all, it has no merits. It is from the same, I proceed to dismiss the instant application without costs.

Order accordingly.

Dated at Dar es Salaam this date 2nd March, 2023.




A.Z.MGEYEKWA

JUDGE

02.03.2023

Ruling delivered on 2nd March, 2023 via video conferencing whereas Mr. Stanslaus Halawe, counsel for the 3rd respondent was remotely present.




A.Z.MGEYEKWA

JUDGE

02.03.2023