

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

**MISC LAND CASE APPLICATION NO. 557 OF 2022**

*(Arising from Consolidated Land Cases Nos. 15 of 2021 and 233 of 2021  
of the High Court Land Division)*

**GENOVEVA KILIBA T/A DAGE SCHOOL  
OF HAIR DRESSING AND DECORATION ..... APPLICANT**  
**VERSUS**  
**ABDULLAH RASHID ABDULLAH ..... RESPONDENT**

*Date of last Order: 15/03/2023*

*Date of Ruling: 25/04/2023*

**RULING**

**I. ARUFANI, J**

The present application is urging the court to be pleased to stay execution of ex parte decree dated 5<sup>th</sup> August, 2022 arising from Consolidated Land Cases Nos. 15 of 2021 and 233 of 2021 of this court pending the outcome of Miscellaneous Land Application No. 501 of 2022 seeking for an order of setting aside the stated ex parte decision pending in this court. The application is made under Order XXI Rule 24 (1) and sections 95 and 68 (e) of the Civil Procedure Code, Cap 33 R.E 2019 and supported by an affidavit of the applicant.

The application was strongly opposed by the counter affidavit affirmed by the respondent which was also accompanied with a notice of preliminary objections containing two points of law which states the application is premature and the application is misconceived. While the applicant was represented in the matter by Mr. Alex Mashamba Balomi, learned advocate the respondent was represented in the matter by Ms. Mary Brown Francis, learned advocate. The counsel for the parties prayed and allowed to argue the stated points of preliminary objections by way of written submissions.

The counsel for the respondent argued in relation to the first point of preliminary objection that, the application is made under Order XXI Rule 24 (1) of the Civil Procedure Code which relates to the court upon which a decree has been sent for execution. She argued that, it is not applicable in the court which passed the decree as it is in the present situation where there is no decree sent to any court for execution and it is not applicable in a situation where there is no an application for execution which has been initiated in the court. To cement her argument, she referred the court to the case of **Desdery Ishengoma V. Scolastica Msekwa**, Misc. Application No. 672 of 2019, HC at Dar es Salaam (unreported).

She submitted that, the respondent has not applied for execution of the decree and it is not pleaded anywhere in the affidavit that the respondent has applied for execution of the decree in this court or before any other court of competent jurisdiction. She also argued that, there is no any execution order that has been issued against the applicant so as to move the applicant to apply for stay of execution. He submitted that situation shows the application was filed in the court prematurely and supported her submission with the case of **Seif Abdallah Ngakonda V. Mathias Matemu**, Misc. Civil Application No. 40 of 2020 (unreported).

She argued in relation to the second point of preliminary objection which was argued in alternative to the first point of preliminary objection that, the application is misconceived as the applicant is seeking for an intervention of the court to issue an order of maintaining the status quo on the property known as Plot No. 487 Block 43 Kijitonyama/Sinza Africasana within Kinondoni Municipality in the City of Dar es Salaam to be restored to its original state. She argued the application for the applicant has no legs to stand on as there is no suit or application pending before this court in connection with the mentioned property.

She submitted that is because the applicant's claim was dismissed and the respondent counter claim was granted in the ex parte decision given by the court on 5<sup>th</sup> August, 2022. She submitted further that the

respondent is the legal owner and he is currently in possession of the property while the applicant was a mere tenant who was evicted from the suit property on November, 2021 for non-payment of rent and no appeal has been preferred. At the end she prayed the points of preliminary objections be upheld and the application be dismissed with costs.

In his reply the counsel for the applicant stated in his submission that, all the raised two points of preliminary objections are devoid of merit and does not pass the test of being preliminary objection as per the long established test. He stated the established test is that, preliminary objection should be on point of law and not on factual matters to be given in evidence during the trial. He referred the court to the case of **COTWU (T) OTTU & Another V. Hon. Iddi Simba Minister of Industries and Trade & Others**, (2002) TLR 88 and **Mukisa Biscuit Manufacturing Company Ltd V. West End Distributors Limited**, [1969] E.A 696 where the test for determine a point of preliminary objection were stated.

He argued that, the raised points of preliminary objection are not points of law that can finally determine the matter before going to the hearing of the matter and tendering evidence. He argued that, the raised points of preliminary objections are wastage of time of the court and of the parties as opposed to the expected aim to be met. He bolstered his submission by referring the court to the case of **East African**

**Development Bank V. Blueline Enterprises Limited**, Civil Appeal No. 110 of 2009, CAT at DSM (unreported) where it was stated preliminary objection should only consist of point of law.

He submitted that the two points of preliminary objections raised by the counsel for the respondent are superfluous as are supported in the main suit but are lacking merit in the application. He invited the court to invoke the overriding objective Principle provided under section 3A of the Civil Procedure Code in the matter. He stated it is important for the matter to proceed to the hearing on merit as there is a need of hearing the evidence provided in the affidavit in support of the application. He stated at the hearing of the application the court will see the attachments reflecting the ongoing informal execution by speedy construction process which is changing the shape of the suit property.

He submitted that, the respondent is doing so to defeat the interest of justice as despite the fact that the ex parte decision was passed on 5<sup>th</sup> August, 2022 and is ripe for execution but no formal application has been preferred. He stated to the contrary there is execution process commenced and the suit property is being substantially changed and the process is continuing. He stated these are matters of evidence which is not correct to be brought at this stage of the application. He insisted the

counsel for the respondent has raised points of facts which need to be ascertained which is not proper.

He argued that, the order to maintain the status quo sought has a role of salvaging the wastage of the suit property. He submitted that, it is imperative to note that, at the end of the determination of the pending application and the subsequent proceedings will be left for academic exercise only if no intervention is made as sought in the application. At the end he submitted that, the points of preliminary objection raised are not founded and cannot escape an order of being dismissed with costs as that is the only course open for such unmerited objections.

In her rejoinder the counsel for the respondent challenged the invitation of the counsel for the applicant for the court to invoke in the matter the principle of overriding objective on the ground that the principle has its limitation on the matters of procedure. To support her submission, she referred the court to the cases of **Mondorosi Village Council & Two Others V. Tanzania Breweries Limited & Four Others**, Civil Appeal No. 66 of 2017 and **Njake Enterprises Limited V. Blue Rock Limited and Another**, Civil Appeal No. 69 of 2017 CAT at Arusha (both unreported) where it was held the overriding objective principle cannot be applied blindly against the mandatory provisions of the procedural laws which goes to the foundation of the case.

She argued that, the respondent's preliminary objections are pure points of law as the law requires every application to stay an execution shall be made in a situation where there is an order or application for execution. She recited in her submission Order XXI Rule 24 (1) of the Civil Procedure Code and the case of **Seif Abdallah Ngakonda** (supra) where it was stated that, no any execution order of the decree has ever been issued by the court which could have moved the applicant to seek for the court intervention to have it stayed.

She argued in relation to the prayer of maintenance of the status quo of the suit property to be restored to its original state that, it is misuse of the court process as the matter was determined by the court in its ex parte judgment delivered on 5<sup>th</sup> August, 2022. She stated the application for maintenance of the status quo has no legs to stand on as there is no suit or application pending in the court in connection to the suit property. She submitted that the respondent is the legal owner of the suit property and stated he is currently in possession of his property while the applicant is a tenant who was evicted from the suit premises from November, 2021. Finally, she reiterated her prayer in chief that the application be dismissed with costs.

After carefully considered the rival submissions from both sides and after taking into consideration the nature of the orders the applicant is

seeking from this court the court has found there is no need of continuing to determine the merit of the points of preliminary objection raised by the counsel for the respondent in the matter which were argued as summarized hereinabove. The court has arrived to the stated view after seeing that, Miscellaneous Land Case Application No. 501 of 2022 which was seeking for an order of setting aside the ex parte judgment and decree passed in Consolidated Land Cases No. 15 of 2021 and 233 of 2021 which is the basis of the present application has already been dismissed by the court.

As the stated application has already been dismissed and there is no other matter pending in the court relating to the ex parte judgment and decree passed by this court which the applicant was praying to be set aside the court has found to continue to determine the merit of the points of preliminary objections raised by the counsel for the respondent and the merit of the application at hand will have no any meaningful use to the parties but rather will be for academic exercise which the court has not seen the reason of indulging into the stated exercise at this moment. In the premises the application filed in the court by the applicant is hereby struck out for being overtaken by event and no order as to costs. It is so ordered.



Dated at Dar es Salaam this 25<sup>th</sup> day of April, 2023



I. Arufani

**JUDGE**

25/04/2023

**Court:**

Ruling delivered today 25<sup>th</sup> day of April, 2023 in the presence of Mr. Hussein Hitu, learned advocate for the applicant and in the presence of Ms. Mary Brown, learned advocate for the respondent. Right of appeal to the Court of Appeal is fully explained.



I. Arufani

**JUDGE**

25/04/2023