

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPLICATION NO. 436 OF 2023

(Arising from Land Case No. 76 of 2022)

ROSE ALOYCE MALLYA.....APPLICANT

VERSUS

KCB BANK TANZANIA LIMITED.....1ST RESPONDENT

BID CITY AUCTION &

ESTATE SALES LIMITED.....2ND RESPONDENT

RULING

26/07/2023 & 31/07/2023

A. MSAFIRI, J.

The applicant herein has filed this application under a certificate of urgency seeking for the following orders; under *ex-parte* orders; that this Court be pleased to issue restraining orders against the respondents from auctioning the applicant's landed properties as described in the chamber summons, pending determination of this application *inter partes*.

On *inter partes* orders, the applicant is moving the Court to investigate the conduct of the respondents in regard to the execution of the Judgement and Decree in Land Case No. 76 of 2022 and make a finding that the 1st respondent has never applied and be granted an order for

Alls.

execution. In addition, the applicant is moving this Court to make a finding that the acts of the 1st and 2nd respondents to advertise the applicant's properties without obtaining an order of the Court in execution proceedings amounts to an abuse of court process.

The application is brought under Sections 38(1) and (2), 68(e) and 95 of the Civil Procedure Code Cap. 33, R.E 2019 (the CPC) and Section 2(3) of the Judicature and Application of Laws Act, Cap 358 R.E. 2019, (JALA). The application is supported by an affidavit of Geoffrey Joseph Lugomo, advocate of the applicant. The respondents also filed their joint counter affidavit and with it, a Notice of Preliminary objection in which they raised two points of objection to the effect that;

- 1. That this honourable Court has no jurisdiction to determine this suit pursuant to the Notice of Appeal filed by the Applicant on 22nd May, 2023.*
- 2. That the application is incompetent for being preferred without any proceeding pending in this Court.*

It is trite law that where a preliminary objection has been raised, it is to be disposed of first before continuing with the hearing of the matter on merit. Hence, in pursuant of that principle of law, the preliminary objection was set to be heard orally on 26/7/2023.

Alle

At the hearing, the respondents were represented by Mr. Antipas Lakam, learned advocate while Mr. Geoffrey Lugomo, learned advocate represented the applicant.

Submitting on the first point of objection, Mr. Lakam stated that, there is a decision of this Court in Land Case No. 76 of 2022 between Rose Aloyce Mallya (who is now the applicant) and KCB Bank Tanzania Limited (who is now the 1st respondent). In the said case, the suit was decided in favour of the 1st respondent and dismissed the claims of the applicant. The Court proceeded to allow the defendant (1st respondent) to proceed with exercising her right of loan recovery.

That the applicant who was the plaintiff was aggrieved by the said decision and preferred an appeal to the Court of Appeal by filing a Notice of Appeal on 22/05/2023.

Mr. Lakam submitted further that after filing a Notice of Appeal, it is trite law that this Court has no jurisdiction to entertain any other matter arising from the judgment and decree which are subject to be challenged by appeal.

He argued that, even if the applicant has moved this Court by its inherent powers, the said powers cannot be exercised when there is a specific law stating otherwise. To bolster his arguments, Mr. Lakam cited the case of **Aero Helicopters vs F.N. Jensen** [TLR] 1990 142, CAT and the case of *Atle*.

Mohamed Enterprises Tanzania Limited vs. the Chief Harbour Master & another, Civil Appeal No. 24 of 2015, CAT at Arusha (Unreported).

On the second point of objection, Mr. Lakam submitted that, this application is referred as interlocutory application arising from Land Case No. 76 of 2022. However, the said land case has already been determined in this Court. That, it is trite law that there is no interlocutory application where there is no pending suit. Therefore, this application has no legal base in this Court. He prayed for the Court to strike out the application with costs.

Mr. Lugomo responded and submitted on the first point of objection that, the counsel of the applicant seems to admit that there is no specific provision of law catering for the circumstances in the application, hence Section 95 of the CPC on the inherent powers of this Court may apply.

He argued further that the cases cited by the counsel for the applicant i.e. **Aero Helicopters (supra)** and **Mohamed Enterprises (supra)** are distinguishable from this application.

Mr Lugomo averred that the nature of this application is peculiar as they are not challenging the Decree but, they are aggrieved by the conducts of the respondent for his failure to follow normal procedure in execution of a Decree. *Alls.*

He said further that the intended appeal is not linked to the current application, hence this Court has powers to entertain it.

On second point of objection, Mr. Lugomo contended that this application is not interlocutory application. The application is based on the abuse of court process and section 95 of the CPC is applicable. He also moved the Court to invoke the principle of overriding objective. He prayed for the second objection to be overruled as it has no merit.

On rejoinder, Mr Lakam argued that the application relates to the judgment and decree of this Court and the contents of the applicant's affidavit proves that.

About the inherent powers of this Court under Section 95 of the CPC, Mr. Lakam argued that even the Court of Appeal has inherent powers. Hence, the right procedure is for the applicant to file this application to the Court of Appeal. He reiterated his prayers.

Having heard the submissions by both rival parties, the issue for my determination is whether the raised preliminary objections are tenable. I shall start with the second limb of objection that the application is incompetent for being preferred without any proceeding pending in this Court. *Alls.*

In the application at hand, it is clear from the contents of the affidavit supporting the application that this application has raised from the Land Case No. 76 of 2022 which has been heard and finally determined by this Court.

The counsel for the applicant has contended that this is not an interlocutory application. However, the application has been brought under Section 68(e) of the CPC and Section 2(3) of the JALA. By this provisions, for this application to stand, there had to be either a suit pending in Court, or in absence of a pending suit, the Court may issue an interim order before institution of the main suit in what is called *Mareva* injunction.

I find that both position not fit in the current application for the reasons that, first the application originates from Land Case No. 76 of 2022 which has already been determined in this Court, hence there is no any pending suit in court relating to the current application. Second, the situation for *mareva* injunction under Section 2(3) of JALA does not apply here, because the same has to be filed and granted before institution of the main suit, while in our matter at hand, the main case has long been instituted, heard and determined.

On the inherent powers of Section 95 of the CPC, they have to be exercised in very exceptional circumstances. However, it is my view that, *Atls.*

this application does not fall under the situation of exceptional circumstances as the counsel for the applicant would like the Court to believe. The procedure for the Court to embark are well set in the provisions of the CPC, and the provisions of Section 2(3) of JALA, by which this application does not fall within.

It is my finding that Section 95 of the CPC applies where there is no specific law or procedure to cater for a particular circumstances but cannot/should not be used as a hiding for abuse of the law and procedures which are set. I sustain the second limb of objection.

On the first limb of objection, it is on the jurisdiction of this Court in the situation where there is a Notice of Appeal to the Court of Appeal. The position of the law where there is a Notice of Appeal filed by a party to the suit is stated in numerous cases of the Court of Appeal and this Court. In the case of **Tanzania Electric Supply Company Limited vs. Dowans Holding SA & Another**, Civil Application No. 142 of 2012, CAT at DSM, the Court of Appeal, on page 7 to 8 of the Ruling stated thus;

*"It is settled law in our jurisprudence, which is not disputed by counsel for the applicant, that **the lodging of a notice of appeal in this court against an appealable decree or order of the High Court commences proceedings in the Court.** We are equally convinced that it has long been established law that **once***

Alle.

a notice of appeal has been duly lodged, the High Court ceases to have jurisdiction over the matter. (Emphasis added).

This position was reiterated in the case of **Serenity on the Lake Ltd vs. Dorcus Martin Nyanda**, Civil Revision No. 1 of 2019, CAT at MZA at page 3 and 4.

In his submission, Mr Lugomo has argued that the application at hand has no link with the intended appeal but it relates to the conducts of the respondent for his failure to follow the normal procedure in execution of a decree.

With due respect, I differ with the views of Mr. Lugomo. It is my finding that this application is very much linked to the intended appeal as the said appeal seeks to challenge the Decree and judgment of the Land Case No. 76 of 2022, the case which decided in favour of the now respondent, who as per decision of the said case, he intends to exercise the right to recover the loan, and as per this application this action is conducts which amount to abuse of court process by failing to follow the normal procedure in execution of a decree.

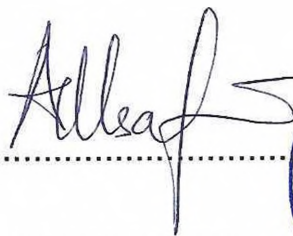
In other words, the respondent has decided to execute decree of Land Case No. 76 of 2022 by individual procedure out of Court. *Alls.*

The applicant is seeking for this Court to stop the respondent from executing a decree individually with no Court Order, the decree which is being challenged by the same applicant in the Court of Appeal.

By this analysis, I find that this application is inseparable from Land Case No. 76 of 2022 and therefore linked with the Notice of Intention to appeal filed in Court.

In the circumstances, this Court has no jurisdiction to entertain this application or any other application arising or coming out of Case No. 76 of 2022. If the applicant has any grievance on how the decision or decree of the Court in Case No. 76 of 2022 is being effected/carried out, then the right path is to table the grievance before the Court of Appeal. I also sustain this first limb of objection.

In upshot, I find the preliminary objections to have merit and therefore this application is struck out with costs.



A. MSAFIRI

JUDGE

31/07/2023

