

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 421 OF 2023

(Arising from Misc. Land Application No. 453 of 2022 and Land Case No. 79 of 2021)

SOPHIA MATHAYO SIMBA.....APPLICANT

VERSUS

EQUITY BANK (T) LTD.....1ST RESPONDENT

ACCURATE RECOVERY AND AUCTIONS LTD.....2ND RESPONDENT

TEGRA TRADING CO. LTD.....3RD RESPONDENT

R U L I N G

Date of last Order: 10 August 2023

Date of Ruling: 26 September 2023

K. D. MHINA, J.

This Application is brought under certificate of urgency by way of chamber summons made under the provisions of Order XXXVII Rules 1 (a) and 2 of the Civil Procedure Code [Cap. 33 R. E. 2019] ("**the CPC**")

The orders being prayed are for this Court;

- i. To grant interim order to maintain status quo ante pending hearing of this application.*

- ii. *To grant temporary injunction restraining the respondents or their agents or workmen from evicting the applicant from her suit premises at Plots No 190 Block "D" with a Certificate of Title No. 151833, Plot No. 187 Block "D" with a Certificate of Title No. 148396 and Plot No. 188 Block "D" a Certificate of Title No. 148397 both located at Kimbiji Kijaka Area, within Temeke Municipality, pending final determination of Misc. Land Application No. 453 of 2022.*
- iii. *Any other relief (s) the Court may deem fit and equitable to grant.*

The application is supported by the affidavit disposed of by Sophia Mathayo Simba, the applicant, which expounded the grounds for the application.

After being served with the application, the first respondent confronted the application with a notice of preliminary objection predicated into four grounds, that;

- i. *This application cannot stand without the main suit.*
- ii. *The application has been overtaken by events as the subject matter being Certificate of Title No. 151833, Certificate of Title No. 148396 and Certificate of Title and Certificate of Title No. 148397 have been disposed of to a third part not a part to the present application.*

- iii. The application is bad in law and contravened section 102 (1) of the Land Registration Act, Cap 334 and*
- iv. The applicant has no cause of action against the 1st respondent.*

As for the brief background of the matter it goes thus, the applicant filed Land Case No 79 of 2021 against the respondents. That land case was dismissed on 8 July 2021 for want of prosecution under Order IX Rule 5 of the CPC.

After the dismissal, since the applicant was out of time to seek for setting aside dismissal order, she applied for extension of time vide Misc. Land Application No. 453 of 2022.

Again, that application was dismissed for want of prosecution on 13 December 2022 after the applicant's failure to attend on the date schedule for hearing.

Relentless, the applicant again filed a Misc. Land Application No. 19 of 2023 seeking to set aside dismissal order and restore Misc. Land Application No. 453 of 2022. This Court on 12 May 2023 restored Misc. Land Application No. 453 of 2022. After that the applicant filed this application.

The preliminary objection was argued by way of written submissions. The applicant was represented by Mr. Amon Rwiza, a learned advocate, while the first respondent was represented by the Law Firm by the name of Freshfield Advocates.

At the hearing, on the first ground, the counsel for the respondent submitted that an application for temporary injunction cannot stand without the main suit. In this application the main suit, i.e, Land Case No. 79 of 2021 was dismissed for want of prosecution.

They narrated that, since one of the laid principles in **Atilio vs Mboe 1969 (HCD 284)**, is that one of the conditional precedents before granting interim injunction there must be a serious question to be tried on the facts alleged. Therefore, since there is no pending suit then there is no serious question to be tried on the facts alleged.

Regarding the second ground of objection, they submitted that the injunction sought by the applicant had been overtaken by events because, the Certificate of Title No. 151833, Certificate of Title No. 148396 and Certificate of Title and Certificate of Title No. 148397 have been disposed of to a third part not a part to the present application.

They narrated that the certificates of title have been sold to Paulo Abraham Mlimi and Joseph Paulo Mlimi under the power of sale, the transfer was completed on 24 April 2023.

Further, the owners of the property Paulo Abraham Mlimi and Joseph Paulo Mlimi, who hold the vacancy possession are not part of the application.

On the third limb of objection, they submitted that the application contravened section 102 (1) of the Land Registration Act. They narrated that if the Court would grant the application it means the decision of the Registrar of Titles to transfer the ownership would be automatically challenged.

They stated that the applicant was supposed to challenge the decision of the Registrar of Title by way of appeal within three months from the date of decision or order of the Registrar.

On the last ground, she submitted that they combined the reasons in ground one, two and three and submitted that, the applicant by filing multiple applications without the main suit amount to abuse of the court process. To support their argument, they cited **Overseas Infrastructure Alliance (India) PVT and Pratibha Industries Ltd Consortium vs. Dawasa**, Misc. Civil Application No. 237 of 2020 (Tanzlii).

In reply, Mr. Rwiza submitted that paragraphs 1, 2 and 3 of the affidavit indicated the presence of Misc. Land Application No. 453 of 2022, a pending application with a purpose of restore Land Case No. 79 of 2021.

Therefore, he narrated that under such circumstances there was no way, the applicant could had filed another main suit while she was expecting her suit to be restored in the pending application.

Regarding the second limb of objection, he cited **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) E.A 696**, and submitted that the preliminary objection should be only on the point of law and not facts. Therefore, the fact that the premises were already sold was known to the 1st respondent only. Therefore, the ground need evidence.

He submitted that the same apply to grounds 3 and 4 of the objections, that also require evidence. Therefore, the grounds do not qualify to be points of preliminary objection.

In conclusion, he distinguished the cited case **Overseas Infrastructure Alliance (Supra)**, by stating that in the cited case, the application was cited in the absence of the suit while in this application, there

is an application seeking to restore the main suit, therefore, the applicant could not in any way file another main suit.

The first respondent did not file a rejoinder.

Having gone through the pleadings, record and submissions for and against the preliminary objection from both parties, I now turn to determine the preliminary objection raised and I will start with the first ground on whether this application cannot stand without the main suit.

In deliberation of this ground, the entry point is Order XXXVII Rules 1 (a) and 2 of the CPC, which is relevant on the issue. For convenience, it is necessary to reproduce the mentioned position of law. It reads;

- "1. Where in any suit it is proved by affidavit or otherwise—*
- a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit or suffering loss of value by reason of its continued use by any party to the suit or wrongly sold in execution of a decree;*
 - 2.-(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit and either before or after judgment, apply to the court for a temporary injunction to restrain*

the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right:

From above cited law, it is essential, in applications such as this, for temporary injunctions there must be a pending suit to enable a party to apply for it. The only exception is when the application is in nature of Mareva where an application can be filed where there is no filed suit in court due to some legal impediments. See **Daudi Mkwya Mwita vs. Butiama Municipal Council and Another**, Misc. Land Application No. 69 of 2020 (HC-Musoma) where it was held that;

"Mareva injunction may be issued where the applicant cannot institute a lawsuit because of an existing legal impediment."

In this matter that is not an issue because the controversy between the applicant and the 1st respondent is whether there is pending suit which can be the basis of the application for temporary injunction.

From the records and submissions, this should not detain me long as I alluded to earlier, there is no dispute that the main suit between the parties, i.e, Land Case No. 79 of 2021 was dismissed on 8 July 2021 for want of prosecution under Order IX Rule 5 of the CPC.

Currently, what is before, this Court is the application for **restoration** of the Land Case No. 79 of 2021. Therefore, there is no main suit rather than an application for restoration.

This Court, in **Tanzania Sugar Producers Association vs. The Ministry of Finance of the United Republic of Tanzania and another**, Commercial Case No. 25 of 2003 (Unreported), was faced by a similar situation. In his decision, Kalegeya, J (as he then was) held that;

*"That said however, the main question is whether there are exceptions to the general legal principle that an injunction cannot issue where there is **no main suit** between the parties.*

*Generally, indeed an injunction **cannot issue where there is no pending main suit**. The logic behind this is not hard to trace. By issuing an injunction the court would be directing, Respondent, you are barred from doing so and so till the controversy between you and Applicant is determined The above said however, I should hastily state that the issue is not surfacing in courts for the first time. In Misc. Civil Cause No. 117/1996, Nicholas Nere Lekule vs. The Independent Power (T) Ltd and The Attorney General and Misc. Civil Cause No. 42 of 1998. Tanganyika Game Fishing and Photographic Ltd vs The Director of Wildlife, The Attorney General and Muanauta and Company (T) Ltd, my brothers, Kaji and Katiti, JJ respectively, held that **the court has jurisdiction to issue an***

interim order where there is no suit pending. [Emphasis provided]

Though, as per the **Attorney General vs. Rev. Christopher Mtikila**, Civil Appeal No. 20 of 2007 (CAT), applications also can be classified as suits but the same must determine or declare the rights of the disputing parties. Therefore, in the instant application the application for restoration of a dismissed matters falls short of the requirement because such kind of an application cannot determine the dispute between the parties.

In addition to that, without the main suit the court will have limited facts for the determination of the application for injunction on key issues such as the nature, claims and reliefs sought in the main suit and whether or not there are triable issues, who will suffer irreparable loss and balance of convenience between the parties. In the cited case of **Tanzania Sugar Producers Association (Supra)** it was held that;

“Now, how would the controversy be decided if the requisite forum has not been set? And, the forum is set by institution of an action. If an action has not been instituted various militating factors would come to the fore and they include the following. The court will have very limited facts at its disposal to assist it in determining whether

indeed there is a controversy worth the name between the parties and which would attract an interlocutory order”.

Flowing from above, it quite clear that the application is incompetent, it was filed while the main suit was already dismissed for want of prosecution. The application for restoration of the main suit cannot be a basis of the application for interim injunction.

Therefore, since the first ground alone suffices to dispose of this application. I do not see any point of considering the remaining grounds of preliminary objection, their determination will not change the outcome of this application.

In the upshot, the application before this Court is incompetent for want of subsisting/ pending main suit as required by order XXXVII Rule 1 (a), (b), and Rule 2 (1) of the CPC, Cap 33 R: E 2019. That means the preliminary objection raised by 1st respondent is sustained,

Consequently, the application is struck out with costs.

It is so ordered.




K. D. MHINA
JUDGE
26/09/2023