

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND CASE APPLICATION NO. 85153 OF 2023**

BETWEEN

JANE DAVID MUSHI

(As administratrix of the estate late DAVID MUSHI.....APPLICANT

VERSUS

RASHID KITWANGA

(As administrator of the estate late

ABDALLAH MSHAM KITWANGA..... RESPONDENT

RULING

Date of last Order: 12/02/2024

Date of Ruling: 27/02/2024

A. MSAFIRI, J.

This is an application made under Section 89 (1) and 95 of the Civil Procedure Code, Cap. 33 R.E 2019. The applicant is praying for the restitution orders of the Court that the respondent be ordered to vacate all that farm constituting ten (10) acres at Madale Area, Kinondoni District, Dar es Salaam and provide vacant possession thereof to the applicant. She prays further that demolition order be issued to remove all structures erected

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thereon upon reversal of the decree of this Court by the Court of Appeal of Tanzania and later on by this Court in Land Case No.316 of 2010.

The application is supported by an affidavit of Wilson Edward Ogunde, advocate of the applicant. The respondent Rashid Kitwanga, also filed a counter affidavit to contest the application and along with it, he filed a Notice of preliminary objection in which he raised seven (7) points of objection as follows;

- 1. That, the Registry which have been indicated by the Applicant is not specific and vague.*
- 2. That, the Application is improperly before this Honourable Court as the dispute is in the Court of Appeal.*
- 3. That, paragraph no.11 is bad in law for being argumentative and conclusive.*
- 4. That, the Application is bad in law for being misconceived and wrongly moving this Honourable Court*
- 5. That, the contents of paragraph no.13 is bad in law for consisting of a prayer.*
- 6. That the application is premature.*
- 7. That, the Application is bad in law for being deponed by an Advocate who has not been authorized.*

As per the principle of the law and procedure, the preliminary objection has to be disposed of first before proceeding with the proceedings on merit.

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By order of the Court, the preliminary objection was disposed of by way of written submissions.

The submissions in support of the preliminary objection was drawn and filed by Mr. Alex Mashamba Balomi, learned Senior Advocate, counsel for the respondent while the submissions in contest of objection was drawn and filed by Mr. Wilson Edward Ogunde, learned advocate for the applicant.

Having read and considered the written submissions by rival parties, the issue for my determination is whether the raised preliminary objection has merit.

In his submissions, Mr. Ballomi, counsel for the respondent abandoned the first point of objection.

The second objection is that this application is improper before this Court as the dispute is in the Court of Appeal, hence this Court has no jurisdiction to entertain it.

In his submission, Mr. Ballomi gave a brief background of the matter that initially, the respondent instituted a Land Case No. 316 of 2010 against the now applicant involving the same subject matter. That the respondent was seeking to be declared a lawful owner of the suit property. That, the

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matter in the first instance was determined by Hon. Wambura,J (as she then was) and decided in favour of the respondent.

That, the applicant was aggrieved and appealed to the Court of Appeal in Civil Appeal No.286 of 2016, where the decision of Hon. Wambura, J was nullified and the matter was remitted to this Court for retrial from the stage reached prior to 05th May, 2015.

He said further that, the matter was retried before Hon. Mgeyekwa,J, who finally dismissed the suit. The respondent was aggrieved and appealed to the Court of Appeal and currently there is a pending Civil Appeal in the Court of Appeal originating from the High Court Land Case No. 316 of 2010.

Mr. Balomi was of the firm view that since there exist an appeal in the Court of Appeal, it is a settled position of law that the jurisdiction of the High Court ceases automatically.

To support his argument, the counsel cited several cases including the case of **Aero Helicopter Limited vs F.M Jansen [1990] T.L.R 142**, where the Court of Appeal laid down the principle that once the notice of appeal is lodged in the Court of Appeal, the jurisdiction of the High Court

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ceases as the two Courts (the High Court and the Tanzania Court of Appeal) have no concurrent jurisdiction.

In response to the first point of objection, Mr. Ogunde for the applicant submitted that, according to the proper facts on the background of this dispute, the respondent was put in possession of the disputed property by the execution Order in Miscellaneous Land Application No. 20 of 2016, dated 27/04/2016.

That the respondent was put in possession of the disputed property following an execution of decree of Hon. Wambura, J of 27th November, 2015 which decided the matter in favor of the respondent.

Mr. Ogunde said that, since the said decision of Wambura, J was quashed and set aside by the Court of Appeal, the only way parties shall be put in the position each one occupied before is by way of restitution. He submitted further that, since the decree of Hon. Wambura, J which gave the respondent the right to in possession of suit property was reversed, then the former position can be restituted under Section 89 (1) of the CPC. He averred that this Court has jurisdiction to entertain this matter.

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To support his argument, he cited the case of **Farid F.Mbaraka & Another vs. Domina Kagaruki & Another, Civil Appeal No. 293 of 2022 (unreported)**.

In rejoinder, Mr. Balomi submitted that, the submissions based on historical background of this matter at this stage are very irrelevant as the facts given are from the member of the Bar hence they should be disregarded.

He reiterated his submissions in chief and pointed that, the provision of Section 89 (1) of the CPC in presence of the issued Notice of appeal cannot help the applicant as it is the law that once a Notice of Appeal is issued, the High Court's jurisdiction is ousted.

In determining this point, I will consolidate the second, fourth and sixth points of objection and determine them as one as they are related since they all touch on jurisdiction of this Court.

I totally agree with the two principles of law which have been pointed by the counsels for the parties in their submissions that an objection should be on point of law and not on factual matters as it was set in the famous

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case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd** [1969] E.A 696.

Also, it is a position of law as set in the case of **Aero Helicopter (supra)** and other numerous cases that once the notice of appeal has been filed in the Court of Appeal over a particular subject matter, the High Court ceases to have jurisdiction over that same subject matter.

However, in the instant Application, I find the position to be different from the one set by the above principle of law.

The respondent has raised a point of objection on the jurisdiction of this Court to entertain this application. In his submission to support the objection, the counsel for respondent has narrated the historical background of the dispute.

The counsel for the applicant responded by also submitting on the historical background of the dispute. Surprisingly, the counsel for the respondent urged this court to disregard the background facts submitted by the applicant for the reason that they are irrelevant at the stage of preliminary objection.

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It is my finding that the preliminary objection raised by the respondent cannot be argued without going into facts of the dispute to see whether this Court has jurisdiction to entertain this matter considering there is a Notice of Appeal filed in the Court of Appeal.

In the case of **Mukisa Biscuits (supra)**, it was observed that;

*"...a preliminary objection consists of a **point of law which has been pleaded or which arises by clear implication out of the pleading**, which if argued as preliminary objection may dispose of the suit (emphasis mine).*

The historical background which has been submitted by both parties in support or against the preliminary objection has been stated in the affidavit supporting the appeal and has been noted by the respondent in paragraphs 1 and 2 of his counter affidavit. I am of the strong view that the issue whether this Court has jurisdiction or not cannot be determined without looking into the historical background of the matter. Therefore in determining on the jurisdiction of this Court or not, I will look into the historical facts as they have been pleaded.

Section 89 (1) of the CPC which is the enabling provision of this Application provides thus;

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89 (1) where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed and, for this purpose, the court may make any orders, including orders for the refund of costs and for payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

The Notice of Appeal and memorandum of appeal purported to be pending in the Court of Appeal is against the decision of this Court by Hon. Mgeyekwa, J (as she then was) dated 28th October, 2022, in Land Case No.316 of 2010 where the suit was decided against the respondent (dismissed).

This is an application for restitution of the position of the suit property to the way it was before the decision of Hon. Wambura, J which decided in favor of the respondent as her decision was reversed by the Court of Appeal.

I believe that, the Notice of Appeal which institute the appeal before the Court of Appeal does not directly relate or cannot affect the instant application. What the applicant is seeking is provided under Section 89 (1) of the CPC i.e. the restitution or placing the parties in the position which they

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would have been but for the decree of Hon. Wambura,J which have been reversed.

It is the position of the law that once there is a Notice of Appeal which constitute the appeal in the Court of Appeal, the High Court ceases to have jurisdiction over that matter, however, the matter at High Court should be in relation to the matter which is the subject of the appeal before the Court of Appeal or it should be established that the intended appeal or decision thereof will have impact/effect on the matter pending in the High Court, as these two Courts does not have concurrent jurisdiction.

By that position, I find that the pending appeal before the Court of Appeal does not originate from the High Court decision by Hon. Wambura, J whereby Hon. Judge decided in favor of the respondent but her decision was reversed by the Court of Appeal. Instead, the appeal pending before the Court of Appeal originates from the decision of Hon. Mgeyekwa,J which was after the Court of Appeal order of retrial.

I find the circumstances, though on the same parties and same subject matter, does not oust jurisdiction of this Court to entertain this application for the reasons I have analysed here in above.

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I overrule the points of objection No. 2,3,4 and 6.

The points of objection No. 3,5 and 7 were also argued in consolidation by parties.

Mr. Balomi submitted that the affidavit in support of application is incurably defective as it contains arguments, conclusion, hearsay and evasive denials which they offend the provisions of Order XIX of the CPC. He added that the verification clause is incurably defective for it should not be on personal knowledge of representing counsel but the respondent himself.

Mr. Balomi submitted further that the prayers in the chamber summons are not tenable in the eyes of law as they ought to be filed in the suit in which the proceedings would entail a trial and evidence, example on a prayer of general damages which cannot be provided in the application at hand.

In reply, Mr. Ogunde submitted that paragraphs 11 and 13 of the affidavit are not argumentative but they contain facts which are within the knowledge of the deponent hence the provisions of Order XIX of the CPC have not been offended. In addition, he submitted further that on argument that the affidavit is bad for being deposed by an advocate who has not been authorized, that argument is misconceived. That, paragraph 1 of the affidavit

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clearly states that the deponent has been authorized to make the affidavit. He invited the Court to overrule the objections.

In rejoinder, the counsel for the respondent practically reiterated his submission in chief.

I have read the contents of the affidavit particularly paragraphs 11 and 13 which are said to be argumentative, conclusive and consisting of a prayer. I find that these two paragraphs contain the facts which are within the knowledge of the deponent and are not argumentative or with prayers.

On the point of objection that the applicant has wrongly moved this Court by seeking for prayers which they ought to be in the separate suit with the proceedings to adduce evidence thereof, I find that in this, the counsel for the respondent has moved from arguing the preliminary objection and into the merit of the Application. It is my view that the respondent's arguments will be better placed during the hearing of the application on merit and not at this stage.

In objection No.7, I find that the verification clause in the affidavit sworn by Mr. Ogunde, advocate for the applicant to be proper before this

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Court as the advocate has verified to have knowledge of the prescribed paragraphs in the affidavit.

In upshot, I find all the raised preliminary objections to have no merit and I hereby overruled all of them with costs.

It is so ordered.



A handwritten signature in blue ink, appearing to read "A. Msafiri". The signature is written over a horizontal dotted line that extends from the seal.

A. MSAFIRI

JUDGE

27/02/2023