**IN THE HGH COURT OF TANZANIA**

**COMMERCIAL DIVISION**

**DAR ES SALAAM.**

**MISC. COMERCIAL APPLICATION NO. 08 OF 2020**

***(ARISING FROM COMMERCIAL CASE NO. 156 OF 2019)***

**EDWARD EPIMARK LASWAY, T/A**

**LASWAY TRUCK.....1ST APPLICANT**

**HUSSEIN RAJAB MWIMBA**

**(AS THE ADMINISTRATOR).....2ND APPLICANT**

**EVELINE ISRAEL KIRENGA.....3RD APPLICANT**

**VERSUS**

**NATIONAL BANK COMMERCE.....1ST RESPONDENT**

**MAS AND ASSOCIATES COMPANY LTD.....2ND RESPONDENT**

**AND COURT BROKERS.....3RDRESPONDENT**

*Date of Last Order: 24/06/2020*
*Date of Ruling: 24/07/2020*

RULING

MAGOIGA, J.

The applicants, **EDWARD EPIMARK LASWAY,T/A LASWAY TRUCK, HUSSEIN RAJAB MWIMBA (administrator of the estate of late Rose Gerald Saria)** and **EVELINE ISRAEL KIRENGA** jointly instituted

the instant application by chambers summons under the provisions of Order XXXVII Rule (1), Section 68 and Section 95 of the Civil Procedure Code, [Cap 33 R.E.2002] against the above named respondents jointly and severally praying for the following orders, to wit:

1. That this Honourable Court be pleased to issue injunction order to restrain the 2nd respondent acting under the instruction of the 1st respondent from conducting auction or doing anything with the building (mortgage property) located at plot No 215 Block "G" Tegeta and plot No 35-36,Block KKK Karanga Moshi pending dertermination of Misc Application No 156 of 2019.
2. Any other order this Court may deem fit to grant.

The chamber summons accompanied by supportive joint affidavit of applicants, starting the reasons why this application should be granted as prayed.

Upon being served with the chamber summons and respective supportive joint affidavit of the applicants, the respondents through DICKSON IKUNGURA deposed joint counter affidavits in reply to affidavits of applicants strongly stating reasons for opposing the grant of the orders sought in the chamber summons. Simultaneously the learned counsel for respondent by way of preliminary objection challenged the competence of

misc Commercial No 08/2020 on one ground which are subject of this ruling ;-

(1) that is the instant application is misconceived and untenable in law for failure to comply to order XXXVII, Rule 1 of the Civil Procedure Code, [Cap 33 R.E.2002]

The facts pertaining to this application as gathered from the records are not complicated, are that the 1st respondent entered into loan agreement with the 1st applicant. The said credit facility was secured by personal guarantee by the 2nd and 3rd applicants; the 1st Applicant failed to adhere to the terms and conditions of the agreement and was in breach of the contract. Facts go that the 1st respondent instituted commercial case No 115 of 2011 under summary procedure as recovery procedure to be paid unpaid money and on 10th August 2012 judgment was entered to 1st respondent by Nyangalika J, as he was then. Fact go further that the applicant being dissatisfied with the decision lodged notice of appeal on 6th day of September 2012 and on 30th day July 2018 an appeal was struck out. Now he has come to this court armed with the instant application seeking for the extension of time to file leave to appeal to court of appeal, the learned counsel for respondent raised preliminary objection against the competency of instant application, subject of this ruling

When this application was called for hearing, it was ordered to be argued by way of written submissions. The applicants and the counsel for respondent complied with the scheduled order of filing written submissions for and against, paving way for this ruling. Let me record my thanks for their industrious input on this matter. I honestly commend them.

During hearing the applicants were not represented. On the other hand, the 1st respondent was enjoying the legal services of Ms. Mariam Ismail, learned advocate.

Submitting in support of preliminary objection the learned counsel for respondent started her submission by giving out the historical back ground of the application that, the applicant had filed Misc Application No 8 of 2020 which arise from misc Application No 156 of 2019 seeking an injunction order to restrain the respondents from conducting auction or doing anything in mortgage property. Furthering on the point the learned counsel for respondent recited the provisions under which the application was preferred and argued the court that the application does not comply with Order XXXVII Rule (1) of the Civil Procedure Code, [Cap 33 R.E.2002] which give discretion to court to grant injunction order in situations where the suit property is in danger of being wasted, damage or alienated by any part to the suit before the finality of the main suit. According to learned

counsel for respondent there is no pending suit on the properties in disputes of Plot No 215 Block " G" Tegeta and Plot No 35-36 Block " KKK" Karanga, Moshi as the dispute was dissolved in commercial case No 115 of 2011 leaving the properties with no pending disputes, hence absence of the pending main suit makes this application incompetent for failure to adhere to sole purpose of injunction, which is to maintain status quo. To cement his stance the learned counsel referred this court to case of **National Bank of Commerce vs Dar es salaam and Office Stationary (1995) TLR 272** in which the court held that "it is common knowledge that the purpose of an order for temporary injunction as set out in Order XXXVII Rule 1 is to preserve and retain the status quo as obtains at the time immediately before the filling of the application until the determination of the suit. It was counsel for respondent submission that, the applicant is intending to stop the sale of the property which the respondent has given go ahead with the court in Commercial case No 115 of 2011.

Further learned counsel respondent submitted that,Misc application No 8 of 2020 arises from Misc application No 156 of 2019 means that this instant application has arise from the application and not main suit as the

applicant has relied on Application No 156 of 2019 which is for extension of time, contrary to the requirement of Order XXXVII Rule 1.

Extending her submission she submitted that, Misc application cannot be termed as suit because there is different between Applications and Suit the pre condition of the suit is to be filed by plaint with compliance with Order VI and VII of the Civil procedure Code while the applications are to be filed by chamber summons supported by affidavit and there must be a main suit.

Disputing the procedure followed by the applicants, counsel for respondents submitted that the correct procedure of the law in order for the applicants to seek any remedy subject to the suit property at this stage is to seek for orders of stay of execution and not an injunction. On that note, concluded his submission that this Court be pleased to dismiss the application.

On the other hand, 1st and 2nd applicant started their submission by giving an introduction and strongly and vehemently stated that the said preliminary objection is devoid and it does not reflect what was filed in the court, to strengthen his position they invited the court to look on the case of **Abdallah M Malik $540 others vs Attorney General & another,Misc Land Application No 119 of 2017 (unreported)** by

Mgonya J, where the court formulated two principles **one** that, the Civil procedure is not exhaustive, **two** that the High court has jurisdiction to grant interim injunction pending institution of a suit in the circumstances not covered by Order XXXVII Rule 1 of the Civil Procedure Code, **three** the High Court has jurisdiction to apply relevant rules of common law statutes of general application in force in England on the 22nd July 1920 where the Code is silence, extending their submission they submitted that the term application as defined in the law of Limitation Act, is similar to the term suit and there is no distinction between suit and application for the purpose of civil application in the court of law. Further applicants submitted that the said preliminary objection has no merit, does nothing but increases of cost and on occasion confusion of issues which is contrary to timely dispensation of justice, based on that submission 1st and 2nd applicants prayed the court to hold that preliminary objection raised by respondent has no merits.

On the other hand 3rd respondent strong opposed the dismissal of the application and she started her submission by giving historical background of the application and she recited the provision under which the application was made. Admitting that there was a commercial case No. 115 of 2011 in which judgment was entered for respondent and the appeal to Court of

Appeal was struck out, so the only remedy available for protection of the said properties was to seek an injunction order as their only hope they have in minds.

Submitting further the 3rd applicant invited the court to the doctrine of overriding objectives under section 3A and 3B of Miscellaneous amendment Act, that preliminary objection raised by the respondent based on procedural technicalities that intend to suppress justice contrary to aim of overriding principle which is to help parties in dispute to reach settlement without compromising justice. Apart from that, the 3rd applicant submitted that, this Court has inherent power under Section 95 of civil procedure Code to give an injunction. Basing on the above submission she invited the court not to dismiss this application as doing so would result to irreparable loss on the part of applicants.

Rejoining Ms Mariam Ismail disputed the applicability of the case **Abdallah M Malik (supra)** to instant application she contended that the said case is concerned with Mareva injunction and applicable law to move the court for grant of Mareva injunction is Section 2(3) of the Judicature of application of Laws Act and not Order XXXVII Rule 1of the Civil procedure Code, hence the applicants has not moved the court with the proper provision to empower it to grant an order of Mareva injunction. Extending her

submission counsel for respondent submitted that the said case is distinguished on the ground that interim injunction known as Mareva injunction are granted before institution of the main suit which is not the case on our instant application as the main suit has been determined on merits.

Submitting on the distinction between the term suit and application counsel for respondent submitted that the fact that the applicant used the Law of Limitation Act to define application is wrong; the Act to be used is Civil Procedure Code and not the law of limitation. Further she submitted that from the quoted definition of applicants it seems that, suit is a court proceeding and application emanates from the suit, she reiterated his formal position that applicant have wrongly sought remedies.

Rejoining on the 3rd respondent submission counsel for respondent submitted that the court should not sway by the fear and worries of the applicant and divert from the procedure set by law as their worries and fear can be curbed by filing an application for stay of execution within 60 days to halt the execution process pending appeal and not an order of injunction.

Submitting on the inherent jurisdiction of the court counsel for respondent cited the case of **Bunda District Council Vs Virian Tanzania Ltd**

**(2000) TLR 338 ,and the case of Tanzania Electric supply (TANESCO) Vs independent power Tanzania Limited and 2 others** Where it was held that, inherent power can be invoked only if there is no clear provision in the Civil Procedure Code to meet the necessity of the application henceforth Section 95 of the Civil Procedure Code cannot be used in instating application as injunction has a specific provision.

Further counsel for respondent submitted that overriding objective principle does not and cannot apply in the circumstances of this case because it is not meant to enable parties circumvent the mandatory rules of the court or to turn blind to the mandatory provisions of the procedural law which go to the foundation of the case. To cement his position she cited the case of **SGS Society Generale de Surveillance SA and another vs VIP Engineering & Marketing Ltd and another vs Appeal No 124 of 2017 (unrepporte)** on that note counsel for respondents argued the court that, the act of applicants to seek injunction on properties which the main suit has been finally determined and it's in execution stage is a procedural disaster, hence counsel for respondent invited the court to disregard the overriding principle from being used in the application and dismiss the application.

This marked the end of hearing of these hotly contested arguments for and against the grant of this application.

From the written submissions made by two rivals for and against in this matter and from the totality of the prayers in the chamber summons, affidavit, counter affidavit, reply to counter affidavit, it is my well considered view that for an order of temporary injunction to be meaningfully issued by this court of law the party seeking to have the property so temporary preserved must satisfy the court that the only remedy available is an order of injunction. This is logically so for an injunction cannot be granted when equally efficacious relief can certainly be obtained by any other usual mode of proceedings. Apart from that principle, it is trite law that for considering restraining orders, Courts are guided with the principles as laid down in **Atilio vs Mbowe (1969) HCD 284, Giela vs Cassman Brown & Co Ltd (1973) E.A 358,Kibo Match Group Ltd vs H.S Impex ,Commercial case No 7 of 1999 [2000] TLR 152** That (i) there must be prima facie case with probability of success (ii) the court interference is necessary to protect plaintiff from injury which may be irreparable (iii) that on the balance there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendant from granting it.

Equipped with such principles, I will put the facts into sieve in order to see whether the same warrants issuance of an order of temporary injunction. The learned counsel for respondent has submitted that this application does not comply with Order XXXVII Rule (1) of the Civil Procedure Code, [Cap 33 R.E.2002] for want of pending main suit, while the applicants have argued the court that, courts of law has power to grant an order of injunction even where there is no pending suit. Up to this junction the issue for determination is whether there are exceptions to the general principle that injunction cannot be issued where there is no pending main suit between the parties. It is trite of law that applications for injective relief such as this one at hand are more appropriately suited where there is pending main suit and not an application, the logic is not far to seek as provided for under Rule 1 Order XXXV11 of the Civil Procedure Code, temporary injunction may be granted where in any suit, the property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit. It is therefore clear that injunctive relief are according to the law as set out above and generally invoked at the stage where the trial of the suit is in progress or pending.

If that is the position then back to instant application can injunctive order be granted at this stage of the suit the answer is no, my reasons for

taking that instance are not far to fetch. **One**, the matter has been concluded on its finality and it is on execution stage at this stage ,the court cannot interfere upon interlocutory application for the purpose of preventing a party from enforcing a legal claim, as granting an order of injunctive at this stage is to prevent the respondent from executing his decree. To me this course amount to misapplication or misuse of injunctive relief more so because I think that an order of stay of execution would have been not only proper but also more efficacious this instance was taken by the court of appeal, in the case of **National Housing Corporation vs. Peter Kassidi &5 Others, Civil Application no 243 of 2016.**

Generally speaking an injunction cannot be issued where there is no pending main suit. However, there are exceptions depending on facts of the particular case, but in my view, if the application is being made under Order XXXVII Rule 1 of the Civil Procedure Code, then, there must be a pending suit. The Applicants' in their chamber summons they have moved this court under, Order XXXVII Rule 1 of the Civil Procedure code and argued that application No 156 of 2016 which is for extension of time has similar as to pending main suit. I am firm that application and suit constitutes distinct and exclusive judicial process which cannot be invoked

interchangeably or in the alterative this means that there is no pending suit which is contrary to Order XXXVII Rule 1 of the Civil Procedure Code.

**Two**, the applicants has argued that courts of law has power to issue an interim order before the institution of the main suit I disagree with the applicants on this argument because the application was made under Order XXXVII Rule 1 of the Civil Procedure Code in which there must be a pending suit, there is nowhere in their application that the applicant used an enabling provision of Section 2 (3) of the Judicature and Application of Laws Ordinance Cap 453 for the court to issue Mareva injunction. If applicants wanted to make an application under Mareva injunction they ought to move the court under Section 2 (3) of the Judicature and Application of Laws Ordinance Cap 453 and not otherwise and the case of case **Abdallah M Malik (supra)** is distinguishable as interim injunction known as Mareva injunctions are issued before institution of the main suit in the instant application there is no possibility that main suit will be instituted as the main suit has been concluded to its finality.

**Three** the applicant argued that, the courts have inherent power to issue temporary injunctions, in circumstances which are not covered, the Civil Procedure Code. I gree with applicants, that where there is no specific provision which will meet the necessities of the case in question then

Section 95 Civil Procedure Code is invoked however the applicant in this application is seeking interim injunction which has specific provision which is Order XXXVII Rule 1 of the Civil Procedure Code. Therefore Section 95 become in applicable as it was held in the case of **Tanzania Electric supply(supra)** where the principle were echoed that the court cannot grant any injunctive orders by invoking Section 95 of the Civil Procedure Code where there is specific provision. So when the rules prescribe the circumstances, in which temporary injunction can be issued, ordinarily the court should use its inherent powers, to make the necessary orders, in the interests of justice, but it is merely to see whether the circumstances of the case, bring it within the prescribed rule, It should therefore be settled law that the court has the inherent power to issue a temporary injunction order for circumstances not covered by civil procedure Code.

**Fourth,** the applicant has argued that the preliminary objection is based on procedural technicalities which will suppress justice; I have considered this argument on the principle of overriding objective. I subscribe to the position that assurance of achievement of substantive justice is paramount, but I am of the view that without procedure rules being adhered to substantive justices cannot be achieved as the whole process of administration of justices will be tainted with uncertainty, in particular the

procedure rules that go to the root of the competence of the suit being entertained by the court. The applicant instead of failing stay of execution to halt execution pending appeal to the court of appeal, have filed an interim injunction against the properties that this Honorable court has allowed the respondent to realize this is an error which goes to the root of the application.

At this juncture, I entirely wish to associate myself with the finding of Hon, Nchimbi, J. in the case of **Puma Energy Tanzania Limited Vs. Diamond Trust Bank Tanzania Limited, Commercial Case No.146 of 2013,** in which he said the following, I would, however, emphasize that being flexible with technicalities in favour of substantive justice may not be always the right course to take. It will all depend on the circumstances of each particular case. In some cases such flexibility can cause anarchy and complete disrespect for the rules thus rendering them nugatory or simply ridiculous to allow such application is possible only if it will not prejudices the respondent. as it was held by the court of appeal in the case of **SGS Society Generale de Surveillance SA and another (supra)** that In that situation overriding objective principle does not and cannot apply in the circumstances of this case, since in its introduction in the written Laws (Miscellaneous amendment) (Act No 8 of 2017) was not meant to enable

parties to circumvent the mandatory rule of the court or turn blind to the mandatory provisions of the procedural law which go to the foundation of the case.Based on the above reasons, Iam for from being convinced by the reasons advanced by the applicant to hold otherwise this court is constrained to dismiss this application with costs.

It is so ordered.

Dated at Dar es Salaam this 24th day of July, 2020.


**S. M MAGOIGA**
**JUDGE**
**24/07/2020**