

IN THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

DISTRICT REGISTRY OF MBEYA

AT MBEYA

MISC. LAND APPLICATION NO.36 OF 2021

(Originating from the High Court of Tanzania at Mbeya,
Miscellaneous Land Application No. 97 of 2020)

ABUBAKAR G. KUSHOKA & ANOTHER ----- APPLICANTS

VERSUS

BANK OF AFRICA TANZANIA & 2 OTHERS----- RESPONDENTS

RULING

Date of last order: 15.07.2021

Date of ruling: 19.07.2021

Ebrahim, J.:

The applicants have brought the instant application under **Order XXXVII Rule 1(a), 2(1) and 4 of the Civil Procedure Code Act, CAP 33 RE 2002** for the orders that:

- (a) An injunction be issued against the 1st and 2nd Respondents to restrain them from evicting the Applicant from the suit house pending the hearing and determination of Misc. Land Application No. 30 of 2021.

- (b) Any other relief court may deem fit and just to grant.
- (c) Costs.

The application is supported by an affidavit affirmed by Abubakar Kushoka, 1st applicant.

Upon being served with a copy of the application, the 1st and 2nd Respondents raised two points of preliminary objection which on the date of hearing with the leave of the court, they abandoned the 2nd point. I shall therefore concentrate on the 1st ground of objection that the application is bad in law and an abuse of the Court process as it seeks for an order of injunction while there is no pending suit.

At the hearing of the application, the Applicants were represented by advocate Mushokorwa; the 1st and 2nd Respondents preferred the service of advocate Ngonyani; whilst the 3rd Respondent had the representation of advocate Tumaini.

Before hearing of the case, advocate Tumaini informed the court that the 3rd Respondent has no interest on the disputed house as he has already been refunded by the bank. Hence, it is obvious that he

is not contesting the matter and should not be taken as a litigant in this matter.

Submitting in opposing the application, Mr. Ngonyani argued before that the instant application is contrary to the law as stated in the case of **Trustee of Sunni Muslim Jamaat V Sayed Mazat Kadhi and 2 Others**, Civil Appeal No. 18 of 2002 (CAT – DSM) pg 7 where it was held that there must be an existing suit before a temporary injunction and/or any interlocutory order could be lawfully granted by any court. He also cited the case of **National Housing Corporation V Peter Kassidi and 4 Others**, Civil Appeal No. 247 of 2016. Basing on the above principles of law, he prayed for the court to struck out the application with costs as it is sanctioned by law.

Responding to the point of objection, Mr. Mushokorwa explained to the court that the trial court did not decide on what is the exact amount of the loan amount which necessitated them to file Land Application No. 30/2021 because the auctioneer seeks to sell the disputed house. He contended that under Order XXXVII, much as it is provided that court can issue an injunctive order on a suit but it

does not explicitly state "an existing suit". He argued therefore that, in his views suit should be interpreted broadly to include every matter in court including the filed application as they had initially filed Land Case No. 16 of 2015. He distinguished the cited cases of the Trustees of **Sunni Muslim Jamaat (supra)** because the case had already been decided long ago; and the case of **NHC(Supra)** that the court looked as to whether there was an appeal or proceedings in court that have not been decided by the court. Following the same principle, he urged the court not to look for an "existing suit" but also incidental proceedings. To cement his argument, he cited the case of **Registrar of Buildings Vs Alinia Mwashia** [1982] TLR 242 which held that a term suit should not be defined narrowly but even a suit filed through a chamber summons. He stressed his by argument by citing the case of **TANESCO Vs IPTL**, [2000] TLR 324 on the holding that it is not forbidden to issue injunctive order where there is no suit. He prayed for the preliminary objection to be dismissed and let the matter be heard on merits.

In rejoinder, advocate Ngonyani insisted that their objection is on point of law and reiterated his submission in chief.

I have carefully followed the rival submissions of the parties and read the affidavit of the Applicants in support of their application.

The Applicants have made the instant application under the provisions of **Order XXXVII R.1(a), 2(1) and (4) of the Civil Procedure Code, Cap 33 RE 2019**. For ease of reference the said provisions read as follows:

"(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 of 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; or

*the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of the property as the court thinks fit, **until the disposal of the suit or until further orders:***

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:

4. The court shall in all cases, before granting an injunction, direct notice of application for the same to be given to the opposite party, except where it appears that the giving of such notice would cause undue delay and that the object of granting the injunction, would thereby be defeated". (Emphasis supplied).

My reading of the above provisions of the law connotes that the injunctive relief is an equitable relief granted by the High Court

where there is a pending suit of which no rights of parties has yet to be determined. In essence, injunctive relief is issued where there is no decree of the court that has been issued. This position has been extensively discussed by the Court of Appeal in the cited cases of the **Trustees of Sunni Muslim Jamaat (Supra)** and the case of **National Housing Corporation (supra)** whereby in both cases it was stressed by the Court of Appeal that for a court to grant a lawful temporary injunction, there must be an existing suit.

Mr. Mushokorwa has clearly told the court that the genesis of the instant application is Land Application No. 30 of 2021 where the parties are seeking extension of time to lodge their notice of appeal to appeal at the Court Appeal. He has strongly argued that since initially there was Land Case No. 16 of 2015, and there is an issue of correct amount of loan to be adjudicated upon which was not done by the trial court; then the instant application is legally correct before the court. With respect, that is a misconception. The Court Appeal clearly stated in the cited case of **National Housing Corporation Vs Peter Kassidi and 4 Others (supra)** as follows:

*"This remedy is in the nature of a **prohibitory order granted at the discretion of the court against a party**. On the other hand, while an order of stay of execution is also in the nature of prohibitory order, **it is addressed to the court carrying out the execution to suspend or delay the enforcement of the decree concerned pending hearing and determination of a proceeding, most certainly an appeal**". (emphasis supplied).*

While Mr. Mushokorwa is aware that a decree has already been issued in respect of a case that they are seeking extension of time to lodge their notice, surprisingly, he is insisting that parties have right to seek for temporary injunction while it is obvious that rights of parties have already been adjudicated upon. Hence as per the interpretation by the Court of Appeal above, the disputed case has already passed a stage where the court can issue prohibitory order against parties. Counsel for the Applicants has vigorously distinguished the facts of the cited cases by the Counsel for the 1st and 2nd Respondents on the basis that the first one was a long-time case and in another one the application followed the application for revision. All in all, the principle established in both cited cases is the same that for a court to issue an injunctive order, it pre-supposes an existence of a suit which would determine rights of parties i.e. a prohibitory order against parties. The citing of the case of **TANESCO**

VS IPTL (supra) by Mr. Mushokorwa is self-defeating as the Court of Appeal while deciding as to whether the court can issue an interim injunctive order stated that " *the High Court has jurisdiction in a proper case to grant an "interim injunction order" pending an institution of a suit or in circumstances not covered by Order XXXVII of the Code*".

Thus, Land Application No. 30/2021 is not a suit within the meaning of the law in so far as the invoking of **Order 37 of the Civil Procedure Code** is concerned as the rights which forms basis of the said application have already been conferred to one party. What follows is for the aggrieved party to challenge those rights. Again, Mr. Mushokorwa has misconceived the principle held in the case **Registrar of Buildings V Elinia Mwasha (supra)** as the spirit of the said case is to accommodate original suits which by their nature are filed through chamber summons or petitions e.g., Originating Summons etc.

All said and done, I hasten to agree with the Counsel for the 1st and 2nd Respondent that this application is bad in law as there is no pending suit for the High Court to issue an injunctive order.

Accordingly, I sustain the objection and dismiss this application with costs.

Accordingly ordered.



A handwritten signature in blue ink, appearing to read "R. A. Ebrahim", is written over the printed name.

R. A Ebrahim

JUDGE

At Mbeya

19.07.2021