

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. LAND CASE APPLICATION NO. 169 OF 2022

THADEUS JOAKIM LYAMUYA 1ST APPLICANT

DAMAS KIVUNGE 2ND APPLICANT

VERSUS

JONAS AQUILINE SWAI..... RESPONDENT

RULING

Last order: 15/02/2023

Date of Ruling: 10/03/2023

BADE, J.

Before me is an application of Mareva Injunction restraining the respondent, her servants and /or agents or any person acting on his behalf from evicting the 2nd Applicant from the demised premises pending maturity of 90 days statutory notice of intention to sue the Respondent, the Deputy Registrar of Tittles and the Attorney General of the United Republic of Tanzania, as they were served as per the law. The application is supported by an affidavit sworn by Josephat Msuya, counsel for the applicants and resisted by the respondent

who filed counter affidavit sworn by his counsel Mr. John Faustin Materu on 10th December, 2022 to that effect.

The petition was brought under **Section 2 (1) and 2 (3) of the Judicature and Application of Laws Act**, Cap 358 R.E 2019 and **Order XXVII Rule 2 (1) and (4) of the Civil Procedure Act**, Cap 33 R.E 2019.

Prior to the hearing of the Application, Counsel for the Respondent raised a point of preliminary objection as follow:

- 1. The application for injunction is incompetent for want of suit which is pending in court.*

When the Application was called for hearing on 15/02/2023, Mr. Josephat Msuya, learned Advocate represented the Applicant whilst Mr John Materu, learned Counsel represented the Respondent arguing orally before this Court.

Supporting his point of objection, Mr. Materu argued that there is no pending suit as required by Order XXXVII Rule 1 and 2(4) in order for the Court to entertain this Application. He insist that an injunction filed under the Civil Procedure Code can only issue pending a determination of a suit. Thus, it was his submission that the Application is misconceived and ought to be struck out. He supported his argument with the case of **Galico Textile Industries Limited vs Zenon Investment Ltd, Registration of Titles and NBC Holding Corporation**, in **Misc. Civil Cause No. 10 of 1998** and **Central**

Bank of Kenya vs Giro Commercial Bank Limited and Another (2007)
Vol. 2 E.A 93.

Opposing the raised point of preliminary objection, Counsel for the Applicant submitted that the Application is for Mareva Injunction which are granted pending the filing of the suit when the Applicant is waiting for the completion of 90 days' notice issued to the local government. He submitted further that they had already issued a 90 days' notice to the Respondents but it has not yet matured. His argument were supported with the case of **Leonilah Kishebuka vs Dunstan Novat Rutageruka and 2 Others, Land Application No. 70 of 2022**. He prayed for the objection to be dismissed.

In a brief Rejoinder, the Respondent's counsel insisted that since the Applicant cited the Civil Procedure Code Cap 33 RE 2009 as the enabling provision, there is a need for a pendency of a suit as a condition for competence of the Application and the grant of the orders sought. He distinguished the cited case of **Leonilah Kishebuka vs Dunstan Novat Rutageruka and 2 Others (supra)** as the filed Application in that case met all the requirement of the Civil Procedure Code Cap 33; and reiterated his position that the Application is incompetent and it ought to be struck out with costs. He aptly added that amongst the condition for issuing of a temporary injunction is pendency of a suit and that is specifically so, so that it is possible to establish the presence of a prima facie case, and thus he wonders how can a prima facie case be established without there being a suit pending.

Having gone through the submissions made by both the learned counsels, the issue for determination is whether the raised objection is valid, and maintainable.

It is trite law that there are circumstances where an application for temporary injunction can be granted without a pending suit or preceding filing of a suit. In this remedy, two conditions have to be met for the order to issue; that is prima facie, a good or arguable case; and, the justifiability of the grant of the order. In other words, this is an equitable remedy. In my view this would fit such situation. Although in his submission the Respondent's Counsel maintained that the Application is incompetent for want of a pending suit, in his submission as it was prompted by this Court, he discerned the particularity that the enabling provision used by the Applicant makes it a condition precedent that a restraining order can only be granted where there is a pending suit, and not otherwise.

In **Registered Trustees of Calvary Assemblies of God (CAG) vs Tanzania Steel Pipes Limited And 2 Others, Misc. Land Case Application No. 677 OF 2019** the Court held that:

"It is apparent from the above quote and in all the cases cited that the provision moving the court in cases where there is no pending suit was section 2(2) of the Judicature and Application of Laws Ordinance and 2(3) of JALA. The rationale is that the Mareva Injunction apply in the Common Law and its application in our courts is by virtue of section 2(2) of the

*Judicature and Application of Laws Ordinance and now section 2(3) of
Judicature and Application of Laws Act."*

Being persuaded by the cited authority, it is crystal clear that the provisions to grant this kind of application are **Section 2(3) Judicature and Application of Laws Act, Cap 358 R.E 2019**. The other enabling provision that is commonly used is section 95 of the **Civil Procedure Code** which provides for the inherent powers of the Court. However, in the present Application, the Applicant added the provisions of Order XXVII Rule 2 (1) and (4) of the Civil Procedure Code which is a misnomer. On being prompted by the Court, the Counsel conceded that if at all they were citing Civil Procedure Code, it would have been Order XXXVII of the Code and definitely not the one cited. The question posed here is whether the added section makes the whole Application incompetent? I Am well aware with the commonplace law that wrong citation of the enabling provision renders the whole Application incompetent, See the case of **Alli Chamani vs Annat Tinda, Civil Application No. 410/4 of 2017, CAT at Bukoba** (Unreported).

In the foregoing Application the situation is a tiny bit dissimilar and hence distinguishable in that the Applicant has cited the proper enabling provision that can moves the Court to grant the order sought; but tainted it with unnecessary addition of unwanted provision of the law which is **Order XXVII Rule 2 (1) and (4) of the Civil Procedure Code**. In that regard, this Court exercise its discretion and invoke the overriding objective principle introduced under

Section 3A and 3B of the Civil Procedure Code, Cap 33 R.E 2019 as amended by the **Written Laws Miscellaneous Amendments (No 3) Act No. 8 of 2018** (Amending Act) which was mostly intended to enhance access of substantive justice and dispense with technicalities in civil matters, that delay justice intended to be done. This Court will omit and disregard the unwanted provisions of the law mentioned herein and proceed with the determination of the Application on merit. As it was held in the case of **Yakobo Magoiga Gichere Vs Peninah Yusuph, Civil Appeal No. of 2017** (CAT at Mwanza, Unreported) that:

"With the advent of the principle of Overriding Objective brought by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 [ACT No. 8 of 2018] the court is now required to deal with cases justly, and to have regard to substantive justice."

That being said and done, while the preliminary objective is otherwise valid, I overrule it on the basis of the reasoning above.

The Court shall proceed with the hearing of the main Application on the scheduled date. The Respondent will have its costs, but the same shall follow the cause.

Ordered Accordingly.

DATED at ARUSHA this 10th day of March 2023.



**A. Z. BADE
JUDGE
10/03/2023**

RULING DELIVERED in chambers at **ARUSHA** this **10th** day of **March 2023**

before Counsel for the parties.



**A. Z. BADE
JUDGE
10/03/2023**

