

IN THE HIGH COURT OF TANZANIA

(MWANZA SUB-REGISTRY)

AT MWANZA

MISC. APPLICATION NO. 25652 OF 2023

(Originating from Land Case No. 31 of 2023 in the High Court (Mwanza Sub-registry))

CHARLES KAHATANO LWEMPISI.....APPLICANT

VERSUS

NATIONAL BANK OF COMMERCE LTD.....1ST DEFENDANT

ACCURATE RECOVERY AND

AUCTIONS LTD.....2ND DEFENDANT

PETER LUIS DAMIAN.....3RD DEFENDANT

CFN MWANZA LIMITED.....4TH DEFENDANT

MAS % ASSOCIATES CO. LTD.....5TH DEFENDANT

RULING

4th & 8th April, 2024

KAMANA, J:

Under certificate of urgency, the applicant has brought this application under Sections 68(e) and 95 and Order XXXVII Rule 1 of the Civil Procedure Code, Cap. 33 [RE.2019] seeking the following:

1. That this Court be pleased to grant a temporary injunction restraining the respondents or their agents from carrying out development activities, disposing of further interference in the suit premises of the House on Plot No. 89 Block "S" Nyerere Road, Mwanza City pending the determination of the main suit.
2. Costs to be provided for.

3. Any other orders the Court may deem fit and just to grant.

Upon being served with the application, the first, second and fifth respondents filed a joint counter-affidavit. The said counter-affidavit was coupled with a notice of a preliminary objection that the application is Res Judicata as the applicant had filed Misc. Land Application No. 53 of 2023 against the respondents for temporary injunction which was determined by this Court.

As regards the third and fourth respondents, apart from filing a joint counter-affidavit, they filed a notice of preliminary objections that:

1. The application is bad in law for contravening the scheduling order.
2. The application is an abuse of the court process.

As the practice dictates, the Court opted to first dispose of the preliminary objections. The applicant, a relentless litigant, was represented by Mr. Mussa Mhingo, learned Counsel. The first, second and fifth respondents had the services of Mr. Galati Mwantembe, learned Counsel. Mr. Iche Mwakila, learned Counsel, appeared for the third and fourth defendants.

By the order of this Court, the respondents were ordered to file their written submissions in support of the preliminary objections no later than 21st March, 2024. The applicant's submission was to be filed no later than 28th March, 2024 and the rejoinder be filed no later than 4th April, 2024. When the matter was called on to ascertain whether the parties had complied with the order, only the respondents complied. When asked as to whether the applicant has filed his submission, Ms. Lucy Mussa, learned Counsel holding brief for Mr. Mhingo informed this Court that the applicant's submission was filed on 3rd April, 2024 and was yet to be registered.

That being the case, I will proceed to determine the preliminary objections without considering the applicant's reply as the same was not filed within the time I stated and no reason to justify the delay was offered by Ms. Mussa. It is an established principle that the scheduling order set by the Court is to be observed unless there is a reason that justifies the delay.

At this point, I would like to put it clearly that in determining the fate of this application as far as the preliminary objections are concerned, I will consider the first preliminary objection raised by the third and fifth respondents. I do so as delving into other preliminary

objections amounts to academic exercise as the said preliminary objection determines the fate of the application.

Submitting in support of the preliminary objection, Mr. Mwakila contended that according to Order VIII Rule 23 of the Civil Procedure Code, no departure from the scheduling order is allowed unless it is necessary in the interests of justice. The Rule reads:

'23. Where a scheduling conference order is made, no departure from or amendment of such order shall be allowed unless the court is satisfied that such departure or amendment is necessary in the interests of justice and the party in favour of whom such departure or amendment is made shall bear the costs of such departure or amendment, unless the court directs otherwise.'

Amplifying his argument, Mr. Mwakila contended that for one to depart from the scheduling order, he must first obtain leave of the Court after adducing convincing reasons through a formal application. He cemented his argument by inviting this Court to consider the case of **Litenga Holding Ltd v. Metal Impex GMBF**, Misc. Land Application No. 68 of 2020 in which this Court (Kakolaki, J) had this to state:

'.....the law puts it mandatory that where the scheduling conference order is made no departure from or amendment of such order shall be allowed unless the court is satisfied that such departure or amendment is necessary in the interest of justice. That means there must be an application for an order of departure from the scheduling conference order duly made, heard and determined by the court before any departure is made.'

Guided by the cited Order and the case, Mr. Mwakila contended that on 7th November, 2023, this Court in Land Case No. 31 of 2023 pronounced the scheduling order. Given that, he held the view that the institution of this application after the pronouncement of the scheduling order offends the provisions of Order VIII Rule 23. He summed up his argument by urging the Court to dismiss the application with costs as the applicant failed to apply for departure from the scheduling order.

As rightly argued by Mr. Mwakila, Order VIII Rule 23 strictly prohibits departure from the scheduling order once it is made unless there are sufficient reasons for departing. The prohibition is exhibited by the use of the word "shall" which connotes compulsoriness. The reason why departure from the scheduling order is discouraged is that justice

dispensation must be predictable as it is associated with time and costs. Further, the scheduling order serves as the tool that ensures timely dispensation of justice. If there were no strict observance of the scheduling order, justice dispensation would be costly in terms of time and expenses. However, there is an exception to the rule whereby a party wishing to depart must furnish reasons that warrant departure in the interests of justice.

That being the position, the instant application was instituted in the absence of the order that allowed departure from the scheduling order dated 7th November, 2023. In such circumstances, the application is before this Court prematurely as it was to be preceded by the order to depart from the scheduling order. In other words, the application is incompetent in this Court and ought to suffer what is in store for it. The application is struck out with costs. Order accordingly.

DATED at MWANZA this 8th day of April, 2024.



A handwritten signature in blue ink, consisting of a series of loops and strokes, representing the name KS Kamana.

KS KAMANA

JUDGE