

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF MWANZA
AT MWANZA

CIVIL REVISION NO. 1 OF 2022

*(Arising from Misc. Civil Application No. 71 of 2021 in the District Court of
Nyamagana at Mwanza)*

MWANZA CITY COUNCIL..... APPLICANT

VERSUS

ALFRED WAMBURA.....RESPONDENT

RULING

Last Order date: 24/1/2022
Ruling Date: 27/1/2022

M. MNYUKWA, J.

This is a Ruling in respect of a Revision that was initiated by the Court suo-moto following complaints lodged by Mwanza City Council (here in referred to as the applicant) against Alfred Wambura (who is referred to as the respondent). This Court invoked its powers in terms of section 44 (1) (b) of the Magistrates' Courts Act, Cap 11 R.E 2019 intending to satisfy itself as to the propriety and correctness of the proceedings and



Orders in Misc. Civil Application No. 71 of 2021 which was filed in the District Court of Nyamagana at Mwanza.

A brief background of this matter as per the available court's record is clear that, some years back in 2001, the respondent successfully sued the applicant in Mwanza District Court in Civil Case No. 72 of 2001. The District Court entered judgement for the respondent that the disputed plot be allocated to the respondent or else the applicant pays the respondent compensation for unexhausted improvements. Dissatisfied with the decision, the applicant filed an appeal to this Court that was dismissed with costs on 11/3/2005. Neither the applicant nor the respondent preferred an appeal against the decision of this Court.

It is on record that on 03/09/2021 the respondent approached the District Court of Nyamagana and filed an application under Certificate of Urgency along with Chamber summons supported by Affidavit prayed before the District Court to extend time for filing an application for Execution of Decree out of time. Following the filing of the said Application that was registered as Misc. Civil Application No 71 of 2021, on 18/10/2021 the applicant filed a reply to the Affidavit and on 17/11/2021 filed a Notice of Preliminary Objection on Point of Law that the application is incompetent for being time-barred and that the District Court has no



jurisdiction to entertain the matter. The same was responded by the respondent on 3/12/2021.

The record again shows that on 03/09/2021, the respondent filed another application under Certificate of Urgency along with Chamber Summons supported with Affidavit prayed before the same District Court for Exparte Order and Interparties Order of Temporary Injunction restraining the applicant and or her agents from collecting rent from 35 shops-rooms occupied by tenants pending determination of application for extension of time for application of the execution of the Decree. The said application was also registered as Misc. Civil Application No 71 of 2021 and the exparte hearing was conducted on 28/09/2021 and its Ruling was delivered on 06/10/2021 that granted the applicant's prayer as shown in the Chamber Summons.

The said Ruling prompted the applicant to lodge a complaint to the Hon. Judge In-charge, complaining on the issuance of the exparte order as their office are well known and near to the court and if the court would have insisted on serving them, they would have appeared to make up their case before delivering the orders. He further complained that the injunction was issued while there was no main suit that was pending as the only application in which they are aware of, is the application for



extension of time to file an application for execution. He went on complaining that, the applicant being the Government institution, an order of injunction cannot be issued against them. It is through this background that this Court opened the Revision to examine the legality of the proceedings of Misc. Civil Application No. 71 of 2021.

When this Revision was called for hearing, Mr. Ringia and Malick Mweneyuni appeared for the applicant while Mr. Herymick Chagula represented the respondent. Both counsels were invited to address the Court on the matter.

Addressing the court, Mr. Ringia submitted that they have several issues against the Misc. Civil Application No 71 of 2021. Firstly, there are two distinct applications: one for extension of time to file execution out of time and another for temporary injunction. Both named as Misc. Application No 71 of 2021 and only one payment receipt was paid as a filing fee. He went on that one of the applications and most likely the subsequent one was wrongly filed without payment of the court fees and the subsequent application was wrongly named as it was supposed to have a distinct number.

Mr. Ringia also submitted that the application for injunction was not properly filed because it was filed subsequent after the application for



extension of time. He averred that the application for injunction offends the provision of Order XLIII Rule 2 of the CPC, Cap 33 R.E 2019 which requires the presentation of the Chamber Summons and Affidavit in court before the application can be heard.

He added that, in the alternative, if the Court finds that the application is properly filed, it was improper for the application to proceed *ex parte* as it is against the provision of Order XXXVII Rule 4 of the CPC, Cap 33 R.E 2019 that requires the Notice to be given to the other party before an injunction order is granted. The learned counsel made a reference to **Tanzania Knitwear Ltd Vs. Shamsu Ismail**, 1989 TLR 48

The counsel for the applicant added that, even if the hearing of the application was *ex parte*, the condition for granting temporary injunction was not met. He further argued that the applicant being a Government institution, the proviso of Order XXXVII Rule (1) and (2) of the Civil Procedure Code, Cap 33 R.E 2019 prohibit the issuance of an order of temporary injunction against the Government. He went on that if the court grant an order against the Government, there should be a pending main suit as it was decided in various case laws including the case of **Atilio vs Mbowe** (1969) HCD 284, **Gazele Trackers Ltd Vs Tanzania**



Petroleum Development Corporation, Civil Application No 15 of 2006, CAT at Dar es Salaam and the case of **Antony Haji Vs Yasmire Haji and Another**, Misc. Civil Application No 187 of 2021, HC at Dar es Salaam wherein all three cases insist the presence of triable issue before the temporary injunction is granted. He further argued that the pending Misc. Application on the extension of time to file an application for execution does not qualify to be termed as a suit because there was no triable issue.

The counsel for the applicant further submitted that the 90 days' Notice was not issued to the complainant as per the requirement of section 6 of the Government Proceedings Act. He added that the law gives the remedy under section 2(3) of the Judicature and Application of Laws Act, Cap 358 R.E 2019 where by the injunction can be granted pending the filing of the main suit while the 90 days notice have not expired. He supported his argument by referring to the case of **Daudi Mkwya Mwita Vs Butiama District Commissioner and Attorney General**, Misc. Land Application No 69 of 2020.

Mr. Ringia finalized his submission by praying before this Court to go through the proceedings to satisfy itself whether there was an urgency to issue an injunction order and if the same was properly issued.



Responding to Mr. Ringia's submission Mr. Chagula argued that the Misc. Application No. 71 of 2021 was properly filed under Certificate of Urgency and the required fees was paid. He added that, the chamber summons was for exparte and interparties order with a prayer to grant a temporary injunction to restrain the applicant from collecting rent in the 35 shops. He went on that the application was duly served to the applicant who filed the counter affidavit and the notice of preliminary objection as it can be reflected in the case file.

Mr. Chagula went on averred that the District Court rightly granted the temporary injunction against the applicant who is a Local Government and not the Central Government. He added that the applicant is misleading the Court by referring to Order XXXVII Rule (1) and (2) of Cap 33 R.E 2019 and even the cited cases have no relevancy in the present case because the cases deal with the Central Government and the applicant is the Local Government.

On the issue of Notice, the counsel for the respondent further submitted that the respondent is not obliged to issue 90 days' Notice since that Notice is not applicable in the Misc. Application for Execution. He argued that the temporary injunction was granted to maintain the status



quo pending interparties hearing in which the applicant concerns will be heard.

He finalized his submission by stating that the Revision was uncalled for as the applicant filed a counter-affidavit and a Notice of Preliminary Objection before the District Court. Therefore, he should leave the trial court to give its impartial decision and if any party is aggrieved thereof should file an appeal to this Court.

Re-joining, Mr. Ringia insisted that they have been served with the Misc. Application No 7 of 2021 for application of extension of time to file an application for execution of which they have filed a counter-affidavit and a Notice of Preliminary Objection and that they did not respond on the application for Injunction. He went on that the application for injunction was filed under the Certificate of Urgency on 03/09/2021 and the hearing was conducted on 28/09/2021 that is 25 days later and the Ruling was delivered on 06/10/2021 in the absence of both parties. The counsel for the applicant remarked that the time spent in dealing with the application was enough to serve the applicant and appear before the District Court.

On the averment of the respondent that the applicant is not the Central Government and therefore the Government Proceedings Act does

not apply to them, the counsel of the applicant submitted that the Misc. Amendment Act No. 1 of 2020 amended section 16 of the Act which defines Government to include the Local Government Authorities as a Central Government.

Mr. Ringia maintained that the respondent failed to issue a Notice as per the requirement of the law and the injunction was improperly issued because there was no main suit that was pending.

Before I embark on the merit of this suo-motu Revision, it is pertinent to put it clear that by virtue of section 44(1) of the Magistrates' Courts Act, Cap 11 R.E 2019, this Court has supervisory and revisionary power over the District Court and Resident Magistrate Court. The section provides as hereunder: -

Section 44(1) In addition to any other power in that behalf conferred by the High Court, the High Court

(a) shall exercise general powers of supervision over all districts courts and a court of resident magistrate and may, at any time, call for and inspect or direct the inspection of the records of such courts and give such direction as it considers may be necessary in the interest of justice, and all such courts shall comply with such directions without undue delay

(b) may, in any proceedings of a civil nature determined in a district court or court of resident magistrate on application being made in that behalf by any party or on its own motion, if it appears that there has



been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or orders therein as it sees fit...

With due respect to the respondent learned counsel, my mind is settled that section 44(1) (b) of Cap 11 R.E 2019 as cited above, this Court has power through a *suo-motu* Revision to call and examine the proceedings and Orders of the District Court to satisfy as to the appropriateness and legality as it sees fit. Therefore, the presence of the complaint before this Court, justified the intervention by the opening of the *suo-motu* Revision.

Coming now to the merit of the complaint, I have had time to go through the available court records in the entire court file. Upon careful perusal of the said file, I find two distinct applications filed in the same file and given the same number as Misc. Civil Application No 71 of 2021. The record further revealed that both applications were filed on the same date that is on 03/09/2021. On my further perusal of the court file, I find two payment receipts of Tsh 50,000 and Tsh 20,000 respectively. The first receipt of Tsh 50,000/- issued by the Judiciary of Tanzania in which the payment was done on 02/09/2021. The receipt was in respect of court fee for filing of the Application. The second receipt was in respect of payment of Tsh 20,000 paid to the Judiciary as court fees. The payment



was done by the respondent on 03/12/2021 through *NMB Wakala*. Since on that date that is 03/12/2021 the respondent filed a Notice of Preliminary Objection, I am convinced to rule out that the payment of Tsh 20,000 was a Court fees in respect of the Notice of Preliminary Objection.

As it was rightly submitted by the applicant's counsel, the available records do not show if the court fee was paid in respect of the subsequent application for a temporary injunction that was heard *exparte*. I say so because there was no proof of payment in the court file relating to the application for *exparte* and interparties order of temporary injunction restraining the applicant and her agents from collecting rent in 35 tenant rooms pending determination of the application for extension of time to file an application for execution of the decree of District Court. On that basis, I agree that, this is the subsequent application that has been filed pending the determination of the application for extension of time to file an application. It is my view that, the subsequent application was supposed to have a different registration number and perhaps supposed to have its own file and the respective court fees need to be paid so as to be properly registered before the District Court.

Now, coming to the gist of the complaint, the applicant alleged that the *exparte* order issued by the District Court denied him their right to be



heard as the District Court would have insisted on serving them, they could have appeared to make their case. The counsel went on that the ex parte injunction order was given in contravention of Order XXXVII Rule 4 of the Cap 33 R.E 2019. In responding the counsel for the respondent submitted that the applicant was given a right to be heard as they have filed the reply to the affidavit and the notice of the preliminary objection. He insisted that the ex parte order was proper.

As I have earlier pointed out, there are two distinct applications that bears the same registration number as a Misc. Civil Application No. 7 of 2021. Furthermore upon going through the reply to the affidavit filed by the applicant it is clear that the applicant was responding to the application for an extension of time to file an application for execution and he has lodged a Notice of Preliminary Objection on that application and did not respond in the Misc. Application for temporary injunction which prays for ex-parte and inter-parties hearing.

Again, upon going to the court's proceedings, it is quite open that the applicant was not served with the Application for temporary injunction. The available records show that the matter came for initial orders on 07/09/2021 where both parties were absent and the honourable Magistrate ordered the matter to come for Mention on 28/09/2021 and



the parties to be notified. The available record do not show if the applicant was notified as ordered and despite the fact that the matter was fixed for Mention on 28/09/2021, on that day the matter was heard exparte without the honourable Magistrate satisfy himself if his order of notifying the parties was properly executed.

As it was rightly submitted by the advocate of the applicant this contravenes the requirement of Order XXXVII Rule 4 of the Cap 33 R.E 2019 that requires the other party to be given notice of hearing as the circumstances of our present case does not show that giving of such notice would cause undue delay as the matter was heard 25 days later after filling. Thus, failure to give notice of hearing to the applicant when the court-ordered so is equal to the denial of the right to be heard to the applicant which is against the principle of natural justice as it is provided under article 13 (6) (9) of our Constitution, Cap 2 R.E 2019 and various decision including the case of **Mbeya – Rukwa Autoparts and Transport Ltd Vs Jestina George Mwakyoma** (2003) TLR 251. Therefore, it is my view that this is a serious irregularity that has to be corrected.

Another irregularity complained of by the applicant was the granting of the temporary injunction ex-parte while the criteria for issuing the same



were not met. The applicant counsel averred that a temporary injunction cannot be issued unless there is a main suit which is pending, in other words, there should be a triable issue and that was not the position in our case. He added that, the applicant, being the Government institution, an order for injunction cannot be issued against them as per the requirement of Order XXXVII Rule (1) and (2) of Cap 33 R.E 2019. Responding, the counsel for the respondent submitted that the applicant is a body corporate able to sue and be sued and therefore is not covered under the provision of Order XXXVII Rule (1) and (2) as the section deals with the Central Government and not Local Government in which the applicant belong. He went on to state that even the case cited by the applicant has no relevancy because the case deals with the Central Government.

In the above complaint, the most important question which needs to be addressed is whether it was proper for the court in the circumstances of this case to be moved to grant an order for temporary injunction. It is a settled principle of law that one of the criteria for granting a prayer for an injunction as it is provided in the case of **Atilio Vs Mbowe** (supra) is that :-

"there must be a serious question to be tried on the alleged facts and a probability that the plaintiff will be entitled to the relief prayed."



In other words, there should be a triable issue, and in our case at hand that would have been arisen in the main application which is nonexistence in our case at hand. Going through the record, the applicant prayed and granted an injunction pending the determination of the application for extension of time to file an application for execution. To my view, that application cannot be termed as a pending suit since will not determine the rights of the parties as the same has already been determined by this Court in Civil Appeal No. 23 of 2003 of which no appeal was preferred and the decision is not disputable by the parties. In other words, the prayer was granted pending nonexistence of the suit which is contrary to the well-established principles of granting of temporary injunction.

On another complaint of issuing the temporary injunction against the Government, I think this issue should not detain me much because the provision of Order XXXVII Rule (1) and (2) is very clear that the order of the temporary injunction cannot be issued against the Government. The amendment brought by section 26 of the Written Laws (Miscellaneous Amendments) Act, 2020 that amends section 16 of the Government Proceedings Act, Cap. 5 R.E 2019 define the word Government shall include a local Government authority. On that basis, the applicant is the



Government in which an order for injunction cannot be issued against them. For the aforesaid reasoning, this is another irregularity that needs to be corrected.

The last complaint is based on the failure of the respondent to adhere to the requirement of issuing 90 days' notice before suing the applicant. The applicant averred that the respondent was required to give 90 days' notice to the applicant regardless of whether there is a main application or miscellaneous application. In responding, the respondent averred that the 90 days' notice is not applicable in the Miscellaneous Application as the Notice was issued when the respondent filed a main suit before the trial District Court.

In this aspect, I don't agree with the applicant's learned counsel that the Miscellaneous Application like the present one needs a 90 days' notice. As he I had earlier observed, there is no pending main suit that can determine the rights of the parties. So long as I agree with the applicant that there was no pending suit, the present Miscellaneous Application cannot be termed as a suit for the respondent to issue a 90 days' notice.

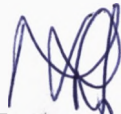
In consequence, I quash all the proceedings and Orders of the District Court in the Misc. Civil Application No. 71 of 2021 that was filed



under Certificate of Urgency along with Chamber Summons supported by Affidavit prayed for Ex-parte Order and Inter-parties Order of temporary injunction restraining the applicant and her agents from collecting rent from 35 tenants' shops. The file is remitted back to the District Court for it to continue with the Application for extension of time to file an application for execution in accordance with the law.

It is accordingly ordered with no order as to costs as the Revision was initiated by the Court suo moto.

Right of appeal explained.



M.MNYUKWA

JUDGE

27/01/2022

Ruling delivered on 27/1/2022 through Audio Teleconference all parties were present online.



M.MNYUKWA

JUDGE

27/01/2022

