Selected
23/8/2000

NN

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

MISC. CIVIL CAUSE NO..... 10 OF 1998

CALICO TEXTILE INDUSTRIES LTD..... APPLICANT
(Acting through Nimrod Elireheemah Mkono, a duly appointed Receiver and Manager)

VERSUS

1. ZENON INVESTMENTS LTD.....)
2. REGISTRAR OF TITLES.....)... RESPONDENTS
3. NBC HOLDING CORPORATION.....)

R U L I N G

MACKANJA, J.

Messrs Calico Textile Industries Limited, acting through Mr. Nimrod Rlireehemah Mkono, have brought these proceedings in which they seeks several prayers to be granted them. Mr. Mkono swears that he acts as receiver and manager for the applicant, a matter that has been hotly contested by the respondents. Suffice it for now to any that the application has been filed under section 95, Order XLIII rule 2 and Order XXXVII rule 1(a) of the Civil Procedure Code, and sections 78(4) and 99(1)(b)(f) of the Land Registration Ordinance, Cap. 334. And the reliefs sought are as follows:-

(1) an injunction restraining the first respondent by itself and/or its agents of whatsoever description from selling, disposing of or in any way dealing with the title deed of the subject of this action;

(2) the caveat registered on 13th August, 1997 in the Land register as Filed Document No. 88682 by the first respondent be removed;

" I solemnly and sincerely declare that M/S Zenon Investments Limited have an interest in the above registered land and require a caveat to be registered and enforced against the land which is presently registered in the name of M/s Calico Textile Industries Limited and that the said M/s Zenon Investments Ltd. pursuant to an agreement with the National Bank of Commerce, under which the former purchased the debts of CALICO TEXTILE INDUSTRIES LTD. owed to the said Bank, thereby by acquiring interest in the said land, and is currently in the process of having the said land registered in the name of Zenon Investments Limited."

Mr. Mkono depones further that although any person who claims an interest in any registered land may register a caveat against a land, it is common knowledge that no overseas body corporate may hold or register an interest in land in the United Republic unless it is in possession of a valid licence first had and received pursuant to the provisions of section 13 of the Land (Law of Property and Conveyancing) Ordinance, Cap 114. The first respondent, a foreign company, he said, had not been granted such licence at the time of registering such a caveat. According to him it follows that the purported caveat is invalid, and should therefore be removed from the land register .

It is the affidavit evidence of Mr. Mkono that in its letter dated 13th June, 1997 NBC not only admitted knowledge of his appointment by TDFL, as receiver and manager of CALICO, but also;

" (a) confirmed to me in writing it has resolved to join TIB and TDFL in the Receivership and that all the legal formalities pertaining to the joining of the Receivership would be communicated to me officially as Receiver and Manager by the Bank and Chief Counsel who would also deal with me on the title deeds...."

(b) By its letter dated 17th June, 1997 duly appointed me joint Receiver and Manager of CALICO"

His letter of 25 July, 1997, points out that the arrangement NBC were making with CALICO to have the first respondent settle Calico's debt would defeat and/or prejudice the interest of TDFL. He therefore demanded in that letter that NBC should release the title deed to no other person but him as the receiver and manager of the assets and properties of CALICO. That letter is Annexture NEM 4 to his affidavit. It is Mr. Mkono's contention that NBC completely ignored his demand because a Notice of Assignment dated 5 September, 1997, drawn by their advocates and copied to him in part read as follows -

> " We give notice to you that, pursuant to the terms of Assignment dated 6th August, 1997, National Bank of Commerce has assigned all its right, title and interest to Zenon Investments Limited, under the Loan Agreement and the Security Documents referred to above. Annexed herewith marked NEM 5 is a true copy of the Notice of Assignment."

So the title deed in blatant disregard of his demand and, estensibly, pursuant to the purported assignment executed by NBC in favour of the first reppondent, was delivered to the first respondent by NBC. As a consequence he has been prevented from selling the property which has now lost the price he could have received for the same. That in a very conspicuous departure from known land registration practice, the respondent registered the first respondent's caveat without annexing to the caveat the instrument of assignment mentioned in the caveat and the Notice of Assignment. Following this omission he argues that wherever it is, that instrument:-

> " (a) is not effectual because, being a disposition, it has not been registered as required by law;
>
> (b) is invalid because the First Respondent is a foreign company and may therefore not have power to hold any interest in land in the Territory unless is in possession of a valid licence first had and received pursuant to the provisions of Section 13 of the Land (Law of Property and Conveyancing) Ordinance Cap. 114;

(c) is invalid because it amounts to a fraudulent preference against the creditors of CALICO, including TDFI.

(d) cannot be acted upon by any competent authority because it has not been duly stamped; and

(e) unlawful because, contrary to the express prohibition of the law, it purperts to place a sum in Tanzanian currency to the credit of a person resident outside Tanzania, to wit the First Respondent."

It is the applicant's contention that the first respondent's caveat is so flawed and does not satisfy the requirements of relevant laws. It is not registrable and should, therefore, be removed from the land register. Indeed, it is their argument that NBC must be seen to have fully discharged CALICO from its obligations to NBC at the point it accepted payment from the first respondent in full satisfaction of the debt owed to NBC by CALICO. So, it is the applicant's case that since it is claimed that acceptances of payment from the first respondent by NBC operated as full discharge of CALICO, it follows that there was left no outstanding obligation (due from CALICO) which NBC could "assign" to the first respondent. In other words, under the purported instrument of assignment there was no condition passing from NBC to the first respondent and that agreement is therefore void. It is in the evidence of Mr. Mkono that the first respondent's caveat is, on this additional ground, also invalid because it is derived from a void agreement. For the like reasons, the detention of the title deed by the first respondent is wrongful. He concludes his evidence by saying that:-

" In the circumstances and for the reasons aforesaid, I do humbly beg this Honourable Court to order the Second Respondent to remove the First Respondent's Caveat from the Land Register, to order the First Respondent to deposit in Court the Title Deed so as to facilitate its release to the Applicant and for an injunction, pending the disposal of the application, restraining the First Respondent by itself, its servant or agent from dealing with the Title Deed in any way.".

The respondents are opposing the application and that they have done with considerable verve. First, the counter affidavit evidence of Mehbub Alam Chatur raises a number of preliminary points of obections and issues of law as follows:-

(1) that the format of chamber summons and of the suppotive affidavit is not in accordance with the provisions of the Civil Procedure Code under which the application is brought;

(2) that since this chamber application is effectively brought under Order XLIII rule 2 and Order XXXVII rule 1(a) no injunction can be prayed for because the same pends nothing against any of the three respondents, jointly or severally;

(3) that the prayers indicated in the chamber summons are absolute and competely contrary to the provision of Order XXXVII rule 1(a) which strictly allows temporary injunctions to be issued "pending the disposal of the suit";

(4) that there is no course of action disclosed whether in the chamber summons or in the affidavit of Mr. Mkono as receiver and manager appointed by the Tanzania Development Finance Limited (TDFL), about six years ago, to justfy Calico Textile Industries Limited making this application against any and/or all the respondents;

(5) that third respondent is wrongly joined as a respondent in as much as the disputed Notice of Deposit over the land registered under certificate of Title No. 15056 was a banking asset to the defunt National Bank of Commerce and cannot, therefore, fall under the provisions of section 10(1)(e) which vests

the third respondent with solely non-banking assets and liabilities of the former National Bank of Commerce; in the alternative, the interest in the banking assets was assigned by NBC to Zenon Investment Limited;

(6) that the affidavit of Nimrod Elirehemah Mkono is hopelessly defective having been attested by a Mrs. F.M. Ngalomba, learned counsel, who is an employee of TDFL, the principal and client of Mr. Mkono acting in his capacity as receiver manager.

In an affidavit he has filed in reply to the counter affidavit Mr. Mkono invites me to strike out the counter affidavit because the deponent being an "unqualfied person" is not authorised to swear to the facts contained in the counter affidavit nor is he qualified to draw that document.

I will now, from the above backgound, consider and determine the preliminary issues of objection on points of law. This will be done in tandem with consideration of the applicant's own objections against the validity or otherwise of the counter affidavit. Let me say right away that learned counsel have approached their task with industry and scholarship. I have found the cases they have cited to be very useful. Let me also say that what cries for a decision now is not the application on the merits; only points of law that have been raised will be considered. I will begin with the first preliminary objection, and proceed to the decide the others in their relationship with the reliefs that are sought in the chamber application.

Learned defence counsel, namely, Mr. Thomas Bashite Mihayo, Mr. Eric Sikujua Ng'maryo and Ms. Jessie Stephen Maguto, have argued in respect of the first objection that the chamber summons and its accompanying affidavit are so defective and so irregularly filed that they cannot, in fairness to the law, be said to have properly initiated an application for an order for temporary

injunction before this Court. It is their contention that the reply to the counter affidavit of Mahebub Alam Chatur by Nimrod Elirehemah Mkono brought no new evidence other than repeating the contents of his earlier affidavit. That the reply does not traverse the several points of law raised in the preliminary objections in the counter affidavit of Mahebub Alam Chatur. Instead, the written submissions by Professor Zebron Steven Gondwe in Item "A" of his Summary of Argument and later, and with virtually no eleboration in paragraph 1.1 and 1.2 raised preliminary objection on a point of law. However, in the presence of preliminary objection being raised by both parties in a matter, they ask whose should be heard and determined first? They opine that it is the respondents' objection which must beconsidered and determined first, and only upon the court dismissing the respondents' preliminary objection can the applicant's objection then be heard and determined. They cited Woodroffe and Asser Ali, Learned authors of the book, Woodroffe & Ammer Ali's Civil Procedure in British India, 2nd Edition (1916) at page 842 when examining Order XVII Rule 1 of the Indian Code of Civil Procedure (1908) which is in pari materia with Order XVIII Rule 1 of our own Civil Procedure Code, 1966, in support of their arguments. The learned authors say that:-

> " The party on whom the onus probandi lies as developed by the record must begin... . At the hearing of a case on a preliminary issue the defendant by whom the issue is raised has the right to begin."

The issue as to which preliminary points of law are to be determined first attracts no controversay at all. In my view as has always been the case, whoever alleges the existence or otherwise of a fact has the onus probandi to prove what he alleges. Here it is part of the defence that the application is untenable at law. So it must first be established whether or not it is so. It is after that that attacks on the defence will be considered. I therefore propose to deal with the defence objection first.

This brings me to the first preliminary objection, namely, the contention that the applicant's chamber summons and affidavit are deficient in format. Learned defence counsel have drawn my attention to the contention that court documents, including chamber summons and affidavits have prescribed formats with which parties to civil litigations are bound to comply. It is their case that the requirement to conform to prescribed forms in civil procedure is laid down in S. 101(2) of the Civil Procedure Code 1966. Although they concede that so far the Chief Justice has not replaced the Indian forms the use of those forms binds parties by virtue of S. 101(2) and (3) of the Civil Procedure Code. I am now invited to hold that the affidavit of Nimrod Elirehemah Mkono and its summons have a title that does not even remotely resemble the form given in the First Schedule to the Indian Code of Civil Procedure, which they allege is the legally prescribed title for all proceedings filed in the court, A copy of that form is Annexture NMN 2 to the defence lawyers written submission. It is reproduced here for ease of reference.

Appendixes to the First Schedule Forms.

APPENDIX A.

PLEADINGS

(1) TITLES OF SUITS

IN THE COURT OF

A. B. (add description and residence).....Plaintiff

versus

C. D. (add description and residence).....Defendant

(2) DESCRIPTIONS OF PARTIES IN PARTICULAR CASES

The Secretary of State for India in Council

The Advocate General of

The Collector of

The State of

The A. B. Company, Limited, having to registered office at

"A. B., a public officer of the C. D. Company.

A. B. (add description and residence), on behalf of himself and all other creditor of C. D. Late of (add description and residence).

A. B. (add description and resident) on behalf of himself and all otherholders of debenture issued by the COMPANY LIMITED

The Official Receiver

A. B., a minor (add description and residence), by C.D. (or by the Court of Wards), his next friend.

I agree with learned defence counsel that, in principle, where our procedural law lacks in some material particular we can conveniently adopt procedures that obtain in comperable jurisdictions, especially India from where our Civil Procedure Code was derived. I am not persuaded, however, that deviation from a court format used in India per se would constitute a ground which could lead to the rendition of a procedding as being invalid. In this connection, I uphold the submissions of Prof. Zebron Steven Gondwe, learned counsel for the applicant, who argues that the objective of the various forms cited by learned defence counsel is no more than the promotion of coherence, certainty and flow in preparing pleadings. In any case, Appendix MNM 2 relates to " Titles of suits". An application such as this one, although it is a civil proceeding, does not constitute a suit. In my view a suit is one that is instituted by a plaint, in which the plaintiff sues and the defendant resists the claim in the manner provided in the Civil Procedure Code. Especially, the institution of a suit must comply with Orders I - VIII of the Civil Prodedure Code, or under the Civil Procedure Code appli able to primary courts. Any proceeding of a civil nature that is instituted otherwise than is provided above is not a suit and, therefore, must be governed by different regulations. At any rate the defence has not shown how non-compliance with the format in Appendix MNM 2 has affected the validity of this application. This problably explains Prof. Gondwe's wonderment as to why, if the chamber summons and the supporting affidavit were wrongly headed, the respondents have their pleadings in the same format they attack. To that extent this objection lacks merit and it would fail.

It is contended in the second point of objection that this application is untenable because it contains a prayer for an injunctive relief in the absence of a suit which is pending in Court on which it would have been founded. As it is obvious from the record of proceedings the applicant cites Order XXXVI rule 1(a) of the Civil Procedure Code as the basis for making this application. Order XXXVII deals with temporary orders. Rule 1(a) provides:-

" 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, demaged, or alienanted by any party to the suit or suffer loss of value by reason of the continued use by any party to the suit or wrongly sold in execution of a decree...

(b) the court may by order grant a temporary injunction to restrain such act, or make such other order for the prupose 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."

The defence lawyers contend that the citation of this particular provision which is for temporary injunction and interlocutory orders necessarily, gives the whole application a temporary and interlocutory bearing. Yet this application is obviously for orders absolute as prayed for under Ss. 78(4) and 99(1)(b) and (f) of the Land Registration Ordinance, Cap. 334 and, contrary to the very essence of Order XXXVII rule 1(a), there is no suit that was filed prior to the application. It is therefore the contention of the defence that the above state of affairs makes the reliefs sought impossible to grant. For that reason alone they invite me to dismiss the application in its entirety.

In his reply Prof. Gondwe argues that a temporary injunction is not the sole relief that is sought so that if it fails then the entire application must follow suit. To that extent I agree with him, but he has not addressed the issue whether an application for an injunction can be sought in the absence of a suit. It remains to be seen, as the prayer goes in the chamber summons and as Prof. Gondwe argues, that the injunction can be granted to restrain the first respondent from selling, disposing of or in any way dealing with the land or the title deed in respect thereof pending the determination of the application.

...13/.

It is the applicant's case that the application is maintainable because, as pointed out earlier, the injunctive relief is one of several prayers. He is conviced that he is entitled to proceed the way he has done in terms of sections 78(4) and 99(1)(b) and (f) of the Land Registration Ordinance, Cap. 334, under which the application is brought. These sections provide as follows:-

"78(1)...

(4) The High Court, on the application of the owner of the estate or interedt affected, may summon the caveator to attend and show cause why such caveat should not be removed and thereupon the High Court may make such order, either ex parte or otherwise as it thinks fit.

99(1) Subject to any express provisions of this Ordinance the land register may be rectified pursuant to an order of the High Court or by the Regisrar, subject to an appeal to the High Court, in any of the following cases -

(b) where the High Court, on the application of any person who is aggrieved by any memorial made in, or by the omission of any memorial from the land register, or by any default being made, or unnecessary delay taking place, in the inscription of any memorial in the land register, makes an order for the rectification of the land register;

(f) in any other case, where, by reaon of any error, or omission in the land register, or by reason of any memorial made under a mistake, or for other sufficient cause it may be deemed just to rectify the land register."

Accordingly, Prof. Gondwe submits that it will be readily apparent that section 78(4) aforesaid permits the applicant to commence proceedings, as he has done, by way of an application and that section 99(1) and (f) empowers this Court to issue orders envisaged therein.

...14/.

As regards the procedure by which an application for a temporary relief which is not based on a suit Prof. Gondwe submits that the instant application is akin to the "originating summons" obtaining under English practice. He then refers to the definition of that expression and that of the term "summons" in Osbon's Concise Law Dictionary, 5th Edition. He does not mention the pages, but according to the Seventh Edition of that law disctionary that expression and term of law are defined at pages 316 and 241, respectively. The definitions are as follows:-

Summons. A document issued from the office of a court of justice, calling upon the person to whom it is directed to attend before a judge or officer of the court. In the High Court of Justice a summons is a mode of making an application to a judge or master in chambers for the decision of matters of procedure prior to or in lieu of the hearing of an action in court e.g., a summons for directions (q.v.) (see Ord.54).

Originating Summons Proceedings may be begum by originating summons, as well as by writ, or petition (Ord. 5) Proceedings suitable for commencement by originating summons are where the principal question is the construction of an Act, statutory instrument, deed, will contract or other document or some other question of law, and where there is unlikely to be any substial dispute of fact.

Originating summons is issued in the Queen's Bench Division as well as in the Chancery Divion, expect that claims in tort (other than trespass to land) or for fraud, breach of promise, infringement of patents, personal injury, and fatal accidents cases must be began by writ (Ord. 5,28).

...15/.

Prof. Gondwe winds up his argument on this issue saying that in view or the foregoing, it is patent that the instant application, lodged under section 78(4) of the Land Registration Ordinance, is an originating summons which can form the basis, as is the case here, of an interlocutory application.

There is no doubt that the practice and procedure obtaining in England is as Prof. Gondwe has pointed out. He is borne out on this by eminent jurists of English jurisprudence on the subject of pre-emptive justice. The learned authors of Halsbury's Laws of England, Fourth Edition in paragraph 1048 of Volume 24, say that an application for an injunction may be made by any party to a cause or matter before of after trial, whether or not a claim for the injunction was included in the party's originating summons. The learned authors of Commercial Litigation: Pre - emptive Remedies by Ian S. Golderein, M. K. and K. H. P. Wilkinson, LL.B (Hons) go further; they cite the precedural order under which an application for an injunction may be made by an originating summons. This they say at pages 30 to 32 of their book. The most relevant parts are as follows:-

" PART C: PRACTICE AND PROCEDURE

1. Introduction

1. Ord. 29, r.1:

"(1)An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.

(2)Where the applicant is the plaintiff and the case is one of urgency such application may be made ex parte on affidavit but, except as aforesaid, such application must be made by motion or summons.

(3) The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms if any, as the Court thinks fit".

There is no doubt that the English provisions that govern the institution of applications for pre-emptive reliefs in the form of temporary injunctions cover a vide range of civil proceedings. In my view this is so because the law there relates to "a cause or matter ..." The Civil Procedure Code under which we operate is not as wide as the English law. Order XXXVII of the Civil Procedure Code lays down a specific procedure which governs any party who desires to institute an application for a temporary injunction. The instant application has been brought under rule 1(a) of the said Order; it provides:-

"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 alienanted by any party to the suit ...

(b) ...

the court may by order grant a temporary injunction to restrain such act..... until the disposal of the suit, or until further orders."

For purposes of the Civil Procedure Code a court may grant a temporary injunction to protect property that is the subject of a suit pending the determination of that suit or until any further orders are made in relation to that suit. An order for a temporary injunction, therefore, cannot be made in a proceeding which is not, stricto sensu, a suit. I am fortivied in this by the scholarly commentary on Order XXXIX 1(a) of the Indian Code of Civil Procedure as made by the learned authors of Sackar's Law of Civil Procedure,

Eight Edition, June 1, 1992. That Order is in pari materia with our Order XXXVII rule 1(a); the authors say this at page 1416:-

> "The principles governing the grant of injunction are well-settled... The object is to proserve the status quo while rights are being litigated and the onus is an the plaintiff to show his need for the injunction."

The term "Plaintiff" in litigation is based on the one who who brings and prosecutes a suit. It is a term that refers to the party in a suit who has lodged a claim for reliefs in terms the Civil Procedure Code as earlier pointed out. So there must be a suit pending in court in respect of which an application for an injunction will be made.

Of course I also have in mind the English practice. Foreign practice will be employed where our own law has made no provision. Where we have a law in phace courts in this country will limit themselves to emulating sound principles of law and of practice from foreign jurisdictions of comperable system of justice. It is in these circumsatances I am persuaded to accept the defence proposition that an application for an injunction will be invalid if it is not based on a suit which is pending in court, for, as I have said, an application such as this one is not a suit. The prayer for an injunction would therefore be refused.

Learned defence counsel contend that the supporting affidavit that was sworn by Mr. Mkono is incurably defective. According to them the counter affidavit of Mr. Mahbub A. Chatur, having been not controverted, establishes that Mrs. F. M. Ngalomba the commissioner for oaths before whom Mr. Mkono swore the affidavit, is an employee of TDFL. It is their further submission that in paragraph 4 of the affidavit of Mr. Mkono, it is unequivocally stated that TDFL appointed him the receiver and manager of Calico. Mr. Mkono is the deponent of the affidavit attested by Mrs. Ngalomba who is an employee of TDFL. Thus, both Mr. Mkono and Mrs. Ngalomba are persons employed by TDFL and are acting on its behalf. Learned counsel have drawn

my attention to the fact that the role of an officer who attests the signature of a deponent is that of a Commissioner for Oaths. That the law that regulates the powers and duties of Commissioner for Oaths is the Notaries Public and Commissioners for Oaths Ordinahce Cap. 12. They argue that that particular piece of legislation is categorical in its total resteiction of the exercise of the powers by a Commissioner for Oaths in proceedings or matter in which that Commissioner is interested. So, because of their mutual interest in the proceedings on behalf of their principal, TDFL, learned defence counsel would have me hold that the attestion of the affidavit of Mr. Mkono by Mrs. Ngalomba is irreparably defective. They argue that by reason of the alleged defects, there is ano application which this Court can adjudicated upon. They have cited the decision of this Court, Onyiuke, J., in The Project Planning Consultants (Tanzania) V. Tanzania Audit Corporation 1974 LRT n.10 in support of their arguments.

The learned counsel for the applicants puts forward the proposition that section 7 of The Notaries Public and Commissioner for Oaths Ordinance, Cap. 12, is directed not at the instrument, but at the conduct of the commissioners for oaths. Had the Legislature intended any sanctions against the affected instrument it would have made specific provision therefor. He give as examples section 44(2) of the Advocates Ordinance and section 46 of the Stamp Duty Act, 1972 which expressly prennounce the fate of a non-complying instrument. He makes the further point that the respondents themselves concede that TDFL is not a party to this application. So to him it is difficult in such circumstances to comprehend how Mrs. Ngalomba, a mere employee of TDFL, would have such interest in this matter as would trigger the operation of section 7 of the Notaries Public and Commissioners for Oaths Ordinance. They submit that Mrs. Ngalomba is a duly admitted advocate and Commissioner for Oaths who has no interest in this matter. In fact the definition of "interest" and especially the definition of "indirect interest" completely exclude her attestation of the affidavit that supports the application from the purview of the provisions aforesaid.

Even more damaging to the respondent's argument he contended, is the fact that the case they are relying on i.e. Project Planning Consultants (Tanzania) v. Tanzania Audit Corporation (1974) LRT No. 10 is easily distinguishable and that, in fact, confirms the applicant's argument. In that case it was held that an officer of the Tanzania Legal Corporation cannot act as a Commissioner for Oaths in any proceedings in which that corporation is advocate to any of the parties to the proceedings. In the instant case TDFL is not an advocate to any of the parties. Indeed, it is not even a party to the application, so it is no wonder that the respondents did not annex to their written submissions what one would have thought a crucial decision for their argument; it is because the same case defeats their argument.

After having argued with so much vitality, Prof. Gondwe, submitted that where a matter is heard by way of written submissions, as is the case here, a reply, , constitutes the applicant's final address to the Court. He cited Jashbhai C. Patel v. B.D.Joshi (1950 - 51) Vol. XVII - XVIII E. A. C. A. where it was held that even during a party's final address Court has the descretion to entertain the substitution of properly drawn instrument for one which exhibits same defect(s) in form where no injury has been occasioned to the other party. It is contended that in the instant case the attestation in question has occassioned no injury to the respondents.

"... We are lodging herewith 6 copies of the re-sworn Affidavit of the Applicant, and the only changes therein are the date of making the oath the signature of the Commissioner for Oaths, the stamp of said Commissioner and the addresses of the Respondents. The rest of the Affidavit is unchanged. My Lord, as the Respondents concede in paragraph 66 of their Submission, this Application involves a 'complexity of issues' which we believe can only be resolved if this Application is heard on its merits. My Lord, under section 95 and 97 or the Code, it is within this Honourable Court's discretion to admit the re-sworn Affidavit and to order re-service thereof on the Respondents."

The controversay, really, if any, lies in the construction of section 7 of the Notary Public and Commissioners for Oaths Ordinance. It provides:-

" 7. No commissioner for oaths shall exercise any of his powers as a commissioner for oaths in any proceedings or matter in which he is advocate to the parties to proceedings or matter in which he is interested."

These provisions create two situations in which a commissioner for oaths is disqualified, .. namely:-

(1) he/she shall not exercise any of his powers is any proceeding in which he is advocate to the parties;

(2) he/she is also barred from exercising such powers in proceedings or matter in which he is interested;

Of the two limbs, I am persuaded by Prof. Gondwe that it has not been established that Mrs. Ngalomba who attested Mr. Nimrod M. Mkono's affidavit has at any time acted for the parties. As to the second limb there is no doubt that she is an employee of TDFL, Mr. Mkono's principals in his capacity as receiver manager of the applicant. The issue is whether her employment is evidence of sufficiency of interest in these proceedings. Prof. Gondwe argues that Mrs. Ngalomba has no interest in TDFL and has cited the definition of term "interest" in Osborn's Concide Law Disctionary, to be:-

" Interest A person is said to have interest in a thing when he has rights, titles, advantages, duties, liabilities concerned with it, whether present, or future, adcertained or potential, provided they are not too remote....."

Some of the meanings ascribed to that word "interest" by the Collins English Dictionary, Second Edition is this:-

"5. benefit, advantage; 6.a. a right, share of claim, esp. in a business or property."

The issue now is whether Mrs. Ngalomba has an interest in TDFL.

There is no doubt that as an employee she has an interest in TDFL from several standpoints. She has rights accruing from her employment; she has duties and obligations under a contract of employment. She derives advantages from her relation with TDFL. She has a right to continue working with TDFL and to be remunarated commensurately. In these circumstances TDFL is her principal in a whose continued survival she must have a legimate interest. Does this interest bar her to act as a commissioner for oaths in a judicial proceeding in which her employer is interested?

Prof. Gondwe has pointed out that TDFL is not a party to this application. That part of learned counsel's submissions is quite attractive but it is entirely untenable. The affidavit of Mr. Mkono clearly shows that the present applicant is more of a frontman for TDFL and that what really appears to have prompted this application are the direct interests of TDFL. That this is the case can be seen from paragraphs 3 and 4 of that affidavit. I will reproduce them here for ease of reference.

> "3. Sometime ago CALICO TEXTILE INDUSTRIES LIMITED (CALICO) executed a Debanture, dated 20 Debanture, dated 20 December 1985 TO TANZANIA DEVELOPMENT FINANCE COMPANY LTD (TDFL) under which CALICO as benefial owner CHARGED, inter alia its Lease (registered on 19 June, 1960 as Title Number 15056 under Folio Number 9074, serial Number 47(60) (the "property") with a first specific charge as security for the payment of monies due from CALICO to TDFL.
>
> 4. By a Deed of Appointment of Receiver & Manager dated 7 April, 1992, TDFL appointed me to be their Receiver & Manager of all properties and assets whatsoever charged under the CALICO Debanture..."

So although not directly a party TDFL is a constractive party to the proceedings because the powers the receiver manager exercises are those of TDFL in the management of CALICO which no longer can act

through its own principal officers. To that extent, the affairs of CALICO are inextricably interwoven with those of TDFL. The interests of CALICO are now merged with those of TDFL. To that extent Mrs. Ngalomba has an interest in the affairs of CALICO as well. Her attestation of Mr. Mkono's affidavit has consequently contravened the provisions of section 7 of the Notaries Public and Commissioners for Oaths Ordinance. In this connection I find as useful reference the decision of this Court, Onyiuke, J., in the case of The Project Planning Consultants (Tanzania) v. Tanzania Audit Corporation 1974 LRT n. 10 where it was held, inter alia;

> " The purpose of this section (Section 7 of Cap. 12) is to ensure the independence of a Commissioner for Oaths as an officer of Court and to avoid any possible clash of interest in the discharge of his duties as a Commissioner for Oaths. The history of Commissioners for Oaths is given at Page 417 in Volume I of the Dictionary of English Law by Earl Jewitt. According to his book, Masters extraordinary in Chancery acted in very early times as Commissioners to administer Oaths to persons making affidavits before them concerning Chancery Suits and Judges of the Common Law Courts were authorised under statute by Commission to empower persons to take affidavits for a fee concerning Common Law actions. The Commissioners for Oaths Act 1889which amends and consolidates twenty-four enactments on the subject, enacts S.1 that the Lord Chancellor, may, from time to time, by Commission signed by him to appoint practising solicitors or other fit and proper persons to be Commissioners for Oaths with power, in England or elsewhere, to administer oath (sic) or take any affidavit for the purposes of any Court in England but it is provided that a Commissioner may not act in any proceeding in which he is solicitor to any of the parties to the proceeding or in which he is interested. This latter provision has been reproduced in s 7 of our Notaries Public and Commissioner (sic) for Oaths Ordinance..."

In the view of the foregoing I will strike out the affidavit in support of the present application as not been (sic) properly sworn. Order XLIII Rule 2 requires every Chamber Application to be supported by an affidavit. Since there is no affidavit supporting this application, I will strike out the application also."

Prof. Gondwe has contended that if it is held that the attestation is fatally irregular, the affidavit be found to be in order because Parliament directes sanction against commissioners for oaths and not against the instruments they execute. In my view that argument is untenable nor are the examples he gave of any assistance. If the Legislature thought that provisions similar to those that apply to an unstamped document were to apply to irregularly attested affidavits, nothing would have stopped it from saying so. Since the words employed in section 7 of the Notaries Public and Commissioners for Oaths Ordinance are unambiguous this Court is not entitled to introduce a foreign meaning to that statute for in doing so the intention of Parliament will be rendured absurd. Hence the affidavit in question is fatally defective and nothing can be done that will save it.

Prof. Gondwe has persued another line of argument. He contends that if the affidavit supporting the application is found to be defective, it can be cured by filing another affidavit containing the same facts, which, in fact he did without leave of court. He has cited Jashbhai C. Patel v. B. D. Joshi (1950 - 51) Vol. XVII - XVIII E. A. C. A. 42, a case that originated from the Supreme Court of Kenya, for the proposition that a party may be allowed to substitute a properly drawn instrument for one that is defective. But, surely the substitution of a property drawn instrument for a defective one is not the same as substituting a properly attested affidavit with one that is defective. The reason for this proposition is not for to fetch, because an affidavit is the evidence on which an application is founded. This means, then, that throughout the life of these proceedings there was no affidavit that supports application until the applicant attempted to introduce fresh evidence to beath life into a nothing;

for an application is in order only if it is supported by an affidavit. Since, therefore, the affidavit supporting the application was fatally defective when these proceedings were instituted, ∠ was invalid ab initio; nothing could be done to it that could save it. ∠the apppli-cation

What is also unusual is the manner the applicant introduced another affidavit into the record without leave of court. To say the least that was very irregular. Every practising lawyer will know that an affidavit is evidence. It cannot be introduced at a time when the trial of the application was ∠. To act as the applicant did is akin to allowing a plaintiff to adduce oral evidence after the close of the defence in substitution for evidence that he will discover cannot prove his case. What, therefore, is entitled the SECOND AFFIDAVIT" of Mr. Mkono was irregularly introduced into the record of proceedings. In that circumstance it has no evidential value and I now order that it be expunged from the record of proceedings. It is upon the foregoing reasons that I would hold that the application is totally invalid ab initio. ∠already concluded

Another attack on the validity of the application is in the defence contention that the application in relation to the second and third reliefs is time-barred. This objection is not one of those that were raised in the counter affidavit. It has been raised in terms of section 3(1) of the Law of Limitation Act, 1971, which provides that:-

> "3.(1) Subject to the provisions of this Act, every proceeding described in the first column of the First Schedule to this Act and which is instituted after the period of limitation prescribed therefor opposite thereto in the second column, shall be dismissed whether or not limitation has been set up as a defence."

It is learned defence counsel's contention that time began to run as regards the second relief, on 13th August, 1997 when the caveat complained of was registered and that time in respect of the third prayer began to accrue on 7th July, 1970.

Since the application was filed on 29th January, 1998, therefore, the second prayer in the chamber summons came five months and seven days after the date the cause of action arose, which is well beyond the time allowed by law, namely, sixty days. That the third prayer was made some twenty seven years, six months and thirteen days from the date the cause of action arose. So that the alleged inaction lasted for twenty seven odd years, but the law allows only six months.

Learned counsel for the applicant has different views on limitation. He contends that the argument concerning limitation is completely irrelevant. The applicant, as pointed out, is seeking to retrieve Calico's title deed from the first respondent and to have certain memorials in the land register removed or, as the case may be, be deleted. That is to say, pending the said removal and delition, the wrongs perpertrated by the respondents will continue unabated. In further difference with the respondents Prof. Gondwe argues that section 7 of the Law of Limitation Act, provides that where there is a continuing wrong a fresh period of limitation shall begin to run at every moment of the time during which the wrong continues.

In my considerered view the period of limitation is tied up with TDFL'S resoolved to put Calico under receivership in a bid to realise its interests under the debanture. That was put into effect when, on 7th April, 1992, Mr. N. E. Mkono was appointed receiver and manager. It is from that time that any action by third parties that interfered with TDFL'S rights over Calico's property became wrongful, hence TDFL'S right to sue to enforce those rights. Nothing adverse to TDFL'S rights took place until 18th August, 1997, when a caveat was registered by the second respondent. The caveat checked the execution of the decision of Mr. Mkono as receiver and manager to sell Calico's assets to unable him realise the mortgage in favour of TDFL. The registration of the caveat is one action which I do find not to be continuous. If, therefore, the registration of the caveat be an actionable wrong, it is not a continuous one. In that circumstance I would uphold the contention by learned defence counsel that the priod of limitation to institute proceedings to have the caveat removed

or deleted from the land register began to run on 18th August, 1997. On the same parity of reasoning the contention that the period for limitation in respect of the third prayer began to accrue on the date alleged by the respondents, that is to say, on the 7th of July, 1970, is rejected. It is my judgment that both prayers are governed by the same circumstances as regards limitation. Consequently, were it that the application was potent in other respects, the third prayer would have been in time.

In yet another objection the respondents are contending that Mr. Mkono has no right to be heard on behalf of Calico. It is submitted on their behalf that the entire purpose of this application is to unable Nimrod Elirehemah Mkono, as a receiver and manger of Calico Textile Industries Limited, to sell the land registered in the name of Calico Industries Limited under C.T. 15056. They argue that Mr. Mkono can not be struggling to remove caveats from the aforesaid title, praying for the title to be released to him then sell the land registered under the title for the benefit of Calico Textile Industries Limited. To wind up their submissions on this point they pose this question: for whom, then, is Mr. Mkono acting in filing this application? To learned defence counsel, apart from naming the applicant, Mr. Mkono's affidavit gives no indication that he is in any way acting for Calico, and it does not reveal how the prayers made in the chamber summons can be of any use to Calico. Rather, Mr. Mkono is acting for his purported principal, the Tanzania Development Finance Limited. So they observe that to indicate Calico Textile Industries Limited as a party to this application is erroneous both in law as well as in fact.

I have given due consideration, as indeed I have to, to the argument that this application cannot be prosecuted by Mr. Mkono on behalf of Calico presumably because he has not been instructed by the applicant company. In my view, and as Prof. Gondwe correctly argues, it is not the application which is erreneous in law as well as in fact. It is the attack on Mr. Mkono's right as receiver and manager to maintain these proceedings which is erroneous.

Because once Mr. Mkono was appointed receiver and manager to enforce TDFL's rights under the debanture he at once was clothed with power to do what Calico and TDFL agreed to in case Calico defaulted to repay the loan that is evidenced by the debanture. I am therefore is total agreement with learned counsel for the applicant that condition 6(1) of the TDFL debanture empowered the applicant to take possession of, collect and get in all or any part of the property belonging to Calico that was mortgaged by Calico as security for the loan that TDFL advanced to Calico. Condition 5 of the debanture empowers the holder, TDFL, to appoint a receiver after".... the principal moneys hereby secured have become immediately payable..." The money becomes immediately payable under certain conditions of the loan agreement. The opening part of condition 6 declares that the receiver is the agent of the borrower company and that :-

> "... he shall have authority and be entitled to exercise the powers hereinafter setforth in addition to and without limiting any general power conferred on him by law -
>
> (1) to take possession of, collect and get in all or any part of the mortgaged premises and for that purpose to take proceedings in the name of the company or otherwise as may seem expedient."

This objection would fail.

The last objection that has been raised by the respodent is the contention that the third respondent is wrongly joined. They rely on Section 10(1)(e) of the National Bank of Commerce (Reorganization and Vesting of Assets and Liabilities) Act, No. 23 of 1997 which reads as follows:-

> "10 - (1) Consequent upon the split of the former bank into the Company, the NMB and the Corporation, all assets and the liabilities relating to banking business, to which the former bank was entitled or subject, immediately before the vesting date, with effect from the 1st day of October, 1997 by vitue of this section and without further assurance -

(a)...
(b)...
(c)...
(d)...
(e) in respect of non-banking, assets and liabilities and all other assets and liabilties and business of the former bank not transferred and vested by paragraph (a)(b)(c), or (d) of the this subsection, be transferred and vest in in the Corporation.

It is submitted that the equitable mortgage given to the National Bank of Commerce by Calico Textile Industrias Limited was a banking asset and for that reason, the same was not vested in the NBC Holding Corporation. It is contended that the applicant has failed to traverse the averment that there is a misjoinder of the third respondent. A specific prayer is therefore being made that the third respondent be struck out of the application and costs thereof be awarded to it.

Again in difference with the respondent's learned counsel, learned counsel for the applicant contends that as regards joinder of the third respondent, section 10(1)(a) and (b) of the National Bank of Commerce (Reorganisation and Vesting of Assets and Liabilities) Act, 1997 (NBC Act), provides for transfer of assets from "specified branches" of the defunct NBC to one of the three now entities. The NBC Debanture dated 26th July, 1977, which appears as Annexure "MC 2" to the first respondent's counter affidavit does not proclaim the branch to which it was issued by CALICO. As such, it is caught by section 10(1)(e) of the NBC Act, and could only vest in the NBC Holding Corporation. It is therefore submitted that the respondent's submission in this connection lacks basis both in fact and law.

Now, /the National Bank was re-organized, three new /when institutions were established to take over all its functions, assets and liabilities. The three institutions so established were the National Bank of Commece (1997) Ltd, the National Microfinance

Bank and the NBC Holding Corporation. Section 10 of the National Bank of Commerce (Reorganization and Vesting of Assets and Liabilities) Act, No. 23 of 1997 makes provision for the vesting of the assets and liabilities of the former NBC into the new institutions. The relevant part of section 10 is subsection (1)(a)(b) and (e). It provides that:-

> "(1) Consequent upon the split of the former bank inot the company, the NMB and the Corporation, all the assets and the liabilities relating to the banking business, to which the former bank was entitled or subject, immediately before the vesting date shall, with effect from the 1st day of October, 1997, by virtue of this section and without further assurance -
>
> (a) in respect of the banking business in the specified branches constituting the Company, be transferred to and be vested in the Company;
>
> (b) in respect of the banking business in the specified branches constituting the NBC, be transferred to and be vested in the NMB;
>
> (c)...
> (d)...
> (e) in respect of non-banking assets and liabilities and all other assets, liabilities and business of the former bank not transferred and vested by paragraph (a), (b), (c) or (d) of this subsection, be transferred to and be vested in the Corporation."

The "Company" in section 10 is reference to NBC (1997) Ltd.

According to Prof. Gondwe the second respondent was made a party to these proceedings because the NBC debanture under review does not proclaim the branch to which it was issued by Calico. By implication he is arguing that although the debanture is a banking asset, it should be held to have been transferred to the

second respondent because of the reason he has put forward.

Now, a very liberal interpretation of section 10 irresistably leads to the conclusion that the banking business to which mortgoges and debantures belong, here transferred to the NBC (1997) Ltd. and to NMB. And, as clearly stated in subsection (1)(e) no-banking assets were transferred to the second respondent, so that the words "... and liabilities and all other assets, liabilities and business of the former bank..." which appear in sub - section (1)(e) must be construed eusdem generis with the words "non - banking assets" which preceed them. By reason of that interpretation the debanture in question could only be transferred to NMB or to NBC (1997) Ltd. Failure by Calico to declare the branch to which it was issued does not qualify it to be vested in the second respondent. What the applicant should probably do in order to be able to enforce TDFL's rights under the debanture would be to locate the branch, for surely the debanture must have been issued to one of the branches of the erstwhile NBC. It is in that circumstances that this preliminary point of objection would succeeded.

Now, as regards the fourth relief, it is on record that the title deed registered under certificate of Title No. 15056 was deposited in court with the consent of all the parties. This prayer has therefore been overtaken by circumstances.

Upon the foregoing considerations the application would fail. It is accordingly dismissed with costs. Since the application has been dismissed, the need to consider the applicant's objections does not arise. It is ordered that the title deed which is the subject of this application be released to the first respondent. Order accordingly.

Delivered this 16th day of June, 1998.

J. M. Mackanja

JUDGE

APPEARANCES :

Prof: Gondwe, Advocate for Applicant

Mr. Mihayo)

Mr. Ng'maryo) : For Respondents.

Ms. Mnguto)