

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM
CIVIL CASE NO. 92 of 1995

OMARI MBUZINI KILAMA.....APPLICANT

VS

NEHEMIAH JEREMIAH MAKOFIA.....RESPONDENT

Ruling

Date of last Order: 02-09-2010

Date of Ruling: 25-10-2010

JUMA, J.:

After trying in vain to execute a decree of this court against the respondent; the applicant is resorting to the inherent powers of this court under section 95 of the **Civil Procedure Code**, to move this court to first join both the General Manager of Mtibwa Sugar and the Chairman of Mtibwa Outgrowers Association of Mtibwa. The applicant is also seeking an order to require the General Manager of Mtibwa Sugar and the Chairman of Mtibwa Outgrowers Association of Mtibwa to honour a decree of this court issued on 21 August 2000 by Bubeshi, J (as she then was).

The background to this application traces back to 1995 when the Applicant OMARI MBUZINI KILAMA as Plaintiff, filed his claim in this court. The applicant claimed that one **NEHEMIAH JEREMIAH MAKOFIA** (the

respondent herein) had encroached upon his two-acre land. During the hearing of the suit, the respondent failed to file his written statement of defence. On 9th February 2000 this court (Bubeshi, J.) allowed the applicant to prove his claim *ex parte*. At the conclusion of the *ex parte* hearing, this court found that the applicant had suffered some loss of profit and was awarded twenty million shillings as damages, costs and interests. The award of twenty million shillings has accumulated to reach Tshs 53,068,665/=. Out of this accumulated sum, the General Manager of Mtibwa Sugar Ltd has already paid only Tshs 10,092,925/=.

When the application came up for a mention on 2 September 2010 the respondent (Nehemiah Jeremiah Makofia) was absent. Attempts to serve the processes of this court on respondent have been futile thus far. Appearing on behalf of Mtibwa Sugar Company; Mr. Odhiambo Kobas, the learned Advocate protested that Mtibwa Sugar Company is not a party to the Civil Case Number 95 of 1995 whose decree the applicant herein is seeking to execute. Following the protestations, I on my own motion directed the parties to initially address me by way of written submissions on two issues. First, whether by relying on section 95 of the Civil Procedure Code this court has properly been moved to join: the General Manager of Mtibwa Sugar; and the Chairman of Mtibwa Out growers Association of Mtibwa. Second, whether an attachment Order in pursuance of an execution of a decree can be issued to the General Manager of the Mtibwa Sugar Ltd commanding the attachment of proceeds arising from the sale of respondent's sugar cane to the General

Manager of Mtibwa Sugar and Chairman of Mtibwa Out-growers Association of Mtibwa.

I propose to begin with the second issue whether an attachment Order in pursuance of an execution of a decree can in law be issued against the strangers to a decree arising from the Civil Case Number 92 of 1995 between the applicant herein and the respondent (Nehemiah Jeremias Makofia) can be made to honour that decree. The applicant believes so. The applicant submitted that because the respondent was and is still selling his sugar cane proceeds to Mtibwa Sugar Estate Ltd, the sugar company is supposed to withhold the amount of money from the proceeds of the sale of respondent's sugar cane and disburse the amount withheld to the applicant.

In his reply on behalf of the Mtibwa Sugar Estate Ltd, Mr. Kobas submitted that a stranger to the proceedings cannot be made a party to that proceeding after determination of the case even for purposes of honouring an attachment order. According to Mr. Kobas, had the applicant wanted to make the General Manager of Mtibwa Sugar Estate Ltd and Mtibwa Outgrowers Association parties to the Civil Case Number 92 of 1995 he should have joined them as parties to the suit much earlier under Order 1 Rules 3 and 7 of the Civil Procedure Code. Mr. Kobas is of the considered view that joining a party in a suit after the same has been determined and is at execution of the decree, is an abuse of the court process.

Both parties made submissions on applicability of section 95 of the Civil Procedure Code to move this court to join the General Manager of Mtibwa Sugar Estate Ltd and Mtibwa Outgrowers Association at execution stage of the decree arising from Civil Case Number 92 of 1995. The applicant pointed out that the execution of this Court's decree has been pending over the last ten years and it is right time for this to resort to its inherent power provided in section 95 of the CPC for the sake of ends of justice. In his response on behalf of the Mtibwa Sugar Estate Ltd, Mr. Kobas submitted that section 95 of the **Civil Procedure Code** is not the correct provision to move this court for purposes of the present application. According to the learned Counsel, in so far as this application is to join a party to a proceeding, it ought to have been done under Order 1 Rules 3 and 7 of the **Civil Procedure Code**.

I have considered the opposing submissions articulated by the applicant and the learned Mr. Kobas with respect to both the applicability of section 95 of the Civil Procedure Code to move this Court to grant the prayers in the chamber application; and joining of strangers to the trial proceedings at execution stage. With due respect, I do not agree with Mr. Kobas that strangers to the Civil Case No. 92 of 1995 like General Manager of Mtibwa Sugar Estate Ltd and Mtibwa Outgrowers Association; cannot be subject to the execution of the decree through an attachment Order. In my opinion, section 48 of the Civil Procedure Code brings strangers/non-party to a suit to within the purview of the attachment power of the courts at the stage of execution of a decree.

As long as moneys or property due to a judgment debtor pass through the hands of strangers to the trial proceedings, the court can issue an attachment order as against the strangers to the Decree. That is, as long as the Registrar of this court believes that the respondent (judgment debtor) is beneficially interested in any moneys or claims whatsoever, passing through or in the custody or under the control of Mtibwa Sugar Estates Ltd, the court, in executing a decree may attach the same. Section 48 of the **Civil Procedure Code** provides,

48.-(1) The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, banknotes, cheque, bills of exchange, promissory notes, Government securities, bonds or other securities for money debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, movable or immovable, belonging to the judgment debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, **whether the same be held in the name of the judgment debtor or by another person in trust for him or on his behalf:** [emphasis added]

Records show that Registrar of this court believes that payments to the respondent arising from the sale of sugar cane passes through Mtibwa Sugar Estates Ltd. Records also show that in order to recoup the amount of Tshs 53,068,665 the Registrar of this court on 7th December 2000 issued an attachment Order to the General Manager of the Mtibwa Sugar Ltd commanding the attachment of proceeds arising from the sale of respondent's sugar cane. And the General Manager of Mtibwa Sugar

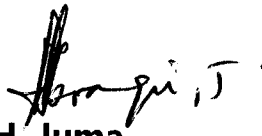
Estates Ltd at one point honoured an attachment order by paying a sum of money. The Registrar of High Court followed up later with another attachment order dated 25 February 2010. This time, the Registrar directed a Court Broker (Property Inter National Limited) to recoup the outstanding Tshs 42,145,739.02 by attaching the proceeds arising from the sale of sugar cane by Mtibwa Sugar Estate Ltd. This move to directly attach the property of Mtibwa Sugar Estate Ltd has not helped the applicant to execute the decree. On 8th March 2010 Mtibwa Sugar Estate Ltd wrote a letter to inform the District Registrar that the sugar company is unable to comply with the order of the court because the company did not have the records of the sugarcane which the respondent judgment debtor sold to the company.

In addition, the sugar company claimed that it did not have direct contact with individual farmers like the respondent/judgment debtor. The Registrar is yet to show that he agrees with the contention by Mtibwa Sugar Estates Ltd that it does not handle moneys passing on to the respondent herein. It is clear in my mind that the Registrar of this court is still handling the execution of the Decree as mandated by section 48 of the Civil Procedure Code. For the time being I am leaving it to the Registrar to satisfy himself that payments due to the respondent herein no longer pass through the Mtibwa Sugar Estate Ltd.

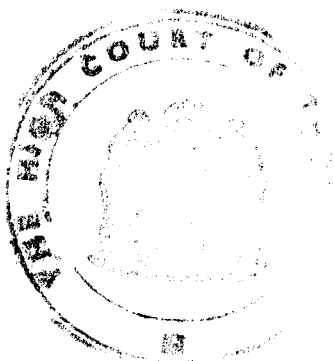
In my opinion, section 95 of CPC is not a proper provision that can be employed to move this court to issue an attachment order to any person

through whom moneys belonging to a judgment debtor passes to reach the judgment debtor. In light of applicability of section 48 of CPC to attach the property of strangers to the suit between the applicant and respondent, the applicant cannot rely on inherent powers of this Court under section 95 to move this Court to join General Manager of Mtibwa Sugar Estate Ltd and Mtibwa Outgrowers Association.

In the upshot, I hereby find and hold that the applicant by relying on section 95 of CPC has not employed proper provision of the law to move this court. The application is hereby struck out. No order is made with respect to costs because the application was filed under the legal aid assistance of the Commission for Human Rights and Good Governance Legal Aid Unit.


I.H. Juma
JUDGE
25-10-2010

Delivered in presence of:
Omari Mbuzini Kilama (Applicant) and
Mr. Marwa (Adv) for Mtibwa Sugar Ltd.




I.H. Juma
JUDGE
25-10-2010