

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION CAUSE NO. 809 OF 2018  
IN THE MATTER OF ARBITRATION**

**AND**

**IN THE MATTER OF ARBITRATION ACT, [CAP 15 R. E. 2002]**

**BETWEEN**

**ARUSHA BLOOMS LIMITED.....1<sup>ST</sup> PETITIONER  
(UNDER RECEIVERSHIP)**

**FELIX MREMA.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**TIB DEVELOPMENT BANK LIMITED.....1<sup>ST</sup> RESPONDENT**

**DANIEL WELWEL (JOINT RECEIVER AND  
MANAGER OF ARUSHA BLOOMS LIMITED).....2<sup>ND</sup> RESPONDENT**

**VINTAN MBIRO, (JOINT RECEIVER AND  
MANAGER OF ARUSHA BLOOMS LIMITED).....3<sup>RD</sup> RESPONDENT**

**RULING**

**Date of last order:**16/07/2019

**Date of ruling:**31/10/2019

**MLYAMBINA, J.**

This petition has been preferred under *Sections 3 and 21 (d) of the Arbitration Act, Cap 15 [R.E. 2002], Rules 5, 10 and 11 of the Arbitration Rules, Section 2 (3) of the judicature and application of Laws Act, Cap 1 R.E. 2002 and Section 95 of the Civil Procedure Code Act, Cap 33 [R.E. 2002].*

The petitioners prayed for the following orders:

1. That, the dispute between the petitioners and 1<sup>st</sup> respondent be referred to arbitration.

2. That, the 1<sup>st</sup> respondent to participate fully in the arbitration process already commenced by petitioners at national construction council.
3. Transfer of ownership of the 1<sup>st</sup> applicant's farm no. 140/1/1 and farm no. 140/1/2 Chekereni, Arumeru District, Arusha be stayed pending final disposal of arbitration between the applicants and the 1<sup>st</sup> respondent.
4. Costs of this petition be provided for.

When answering to the petition, the respondents raised five *plea in limine litis* namely:

- i. That, there is no citation of enabling provision of the law.
- ii. That, the 1<sup>st</sup> petitioners (under receiver ship) cannot take out proceedings without the receivers and or their consent.
- iii. That, the 2<sup>nd</sup> petitioner has no power to sign petition for the 1<sup>st</sup> petitioner.
- iv. That, the second petitioner has no *locus standi* and cause of action against the respondents.
- v. That, the suit has been overtaken by events.

On the non citation of the law legal point of objection, as properly submitted by the petitioners, there is no any specific provision of the law in our jurisdiction which empowers the Court to grant the reliefs sought. As such and as held in the case of *Norconsult v. Tanzania National Roads Agency*, Misc. Commercial Application No. 10 of 2008 (unreported), *Section 2 (3) of the JALA* is relevant in filling such *lacunae*. Indeed, Section 3 of the

Arbitration Act is the bedrock on which a process to access to arbitration can be based.

Needless the above observation, even if I could agree with the respondent's that the petitioners have not cited the enabling provision, it is the current law of the land that Courts should uphold the overriding objective principle and disregard minor irregularities and unnecessary technicalities so as to abide with the need to achieve substantive justice. That proposition of the law is well reflected in the provision of *Section 6 of the Written Laws Miscellaneous Amendment Act No. 3 of 2018*. Through the Court of Appeal Rules are not applicable to this Court, the Court can borrow the wisdom contained under the Tanzania Court of Appeal (Amendment) Rules G.N No. 345 of 2019 in particular Rule 9 which amendment reads:

*"Provided that where an application omits to cite any specific provision of the law or cites wrong provision, but the jurisdiction to grant the order sought exists, the irregularity or omission can be ignored and the Court may order that the correct law be inserted."*

Again, the omission to cite enabling provision of the law (if any) does not necessarily have to touch the interests of the parties by barring them to bet justice before the Court.

In the case of *Jacob Magoiga Gichere v. Penina Yusuf, Juma C. J* stressed on oxygen principle which has been brought by the written laws (Misc. Amendment) Act No. 3 of 2018. It requires the Courts to deal with cases

justly with regard to substantive justice. As such, the first ground of objection is devoid of merits.

I equally find the second, third and fourth grounds of objection to lack merit on the reasons stated by the petitioners. That, *one*; the powers vested unto a receiver and manager under the provisions of *Section 253 (e) and 416 (1) of the Companies Act, Cap 212 (R.E 2002)* are merely in connection with actions taken against an outsider. There is no any specific provision that covers a situation where the intended legal action or proceedings are to be taken against the receiver and managers as it applies in this matter.

The respondents have argued that the 1<sup>st</sup> petitioner ought to have sought and obtained consent of receivers before lodging the petition against them. This is not a proper legal argument because the law bars person to be judges of their own case "*Nemo Judex in Causa Sua*".

As it was held in the cited case of *Kobil Tanzania Ltd v. Mariam Kisangi T/A Mnafu Traders*, Misc. Commercial Application No. 12 of 2007 (unreported), in situation where there is no procedure to cater for certain situation, the Court is obliged to use its common sense, justice, equity and good conscience and resolve the problem before it to further the interests and prevent abuse of the process.

*Two*, the 2<sup>nd</sup> petitioner being the statutory director and majority shareholder of the 1<sup>st</sup> petitioner had the mandate to sign the petition on her behalf.

*Three*, the 2<sup>nd</sup> petitioner being the majority shareholder of the 1<sup>st</sup> petitioner has got both legal and equitable interest on the 1<sup>st</sup> petitioner and her assets as well.

As regards the last point of objection, it was the respondent submission that this petition has been overtaken by events. Thus, one of the relief (s) sought by the petitioners at paragraph 21 of their petition is for the order to preserve the subject matter pending commencement and finality of their arbitration sought. It was the respondent's submission that the said properties have already been disposed of and the title has already passed so as to realize the outstanding loan which was due as was advertised by TIB Development Bank on 21<sup>st</sup> April and 4<sup>th</sup> June, 2018 respectively.

In view of the respondents there is nothing this Court can do to preserve the subject matter at this stage since the same could serve no practical purposes.

To buttress their submission, the respondents cited the case of *Shabiri Ebrahim and 2 Others v. Seleman Rajabu Mizino* and Registrar of Titles Civil Application No. 40 of 2007 (CAT) in which the Court cited the case of *Joachim Kalembe V. M. K. Mwamlima and Shell and B. P Tanzania Ltd v. The University of Dar es Salaam*. In that case the Court held at pages 8-9 that where it is shown that the application has been overtaken by events, the Court has to dismiss the application.

In reply, the petitioner submitted that, in prayer no. 3, the petitioners are praying for an order to stay transfer of ownership of the property, subject of the party's dispute pending final disposal of arbitration between the petitioners and 1<sup>st</sup> respondent. The petitioner asserted that, no any piece of evidence has been adduced by the respondents confirming that transfer of ownership has already taken place. That, sale of property is one thing and

transfer of ownership of that property is another thing. Thus, transfer is done by the Ministry of Lands and is evidenced by endorsements made by the Registrar of Titles on the Certificate of Title.


In view of the petitioner, since the alleged sale took place till to date, no any transfer has been done. That being the case, the objection is unfounded. To support their objection, the petitioner cited the case of *Zein Mohamed Bahroon v. Reli Assets Holding Co. Ltd* Misc. 307 of 2017 at page 8 (unreported).

In rejoinder to the point that the suit is being overtaken by events, the respondents submitted that the sole purpose the TIB Development Bank (a Creditor) appointed receiver was to realize the outstanding debts owned by the 1<sup>st</sup> petitioner. This was done by disposing assets guaranteed under debenture agreement which the petitioners are now asking this Court to preserve.

I have painstakingly labored to consider the arguments of both parties. It is undoubted from the petition under paragraph 21 (iii) of the petition that the petitioners are seeking for orders of preservation of the subject matter of the dispute be issued by this Court pending commencement and final disposal of the arbitration. Indeed, under prayer No. 3 to the petition, the petitioners are seeking for orders that transfer of the 1<sup>st</sup> applicants farm No. 140/1/1 and farm No. 140/01/02 Chekereni Arumeru District, Arusha be stayed pending final disposal of arbitration between the applicants and the 1<sup>st</sup> respondent.

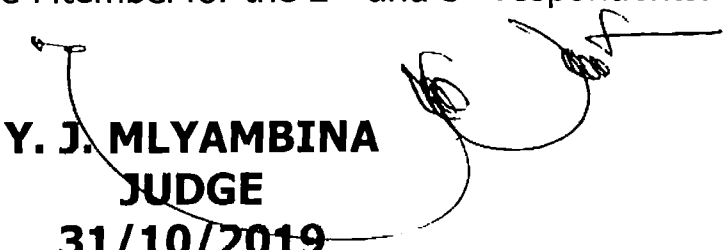
In the light of the above reliefs sought, the Court has to ask itself on the role of TIB in this matter. It is not in dispute that TIB was a creditor. The appointed receiver obligation was to realize the debt due owed by the petitioners. The role of recovering the debt was brought to finality at the conclusion of the auction. The auction is deemed to have been concluded when a certificate of sale over a right of occupancy comprised under (T. No. 44371. N.O Arusha Blooms Limited of P. O. Box 6175 Arusha was issued by Kilindi and Company Limited certifying that TIB Development Bank Ltd was the purchaser of farm no 140/1/1 and No. 140/01/02.

It is the finding of this Court that, with the afore said successful auction, the whole petition becomes of no use. The petitioners should have preferred this matter prior the auction or at least prior issuance of the certificate of sale. Hence, the fifth ground of objection is sustained with costs. Order accordingly.



**Y. J. MLYAMBINA**  
**JUDGE**  
**31/10/2019**

Ruling delivered and dated 31<sup>st</sup> October, 2019 in the presence of Judith Kyamba Advocate for the petitioners Grace Lupondo state attorney for the 1<sup>st</sup> respondent and Beatrice Mtembei for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.



**Y. J. MLYAMBINA**  
**JUDGE**  
**31/10/2019**