

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

AT DAR ES SALAAM

MISCL. CIVIL APPLICATION NO. 696 OF 2018

**LUPYANA FREDERICK TIMOTHY KADUMA
(Personal Legal Representative of
Timothy KADUMA) APPLICANT**

VERSUS

**EASTERN AND SOUTHERN TRADE AND
DEVELOPMENT BANK (Trade &
Development Bank).....1ST RESPONDENT
AMITECH TANZANIA TRADING
COMPANY LTD.....2ND RESPONDENT
YONO AUCTION MART & CO. LIMITED...3RD RESPONDENT
SAMWEL MASSAWE.....4TH RESPONDENT**

Date of last Order: 22/11/2019

Date of the Ruling: 28/02/2020

R U L I N G

MGONYA, J.

This Ruling is in respect of the points of preliminary objection raised by the 3rd and 4th Respondents to the effect that:

- 1. That the affidavit in support of the application is defective for carrying argumentative and conclusive paragraphs;***

- 2. That this Honorable Court is improperly moved; and***
3. That this Honorable Court lacks jurisdiction to entertain this matter and therefore, should be dismissed in its entirety.

When the matter came up for hearing, I order the parties to dispose the matter by way of written submissions. Indeed all the parties to this matter have adhered to the scheduled order, hence this Ruling.

I am not going to reproduce the entire submissions in support and against the points of preliminary objection serve for the Respondents brief contents for the 1st and 3rd points as the second one is self-explanatory.

For the first point of preliminary objection, is the 3rd Respondent's Counsel concern that the Applicant's Affidavit contains argumentative and conclusive matters in its paragraphs 4, 9, 11 and 12, hence defective. Further to that, on the second point of preliminary objection, that the law that has brought the instant Application before the court is improper, hence the court is improperly moved.

As for the third point of preliminary objection raised by the 4th Respondent's counsel, it is contended that this court has no jurisdiction to entertain the instant matter before it, as the

dispute at hand emanates from the Loan Agreement that the Applicant's parents through the 2nd Respondent entered into with the 1st Respondent; of which directs that in case of any dispute between the parties, the matter should be referred to Arbitration. Then it is from that condition, then this honorable court has no jurisdiction over the matter before it, as it is supposed to be brought before Arbitration.

In response, for all points of preliminary objection raised, the Plaintiff strongly challenged the 3rd and 4th Respondents that the points of the preliminary objection raised does not qualify to be termed as points of preliminary objection as the same are not matters of law. The Applicant's counsel referred the Court to the famous case of ***MUKISA BISCUIT MANUFACTURING CO. LTD VS. WEST END DISTRIBUTORS LTD (1996) EA 696*** which held that; the preliminary objection must be purely on point of law and not facts.

In cementing his position, the Applicant's counsel also referred the court to **Article 107A (2) (e) of the Constitution of the United Republic of Tanzania [1977]**, that in order for the court to reach ends of justice, it has to dispense justice without being tied up with technicalities provisions which may obstruct dispensation of justice. The Applicant's Counsel therefore

prayed for the points of preliminary objection be dismissed with costs.

In disposing the same, this Court therefore will deal on the said preliminary objections without reproducing much on what was already submitted by the parties herein.

Having carefully gone through the submissions of all learned Counsel concerning parties to the points of preliminary objection and considered the relevant laws, I am of the following views:

Regarding to the 1st point of preliminary objection as that **the affidavit in support of the application is defective for carrying argumentative and conclusive paragraphs;** I have managed to go through the alleged defective paragraphs, being paragraph **4, 9, 11** and **12** respectively, and out of the four paragraphs, I can only join hands with the 3rd Respondent's counsel that it is only the **9th paragraph** that indeed contains the argumentative and conclusive substance. For the rest of the three paragraphs, I have failed to find them with the said argumentative and conclusive materials as alleged. From the same, the remedy to this kind of defect is to expunge the defective paragraph and not otherwise. In the event therefore, **I proceed to expunge the 9th paragraph from the**

Applicant's Affidavit for being defective. In this event therefore, the rest of the paragraphs in the affidavit stands to support the application.

In determining the 2nd point of preliminary objection that **this Honorable Court is improperly moved**; it is my considered view that the 3rd Respondent's counsel has misconceived this point as the law that has moved this court is proper. Further, I don't buy the conception that the law which was required to move the court is the **Diplomatic and Consular Immunities and Privileges Act** for the reason that the Applicant mentioned the said law in his Application. It is from that contention, I find this point of preliminary objection misconceived, hence **overruled**.

Coming to the 3rd point of preliminary objection duly raised by the 4th Respondent herein, that **this Honorable Court lacks jurisdiction to entertain this matter**, I had a privilege of going through the Loan Agreement in favor of the 1st and 2nd Respondents herein, that is between **the Eastern and Southern Trade and Development Bank** and **Amitech Tanzania Trading Company Ltd.** attached to the Applicant's Application. From the same, I came across **Section XVII** on **Applicable Law** and particularly **clause 17.01** of the said Agreement. The same states:

*"In the event that there is any conflict between the provisions of this Mortgage and Agreement, the provisions of the Agreement will prevail PROVIDED AND THE PARTIES HEREBY AGREE THAT the applicable law and arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce as provided for in the Agreement shall apply to all matters between the parties hereto; **save and except for realization of security and exercise by the Mortgagee of any other rights reserved for it under this Mortgage in which case Tanzania law shall apply.**"*

I have to admit that it is factual as well stated in the said Loan Agreement that in the event that there is any conflict between the parties to the provisions of this Mortgage and Agreement, the provisions of the Agreement will prevail and that the applicable law and arbitration under the **Rules of Conciliation and Arbitration of the International Chamber of Commerce as provided for in the Agreement shall apply**. However, there is a proviso to the said clause stating that:

*"..... **save and except for realization of security and exercise by the Mortgagee of any other rights reserved for it under the Mortgage in which case Tanzania law shall apply.**"*

It is strange that neither the Applicant's Counsel nor the 4th Respondent's Counsel have noticed the wording of this clause to be divided into two situations. I would like at this juncture to explore as to what does this part of the clause mean? From my perception, I can say that, **for all matters that involves the Mortgagee realization of the collaterals / securities in this particular Mortgage, and all the rights emanates thereto, Tanzania Law shall apply.** This means that, as presumed that there was a Mortgage in respect of grant of loan / advanced sum to the 2nd Respondent of which is alleged to be once under the directorship of the Applicant's parents, further there was a default to the said loan, hence the 1st Respondent the Mortgagee realized the securities and exercised his rights under the Mortgage; **then all matters and claimed rights thereto, must be resolved by applying the Tanzania Law.**

From the above explanation, it is my considered view that the matter before the court, of which qualifies the above stated situation, then the claims before the court cannot be sent to Arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce but rather to be determined

by Tanzania Law as the case at hand. In the event therefore, the point of preliminary objection in this respect too is **overruled**.

In the circumstances therefore, the points of preliminary objection raised by the learned Counsel for the 3rd and 4th Respondents herein are consequently **overruled**.

Costs in due cause.

The Application is to proceed for hearing on merit.




L. E. MGONYA
JUDGE
28/02/2020

Court: Ruling delivered in the presence of the Applicant in person, Ms. Halima Semada holding brief for Mr. Athanasia Soka, for the 4th Respondent and Ms. Janet Bench Clarke in my chamber today 28th February, 2020.




L. E. MGONYA
JUDGE
28/02/2020