

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

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO.269 OF 2019

(Originating from execution in civil Case No. 245 of 1995)

PACIFIC DIAGNOSTICS LIMITED.....APPLICANT/OBJECTOR

VERSUS

BURAFEX LIMITED formerly

Known as **AMETAA LIMITED & 3 OTHERS.....1ST RESPONDENT/DECREE HOLDER**

THE COMMISSIONER FOR LANDS2ND RESPONDENT/JUDGMENT DEBTOR

THE ATTORNEY GENERAL3RD RESPONDENT/JUDGMENT DEBTOR

IBRAHIM HASSAN KIMANGILE.....4TH RESPONDENT/JUDGMENT DEBTOR

RULING

NGWALA, J.

Before me is a chamber summons filed by the applicant Pacific Diagnostics Limited. The application has been brought under Rules 97, 98(1) & (2) and 99 of the Civil Procedure Code Cap 33 RE 2002 and Rule 2(1) & (3) of the Judicature and Application of Laws Act Cap 358 RE 2002. The application is supported by the affidavit sworn by Anthony G. Shuma.

The 1st Respondent through her learned counsel Mr. Deogratius J. Lyimo attacked the application by raising preliminary objections on points of law to wit;

1. That the Application is incurably defective for being preferred under a wrong enabling provision of the law.
2. That, the application before the court is incompetent for contravening the provisions of Order XXI Rule 100 of the Civil Procedure Code Cap 33 RE 2002.
3. That, the applicant is barred to enjoy the reliefs provided by the provisions of Order XXI Rule 98 of the Civil Procedure Code, Cap 33 RE 2002 by the doctrine of lis pendens (the transferee pendet lite)

When the matter was called on for hearing of the preliminary objection, Mr. Roman Masumbuko learned counsel appeared for the Applicant while the 1st Respondent enjoyed the legal services of Mr. Deogratias Lyimo Kiritta Advocate. At the instance of Mr. Deogratias Lyimo this court ordered that the preliminary objection be argued by way of written submissions.

Submitting in support of the preliminary objections Mr. Lyimo combined all the grounds of objections and argued them together. Citing the provisions of order XXI Rule 100 of the CPC, Cap.33 R.E 2002, Mr. Lyimo contended that, the marginal note thereof contain the words rules not applicable to transferee "*pendent lite*" where it comes into ownership and possession when the suit is pending in court

According to him Rule 100 restrict the application of Rule 97 and 98 of Order XXI on the circumstances that:

1. There was a suit in court in respect of immovable property,
2. The decree in respect of that suit has passed by the court,
3. The decree holder is in execution of the decree, and
4. There is a person resisting or obstructing execution of that decree but that person is the one who has come into the ownership of that property after the institution of that suit, and from the person other than the decree holder.

It is the learned counsel's contention that, in view of the pleaded facts the Applicant purchased Plot No.5 after the institution of the Civil Case No.245 of 1995, where the 1st Respondent was already declared the owner of Plot No.5, and that the Applicant has purchased that property from the person other than the decree holder. According to him Rule 100 of Order XXI (supra) bar/restrict the Applicant from moving the court for the reliefs under the provisions of Rule 97 and 98 of order XXI as done by the Applicant.

It is therefore the learned counsel's submission that by virtue of Rule 100, the provisions of Rule 97 and 98 of the said Order XXI are not applicable to the circumstances of the present application. According to him in this Application the Applicant is resisting its eviction from Plot No .5 in which it purchased after the institution of the suit which determined the owner, and he has purchased to the person other than the owner. He elaborated

further that, the Applicant could have enjoyed the reliefs falling Under Rule 98 of Order XXXI if and only if it would have purchased Plot No.5 from the person other than the Judgment Debtor and when there was no pending suit in respect of such Plot in Court of law. Under such circumstances the court ought to have put that Applicant in possession of the Plot as per by Rule 99 of Order XXI.

Citing the provisions of Rule 101 of Order XXI of the Civil Procedure Code Mr. Lyimo stated that, the remedy available for the applicant was to institute a suit in court in order to establish his right over the property.

Citing the case of **Aero Helicopters (T) Ltd vs. F.N Jansen (1990) TLR at Pg 142**; Mr. Lyimo stated that, section 95 of the Civil Procedure Code is only applicable where the law has made no provision governing the particular matter at hand. He submitted that, the law governing the matter at hand is Rule 101 of Order XXI of the CPC. As for section 68 the learned counsel argued that, since section 95 is not an enabling provision in this case, then section 68e of the Civil Procedure Code will not move the court for the grant of reliefs sought.

Mr. Lyimo went further to cite the case of **Robert Leskar v. Shibesh Abebe Civil Application No. 4 of 2006, unreported** and stated that, citing a general provision is equivalent to non-citation or wrong citation of the law which renders the application incompetent.

In reply thereto Mr. Masumbuko argued that, the raised preliminary objections are not tenable as the first Respondent is only intending to prevent this Honourable court from deliberating the illegalities concerning

the proceedings in the execution leading to the present application. He added that the legality of the first Respondent executing the decree is also subject to to determination in another application before this honourable court known as Misc. Civil Application No. 424 of 2019.

It is Mr. Masumbuko's further argument that, the counsel for the first Respondent has tried to submit issues which are the basis of the objection proceedings before this court. The learned counsel stated further that, the counsel for the Respondent has raised issues that call for investigation. According to him, the preliminary objections raised are not an pure points of law as the submissions reveals that, they need evidence to prove which is contrary to the case of **Mukisa Biscuit Manufacturing Co. Limited vs West End Distributors Limited (1969) E.A. 96.**

The learned counsel went on to contend that, the gist of the submission by the counsel for the first Respondent is that, the property was transferred during a pending litigation- (pendente lite) but this is not the case. According to him, this calls for proof. He added that, the judgment in Civil case No. 245 of 1995 was delivered on 20th July, 2009 while the Applicant purchased the property in December 2016 and that it was never purchased during a pending litigation. Hence, the Applicant is not precluded to file the application under Rules 97 and 98.

It is submitted further that, the other issues submitted by the counsel for the first Respondent are matters that are subject to investigation of this honourable court in the pending application. According to him, the counsel

for the respondent is arguing on the merits of the application instead of the preliminary objection.

The learned counsel went on to argue that, Rule 101 of Order XXI of the CPC is not the proper provision for Application to move this court for the orders sought as the same comes into effect after this court has investigated the matter and entertained the application under Rules 98, 99 and 100.

Having gone through the chamber summons and its supporting affidavit as well as the counter affidavit, having also considered the rival submissions of the learned counsel for both parties, I will now determine the merits or otherwise of the preliminary objections. I will determine the objections in seriatim.

On the first preliminary objection for the purpose of clarity I find it apposite to reproduce the provisions of **Order XXI Rule 97, 98(1) & (2) and 99 of the Civil Procedure [Code Cap 33 RE 2002]** under which this application was brought.

97. Where the court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment debtor, the court shall make an order dismissing the application.

98. (1) Where any person other than the judgment debtor is dispossessed of immovable property by the holder of a decree for the

possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the court complaining of such dispossession.

(2) The court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

99. Where the court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment debtor, it shall direct that the applicant be put into possession of the property.

Further to that Rule 100 of Order XXI provides that;

Nothing in rules 97 and 98 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

Rule 100 therefore bars the application of Rules 97 and 98 in resistance or obstruction in execution of the decree by a person who obtained the immovable property by transfer from the judgment debtor after the institution of the suit in which the decree was passed.

Now, the issue to be determined by this court is whether the subject matter in this case falls under Rule 100 (supra).

Paragraph 3 of the affidavit in support of the chamber summons states that the Applicant purchased the disputed property from TIB Development Bank in December, 2016 following default by the mortgagor/borrower namely Mingoyo Sawmill Company Limited. Thus, the property was sold after institution of Civil Case No. 245 of 1995. It therefore goes without saying that, the provisions of law cited by the applicant are not proper provisions to move the court for the orders sought.

Now what is the fate of this application? It is a well settled principle of law that, wrong citation of law renders the application incompetent. This principle was reiterated in a number of decisions including the case of **Hussein Mgonja v. The Trustees of the Tanzania Episcopal Conference, AR Civil Revision No. 2 of 2002** in which it was held that;

"If a party cites the wrong provision of the law the matter becomes incompetent as the Court will not have been properly moved".

Further to that in the case of **Njamba S/o Kulamiwa v Republic, Criminal Application No 4 of 2010 (unreported)** in which Kaijage JA had this to say:

"Times without number this Court has also said that wrong citation of an enabling provision of law or non-citation renders an application incompetent"

The Court of Appeal of Tanzania also in the case of **ChinaHenan International Co. Operation Group V. Salvand K.A Rwegasira (2006) TLR 220**, held that:-

"the omission in citing proper provision of the rule relating to reference or citing a wrong or inapplicable rule in support of the application is not in our view a technicality falling within the scope and purview of Article 107 A (2) (e) of the constitution. It is a matter which goes to the very root of the matter."

Guided by the above cited authorities I find that, this application lacks legs to stand. I therefore find no reasons to determine the remaining grounds of preliminary objections.

Consequently, I have no other option than to strike out this application and I do so with costs.



A. F. Ngwala

JUDGE

20/02/2020

20/02/2020

CORAM: Hon. A. Ngwala, J.

For the Applicant - Absent

For the 1st Respondent - Miss Ole Shaddy (Legal Officer)

For the Respondents - Absent

CC: Manumbu

Court: Ruling delivered in the presence of the legal officer of the 1st Respondent's advocate.

Court: Right of Appeal to Court of Appeal of Tanzania explained.



A. F. Ngwala

JUDGE

20/02/2020