

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

CIVIL REFERENCE NO. 23 OF 2019

(Arising from Misc. Civil Application No. 37 of 2018 at the Resident Magistrate's Court of Morogoro at Morogoro before Hon. E.J. Nyembele. Originating from Civil Case No. 48 of 2014 at RM's Court Morogoro)

FRANKEN FAITHSON KIMARO APPLICANT

VERSUS

BEATRICE J. MBAGA RESPONDENT

RULING

Date of Last order: 17.06.2020

Date of Ruling: 27.10.2020

EBRAHIM, J.:

The Applicant herein has lodged the instant application praying for the following orders:

1. That, this honorable court be pleased to provide clear reference on whether property subject to attachment vide Commercial Case

No. 76 of 2012 between EXIM BANK TANZANIA LTD and Franken Faithson Kimaro is allowed for further attachment.

The application has been preferred under **Order XLI Rule 1 and 5 of the Civil Procedure Code Cap 33 RE 2002**; and it is supported by the affidavit of **Franken Faithson Kimaro**, the applicant.

The brief facts of the matter as could be gathered from the records are that the Respondent herein obtained judgement against the Applicant herein way back on 4th March 2016. The genesis of the matter was a claim for breach of contract and failure by the Applicant to pay TZS 30,839,920/- for the maize consignment supplied to him by the Respondent. Finally, the trial court ordered the Applicant to pay the Respondent TZS. 30,839,920/ and general damages to the tune of TZS. 10,000,000/-. Following the order of the trial Court, the Respondent initiated execution proceedings, Misc. Civil Application No. 37 of 2018, where the executing court ordered attachment and sale of the Applicant's house situated on Plot No. 17 Mafisa A area, within Morgoro Municipality. The Applicant has brought the instant application claiming that the same house has been subject to attachment in Commercial Case No. 76 of 2012

between Exim Bank Tanzania Limited and the Applicant. He has therefore filed the instant application praying for reference as to whether the same house can be attached by the Respondent.

This application was argued by way of written submission.

The Applicant's submission was predicated on his argument that the property ordered for attachment by the trial court is not liable for attachment as it has already been attached by the High Court. To cement his argument on the legal principle in respect of his argument, the Applicant cited the case of **Bahadur Ephraim Shamji Vs. Alnour Sharif Jamal**, Civil Application No. 17 of 2015, (HC- Commercial Division) which held that entire process of court attachment must not include properties which are not liable to attachment. He further referred to **Order XXI Rule 15(1-4) read together with Rule 12(1) of the Civil Procedure Code, Cap 33 RE 2019**. He thus posed two questions as to whether the requirement of **Order XXI Rule 12 of the Civil Procedure Code** has been met; and that whether the trial court has jurisdiction to order attachment of the disputed property after the same has been attached by the High Court.

Responding briefly, Counsel for the Respondent replied that the invocation of **Order XII of the CPC** presupposes that there is pending matter; whilst in our case the executing court has already concluded the matter.

Commenting on the order of attachment issued by the Commercial Court, Counsel for the Respondent contended that the said house has yet to be attached by EXIM Bank. If at all it should be for the EXIM Bank to complain. He prayed for the application to be dismissed for want of merits with costs.

In rejoinder, the Applicant insisted that the Respondent has failed to adhere to the legal requirement set in **Order XXI Rule 15(1-4) read together with Rule 12(1) of the CPC**. He also insisted the Court to ascertain whether the executing court had jurisdiction to order execution of the house that has already been ordered by the High Court.

In determining this application, I shall straight away address the issue of jurisdiction. Indeed, jurisdiction is a creature of statute. It is not disputed that the executing court had jurisdiction to entertain an application for execution before it. The only question is whether it was

correct to order execution of the property that has already been ordered by the High Court.

Order XXI Rule 12(1) and Rule 15(1) (2) (3) and (4) of the Civil Procedure Code, Cap 33 RE 2019 provides as follows:

"12. (1) Where an application is made for the attachment of any immovable property belonging to a judgment debtor, it shall contain at the foot–

(a) a description of such property sufficient to identify the same and, in case such property can be identified by a title number under the Land Registration Act, such title number; and

(b) a specification of the judgment debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same."

In essence Rule 12 (1) calls for identification of the property subject to attachment and specification of the interest of the judgement debtor on the said property. There is no dispute on the identification of the property and the same has been clearly indicated in the execution form. Again, the Applicant has not disputed on the ownership of the disputed property that it is his house. More so **Rule 15 of Order XXI of**

the Code, provides for the procedure to be done by the court on receiving application for execution of a decree which is to adhere to the requirement of **rule 10 and 12 i.e.** identification of the property; amendments (if any) to be signed and the matter registered.

Going by the application filed before the executing court I find that the same has adhered to the requirement of the law and see no such non-adherence as alluded by the Applicant. In-fact I fail to comprehend what is the basis of reference by the Applicant in so far as the relied cited provisions of the law are concerned.

Coming to the issue of jurisdiction, as intimated earlier, the executing court was vested with jurisdiction to order the attachment of the said house. The fact that the High Court ordered execution of the same property, does not prohibit the Respondent from realizing her decree from the same property considering that the priority on the charge or payment of debts shall be ascertained between the decree holders. Considering also that the court has not been availed of any restriction of the charged property to be realized by EXIM Bank only. Again, as observed by the Counsel for the Respondent, it is for the EXIM Bank to claim priority and not the Applicant.

That being said, I find this application to have no merits at all but rather filed to delay and frustrate the process of execution.

Accordingly, I dismiss this application with costs.

Accordingly ordered.

A handwritten signature in black ink, appearing to read 'R.A. Ebrahim', written in a cursive style.

R.A. Ebrahim
Judge

Dar Es Salaam
27.10.2020