

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

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 204 OF 2022

VELISAS ELIZABETH DEFLOSSE

INGLETON (legal representative under

the Power of Attorney of Gordon McClymont) APPLICANT

VERSUS

GAUTAM JAYRAM CHAVDA 1ST RESPONDENT

ABDALLAH MAKATTA T/A

SENSITIVE AUCTION MART 2ND RESPONDENT

(Arising Misc. Civil Cause No. 62 of 2000)

RULING

30th June & 5th July, 2022

KISANYA, J.:

This is an application for stay of execution of the decree of this Court (Muruke, J) dated 18th October, 2013 in Misc. Civil Cause No. 62 of 2000 pending determination of Misc. Commercial Cause No. 20 of 2021 at the High Court of Tanzania, Commercial Division, Dar es Salaam (henceforth “the Commercial Court”). It is made under sections 68 and 95 of the Civil Procedure Code, Cap. 33, R.E. 2019 and supported by an affidavit of Velisas Elizabeth Deflosse Ingleton, the legal representative of Gordon McClymont. The application is not contested by both respondents.

When the matter was placed before me for hearing, the applicant had the legal services of Mr. Rico Adolf, learned advocate, while the respondents were represented by Mr. Noel Sanga, learned advocate.

Before the hearing could commence, Mr. Sanga rose to inform the Court that the respondents were not contesting the application.

Although the matter was not contested, I found it apt to satisfy myself on its competency before the Court. Thus, I asked the learned counsel for the parties to address the Court on whether the provisions cited in the Chamber Summons enables me to determine this application.

Submitting in support of the application and the issue raised by the court, Mr. Adolph argued that the application is premised on sections 68 and 95 of the CPC. He submitted that section 68 of the CPC enables the court to make an interlocutory order which it find just and convenient to grant. He further submitted that section 95 of the CPC empowers this court to make orders which are necessary for ends of justice.

Mr. Adolph went on submitting that, although the case subject to this application is pending in the Commercial Court, this matter was filed in this court where the execution proceedings is being carried out. Contending that

the case pending in the Commercial Court has effect to the decree sought to be executed, the learned counsel was of the view that the correct recourse was for the applicant to file the present application for stay of execution. He, therefore, prayed that the application be granted.

On his part, Mr. Sanga supported the submission and prayers made by the applicant's counsel.

I have carefully considered the chamber summons, supporting affidavit and the submissions made by the learned counsel for the applicant and supported by the respondents' counsel. It is my considered view that this matter may be disposed of by considering whether the Court has been properly moved to determine the matter. If the first issue is answered in the negative, whether the Court has mandate to determine the application at hand.

Starting with the first issue, Mr. Adolph conceded that the application is made under sections 68 and 95 of the CPC. Do these provisions empower this court to grant the orders sought? As far as section 68 of the CPC is concerned, it is supplemental proceeding which recaps the general powers of the court in respect to interlocutory proceedings. That being the case, the applicant was expected to cite the specific provision (order) in the schedule to the CPC. This position was stated in the case of **Sea Saigon Shipping Limited Vs**

Mohamed Enterprises (T) Limited, Civil Appeal No. 37 of 2005 (unreported)

in which the Court of observed that: -

*"It is to be observed that section is similar to Section 94 of the Indian Code of Civil Procedure where it is also specified as a supplemental proceeding. Commenting on this provision of law (section 94), **Mulla on the Code of Civil Procedure**, Volume 1, Fifteenth Edition, at page 666 had this to say:*

"These section summaries the general powers of the court in regard to interlocutory proceedings. The details of procedure have been relegated to schedule."

Since Section 68 merely summaries the general powers of the court in regard to interlocutory proceedings, whoever applies for a specific order must cite the order under which he is applying for."

Being guided by the above position, it is clear that the instant application contravenes the settled position for want of the specific order of the CPC under which it is made.

With regard to section 95 of the CPC, it is trite law that the said provision is applicable when the matter under consideration is not governed by the law. I am fortified, among others, by the case of **Aero Helicopter (T) Ltd vs F.N.**

Jansen [1990] TLR 142 where it was held that:

"It is to be remembered that the inherent power of the High Court under section 95 of the Code is exercisable were (sic) the law has made no provision governing the particular matter at hand."

The question that arises is whether there is no provision governing the matter at hand. I have considered that the decree subject to this application originates from deed of settlement registered in this Court (High Court, Dar es Salaam Registry). I have considered further that in the case pending before the Commercial Court, the applicant prays, *inter alia*, for an order of nullifying the deed of settlement and decree on the ground that they were fraudulently acquired. That being the position, I am settled that the provision which empowers this Court to determine the instant application is Order XXI, Rule of the CPC. The said provision reads, thus: -

"Where a suit is pending in any court against the holder of a decree of such court, on the part of the person against whom the decree was passed the court may, on such terms as to security or otherwise as it thinks fit, stay execution of the decree until the pending suit has been decided."

Since there is specific provision of the Civil Procedure which governs the matter at hand, the applicant ought to have cited the same. This was not done. The time bound principle is to the effect that wrong citation or non-citation of the enabling provisions of law renders the application incompetent. See for instance the cases of **Hussein Mgonja vs The Trustees Tanzania Episcopal Conference**, Civil Revision No. 2 of 2002, CAT at Arusha, **N. B. C (1997) LTD vs Thomask Chacha T/A Ibora Timber Supply (T)**, MZA Civil Application No. 3 of 2000, **N. B. C vs Sadrudin Meghj**, Civil Application No. 20 Of 1997, **Bahadir Sharif Rashid and 2 Others v. Mansour Sharif Rashid and Another**, Civil Application No. 127 of 2006, CAT at Dar es Salaam, **Chama cha Walimu Tanzania vs. Attorney General**, Civil Application No. 151 of 2008, CAT at Dar es Salaam, **Anthony J. Tesha vs Anita Tesha**, Civil Application No.10 of 2003 (all unreported).

However, I have considered that section 3B of the CPC requires the court to handle all matters placed before it with a view to attaining just determination of the proceedings, efficient use of the available judicial and timely disposal of the proceedings at a cost affordable by the respective parties. In that regard, the issue whether or not the application was made under non-citation or wrong citation of law becomes incompetent depending on the circumstances of each case. For instance, such application cannot be held incompetent if the court is

satisfied that it has the power to determine the same. This stance was taken in the case of **Maranatha Engineering and Trading Co. LTD vs. TPB (Mbeya Branch)**, Misc. Land Application No. 39 of 2020, HCT at Mbeya (unreported) in which my senior brother Utamwa, J had this to say on the issue under consideration: -

"As to the second limb of the PO, I agree with the learned counsel for the applicant that, the contemporary law is to the effect that, wrong or non-citation of the enabling provisions does not necessarily render the application incompetent if the court has the requisite jurisdiction to entertain the application before it."

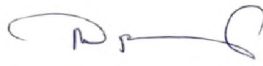
I associate myself to the above position. Considering that Order XXI, rule 27 of the CPC empowers this Court to determine the matter at hand, I find it just to hear and determine the same on merit. In so doing, I have considered that the application is not contested by the respondent. Since it is undisputed that the decree which is being executed in the execution proceedings pending before this Court has been challenged in the petition pending in the Commercial Court, I am of the view that this is a fit case for granting the order of stay of execution.

In the end result, the application hereby is granted. It is accordingly ordered that the execution of the judgment of this Court in Civil Cause No. 62

of 2000 be stayed pending determination of Misc. Commercial Cause No. 20 of 2021 at the Commercial Court. Costs to follow the event.

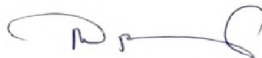
Order accordingly.

DATED at DAR ES SALAAM this 5th day of July, 2022



S. E. Kisanya
JUDGE

COURT: Ruling delivered this 5th day of July, 2022 in the presence of Mr. Rico Adolph, learned advocate for the applicant and in the absence of the respondent.



S.E. Kisanya
JUDGE
05/07/2022