

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

**AT DAR ES SALAAM**

**LAND CASE NO. 12 OF 2015**

**ALAF LIMITED.....PLAINTIFF**

**VERSUS**

**SAID NDYAMUKAMA.....DEFENDANT**

**JUDGMENT**

10<sup>th</sup> May, 2022, & 25<sup>th</sup> August, 2022

**ISMAIL, J;**

ALAF LIMITED, the plaintiff herein, featured as an objector in the objection proceedings instituted in the Resident Magistrates' Court of Dar es Salaam at Kisutu. The proceedings were designated as Misc. Civil Application No. 135 of 2014. The objection proceedings were intended to thwart the defendant's efforts to execute a decree that was issued in favour of the defendant, in respect of Employment Cause No. 192 of 1997. The judgment debtor in the said decree was none other than the defendant's employer, the General Manager Casement Africa Ltd.

It is also apparent that the property sought to be attached and sold in satisfaction of the said decree, was Plot No. 72, situated at the junction of Kinondoni Road and Bagamoyo Road, within the city of Dar es Salaam.

The plaintiff's basis for the objection was that the subject matter of the attachment proceedings was a property that belonged to the plaintiff and not the judgment debtor. This objection was nipped in the bud, thanks to the preliminary objection which was taken at the instance of the defendant. The ground that shattered the objection proceedings was that Ms. Hamida Sheikh, learned counsel, could not serve as counsel for the applicant and the judgment debtor in the same proceedings.

Invoking the provisions of Order XXI rule 62 of the Civil Procedure Code, Cap. 33 R.E. 2019 (CPC), the plaintiff chose to institute the instant proceedings, in this Court. Several reliefs were sought, as follows:

- (i) That the Honourable Court be pleased to declare that the defendant has no legal right to attach and sale any property belonging to the plaintiff, especially Plot No. 72 situated at the junction of Kinondoni Road and Bagamoyo Road, Kinondoni District Dar es Salaam to satisfy a decree in RM Civil Cause No. 192 of 1997;*
- (ii) That the Honourable Court be pleased to issue a permanent injunctive order against the Defendant not to attach, auction sale,*

*dispose of or interfere with the land refer to as Plot No. 72 situated at the junction of Kinondoni Road and Bagamoyo Road, Kinondoni District Dar es Salaam;*

- (iii) That the Honourable Court be pleased to order the defendant to pay the plaintiff general damages;*
- (iv) The Costs of the suit be borne by the defendant;*
- (v) Any other reliefs that the Honourable Court may deem just, fair and equitable under the circumstances.*

Subsequent to the filing of the written statement of defence, the defendant raised a couple of sets of preliminary objections, punching holes in the competence of the suit. These objections are as follows:

- (1) That the application is bad in law as was made under the wrong provision of the law.*
- (2) That the application is res-judicata as the claims and reliefs herein this application were decided in former suit.*
- (3) That the plaintiff "ALAF" was not a party of the employment case No. 192 of 1997, this application is bad in law as his prayers attempted to block the Decree holder or is making resistance of execution that the properties of the Casement Africa Ltd and his partners not to be attached.*

*(4) That this suit was filed/instituted very prematurely hence this honourable Court has no jurisdiction to entertain the same.*

In both of the sets of objections, the parties were called upon to prefer written submissions, an order which was duly complied with. The Court then (through the predecessor Judge) reserved the rulings, preferring to deliver them as part of the judgment of the substantive suit.

Midway through the trial proceedings, at the instance of the defendant, the predecessor Judge recused from the conduct of the matter. This saw the matter re-assigned to me and, when counsel for the parties appeared in Court on 10<sup>th</sup> May, 2022, they were addressed on the takeover of the matter, after which they were given the right to choose to proceed from where the predecessor left or start afresh. Both parties were unanimous that the matter should proceed from where it last ended.

Going through the preliminary objection, I take the view that ground four of the objections touches on the question of the Court's jurisdiction which has a decisive importance. I have chosen to deal with it first.

Regarding this ground of objection, the contention by Mr. Peter Bana, learned counsel for the defendant, is that, since the matter was disposed of at the early stage of the proceedings through sustenance of the preliminary objection, the merits of the matter were yet to be determined. While

contending that the appropriate course of action was to strike out the application and not to dismiss it, counsel's further argument is that, in such a case, the recourse that the plaintiff had was to go back to the trial court and pray to have the decision reviewed before a decision was made to institute fresh proceedings. This would hand the plaintiff an opportunity to have the errors apparent on the decision corrected.

The defendant's advocate submitted that paragraphs 9, 10 and 11 of the plaint contain the basis for institution of the suit. He added that paragraph 11 clearly shows that the present suit was instituted under Order XXI rule 62 of the CPC. Mr. Bana maintained that matters relating to investigation into the plaintiff's ownership or possessory rights over the suit property were a domain of the Kisutu court and that, in this case, nothing was determined to its finality. Learned counsel was insistent that there is a serious jurisdictional issue which should be resolved first, in line with the Court of Appeal of Tanzania's decision in ***Yazidi Kassim t/a Yazidi Auto Electric Repairs v. Hon. Attorney General***, CAT-Civil Application No. 354/04 of 2019 (unreported).

Submitting on the applicability of Order XXI rule 62 of the CPC, the defendant argued that such provision comes into play where objection proceedings are heard on merit and the question of possession is resolved.

This, he argued, ruled out resort to institution of a fresh suit. He buttressed his arguments by citing the decisions of the Court of Appeal of Tanzania in ***Bank of Tanzania v. Devram P. Valambhia***, CAT-Civil Application No. 15 of 2002; and ***Truck Freight (T) Limited v. CRDB Bank Limited***, CAT-Civil Appeal No. 128 of 2006 (both unreported).

The defendant urged the Court to dismiss the suit in its entirety.

Regarding the contention that the suit is prematurely preferred and that the Court has no jurisdiction, the rival contention by Ms. Hamida Sheikh, learned counsel for the plaintiff, is that the same is bred out of misconception. She argued that, having had the right of appeal blocked by rule 62 of Order XXI of the CPC, institution of fresh suit represented the only recourse available to the plaintiff. This, she argued, was in line with the reasoning in ***Bank of Tanzania v. Devram P. Valambhia*** (supra) and ***Truck Freight (T) Limited v. CRDB Bank Limited*** (supra). Ms. Sheikh took the view that it would not matter if the application had been dismissed or struck out, as none of it presented the objector with an opportunity to re-file the application. She took the view that the application was not filed prematurely and, on this, she relied on section 5 of the Law of Limitation Act, Cap. 89 R.E. 2019, which provides that the right of action accrues on the date on which the cause of action arises.

The plaintiff's learned counsel was adamant that the defendant's attachment of the suit property was an infraction of the law and a blatant abuse of the court process which only be addressed by having the plaintiff file fresh suit. Ms. Sheikh sought to distinguish the decisions cited by her counterpart, choosing to rely, instead, on what she described as perennial cases of ***Bank of Tanzania v. Devram P. Valambhia*** (supra) and ***Truck Freight (T) Limited v. CRDB Bank Limited*** (supra).

As she wound down her submission, learned counsel took an exception to the purity of the preliminary objection, contending that the same is not only vague but also failing to cite the provision of the law on which it is based. She argued that one would require delving into establishing what the cause of action is and when it actually arose. She argued that doing so would require introduction of evidential matters, thereby disqualifying the objection from being a preliminary objection. She cited the cases of ***Mukisa Biscuits Manufacturing Company Limited v. West End Distributors Limited*** [1969] EA 696; and ***NIC (T) Limited & PSRC v. Shengena Limited***, CAT-Civil Application No. 20 of 2007 (unreported).

The singular question from these rival arguments is whether the suit is properly before this Court.

There is no dispute that this matter has been instituted pursuant to the provisions of Order XXI rule 62 of the CPC, and that such filing followed the events that occurred with respect to Miscellaneous Civil Application No. 135 of 2014. In this application, the plaintiff's effort to lift the attachment of the suit property fell through, albeit on technical grounds. As both counsel agree, Order XXI rule 62 of the CPC creates a finality of the objection proceedings by curtailing the unsuccessful party's right of appeal or revision. The decisions cited by both counsel attest to this. That no appeal or revision lies from an order on the objection proceedings has been underscored time and again. In ***National Housing Corporation vs. Peter Kassidi & 4 Others***, CAT-Civil Application No. 294/16 of 2017 (unreported), delivered on 27<sup>th</sup> July, 2022, the upper Bench reasoned as hereunder:

*"Going by the above-cited two authorities, we take it to be firmly established law that, pursuant to Order XXI Rule 57(1) of the CPC, **where an objection is preferred and an order determining that objection is subsequently made, in terms of Rule 62 of the same Order, the only remedy available to the party against whom that order is made is to institute a regular suit to prove his claim.** Put in other words, after the decision on an*



*objection proceeding has been made by a competent court, there is no remedy for appeal or revision. The rationale behind the above-stated stance of the law is not farfetched. We hope that it will be immediately appreciated even by the doubting Thomases that, not emanating from a suit, an order determining objection proceedings is not appealable. (see **Ibrahim Mohamed Kabeke v. Akiba Commercial Bank and Another**, Civil Application No. 71 of 2004 c/f No. 141 of 2004 (unreported))* [Emphasis is mad

By closing the window of appeal and revision, the law has also opened up a new avenue of instituting fresh suit through which title of the objecting party may be determined. For ease of reference, it is apposite that the substance of the said provision be reproduced. It stipulates as hereunder:

*"Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."*

In the instant case, the contention by the defendant is that the order spoken about in the quoted provision is one that determines the application in its substantive nature. I subscribe to this reasoning. The legislature intended that an order that opens up a window of institution of fresh suit

must be that which determines the objector's complaints in the application. It must be an order that spells out the fate of the applicant, as far as possessory rights on the subject matter of the attachment, are concerned. Dismissal of the application on technical grounds would not, in any way, be considered to be an order that closes the window of appeal or revision, if the same were revisable or appealable.

The law on institution of fresh suit has taken into account that conclusiveness of an order lies in the determination of substantive matters in the application for objection proceedings. My finding is predicated on the reasoning of an Indian Court in ***Ghasi Ram vs. Chait Ram Saini***, AIR 1998 SC 2476 (2479). In the said case, the Court gave an explanation to Order XXI rule 103 of the Indian Code of Civil Procedure which is *pari materia* with Order XXI rule 62 of our CPC. The Court concluded that:

***"The word 'Conclusive' appearing in this rule indicates that it creates a presumption in favour of facts relating to rights to property as well as legality of the matter stated in the order. Such an order passed under rule 98 is not subject to further inquiry in any other proceeding, except by bringing a fresh suit under rule 103. Thus in view of the conclusiveness attached to the order passed by the executing court on an application filed under rule 97, which is the subject result of the suit, if any, filed***

*under 103, is not assailable, in any other proceeding. In case no suit is filed under Rule 103, the order passed under rule 98 is final between the parties."* [Emphasis is added]

As Mr. Bana argued, dismissal of the application, an erroneous eventuality, would be cured by having the trial court review its position and substitute the dismissal with the striking out of the application. That would have given the plaintiff a lifeline which would enable her to institute another application, this time free of the 'maladies' which were the basis for the striking out in the former application.

It is in view of the foregoing that I feel persuaded by the plaintiff that the decision to institute the instant suit was quite premature and, therefore, needless. The court did not conduct an investigation which would ascertain the rights of the parties, a decisive point in the objection proceedings.

Disposal of this issue takes me to another equally important issue. This relates to jurisdiction of the Court to entertain this matter. This issue emanates from the fact that the law, as it currently obtains, is to the effect that a suit preferred subsequent to conclusion of the objection proceedings must be instituted in the same court in which the objection proceedings were determined. This implies that, in our case, the claim of ownership as constituted in the instant suit ought to have been laid in the Resident

Magistrates' Court of Dar es Salaam at Kisutu and not in this or any other Court.

This sensible plausible position has been accentuated in numerous decisions of this Court and the Court of Appeal of Tanzania, and I will pick a few to vindicate my conviction. In ***Rosebay Elton Kwakabuli v. Aziza Selemani & 2 Others***, HC-Land case No. 57 of 2019 (unreported), a discussion on the applicability of Order XXI rule 62 of CPC culminated in the following observation:

*"To file a fresh suit to establish one's title contemplated in the circumstances of the above provision entails suing on the same subject matter pursued in the objection proceedings and against all the parties involved **preferably in the same Court that heard the original suit and objection proceedings.**"* [Emphasis added]

The Court went further to emphasize as follows:

*"The Court that **competently determine the objection proceeding is the one competent to determine the fresh suit filed by the one losing in objection proceedings, contemplated under Order XXI Rule 62 of the CPC.** This is not the Court that heard the original suit and the objection proceedings, thus not competent to determine a fresh suit filed on the basis of the above provision. "*

In yet another encounter with the same issue, the Court decried what is considered as a transgression of the provisions of Order XXI Rule 62. This was in ***Jacquiline Donath Kweka Abrahamsson v. Exim Bank (T) Ltd & 4 others***, HC-Land Case No. 17 of 2020, (unreported) wherein it was held:

*"In the present case, the original suit and the objection proceeding, were filed in the High Court Commercial division. While invoking the above provision of the law and the cited case which I subscribe to, it is my humble opinion that, the Commercial Court being seized with the original proceedings during the execution of the sale order, the sale which the plaintiff wishes to displace, stands a better chance to rule on any issue arising out of execution process. Thus, this Court is incompetent to determine the present case. The resultant consequence is to struck out for failure of the plaintiff to comply with the requirements of order XXI Rule 62 of the Civil Procedure Code [Cap 33 R.E: 2019]."*

A more decisive and commanding position in this matter was laid down a couple of months ago. This was in ***Sosthenes Bruno and Dianarose Bruno v. Flora Shauri***, CAT-Civil Appeal No. 249 of 2020 (unreported), in which the Court of Appeal of Tanzania aptly guided as hereunder:

*"In the context of the instant matter, we are of the considered position that, had the first appellant not abandoned his objection proceedings, he would have, quite properly pursued them to finality in the Resident Magistrate's Court. **In case his objection was to be dismissed, he would have lodged a suit as indicated above under Order XXI rule 62 of the CPC in order to prove his title to the land. If that suit would have been unsuccessful, that is when the first appellant would have challenged it to the High Court according to law. Instead of following this procedure, the first appellant abandoned it midway to initiate a fresh litigation at the High Court in 2012, which in our view, was a premature pursuit.**"* [Emphasis is added]

It behoves me to conclude, at this point, that institution of the proceedings in a court other than which had jurisdiction to entertain the objection proceedings constitutes a violation of the law. It renders the suit untenable, as the court in which the suit is instituted lacks the jurisdiction to deal with it. In our case, the inevitable and sad reality is that the instant suit is incompetent as the Court is not vested with jurisdiction to entertain it.

In consequence of all this, this suit is hereby struck out and the defendant will have his costs.

Disposal of the matter through this ground of objection renders determination of the rest of the objections and the substantive matter a mere academic exercise that I would not indulge into.

Order accordingly.

Rights of the parties have been duly explained.

DATED at **DAR ES SALAAM** this 25<sup>th</sup> day of August, 2022.



**M.K. ISMAIL**

**JUDGE**

**25.08.2022**

