

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

**AT DAR ES SALAAM**

**MISCELLANEOUS CIVIL APPLICATION NO. 220 OF 2022**

**(Arising from Misc. Civil Application No. 584 of 2021 and Original Civil  
Case No. 176 of 2021)**

**BETWEEN**

**WALTER BUXTON CHIPETA (Receiver Manager).....1<sup>st</sup> APPLICANT  
EXIM BANK (TANZANIA) LIMITED .....2<sup>nd</sup> APPLICANT**

**VERSUS**

**MUHAMMAD AWAIS PARDESI.....1<sup>st</sup> RESPONDENT  
COSMOS PROPERTIES LIMITED.....2<sup>nd</sup> RESPONDENT**

**RULING**

**MRUMA,J.**

This application is brought under section 409 of the Companies Act [Cap 212 RE 2019], Section 127(1) of the Land Act [cap 113 RE 2019] section 2(3) of the Judicature and Application of Laws Act and section 95 of the Civil Procedure Code ( Cap 33 RE 2019).

The Applicants Walter Buxton Chipeta (Receiver Manager) and Exim Bank (Tanzania) Limited seek for a declaration from this court that the acts of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents of obstructing the 1st Applicant from entering possession and perform his duties and function as Receiver Manager of the properties of the 2<sup>nd</sup> Respondent duly appointed under a Deed of Appointment (the Instrument) registered on

20<sup>th</sup> February 2022 under filed documents No. V 184399, are acts of contempt and an obstruction to execution of lawful order / process.

The Applicants are also seeking for orders from this court to condemn the said 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents for contempt and impose on them a punishment to pay fine in the extent to be assessed by the court and on failure thereof, to condemning the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the Directors of 3<sup>rd</sup> Respondent, to serve custodial sentence respectively. They are also possessing for costs of the matter.

The application is supported by an affidavit sworn by Mr. Walter Buxton Chipeta, the 1<sup>st</sup> Applicant who introduced himself as the Receiver Manager of the 2<sup>nd</sup> Respondent's properties mortgaged to the 2<sup>nd</sup> Applicant setting out premises upon which the prayers in the chamber summons are grounded.

Both Respondents filed counter- affidavits strenuously opposing the Application. While the 1<sup>st</sup> Respondent Mohamed Owais Pardes denied to be a party to both the main suit (i.e. Civil Case No. 176 of 2021) and Miscellaneous Civil Application No. 584 of 2021, he joined the 2<sup>nd</sup> Respondent Cosmos Properties Limited in a contention that the appointment of the 1<sup>st</sup> Applicant as Receiver and Manager of the 2<sup>nd</sup> Respondent's property is contested.

As stated at the outset of this ruling, this application is pegged under the provision of section 409 of the companies Act No.12 of 2002. The said section provides.

*"A receiver or manager of the property of a company appointed under the powers contained in any instrument may apply to the court for directions in relation to any particular matter arising in connection with the performance of his functions, and on any such application the court may give such directions, or may make such order declaring the rights of persons before the court or otherwise as the court may think just."*

In his affidavit in support of the application the 1<sup>st</sup> Applicant deponed in paragraph 1 that he was duly appointed by the 2<sup>nd</sup> Applicant under the Deed of Mortgage and Deed of Debenture which are duly registered and that his appointment was made after the 2<sup>nd</sup> Respondent had failed to service the loan facility advanced to her by the 2<sup>nd</sup> Applicant. The 1<sup>st</sup> Respondent in his counter affidavit did not dispute the fact that the 1<sup>st</sup> Applicant was appointed as a receiver and manager of the 2<sup>nd</sup> Respondent's properties but he stated that the said appointment of the 1<sup>st</sup> Applicant is contentious. A similar contention has been raised by the 2<sup>nd</sup> Respondent.

In his submissions in support of application Mr. Elisa Abel Msuya submitted that following the dismissal of the Respondent's application for temporary injunction which was made through Miscellaneous Application No. 584 of 2021 in which the Respondents herein had sought for orders restraining the present Applicants, their servants, directors, managers and/ or agents from dealing with the assets and /or affairs of the company, the 1<sup>st</sup> Applicant who is the Receiver and Manager of the 2<sup>nd</sup> Respondent's mortgaged property and therefore her agent within the context of the term agent, is entitled to proceed to execute her functions as the Receiver and Manager thereof and any act to restrain him from performing his functions as such constitutes contempt of court orders.

On his party Mr. Daniel well well, counsel for the Respondents opposed the application on two grounds; first it was Mr. Well Well's contention that the application is untenable because section 409 of the companies Act empowers the court to give orders and/ or directions only where the Receiver or manger was duly appointed and that those powers are exercise able in substantive proceedings where the rights of the parties are being determined and not in an interlocutory application like the one at hand. It is the submission of Mr. Well Well that if the

reliefs sought in this application are granted, the Respondents will have been condemned un heard.

I have carefully gone through the prayers made in the application, the affidavits in support of and the counter affidavits in opposition of the application and also the submissions of the learned counsel for and against the application. In my view the only question for determination is whether this court has powers under Section 409 of the Companies Act to give directions and /or orders sought in the chamber summons.

From the affidavit evidence adduced in this matter there can be no dispute that the 1<sup>st</sup> Applicant was by a Deed of Appointment dated 17<sup>th</sup> January 2022 appointed by the second Applicant Exim Bank (Tanzania) Limited as a Receiver Manager in respect of all the assets and property charged by the mortgage Deeds upon terms and conditions and with all powers conferred by the mortgage Deed or by law. The said deed was annexed to the affidavit as annex Exim - 1. The instrument was duly registered with and stamped by the Registrar of Document on 20/01/2022.

Counsel for the Respondent has submitted that the said appointment is being contested but no evidence has been produced to prove that. Both under the Mortgage and Debenture deeds entered

between the 2<sup>nd</sup> Applicant and the 2<sup>nd</sup> Respondent, the 2<sup>nd</sup> Applicant has powers to appoint a Receiver and/or manager of the mortgaged properties. Whether the appointment of the 1<sup>st</sup> Applicant is valid or not is not the subject of this ruling and this court is not aware of any pending suit challenging the validity of the said appointment. Thus the assertion that the said appointment is contentious is not correct at least as far the main suit (i.e. Civil Case No. 176 of 2021) is concerned. For instance in amended plaint, the plaintiff, who is the second Respondent in the present application is seeking of the following orders:

- a) A declaration order that the Defendants conducts complained of are unjustified, unlawful and injurious to the plaintiff.
- b) A declaration that the 1<sup>st</sup> Defendant refusal to swapping deal trust rated the Plaintiff loan repayment opportunity.
- c) A declaration that Plaintiff's conduct complained of are in a bad faith designed to deny the Plaintiff the right to dispose of the 17 properties and obtain better price.
- d) A declaration that the loan facility agreement is terminated on account of frustrations.
- e) Payment of Tshs One Billion as general damages.

- f) Payment of Tanzania shillings two Billion as exemplary damages.
- g) Costs of the suit. .

No remedy is claimed against the Receiver and/or Manager who is cited as the 2<sup>nd</sup> Defendant in the suit. Thus, the Respondents cannot be heard saying that the appointment of the Applicant is contentious. Accordingly as there is no pending matter challenging the appointment of Walter Buxton Chipeta (as a Receiver and Manager), the 1<sup>st</sup> Applicant, Walther Buxton Chipeta has the right to bring this action under section 409 of the companies Act.

Regarding the joining of Muhammad Awais Pardesi as the 1<sup>st</sup> Respondent while he was not a party neither in Civil Case No. 176 of 2021 nor in Miscellaneous Civil Application No. 584 of 2021, my view is that contempt proceedings may be brought against any person who fails to obey a court order that was issued for another party's benefit. The only question that follows is whether there was such order and my answer to that question is that there was no such order.

As is agreeable by both parties what this Court did is to refuse to grant temporary injunction orders which would have restrained the present Applicants from dealing with the properties the subject of the main suit (ie Civil Case No. 176 of 2021). The refusal to grant injunctive

orders against the present Applicants does not mean that injunctive orders were granted against the present Respondents. I therefore decline to find that the Respondents are guilty of contempt of court orders as prayed by the Applicant.

However, the above findings notwithstanding, in paragraph 5.0 of the affidavit of Walter Buxton Chipeta, the 1<sup>st</sup> Applicant asserts that he was defiantly obstructed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from carrying out his functions as a Receiver and Manager of the mortgages property. As stated herein before appointment of a receiver and manager, is one of the covenant agreed by the parties. In the mortgage deed there was a clause for the Mortgagee to exercise her statutory power to appoint a receiver of all or any party of the Mortgages property (See clause 6.2 of the Mortgage of the Right of Occupancy which is annexed to the 1<sup>st</sup> Applicant's affidavit). An appointed receiver is an agent of the mortgaged. According to the deed of appointment he is a disinterested person appointed by the 2<sup>nd</sup> Applicant for the purposes described in the instrument of his appointment. Under section 409 of the companies Act, this court is vested with powers to make orders and/ or directions in connection with the performance of his functions. Accordingly I grant prayer No. 1 in the Chamber Summons and direct and order the



Respondents not to obstruct the 1<sup>st</sup> Applicant, the Receiver Manager of the mortgaged properties Mr Walter Buxton Chipeta from performing his duties and functions. Failure to comply with this order may constitute contempt of court orders.

As stated in the course of this ruling the 2<sup>nd</sup> prayer in the chamber summons which is seeking for orders to condemn the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents for contempt and impose on them a punishment to pay fine in the extent to be assessed by the court is denied. It is denied because no contempt has been established. To constitute Civil contempt there must be evidence of failure to obey a court order that was issued for another party's order in the present proceedings.

That said, the application is partly granted and partly denied. It is granted to the extent that the Respondents are ordered not to obstruct the Receiver Manager from performing his functions and duties as was agreed by the parties in the mortgage and debenture deeds. On the other hand prayer No.2 in the chamber summons which is for orders to condemn the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents for contempt and impose on them a punishment to pay fine or save custodial sentence is denied. It is denied because no order had been exhibited to have been disobeyed.

I make no orders as to costs.



**A.R. Mruma**

**Judge**

**8/7/2022**

**8/7/2022**

Coram: Hon. A.R. Mruma,J

For the 1<sup>st</sup> Applicant:

For the 2<sup>nd</sup> Applicant

Miss Irene Mchau for Miss. Simon Barow

Lyimo

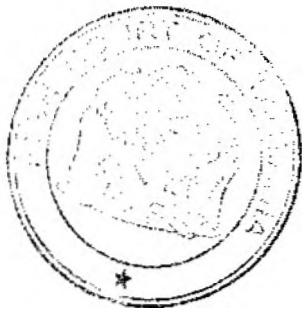
For the 1<sup>st</sup> Respondent

For the 2<sup>nd</sup> Respondent

Mr. Stephen Byabato for Respondents

Cc: Delphina

Court: Ruling delivered.



**A.R. Mruma**

**Judge**

**8/7/2022**