

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC.CIVIL APPLICATION NO 70 OF 2023

(Arising from Civil Case No. 34 of 2018 and Execution No. 91 of 2020)

EXIM BANK (TANZANIA) LIMITED..... APPLICANT

VERSUS

TANZANIA ELECTRIC SUPPLY COMPANY LIMITED.....1ST RESPONDENT

DECREE HOLDER

AM STEEL & IRON MILLS LIMITED.....2ND RESPONDENT

JUDGEMENT DEBTOR

NASSORO SHABANI HASSANI

t/a AUCTION MART LIMITED.....3RD DEFENDANT

HON. ATTORNEY GENERAL.....4TH RESPONDENT

RULING

Date of Last Order: 06/06/2023

Date of Ruling: 30/06/2023.

E.E. KAKOLAKI, J.

Under certificate of urgency and by way of chamber summons, the Applicant herein instituted the instant application seeking for the following orders:

- (a) The honourable court be pleased to stay the sale of properties on Plot No. 95 CT No.31310 Mbagara Industrial Area Temeke Municipal, Dar es Salaam and Plot No. 472 Block "F" CT No. 58594 Msasani Village area, Kinondoni Municipality Dar es Salaam pending determination of this application.
- (b) The honourable court be pleased to investigate the applicants claim and be pleased to lift an order of attachment over plot No.95, CT No. 31310 located at Mbagara Industrial area Temeke Municipality and Plot No.472 Block FCT No. 58594 Msasani Village Area Dar es Salaam, both in the name of the second respondent (the property) and be pleased to order and hold that the said two properties are not liable for attachment in execution of decree in Execution of Civil Case No. 34/2018.
- (c) The honourable court be pleased to lift an attachment order over the referred properties.
- (d) The honourable court may be pleased to condemn the respondents to pay the costs of this application.

The application has been preferred under Order XXI Rules 57(1) and (2), 58,59 and 61 of the Civil Procedure Code, [Cap 33 R.E 2019], supported by

an affidavit of **Edmund Aaron Mwasaga**, a principal officer to the applicant explaining reasons as to why the prayers sought should be granted. The application is contested by the 1st and 4th respondents who filed a joint counter affidavit to that effect.

Briefly as gathered from the affidavit, applicant as a banking institution, whose core functions is to lend money to its interested customers subject to the provisions of the required securities, in June 2014 offered credit facilities to the 2nd respondent for supporting her business in which the later mortgaged the landed properties as securities for loan facility as exhibited in annexure EXIM-1, which are property at plot No.472 Block F under CT No. 58594 at Msasani village, Kinondoni Municipality Dar es Salaam City and Plot No.95 under CT No. 31310 located at Mbagala Industrial Area Temeke Municipality Dar es Salaam City (the properties) both in the name of the 2nd respondent. That the mortgage deeds as exhibited in annexures as EXIM-2, EXIM3, EXIM4, and EXIM -5 respectively are yet to be discharged to date. It was averred that, the 2nd respondent defaulted to pay the said loan, the consequence of which the applicant instituted recovery proceeding in the High Court of Tanzania Commercial Division in which a settlement was reached by the parties and decree issued by the Court as shown in annexure

EXIM-8 and EXIM -9, before the 2nd respondent failed to honour the said decree hence an application for execution of the same by the applicant, the application which was granted by issuing execution and attachment order as shown in annexures EXIM-10 and EXIM-11 respectively, since the application for attachment of property at Plot No. 472 Block "F" under CT No. 58594 at Msasani Village Kinondoni Municipality Dar es Salaam City is still pending in court. It was his averment further that, the applicant is not willing or consenting for execution by 1st respondent to proceed in so far as the preferred properties are concerned as they will be sold under the process of execution initiated by the applicant himself under commercial Case No. 121/2017 consolidated with Commercial case No.120/2017.

As alluded to above, the application was not welcomed by the 1st and 4th respondents who filed counter affidavit dully sworn by Steven Urassa principal officer of the 1st Respondent, contesting its grant. It was deposed that, the 1st and 4th respondent were not aware of the existing dispute between the applicant and the 2nd respondent as the 2nd respondent has never indicated to the 1st respondent that he had commercial dispute with the applicant. It was also said that, the 1st respondent entered into dispute with the 2nd respondent under summary procedure suit which resulted into

1st respondent obtaining a judgment in his favour and that, she was also in initiation of execution process against the properties of the 2nd respondent, the properties listed in this application being among them.

On the other side 2nd respondent supported the application while stating that, execution of this decree if carried out will adversely affect the applicant and the 2nd respondent since the right of both are yet to be determined by the Court of Appeal.

As to the 3rd respondent, she did not enter appearance despite being served. Hence the matter proceeded ex-parte against him. Hearing of the application took the form of written submissions and each party had representation, save for the 3rd respondent who abandoned the hearing. Applicant had representation of Mr. Mnyele while 1st and 4th respondent were represented by Daniel Nyakiha and the 2nd respondent enjoyed the legal services of Capt. Ibrahim Mbiu Bendera, both learned counsel.

In support of the application Mr. Mnyele preceded his submission by seeking leave of the court to adopt the affidavit by Edmund Aaron Mwasaga, and remind the court of applicant's prayers as per chamber summons. He then went on submitting that, the 1st and 4th respondents are not opposing the

application nor denying existence of attachment order of one of the properties in Plot No. 95 in Mbagala Industrial area, except their contention that, they were not aware of the dispute between the applicant and the 2nd respondent, while the 2nd respondent is supporting the application.

The learned counsel argued that, for applicant's prayers in the chamber summons to be granted, the Court upon making an inquiry must be satisfied of two things. **One** that, the attachment has been done to a property and **two**, the applicant has protectable interest in the property that makes its attachment not tenable, in which thereafter shall release the property from attachment in terms of Order XXI Rule 59 and 61 of the Civil Procedure Act.

According to Mr. Mnyele, in the present matter the fact that the properties subject of this application have been attached is not in dispute as it has not been disputed by the respondents hence proof of the first ground. As to the second ground referring the Court to the provisions of section 89(1) of the Evidence Act and the case of **Fadhili Mollel vs Lekule Loshura**, Civil Appeal No. 22/2019 [HC-unreported], he invited the Court to take judicial notice of proceedings in Execution No.91 of 2020 between the 1st and 2nd respondent as decree holders and judgment debtor, respectively, wherein execution proceedings were filed by the 1st respondent on 9th November,

2020 and warranty of attachment issued on 28th December, 2022 in respect of the properties subject of this objection proceedings as itemized as No. 1 and 5, in which the applicant has interest created by mortgages by the 2nd respondent as exhibited in annexures EXIM-2 and 3 to the affidavit. The cases of **Letshago Bank (Tanzania) Limited vs Bank of Afrika and 4 Others**, Misc. Application No. 146 of 2020 and **Equity Bank (T) Limited vs Prosper Rweyendera and 2 Others**, Misc. Land Case No. 356/ 2021 (both HC-unreported) on the need to establish and prove existence of applicant's interest on the property were referred to the Court to support of his stance. He thus prayed the Court to grant all applicant's prayers in the chamber summons with costs.

In rebuttal, Mr Nyakiha while citing the provisions of Order XXI Rules 57 to 62 of the CPC and submitted that, Rule 57 (1) provides for two aspects, one of which is to give the stranger access to court of law and second, vesting jurisdiction to the court that passed a decree to hear the objector on his objection as if he was a party to the suit. He submitted that, the proviso to the rule imposes a caveat that, in order for the claim to succeed, the proceedings need not be designedly or unnecessarily delayed by the objector in terms of presenting them to court. He added that under rule 58 of the

same Order XXI of the CPC the applicant must prove existence of two element, One, his interest in the property and second or in alternative, that at the time of attachment he was in possession of the property attached, in which under Rule 59, upon the Court being satisfied shall make an order releasing the property from attachment.

According to Mr. Nyakiha, the applicant's affidavit shows that, the only advanced reason for the grant of this application is her interest in the said properties attached to the mortgages in which the 2nd respondent is yet to have them discharged upon repayment of loan, in which also 1st respondent has claim against the 2nd respondent though this fact is not mentioned by the applicant. He said, the applicant has failed to prove as to how she will be affected with the attachment order whilst the properties are still under the name of the 2nd respondent. In winding up he implored the court to disallow the application after consideration of the application in reference to rule 60 of Order XXI of the CPC.

Capt. Bendera for the 2nd respondent, having sought leave of the Court to adopt the 2nd respondents counter affidavit especially paragraph 4 of the affidavit to form part of his submission, informed the Court that, the 2nd respondent had no intention of defaulting to pay the applicant as she has

brought in the country adequate funds to effect full payment. And further that, in the meantime there is Civil Application No. 743/16 of 2022 pending in the the Court of Appeal (CAT) where the ruling and drawn order of the consolidated Commercial Cases Nos. 120 and 121 of 2017 of High Court of Tanzania (Commercial Division) Dar es Salaam, were stayed pending inter-parties hearing which its date is yet to be fixed as exhibited annexure AMS-1. It was his prayer therefore that, for the interest of justice the applicant's prayers be granted. As to the applicant's rejoinder submission in respect of 1st and 4th respondents' opposing submission, Mr. Mnyele informed the Court that, the applicant did not find any reason to so do.

I have keenly considered the rivalry submission by the parties concerning the prayers sought and took time to revisit the affidavit and counter affidavits by the 1st and 4th respondents as well as the 2nd respondent in support and against the application. It should be stated from the outset that, in this application the first prayer will not be dealt with as the same was granted on 30/03/2023. Secondly, it is noted from the submissions that both parties are at one in that, under Order XXI Rule 58 of the CPC for the prayers sought by the applicant to be granted he must prove existence of two elements, **one** that, the property was attached and that he has protectable interest in

the property that makes its attachment not tenable, **two**, and in the alternative that at the time of attachment he was in possession of the property attached. Parties are further in agreement that, in consideration of the application of this nature the provisions of Order XXI Rules 57,58,59 and 60 of the CPC are to be considered depending on the circumstances obtained in each application. The only issue in which they part way and thus calling for attention and determination of this Court is whether the applicant has supplied sufficient materials warranting grant of the sought orders.

Mr. Mnyele tried to impress upon the Court that, in this application in which he referred to prayers in the chamber summons, the applicant has been able to establish and prove that, the properties subject of the application were attached as that fact is not contested by the respondent. And secondly that, the applicant has interests in the said properties attached to the mortgages in respect of the loan advanced to the 2nd respondent, hence the same cannot be subjected to attachment by the 1st respondent. Mr. Naykiha is of the contrary view that, the application has not been proved.

It is not in dispute that, in terms of Order XLIII Rule 2 of the CPC it is the chamber summons which institutes the application supported by the affidavit. In the present application as per the chamber summons the

properties in which the orders for lifting its attachment and holding that, are not liable for attachment by the 1st respondent are in respect of execution of decree in execution Civil Case No. 34 of 2018. Glancing at the affidavit and its annexures in support of this application, this Court is unable to come up with any fact deposed in respect existence of the said execution Civil Case No. 34 of 2018, so as to satisfy itself as to whether there was an order of attachment of two properties in which the applicant claims interest on as submitted by Mr. Mnyele warranting Court grant the prayers sought. What is being referred in paragraphs 8 of the affidavit is an application for execution in respect of Commercial Cause No. 120 and 121 of 2017 between the parties in this application in which a prohibitory order was issued under Order XXI Rule 53(1) of the CPC, in respect of five properties by the 2nd respondents, the two properties subject of this application inclusive annexed as annexure EXIM-10 and EXIM-11 respectively and not execution Civil Case No. 34 of 2018 referred in the chamber summons. It is a settled principle now that parties are bound by their pleadings. The principle was well stated in the case of **Charles Richard Kombe t/a Building Vs. Evarani Mtungi and 2 Others**, Civil Appeal No. 38 of 2012 (CAT-unreported) where the Court had this to say:

“It is cardinal principle of pleadings that the parties to the suit should always adhere to what is contained in their pleadings unless an amendment is permitted by the Court. The rationale behind this proposition is to bring the parties to an issue and not to take the other party by surprise. Since no amendment of pleadings was sought and granted the defence ought not to have been accorded any weight.” (Emphasis supplied).

Having noted the omission to mention the case in which the alleged order of attachment sought to be lifted was made, Mr. Mnyere in his submission invited the Court to take judicial notice to existence of Execution No. 91 of 2020 before this Court where the alleged order of attachment of the two properties subject on this application were entered. With due respect I am not prepared to accept that invitation for one good reason that, apart from the copy of the said Execution No. 91 of 2020 not being annexed to the submission, it is a settled principle that submission being a summary of arguments cannot be used as a platform to adduce evidence. My findings are stemmed on the Court of Appeal decision in the case of **Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Company Ltd Versus Mbeya Cement Company Ltd and National Insurance Corporation (T) Ltd** [2005] TLR 41, where the Court held that:

“It is now settled that a submission is a summary of arguments. It is not evidence and cannot be used to introduce evidence. In principle all annexures, except extracts of judicial decisions or textbooks, have been regarded as evidence of facts and, where there are such annexures to written submissions, they should be expunged from the submission and totally disregarded.”[emphasis supplied]

Guided with the above cited binding decision to this Court, it is the findings of this Court that, the affidavit being a substitute of evidence as it was stated in the case of **Uganda Vs. Commissioner of Prisons, Ex-parte Matove**, [1966] E.A, the applicant ought to have stated such important fact that, the attachment order sought to be lifted in this application was effected in Execution No. 91 of 2020, in which duty she failed to discharge.

In this matter since the applicant failed to adduce evidence through her affidavit that, there exists attachment order in Execution Civil Case No. 34 of 2018, in respect of the two properties referred in the chamber summons, in which orders for lifting it up and that, the same are not liable for attachment by the 1st respondent is sought, I find the first ground is not established. The only established and proved fact is that, the applicant has interest in the said properties attached to the mortgages by the 2nd

respondent securing the loan which she obtained from the 2nd respondent. Much as the two grounds are to be proved conjunctively as rightly observed by both parties, and since the applicant has failed to establish one of them, it is the findings of this case that, she has failed to prove to the court's satisfaction that, this application has merit. With the above findings the cases of **Letshago Bank (Tanzania) Limited** (supra) and **Equity Bank (T) Limited** (supra), relied on by Mr. Mnyeale to support this application are distinguishable from the facts of this case as the cases in which the orders sought to lifted or released from attachment were specified in this matters unlike in this case where the same are not specified.

In the upshot and for the fore stated reasons, it is the findings of this Court that, the application is destitute of merit and the same is hereby dismissed with costs.

Order accordingly.

Dated at Dar es Salaam this 30th June, 2023.



E. E. KAKOLAKI

JUDGE

30/06/2023.

The Ruling has been delivered at Dar es Salaam today 30th day of June, 2023 in the presence of Mr. Simon Mnyele, advocate for the applicant, Ms. Nuru Jamaal, advocate for the 2nd respondent and Mr. Oscar Msaki, Court clerk and in the absence of the 1st and 3rd respondents.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

30/06/2023.

