IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY
AT ARUSHA

MISC. CIVIL APPLICATION NO. 165 OF 2022

TIB DEVELOPMENT BANK LIMITED _____ 1ST APPLICANT

ATTORNEY GENERAL _____ 2ND APPLICANT

VERSUS

BOX BOARD TANZANIA LIMITED _____ 1ST RESPONDENT

MOUNT MERU FLOWERS LIMITED _____ 2ND RESPONDENT

ALLAN REUBEN MOLLEL T/A

FIRST WORLD INVESTMENT, COURT BROKER _____ 3RD RESPONDENT

RULING

28th July & 11th August, 2023

BADE, J.

The applicants herein have preferred this application by way of objection proceeding under Order XXI Rules 57(1), 58 and 59 as well as section 68(e) of the Civil Procedure Code, Cap. 33 [R.E 2019] (henceforth "the CPC"), moving the Court to investigate and make a finding that the order for execution by attachment was for immovable properties and not movable properties. Further, the Court is moved to order release of the attached properties *to wit*: Tractor with Registration No. T 403 CTH, Mercedes Benz Truck with Registration No. T 852 DMB, Suzuki Maruti with

Registration No. T 831 CQQ, eighty (80) big water pipes, two borehole pumps, six complete cooling condenser system for the cold room, one dump trailer unregistered and all office furniture all located at Mt. Meru Flowers Ltd premises, from attachment and sale. The applicants also pray for costs of the application and any other orders or reliefs this Court may deem fit and just to grant.

The application is supported by affidavit deponed by Mr. Samwel Marco, Principal Officer of the 1st applicant. The application is contested in a counter affidavit deponed by Mr. Thobias Martin Lweye, Managing Director and Principal Officer of the 1st respondent. The 2nd and 3rd respondents neither contested the application nor entered appearance in Court, despite being dully served.

Before embarking on matters befalling in the application, I deem it appropriate to recount the background facts of the case leading to this application, as can be gathered from the affidavits and annexes, albeit briefly. On 10/02/2006, the 1st applicant entered into financing facility agreement with the Tanzania Flowers Limited and 2nd respondent, whereby the latter were issued with a loan facility to expand their horticulture programme. The loan facility was secured by mortgage deed signed on 02/07/2009 in respect of the both Tanzania Flowers Limited and 2nd respondents' certificates of titles No. 15434 LRM Land Office No.

178328 Farm No. 105/1/1 and 19569, Land office No. 178346, Farm No. 105/1/2/1. Further, a debenture deed of the 2nd respondent securing the loan of TZS 4.4 billion was signed on the same day to secure the facility. The facility was to be repaid within a period of ten years from the day of issuance, including two years grace period.

Unfortunately, both Tanzania Flowers Limited and the 2nd respondent did not service the facility as per the agreed terms. As at 13/12/2022, the total exposure of the duo to the 1st applicant stood at TZS 34,205,689,681/=. Owing to the fact that the 2nd respondent was a going concern company, and in order to realize the amount outstanding from its assets, the 1st applicant appointed a Receiver Manager on 05/08/2021 to take over the affairs of the 2nd respondent, including to service the loan through the assets of the 2nd respondent. Notice of appointment of the Receiver Manager was made to the general public to that effect.

Notwithstanding the above state of affairs, there were other claims against the 2nd respondent by other creditors and or suppliers, including the 1st respondent. The 1st respondent successfully sued the 2nd respondent vide Civil Case No. 8 of 2016, for breach of supply agreement. This Court, (Kamuzora, J.) found the 2nd respondent liable and was

ordered to pay the 1st respondent USD 57,638.20 as specific damages, TZS 10,000,000/= as general damages, an interest of 12% per annum of the decretal sum from the date of default to the date of judgment and an interest of 3% per annum on the decretal sum from the date of judgment to the date of payment in full. The 2nd respondent was further condemned to pay costs.

The 2nd respondent failed to satisfy the decree of the Court which tallied to TZS 252,220,086/=. As a result, the 1st respondent filed Execution Application No. 31 of 2022 against the 2nd respondent to have the decretal amount satisfied. The mode of execution sought by the 1st respondent was through attachment and sale of the properties of the 2nd respondent. Consequently, on 06/12/2022, the Deputy Registrar ordered the 3rd respondent to attach the properties above stated and return the warrant before the court on or before 13/01/2022 for further orders. As pointed out earlier on, the 1st applicant had lien by way of mortgage and debenture in respect of the assets including those attached. Therefore, the 1st applicant instituted this application to establish her interest on the attached properties and seek release of the same from attachment and sale.

On 30/01/2023, counsel for the 1st respondent by notice, raised four points of preliminary objections, which were couched in the following

terms:

a) *That the affidavit in support of the application contravenes section 7 of the Notaries Public and Commissioner for Oaths Act, Cap. 12 [R.E 2019] and Regulation 45 of the Advocates (Professional Conduct and Etiquette) Regulations, 2018;*

b) *That the affidavit in support of the application is defective for containing prayers, hearsay and arguments contrary to Order XIX Rule 3(1) of the CPC;*

c) *That the application is incompetent for lack of the 2nd applicant's affidavit or authorization to the 1st applicant to plead on behalf; and*

d) *That the application is incurably defective for failure to either join the Receiver Manager as necessary party or to indicate that the 2nd respondent is under receivership.*

As a matter of principle, once the Court is faced with preliminary objection along the main application, the preliminary objection must be determined first before delving into the merits or demerits of the main application. See: **Thabit Ramadhan Maziku and Kisuku Salum Kaptula vs Amina Khamis Tyela and Mrajis wa Nyaraka Zanzibar,** Civil Appeal No. 98 of 2011, and **Khaji Abubakar Athumani vs Daud Lyakugile t/a D. C. Aluminium and Another,** Civil Appeal No. 86 of 2018 (Both unreported).

Appreciating the above position, I called upon counsel for the parties to address me on the preliminary objections first. At the hearing of the preliminary objections, the applicants were represented by Mr. Mkama Musalama, learned State Attorney while the 1st respondent was represented by Mr. Aggrey Cosmas Kamazima, learned advocate. As indicated earlier on, the 2nd and 3rd respondents did not enter appearance. Hearing of the Pos' was through *viva voce*.

For reasons which will be apparent in the due cause, determination of the application will be hinged on the 4th preliminary objection. Submitting in support of the 4th limb of the preliminary objection, Mr. Kamazima contended that the applicants did not join the Receiver Manager in whose custody, the assets of the 2nd respondent were vested nor was there statement in the affidavit in support of the application that Receiver/Manager has been appointed. He made reference of section 411(1) of the Companies Act, which makes such mandatory procedure. He made reference to paragraph 9 of the affidavit in support of the application where the deponent stated that all the assets of the company including the assets attached by the 3rd respondent are in the possession of the Receiver Manager. According to Mr. Kamazima, since the Receiver has direct interest on the attached properties, he is by all fours, a necessary party. According to counsel for the 1st respondent, a company

under receivership has no *locus standi* independent of its Receiver/Manager. To cement his argument, he made reference to the case of **Aqua Power Tanzania Limited T/A Turbine Tech Limited vs I&M Bank Limited and Another**, Civil Case No. 6 of 2023 (unreported).

According to Mr. Kamazima, since the assets subject of this application are vested in the Receiver, the reliefs sought in this application affects him directly and an affective decree cannot be passed in his absence. He prayed that the preliminary objection be sustained.

On his part, Mr. Musalama submitted that since the application has been brought under Order XXI Rules 57 and 58 of the CPC, the application is merely an objection proceeding. He insisted that the provisions upon which the application is predicated, calls upon parties interested in the properties subject of attachment while such parties were not parties in the original to apply to the Court and explain that the property so attached is not liable for attachment.

In Mr. Musalama's view, the Receiver Manager has not been prejudiced and has not complained for not being joined in the proceedings. He added that a case cannot be defeated for non-joinder or misjoinder of a party in a proceeding relying on Order I rule 9 of the CPC. Regarding section 411

of the Companies Act. Mr. Musalama accounted that the provision only makes it mandatory that the Receiver Manager be notified but it does not say that he should mandatorily be joined in the suit. He concluded by praying for the preliminary objection to be overruled.

In rejoinder submission, Mr. Kamazima reiterated what he submitted in the submission in chief.

I have considered the preliminary objection as well as the competing submissions by both counsel for the parties. The main issue for deliberation is whether the preliminary objection has merits.

At the outset, there is no dispute that the 2nd respondent was put under receivership on 05/08/2021 by the 1st applicant to oversee the daily business of the 2nd respondent and pay its debts. That is supported by the appointment deed (annexture TIB-2) as well as the notice issued to the general public vide the Guardian Newspaper (annexture TIB-3). According to the documents exhibiting the appointment of Receiver Manager, the 1st applicant appointed Daniel B. Welwel of ASYLA Attorneys to undertake the affairs of the 2nd respondent.

Next is whether the Receiver Manager appointed by the 1st applicant is a necessary party in this application. In order to resolve this issue, it is incumbent, first, to appreciate who is a necessary party in a suit/application. A necessary party in a suit is a person whose presence in

the suit is necessary for effectual and complete settlement of all questions involved in the suit. In establishing such necessity, it has to be shown that orders which the plaintiff seeks in the suit would legally affect the interests of that person, and it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. The position on who is a necessary party, was discussed in *extenso* by the Court of Appeal in the case of **Tang Gas Distributors Limited vs Mohamed Salim Said and 2 Others**, Civil Application Revision No. 68 of 2011 (unreported), where it was held inter alia that:

> *"It is in this way that one would appreciate the force of the reasoning of Mulenga, JSC (supra), to the effect that a person is a necessary party in a suit if the order, which the plaintiff seeks in the suit would legally affect the interests of that person, and it is desirable for the avoidance of multiplicity of suits to have such person joined so that he is bound by the decision of the court in that suit."*

Now it is beyond a shadow of a doubt that the Receiver Manager is a necessary party in this application. My reasons are as follows:

First, according to the deed of appointment, the Receiver Manager was appointed as receiver and manager of all properties and assets of the Company charged by the said Debenture and Mortgage upon terms and conditions and with all powers conferred by the two instruments. In view

of what is contained in the deed of appointment, the Receiver Manager was appointed to be the caretaker of all properties of the 2nd respondent herein. **Second**, even in the deed of indemnification, the 1st applicant undertook to indemnify the Receiver Manager in the performance of his duties including actions, suits, claims demands etc. arising out of his duties. **Third**, as soon as the Receiver Manager was appointed, the mandates of the directors of the 2nd respondent seized to apply, in lieu thereof, all business of the 2nd respondent was under the Receiver Manager. This position was the matter under discussion in the cited case of **Aqua Power Tanzania Limited T/A Turbine Tech Limited vs I&M Bank Limited and Another** (supra), which cited a Zambian case of **Magnum (Zambia) Ltd vs Basit Quadri (Receivers/manager) & Grindlays Bank International Zambia Ltd** [1981] Z.R 141 where it was held that:

> *"A company* ***under receivership has no locus standi independent of its receiver****. As long as a company continues to be subjected to receivership,* ***it is the receiver alone who can sue or defend in the name of the company.****"*(Emphasis added)

I endorse the above prescripts to be the position of the law in our jurisdiction. Since the Receiver Manager was duly appointed by the 1st applicant to oversee and take care of all the assets of the 2nd respondent,

and owing to the fact that this application was filed to challenge attachment of the properties owned by the 2nd respondent, which in all respects are in the custody of the Receiver Manager, I am inclined to agree with counsel for the 1st respondent that Receiver Manager is a necessary party in this application. Whatever order that would be issued by this Court in respect of the properties of the 2nd respondent, would equally affect the Receiver Manager. Failure to join the said Receiver Manager, is clear contravention of the law, specifically Order I Rule 10(2) of the CPC. Fortified by the above reasoning, I sustain the 4th limb of the preliminary objection.

Having sustained the 4th preliminary objection, I find no compelling reasons to dwell on determining the rest of the preliminary objections, since the defect in the 4th limb renders the application defective.

On the totality of the foregoing discussion, failure to join the Receiver Manager, rendered the application incompetent. Having hold and found that the application is incompetent, I have no other recourse than striking it out, as I hereby do. The 1st applicant shall pay the costs.

Order accordingly.

DATED at **ARUSHA** this **11th** day of **August**, 2023

A. Z. Bade
Judge
11/08/2023

Judgment delivered in the presence of parties / their representatives on **11th** day of **August, 2023**

HIGH COURT OF TANZANIA

A. Z. Bade
Judge
11/08/2023