

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

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 548 OF 2023**

**IRENE RICHARD SUMA.....OBJECTOR/APPLICANT**

**VERSUS**

**ERICK RICHARD SUMA**

**(Personal representative of**

**RICHARD SUMA) .....1<sup>st</sup> RESPONDENT/ J/DEBTOR**

**ERICK RICHARD SUMA.....2<sup>nd</sup> RESPONDENT/J/DEBTOR**

**DP1 SIMBA LIMITED.....3<sup>rd</sup> RESPONDENT**

**EXCESS CONSTRUCTION**

**COMPANY LIMITED..... 4<sup>th</sup> RESPONDENT/J/DEBTOR**

**JESCA W.L. MASSAWE T/A**

**JJ AUCTION MART LIMITED.....5<sup>th</sup> RESPONDENT**

**RULING**

*Date of Last Order: 27/10/2023.*

*Date of Ruling: 10 /11/2023.*

**E.E. KAKOLAKI, J.**

The objector/applicant herein under certificate of Urgency filed an application for objection proceedings before this court under **Order XXI Rule 57,58,59 and sections 48(1)(e), 68(e) and 95 of the Civil Procedure Code, [Cap 33 R.E 2019] (the CPC)** pleading the court to

investigate her claim and objection seeking to restrict execution of decision of this Court (ruling and order) dated 22<sup>nd</sup> day of August 2022 by Justice Mruma, J. in Civil Case No. 178 of 2018 and application for execution No. 25 of 2023 pending in this court against her matrimonial property. The application which is supported by the applicant's affidavit and supplementary affidavit is vehemently challenged by the 3<sup>rd</sup> respondent who filed the counter affidavit and supplementary counter affidavit. Further to that, the 3<sup>rd</sup> respondent filed a Notice of Preliminary Objection containing two grounds before an additional ground of objection was issued orally on 13/10/2023 thus a total of three grounds of objection going thus:

1. The application is bad in law for being filed out of time
2. The affidavit in support of chamber summons contains arguments
3. The application is bad in law for contravening Order XXIII Rule 1(3) and rule 2 of the Civil Procedure Code, [Cap 33 R.E 2019].

As it has always been a practice of the Court to dispose of first the points of objection on law whenever raised, parties herein were heard viva voce. The objector/applicant was represented by Mr. Alex Mashamba Balomi, learned advocate, while the 2<sup>nd</sup> respondent appeared in person also representing the 1<sup>st</sup> respondent as personal legal representative and director to the 4<sup>th</sup>

respondent and the 3<sup>rd</sup> respondent enjoyed the services of Mr. Shukran Mzikila, Mr. Boniphace Woiso and Mr. Godlove Godwin, all learned advocates. The 5<sup>th</sup> respondent could not be traced hence hearing proceeded in her absence.

In his submission in support of the raised preliminary objections Mr. Godwin counsel for the 3<sup>rd</sup> Respondent opted to drop the 2<sup>nd</sup> point of preliminary objection and argue the rest separately. On the 1<sup>st</sup> point of objection he contended that, this application is time barred. He said, time limitation within which to file the application of this nature is not provided for under the CPC, hence resort has to be made to item 21 of part III to the Law of Limitation Act, [Cap. 89 R.E 2022] (the LLA) providing for sixty (60) days. In this application he argued, when the applicant became aware of the execution proceedings against the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents, on 30/06/2023 she filed an objection proceedings in Misc. Application No. 322 of 2023 which was later on 28/07/2023 withdrawn without obtaining leave of the court to refile another application before Misc. Application No. 405 of 2023, was filed and withdrawn by the applicant again without leave to refile and later on this application filed on 29/09/2023 more than 90 days lapsed since the applicant was made aware of the attachment order. He therefore prayed for the

dismissal of this application for being time barred and referred the court to its decision in **Christina Ntumigwa Mwakifulefule Vs. Equity Bank Tanzania Ltd & 5 Others**, Misc. Land Application No. 558 of 2021 (HC-unreported), where the application was dismissed for being time barred.

Regarding the 2<sup>nd</sup> point of objection he argued that, the application is filed in contravention of order XXIII rule 1(3) of the CPC providing that a party who withdraws a suit cannot refile the same without leave of the court. He contented the applicant herein never obtained leave of the court to refile the present application after withdrawing the former ones. He invited the Court to adopt the position obtaining in the case of **Halima Hamis Rajabu Budda and 4 Others Vs. Abubakari Hamisi**, Misc. Civil Application No. 34 of 2022 (HC-unrepresented) where it was held at page 5 that, if the suit is withdrawn without leave to refile the plaintiff is precluded from instituting a fresh case in respect of the same matter.

In rebuttal Mr. Balomi, Advocate stated that the raised preliminary objections are totally misconceived as they do not pass the test of an objection on point of law for basing on factual matters such as reference to Misc. Civil Application No. 322 of 2023 which is neither in court records nor forming part of the 3<sup>rd</sup> Respondent's counter affidavit or supplementary counter

affidavit. He referred this court to the case of **COTWU (T) OTTU Union and Another Vs. Hon. Iddi Simber, Minister of Industries and Trade and 7 Others** [2002] TLR. 88 where it was observed that, when a point of objection is raised it should be on point of law, capable of disposing of the matter if the objection is sustained and the same should not make reference to facts which call for proof. Regarding the case of **Christina Mwakifulefule** relied on by the 3<sup>rd</sup> Respondent he contended the same is not binding to this Court. And further that, it is distinguishable with no relevance to this matter hence the objection should be dismissed for want of merit. On the 2<sup>nd</sup> ground of objection he submitted that, the same is misconceived as Order XXIII rule 1(3) of the CPC is of no relevance for creating cost liability only to the withdrawing part and not dismissal effect to the application. He rested his submission by stating that, an objection proceedings is expected to arise from an order for attachment or certificate of sale. In the present matter he noted the 3<sup>rd</sup> respondent failed to demonstrate to the court's satisfaction the date when the attachment order or certificate of sale if any was issued for reckoning and proving that the application is time barred. He thus invited the Court to find no merit on the raised point of objection. On his part the 2<sup>nd</sup> respondent who also appeared

as representative for the 1<sup>st</sup> and 4<sup>th</sup> representative resisted the submission by the 3<sup>rd</sup> respondent when opted to adopt and support the submission by the applicant as part of his submission.

On rejoinder Mr. Mzikila submitted that, the raised objections qualify to be objections on points of law as the complained of copy of Misc. Civil Application No. 322 of 2023 allegedly neither forming part of this court's record nor annexed to 3<sup>rd</sup> respondent's counter or supplementary counter affidavit is annexed to the 3<sup>rd</sup> respondent supplementary affidavit. He said it is established principle of law that, in determination of points of objection the court has to look on the pleadings and its annexures as stated in **Mukisa Biscuits Company Ltd Vs. West End Distributors Ltd** (1969) EA 100. According to him, since the complained of copy of the application by the applicant is attached to the 3<sup>rd</sup> respondent counter affidavit hence forming part of the pleadings to be referred by this court in determination of the point of objection then both grounds of objection are point of law. Regarding the submissions that, objection proceedings are only filed where there is an order for attachment or certificate of sale and that the 3<sup>rd</sup> respondent did not supply evidence to prove as to when the attachment order was issued, he countered that the same is found in the applicant's supplementary

affidavit under paragraph 21. He therefore maintained that, the raised points of objection are based on purely point of law and prayed for the dismissal of the application with costs.

Having gone through the contending submissions from both sides and before addressing the above raised points of objections, it is imperative that this Court determines the point raised by Mr. Balomi in his reply submission that, the points of objection raised by the 3<sup>rd</sup> respondent do not meet the test of what amounts to preliminary objection on point of law as enunciated in **Mukisa Biscuits** case (supra). The issue to be answered then is whether the two raised preliminary objections suffice to constitute preliminary objections on point of law.

It is settled legal stance in the landmark case of **Mukisa Biscuits** (supra) that, a preliminary point of objection can be raised by referring on the pleaded facts in the pleadings except on the fact that need to be ascertained or which depend on discretion of the Court. In so observing the Court stated thus:

*"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on assumption that all the facts pleaded by the other side are*

*correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."*

The fact that a preliminary objection must be on pure point of law and not one that needs ascertainment of fact or evidence to be proved, does not necessary mean that no reference of fact shall be made to the pleadings or record as objection cannot be raised from abstract. I am therefore persuaded that, some facts in the pleadings or record must be looked into without going into details of evidence rendered or facts pleaded therein as it was held in the case of **Ali Shabani & 48 others Vs. Tanzania Road Agency and Another, Civil Appeal No. 261 of 2020** (CAT-unreported) where the Court of Appeal had the following to observe:

*"...at any rate, we hold the view that no preliminary objection will be taken from abstract without reference to some facts plain on the pleadings which must be looked at without reference examination of any other evidence."*

Similar stance was taken by the Court of Appeal in case of **Gideon Wasonga & 3 others Vs. Attorney General & 2others**, Civil Appeal No. 37 of 2018 (unreported) where it was observed that:

*"As to where the point of preliminary objection can be found, we do not have qualms that the court needs to ascertain it into*



*the **plaints and its annexures without any further evidence** in determining the issue of time limitation. ...the preliminary objection would always be in the record of appeal.”*

[Emphasis supplied]

Being guided by the principles in the above cited cases and the fact that during submission counsels for the 3<sup>rd</sup> respondent made reference to both parties' pleadings seeking to establish whether this application is time barred or not after filing and withdrawing several applications including Misc. Civil Application No. 322 of 2023 in which Mr. Balomi unjustifiably is complaining not to have been annexed to the pleadings, I find the two grounds of objection are pure point of law for meeting the test established in **Mukisa Biscuits** (supra) as none of the referred facts entails ascertainment or proof by evidence.

Now, going back to the raised grounds of objections and to start with the first point of objection on whether the application is time barred or not, it is true as correctly submitted by Mr. Godwin that, time limitation within which to file objection proceedings is not provided for under the CPC hence resort is made to Item 21 part III of the LLA providing for sixty (60) days. It is also uncontroverted fact as rightly submitted by Mr. Balomi that, objection proceedings is expected to arise where there is an order for attachment or

certificate of sale. In his submission Mr. Balomi contended that, the 3<sup>rd</sup> respondent failed to exhibit to the Court's satisfaction as to whether there was an attachment order subject of execution proceedings and when did the applicant become aware of it, if any existed so as to reckon the date before appreciating the objection that this application is time barred. With due respect to the learned counsel, I distance myself from that proposition as the order of this Court dated 22<sup>nd</sup> August, 2022 in Civil Case No. 178 of 2018, subject of the pending execution proceedings in Execution No. 25 of 2023 in which this application emanates from is pleaded and annexed as annexure 'B' to paragraph 3 of the applicant's affidavit, hence part of the pleading in which this Court is entitled to make reference to. For clarity paragraph 3 of the applicant's affidavit reads:

*4. That, am made to understand that, there is the said pending execution proceedings fixed for necessary orders on the 21<sup>st</sup> September, 2023 before Hon. Luambano, the Registrar in this Court and is now due for execution by way of attachment and sale in order to satisfy the purported Drawn Order dated 22<sup>nd</sup> day of August, 2022 by Hon. Mruma, J. Copies of the said Drawn Order and the Application for execution are annexed hereto and collectively marked Annex 'B' to be read as forming part of my affidavit.*

As to when did the applicant become aware of the order subject of execution proceedings glancing at the pleadings, this Court is satisfied and therefore arrive to the finding that, it was before 30.06.2023, whereby upon becoming aware of the said order she filed three applications in this Court on separate dates which were later on withdrawn without leave to refile it as deposed in paragraph 5 and 6 of the 3<sup>rd</sup> Respondent supplementary affidavit. Paragraph 5 of the 3<sup>rd</sup> respondent supplementary affidavit reads thus:

*"..... the 3<sup>rd</sup> respondent states that further it is not true that the applicant was made aware of the execution proceedings on 21<sup>st</sup> September 2023, because before this application she has already filed several applications of this nature including Misc. Civil Application No. 322/2023 filed on 30.06.2023 though the matter was withdrawn on 28.07.2023 before Hon. Kakolaki, J. for being incompetent. Sequel to that, the applicant filed another Misc. Civil Application No. 405/2023 on 02.08.2023 and the application was withdrawn on 21.09.2023 before Hon. Luambano, DR. ..."*

And in paragraph 6 the 3<sup>rd</sup> respondent deposed that:

*5. That, apart from that she has already filed other applications only to be rendered incompetent and henceforth withdrawn. These including, Misc. Civil Application No. 335/2023 and reference No. 14/2023 which*

*were withdrawn on 13.07.2023 before Hon. Pomo, J. Attached are copies of Misc. Civil Application No. 335/2023 and Reference No. 14/2023 marked as Annexure DPI-3.*

From the pleaded facts above the three withdrawn applications in Misc. Civil Applications No. 322 of 2023, No. 355 of 2023 and No. 405 of 2023 above mentioned all aiming at challenging execution order of 21/06/2023 in Execution No. 25 of 2023 as per the prayer in their chamber summons, were undeniably annexed to the supplementary affidavit hence became part of the pleadings in which this Court is entitled to make reference to and establish whether the applicant was aware before 30/06/2023. In further proof the applicant in her reply to 3<sup>rd</sup> respondent supplementary affidavit admitted to have withdrawn the above referred application, when stated at paragraph 3 thus:

*"...the alleged **existed other applications but were all withdrawn by the applicant** and consent of the 3<sup>rd</sup> respondent was obtained in this court, thus are not a bar to file this proper objection proceedings." (Emphasis supplied)*

From the above referred paragraphs conclusion can be drawn that, the applicant does not deny to have withdrawn applications of same nature to the present one filed after becoming aware of existence of order of this Court

dated 21/06/2023 in Execution No. 25 of 2023, which no doubt was entered before 30/06/2023, when the first Misc. Application No. 322 of 2023 was presented for filing in Court. In view of the above fact this Court is satisfied that, time for filing the application of this nature started to run from 30<sup>th</sup> June, 2023 when the first application challenging the said execution order was presented for filing in court and therefore the 60 days were to lapse on 29<sup>th</sup> August, 2023.

Now, reckoning from 30<sup>th</sup> June 2023 when the applicant became aware of the execution order and presented the 1<sup>st</sup> application for filing which was withdrawn later on, to the date when this application was filed on 29<sup>th</sup> September 2023 it is almost 90 days passed. I therefore agree with the counsel for the 3<sup>rd</sup> respondent and uphold the 1<sup>st</sup> preliminary objection in that this application was filed outside the prescribed time limitation of 60 days as provided under item 21 of part III to the LLA.

Next for determination is the second ground of objection in which the 3<sup>rd</sup> respondent contends that the application is preferred in infraction of the provisions of Order XXIII Rule 1(3) of the CPC for being filed subsequent to the similar application withdrawn without leave to refile. Order XXIII Rule 1(3) of the CPC provides:

*"(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the court may award and **shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.**"*

The above provision of sub-rule (3) to rule 1 of Order XXIII of the CPC in my humble view is not restricted to condemning the party withdrawing or abandoning the suit to pay costs only as Mr. Balomi would seem to impress upon this Court but rather extends to restrict institution of fresh suit after the former is withdrawn without permission or leave of the Court. The provision no doubt was enacted to prevent abuse of court process and endless litigation where the party would file and withdraw the suits endlessly and in frustration of the other party. See also the decision of this Court in **Halima Hamis Rajabu Budda and 4 Others** (supra) which I find persuasive, where the application marked withdrawn and refiled without leave was struck out. In this matter since the applicant filed and withdrew from the court three similar matters and filed the present one without leave of the Court, I find the second point of objection is meritorious hence sustain it.

With the above findings the obvious question is what is the effect of the sustained preliminary objections as both of them have the effect of disposing of this application. I opt to deal with the effect of time limitation as it goes to the jurisdiction of the court in entertaining the present application as it was stated by the Court to Appeal in **Yusuf Khamis Hamza vs. Juma Ali Abdalla, Civil Appeal No. 25 of 2020**, when observed that: -

*"We are alive with the settled position of the law that time limitation goes to the Jurisdiction issue of the Court, and it can be raised at any time."*

As to the effect of filing the matter in Court outside the period prescribed by the law, section 3 (1) of the LLA is instructive that any proceeding instituted after a period of limitation shall be dismissed. The said section 3(2) of LLA provides:

*3.-(1) Subject to the provisions of this Act, **every proceeding** described in the first column of the Schedule to this Act and which is **instituted after the period of limitation prescribed** therefore opposite thereto in the second column, **shall be dismissed whether or not limitation has been set up as a defence.** (Emphasis supplied)*

The position in the above cited provision was applied by this Court in **Christina Ntumigwa Mwakifulefule** (supra), where an application for objection proceedings filed out of time was dismissal under section 3(1) of the LLA.

In this matter since the application was filed outside the prescribed period of time of sixty (60) days the cumulative effect is to dismiss it with costs, the order which I hereby issue.

It is so ordered.

Dated at Dar es Salaam this 10<sup>th</sup> November, 2023.



E.E KAKOLAKI

**JUDGE**

10/11/2023

The Ruling has been delivered at Dar es Salaam today 10<sup>th</sup> day of November, 2023 in the presence of Eric R. Suma in person as 2<sup>nd</sup> respondent, director to 4<sup>th</sup> respondent and personal legal representative to the 1<sup>st</sup> respondent and Mr. Boniface Woiso and Shukran Mzikila, advocates for the 3<sup>rd</sup> Respondent and Mr. Oscar, Court clerk and in the absence of the the applicant and 5<sup>th</sup> respondent.



Right of Appeal explained.



E. E. KAKOLAKI

**JUDGE**

10/11/2023

