

**THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
DAR ES SALAAM SUB-REGISTRY**

**MISC. CIVIL APPLICATION No. 475 OF 2023**

**MSOZA TRANSPORT COMPANY LIMITED .....APPELLANT**

**VERSUS**

**GOMBO SAMANDITO.....1<sup>ST</sup> RESPONDENT**

**SAID HAMED AL-AGHIBARI.....2<sup>ND</sup> RESPONDENT**

**JESCA MASSAWE T/A JJ AUCTION MART**

**LIMITED.....3<sup>RD</sup> RESPONDENT**

**RULING**

*Date of last Order: 7-12-2023*

*Date of Ruling: 12-2-2024*

**B.K. PHILLIP, J**

This application is made under Order XX1 Rule 57(1) of the Civil Procedure Code, Cap 33 R.E 2019 ( the "CPC"). The applicant prays for the following Orders;

- i) This Honourable Court be pleased to investigate the Applicant's claims that the trucks and machinery which are not subject to attachment Execution No. 26 of 2021, Gombo Samandito versus Said Hamed Aghabari, and are owned by the Applicant who was

not party in Civil Case No. 82 of 2016 and Execution No. 26 of 2021 and the eviction Order of this court, be raised.

- ii) The costs of the suit be borne by the respondents.

The application is supported by an affidavit sworn by Mr. George Dogan Mwalali, learned counsel for the applicant.

The 1<sup>st</sup> respondent was represented by the learned Advocate Noel Sanga whereas the 2<sup>nd</sup> respondent appeared in person, unrepresented. The 3<sup>rd</sup> respondent did not show up in court, thus, the case proceeded ex parte against her. Upon being served with the chamber summons, Mr. Sanga filed a counter affidavit in opposition to the application, together with the following points of preliminary objection.

- i) That, the application before the court is incompetent for want of board of resolution from the Applicant.
- ii) That, the attached minutes of the board of directors meeting is defective.
- iii) That, the application before this honorable court is incompetent for being prepared by advocate George Dogan Mwalali who has a conflict of interest.
- iv) That, this application is prematurely filled before this court.

When the matter was called for a hearing of the points of preliminary objection, the applicant and his advocate did not enter an appearance in court although the hearing date was scheduled in their presence. Consequently, the hearing of the points of preliminary objection proceeded ex parte against the applicant.

Mr. Sanga argued the 1<sup>st</sup> and 2<sup>nd</sup> points of preliminary objection conjointly. His arguments were to the effect the position of law is that suits instituted by companies must be accompanied by a copy of the board resolution authorizing the company to institute a case in court, short of that a case is defective and has to be struck out. To cement his argument he cited the case of **Simba Papers Converters Limited Vs Packaging & Stationary Manufactures Limited & DR. Steven K. Mworio, Civil Appeal No. 280 of 2017**, (unreported). He went on to submit that the minutes attached to the affidavit in support of this application are defective because the said minutes cannot be termed as a Board Resolution and do not indicate the name of the Director or Chairman who attended the meeting in question. He contended that those minutes do not contain the names of attendees and the one who convened the meeting. He insisted that this application deserves to be struck out.

Submitting for the 3<sup>rd</sup> point of preliminary objection, Mr. Sanga argued that Mr. Mwalali, Advocate had a conflict of interest in the matter as revealed in annexure MS2 to the applicant's affidavit which shows that, Mr. George Mwalali appeared for the 2<sup>nd</sup> respondent during the hearing of the case before the lower court. He cited the case of **Kilindi District Council Vs Mussa Nyeji & 2 others, Labour Revision No. 6 of 2019** (unreported).

Submitting for the 4<sup>th</sup> point of preliminary objection, Mr. Sanga argued that this application is prematurely filed because it contravenes the provision of Order XX1 Rule 57 (1) of the Civil Procedure Cap. 33 R.E 2019 which provides that objection proceedings can be filed in respect of the property attached during execution of a court decree and not otherwise. He supported his argument by citing the case of **Mwanga District Council Vs Islamic Development Foundation & 2 others, Misc. Land Application No. 22 of 2022**, (Unreported). He pointed out that in this application the affidavit in support of the chamber summons, does not state specific properties (Motor Vehicles), in terms of their registration numbers and type, which had been attached in the execution of a court

order/ decree to move this court to invoke its powers under Order XX1 Rule (1) of the CPC to investigate on the attached properties. Thus, he prayed for the dismissal of this application with costs.

Having dispassionately analyzed the arguments raised by Mr. Sanga, let me proceed with the determination of the merit of this application. To start with I think it is imperative to point out the famous principle of law on the quality of preliminary objection as stipulated in the case of **Mukisa Biscuits Manufacturing Ltd Vs West End Distributors Ltd ( 1969) E. A 696**, to wit; A point of preliminary objection must be a pure point of law that does not require any evidence to prove. In his arguments in support of the 1<sup>st</sup> and 2<sup>nd</sup> points of preliminary objection, Mr. Sanga was referring to the minutes annexed to the affidavit in support of the chamber summons and maintained that the same were defective. Thus, in my considered opinion the 1<sup>st</sup> and 2<sup>nd</sup> points of preliminary objection are intertwined and are not pure points of law as they cannot be determined without scrutiny of the evidence ( the document annexed to the affidavit in support of the chamber summons). So, the same does not qualify to be dealt with as points of preliminary objection.

I will skip the 3<sup>rd</sup> point of preliminary objection and deal with the 4<sup>th</sup> point of preliminary objection which is about the appropriateness of this application before this court. It is common knowledge that before this court embarks on the determination of an application, it has to make sure that the same is proper before the court. Additionally, if this court finds that this application is filed in court prematurely, the 3<sup>rd</sup> point of preliminary objection which is concerned with Mr. Mwalila's right to represent the applicant will be redundant, that is why I think it is imperative to start dealing with the 4<sup>th</sup> point of preliminary objection.

I have perused the affidavit in support of this application and noted that the same does not contain any specific particulars of the motor vehicles allegedly belonging to the applicant which have been wrongly attached in execution of the court decree. As correctly submitted by Mr. Sanga, the provisions of Order XX1 Rule 57 (1) of the Civil Procedure Cap 33 RE 2019 provide that objection proceedings can be filed in respect of properties attached during the execution of a court decree/order and not otherwise. As alluded to earlier herein above, in this application there is no detail of the motor vehicles allegedly attached by the respondent, thus, this court can't conduct any investigation as prayed by the applicant since it can not

manage to investigate unknown properties. It is worth noting that, this court cannot work on speculations and the investigations envisaged in Order XXI Rule 57 of the CPC presuppose that the applicant gives sufficient particular of the property in question since any investigation requires enough particulars for the investigator to arrive at the correct outcome.

I uphold the 4<sup>th</sup> point of preliminary objection. Thus, I do not see any plausible reason to proceed with the determination of the 3<sup>rd</sup> point of preliminary objection. In the upshot, this application is struck out with costs.



Dated this 12<sup>th</sup> day of February 2024

  
**B.K. PHILLIP**

**JUDGE**