

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO.50 OF 2000

CRDB BANK LIMITED.....PLAINTIFF
VERSUS

MWAMBA ENTERPRISES LTD.....1ST DEFENDANT
CHARLES MULOKOZI.....2ND DEFENDANT

R U L I N G

NSEKELA, J.

This chamber summons was filed under Order XXI rules 57, 58, 59, 88(1) and section 95 of the Civil Procedure Code, 1966 (CPC) in which the applicant, one Calvin E Mafuru, is seeking, inter alia, the following order, namely –

" (i) That this Honourable Court may be pleased to set aside the sale of the house situate on plot No.114 Block "C." Mikocheni area Kinondoni, Dar-Es-Salaam sold by public auction on the 27th May, 2001 at 10.00 hrs."

A brief background to Commercial Case No. 50 of 2000 will be in order. The plaintiff in this suit was CRDB Bank Ltd instituted this suit under Order XXXV – Summary Procedure – of the CPC against two defendants (i) Mawamba Enterprises Ltd and (ii) Charles Mulokozi. On the 1.11.2000 this court made the following order –

" In view of the admission made by the defendants in their letter dated 31.10.2000 I hereby enter judgment for the plaintiff under Order XII rule 4 of the Civil Procedure Code. The time-table for the repayment of the debt of Shs. 55,941,708/= will be as follows –

- (i) *The defendants will pay six monthly instalments of Shs 9,823,618/= with effect from the 30.11.2000. The figure of*



Shs 58,941,708/= is inclusive of costs amounting to Shs 6,143,527/= with the usual default clause. It is accordingly ordered."

Apparently the defendants did not honour the repayment schedule recorded on the 1.11.2000 and this prompted the decree –holder to apply for the execution of the decree by the sale of mortgaged property on plot no.114 Block "C" Mikocheni Dar-Es-Salaam comprised in Certificate of Title No.186307/50 I.N.O.) CHARLES MULOKOZI. According to the proclamation for sale dated the 25.4.2001 the said property was to be sold by public auction by **Semy J. Mkumbo t/a Comrade Auction Co. Limited** at Dar-es-Salaam on Sunday the 27.5.2001. The said Court Broker has already reported to the Court that the house in question was sold to **Mr. Salum Ally Salum** on the same day, the 27.5.2001, hence this application by **Mr. Calvin E. Mafuru**. The applicant's affidavit in support, reads in part as follows –

" 2. That I am the owner of the house situate on plot No.114 Block "C" Mikocheni Area Kinondoni District, Dar-Es-Salaam. The copy of the letter Certificate of Offer is annexed hereto marked "EN" to form part of this affidavit.

*3. That I purchase the house from the 3^d respondent Charles Mulokozi when it was just a foundation on or about **26th November, 1991** at the consideration of Tshs. 1,200,000/= and the said Charles Mulokozi surrendered the house in my favour to the Kinondoni Land Office. The copy of the letter of surrender is annexed hereto and marked "EN 2" to form part of this affidavit.*

(4) That as the said Charles Mulokozi was living outside the country one Denis Zimbeiya was acting as his attorney who executed the deed of conveyance. The copies of the agreement for sale and transfer deed are annexed hereto marked "EN 3" collectively to form part of this affidavit.

*(5) That on **6th May, 1991** the said Charles Mulokozi reported to the officer in-charge Chang'ombe Police Station that the Certificate of Occupancy was lost. The copy of the letter is annexed hereto marked "EN 4" to form part of this affidavit.*



(6) That I was surprised to be informed that the 3rd and 4th respondents used the same certificate as security for mortgage arrangement resulting in the sale of my house.

(7) That the 3rd and 4th respondents have no saleable interest in my house.

(8) That I was not informed of any mortgage arrangements with the 1st respondent on my house until I was served with Notice of Execution.

(9) That the 3rd and 4th respondents maliciously did not seek leave to defend the suit against my house because they knew they had committed fraud.

(11) That this Honourable court being the fountain of justice is the only saviour of my said house in which I am residing with my family, therefore I humbly pray that this objection be upheld and the sale be declared illegal."

Mr. Maira, learned advocate for the applicant/objector has submitted very forcefully that the 3rd respondent, Charles Mulokozi, perpetrated a massive fraud upon the 1st respondent bank in obtaining the overdraft facility which was secured by a mortgage over a house which did not belong to him. The learned advocate submitted that the house in question had already been sold to the applicant/objector way back in November, 1991. He added that the 3rd respondent had not rebutted these allegations and therefore it is an established fact that the house belongs to the applicant/objector. In paragraph 4.1 of the written submissions Mr. Maira has stated thus –

" The crux of our submissions your Lordship is that there has been fraud. We have already pointed out that the 3rd and 4th respondents have no interest in the property. This name Charles Mulokozi which appears in the Certificate of Title is there by fraud and/or concealment of the true facts. The man Charles Mulokozi fraudulently mortgaged a property in which he has absolutely no proprietary interest. The agreement between him and the plaintiff bank having been obtained as a result of fraud it cannot be allowed by this Honourable Court to stand or have any legal effect."



To bolster his case, the learned advocate referred me to section 17 of the Law of Contract Ordinance, Cap. 433 on the definition of "fraud" under the said Ordinance and an array of cases including **Chief Onyiuke III v Okeke** 1976 (1) ALR 1; **Bura v Mubiru** (1995) TLR 211; **G.G.Somaiya & Co. Ltd v Govndji Popatlal** (1957) EA 30 and **Alfi East Africa Ltd v Them Industries and Distributors Agency Ltd** [1984] TLR 256.

On the part of the 1st respondent, the decree-holder, there is a counter-affidavit sworn by one **Alfred R. Woiso**, Manager of Legal Services. It provides in part as under –

" 4. That further to what is averred in paragraph 3 of above, contents of paragraph 3 of the affidavit are denied and I say that the mortgaged property on Plot No.114, Block "C" Mikocheni Dar-Es-Salaam belong to and has been the property of one Charles Mulokozi the second judgment debtor herein as evidenced by a photostat copy the certificate of title appearing as annex CRDB-2 to the plaint and a report of the official search conducted by one F. M. Mawamba on 20th May 1998 whose photostat copy is annexed hereto marked ARW-1 as part of this counter-affidavit or else, the applicant is put to strict proof of its allegations to the contrary.

5. In further answer to the contents of paragraph 3 of the affidavit, I say that the purported sale of the mortgaged property in 1991 is inoperative and/or ineffectual as ownership of the said property continued to be in the name of Charles Mulokozi who, at all material times remained with the title deed thereof until as late as June 1998 when the mortgage was executed and the said title deed is in the custody of the decree-holder.

7. That as regards the averments in paragraph 6 of the affidavit, I say that the mortgage in respect of the property was validly executed against a loan to the 1st judgment-debtor which mortgage was executed by the registered owner of the property free from any third party interest or encumbrances whatsoever....."



trust for some other person, or partly on his own account and partly on account of some other person, the court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment.

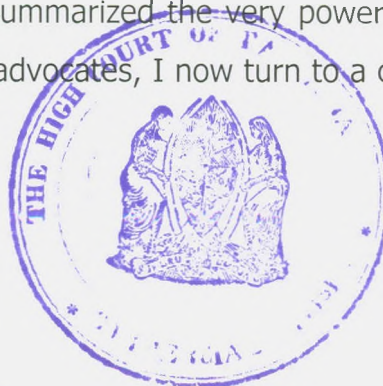
60. Where the court is satisfied that the property was at the time it was attached, in the possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the court shall disallow the claim."

Mr. Mwandambo, learned advocate for the 1st respondent bank, with equal force and deep conviction, was of the view that the objection was not maintainable since the objector had not established ownership of the mortgaged property. He submitted that the objector had to prove that he was the lawful owner of the mortgaged property and that bare assertions that he bought the property in question in November 1991 would not suffice and referred to paragraphs 4, 5, 7, 8, 9 and 11 of Mr. Woiso's counter-affidavit to the effect that the mortgaged property belonged to the 3rd respondent. Somewhat half heartedly, the learned advocate submitted and I quote him –

"he might have been in possession of the property at the time of attachment and sale, but that is not equivalent to saying that the objector is the lawful registered owner of the mortgaged property. In our view, any attempt to prove ownership would be made by way of documentary evidence of sale and transfer thereof to the objector by the mortgagor."

Lastly, Mr. Mwandambo submitted that the alleged sale agreement between the 3rd respondent and the applicant cannot be acted upon since it contravenes sections 46 (1) and 40 (d)(1) of the Stamp Duty Act, 1972. To cap it all, there was no consent in terms of Regulation 3(1) of the Land Regulations 1948, to the purported disposition of the property in dispute.

Having hopefully accurately summarized the very powerful and engaging submissions made by the learned advocates, I now turn to a consideration and

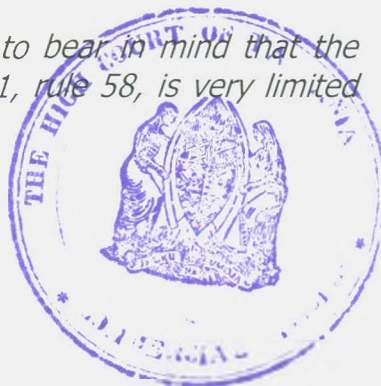


determination of the law in objection proceedings of this nature. I have already quoted Order XX1 Rules 57 (i); 58; 59 and 60 which are central to this Ruling and are the ones relied upon by the objector. My limited research has taken me to India for obvious reasons. Our Civil Procedure Code is moulded in large measure upon their Code of Civil Procedure and I have found very useful guidance from Indian decided cases on the interpretation of our rules 57, 58; 59 and 60 which are in pari materia with Order XX1 rules 58, 59, 60 and 61 of the Indian Code of Civil Procedure Act, 1908. His Lordship, Mukhi J. in the case of **G.R. Bhande v B.R. Jhadav** AIR 1974 Bom 155 had this to say in paragraph 22 of his judgment –

" It is substantially clear that on a proper construction of these Rules the question to be decided is whether on the date of the attachment it was the judgment debtor who was in possession or it was the objector who was in possession and further when the court comes to a finding that the property was in the possession of the objector, then the court must proceed further to find whether that possession of the objector was on his own account for himself or as trustee or on account of the judgment debtor. It requires to be emphasized that the direction of the investigation, which the court has to carry out, points to possession being the criteria. It is, of course, possible that in the course of such an investigation as to who is in possession of the property subjected to attachment, the question of some legal right or interest or title may also arise and if such legal right affects the determination of the question as to who is the real person in possession in fact or in law, then such a legal right or interest will naturally have to be taken into account. But it is also settled law that complicated questions as to title are not to be gone into under summary procedure of investigation under Order XX1 rule 58."

And in the case of **Sawai Singhai v Union of India** AIR 1966 SC 1068, the Supreme Court of India had this to say on Order 21 rule 58 (ours, 57) –

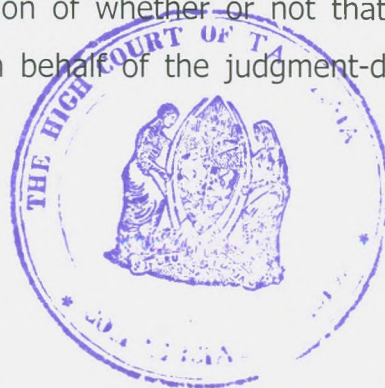
" In this connection, we ought to bear in mind that the scope of enquiry under Order 21, rule 58, is very limited



and is confined to the question of possession as therein indicated while the suit brought under Order 21 rule 63 (ours, 62) would be concerned not only with the question, but also with the question of title. Thus the scope of the suit is very different and wider than that of investigation under Order 21 rule 58."

What emerges from these cases is that when the court is dealing with an objection under Order XXI rules 57, 58, 59 and 60 of the CPC, the court should concentrate on the question of possession of the property the subject of attachment and then decide whether the judgment-debtor is in possession of the property on his own behalf or on account of or in trust for some other person. If the property is in the actual possession of some person other than the judgment-debtor, then the court has to decide whether that possession is in trust for or on behalf of the judgment debtor: The court should not be concerned with the question of title unless necessary for its decision on the question of possession. (See also: **Bachu Lal v Ram Dim** AIR 1939 Allahabad 117; **Chotabhai M Patel v Chartubhai M Patel** [1958] EA 743.)

It is I hope clear by now that the scope of the investigation under Order XXI rules 57, 58, 59 and 60 is confined to the question of possession and not title or fraud for that matter. The investigation should be directed as to who is in possession of the mortgaged property. It is not seriously controverted that the objector is in actual possession of the mortgaged property. This is evident from paragraphs 2,7 and 11 of the objector's supporting affidavit. The counter-affidavit by Alfred R Woiso does not dispute this fact of possession but concentrates mainly on the question of ownership. On the affidavit evidence before me, I find that the mortgaged property when it was sold by public auction on the 27.5.2001 by Semy J Mkumbo, the Court Broker and second respondent in these proceedings, was not in possession of **Charles Mulokozi**, the third respondent. It was in the possession of the objector, **Calvin Mafuru**. This takes me to a consideration of whether or not that possession by the objector was in trust for or on behalf of the judgment-debtor, in this case,



Charles Mulokozi. There is a letter dated 21.11.91, Annexure "EN 2" which is referred to in paragraph 3 of the objectors affidavit in support. It reads as follows:

"Nd. Charles Mulokozi
S.L.P 543
Dar-es-Salaam
21st November, 1991

Afisa Ardhi
Kanda ya Kinondoni
S.L.P 9583
Dar-Es-salaam

Ndugu,

**NAOMBA KUMWACHIA KIWANJA NA.114 KITALU
"C" MIKOCHENI MJOMBA WANGU MR. CALVIN E
MAFURU, WA SLP 63326 DAR ES SALAAM**

Kama Kielelezo cha barua hii kielezavyo hapo juu mimi CHARLES MULOKOZI wa SLP 543 D'Salaam, ni mmilikaji wa Kiwanja namba 114 Kitalu C. Mikocheni H/D, chenye kumbukumbu na. D/KN/A11579/3/SOM ya tarehe 17.7.83 kama barua ya toleo inavyoeleza. Nina kibali cha ujenzi na nimeisha kiendeleza kwa kujenga msingi baada ya ujenzi wa msingi niliondoka kwenda sweden kusoma, nimerudi wakati ninajitayarisha kuendeleza ujenzi. Mwajiri wangu akanipeleka kufanyia kazi Botswana. Nimerudi mwezi jana na mwezi ujao ninaenda kusoma miaka mitatu, kutokana na hali hii nimeamua kumwachia mjomba wangu aendeleze ujenzi **na amilikishwe kiwanja hicho badala yangu.**

Nitashukuru kwa kumuhalalisha na kumpa Letter of Offer na hati ya umilikaji kwa Kamishna wa Ardhi.

Ni tumaini langu ombi langu litashughulikiwa.

Wako katika Ujenzi wa Taifa.

Charles Mulokozi"

Nakala:-
Mr. Calvin E.Mafuru
SLP 63326
Dar-Es-Salaam.



Order XX1 rule 60 provides as to when the claim to the property attached shall be disallowed and this happens when the court is satisfied that the property at the time of the attachment was in the possession of the judgment-debtor as his own property and not on account of any other person; **OR** was in the possession of some other person who was holding the property in trust for the judgment-debtor **OR** that the property was in physical possession of a tenant or other person who was paying rent to the judgment-debtor. It is evident that what has to be investigated and decided is who, as between the **judgment debtor** or the **objector**, was in possession on the date of the attachment of the property. As stated before, it was the objector who was in possession. The letter quoted in extenso dated 21.11.91 tells the whole story. The 3rd respondent, Charles Mulokozi, expressed therein a clear intention to surrender the property to his nephew Calvin E Mafuru, the objector to further develop it and ultimately ownership be transferred to him. And in paragraph 11 of the affidavit in support, the objector states that he is residing with his family in the house. Since the property was in the possession of the objector, I proceed to find out whether that possession of the objector was on his own account for himself or as trustee or on account of the judgment debtor. Again, my reading of the letter dated 21.11.91, leaves me in no doubt that the said property was in possession of the objector at the date of attachment holding the property in trust for the judgment-debtor. Admittedly, there was an intention to transfer ownership to the objector, but as was stated by **Mukhi J** in Jhadav's case (supra)

"complicated questions as to title are not to be gone into under the summary procedure of investigation under Order XXI, rule 58 (read 57)."

It is therefore not my intention to embark upon such an investigation as regards title. It is obvious to me that from the submissions made by Mr. Mwandambo in particular, that complicated legal issues regarding the ownership of the mortgaged property have been canvassed at length including



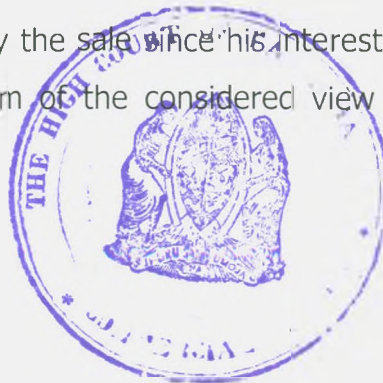
the validity of the purported sale and transfer of the mortgaged property from the third respondent to the objector, not forgetting the question of who had a paramount claim over the property. I also subscribe to the view that such questions do not fall for consideration in proceedings under Order 21 rule 57 of the CPC. This does not of course bar the objector from invoking rule 62 (see: **Omoke Oloo v Werema Magira** (1983) TLR 144.)

Mr. Maira, learned advocate for the objector, did cast his net wide and invoked rule 88 (1) as well which reads as under –

" Where any immovable property has been sold in execution of a decree, the decree-holder, or any person entitled to a share in reteable distribution of assets, or whose assets are affected by the sale may apply to the court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it:

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud."

Before I embark upon a consideration as to whether or not, on the facts, the conditions contained in rule 88(1) do exist, the objector must be one of the persons entitled to make such an application. The objector is certainly not the decree-holder. Secondly, is he any person entitled to a share in the reteable distribution of assets? The objector does not fall under section 54 of the CPC since he is not a person entitled to a share in a reteable distribution of assets. Is the objector then " any person whose interests are affected by the sale?." At the risk of boredom, the core of the objector's arguments is that he bought the mortgaged property from the third respondent who fraudulently mortgaged it to the first respondent bank. In a nutshell, the objector is claiming that he has a paramount title to that of the third respondent. As the objector is claiming to be a purchaser of the said property before its sale on the 27.5.2001, then his interest cannot be legally affected by the sale since his interest existed before the sale. In the circumstances, I am of the considered view that since the



objector is neither a decree-holder; nor a person entitled to a rateable distribution of assets under section 54 and nor a person whose interests are affected by the sale, Order XXI rule 88(1) is inapplicable.

To conclude, for reasons stated above, as the mortgaged property was in the possession of the objector in trust for the judgment-debtor, that is, the third respondent, Charles Mulokozi, I do hereby disallow with costs the objection by Calvin Mafuru. It is accordingly ordered.

H.R.Nsekela,
Judge

10.8.2001

Ruling delivered in the presence of Mr. Mwandambo and Mr.Maira, learned advocates for the parties.

H.R.Nsekela,
Judge
10.8.2001



I Certify that this is a true and correct
of the original order judge endorsing
.....
Registrar
Commercial Court
Dar es Salaam
Dated 10/8 of 2001