

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

COMMERCIAL CASE NO. 176 OF 2002

EDITH MAJULA COMPANY LTD
BENEDICT M. MATABA....JUDG.DEBTOR/1ST APPLICANT
EDITH MATABA.....JUDGEMENT DEBTOR/2ND APPLIANT
VERSUS

N.B.C LTD.....DECREE HOLDER/1ST RESPONDENT
MAINE ALI MOHAMED T/A
VUMILIA AUCTION MART
AND COURT BROKER.....2ND RESPONDENT

R U L I N G

KIMARO, J.

This is an application filed under Order XXI rule 68 (1) and Section 95 of the Civil Procedure Code, 1966 by Edith Majura and Co. Ltd, Benedict M. Mataba and Edith Mataba. The respondents are NBC Ltd and Maine Ali Mohamed T/A Vumilia Auction Mart and Court Broker.

The application seeks for an order to stop the second respondent from selling landed property on plot No. 3 Block "P" Rufiji Street Mwanza City comprised in the Certificate of Title No.033055/12 which was supposed to take place on 30th

January 2005. The application also seeks for an order for costs.

The application is supported by an affidavit of Benedict Mataba. The only reason given to support the application is that although the certificate of title No.033055/12 for plot No.3 Block 'P' Rufiji Street, within the City of Mwanza has remained in possession of the 1st Respondent, the applicants have not mortgaged that property as a security for a loan which the 1st Respondent granted the 1st Applicant. It is deponed that what was mortgaged as security for the loan was property on plot No.29 Block "W" Capri Point Mwanza and the Certificate of Title is No.22508.

In a counter affidavit sworn by Godson M.T.Killiza, it is deponed that the titled deed for plot No.3 Block 'P' Rufiji Mwanza City was deposited by the applicant as an additional security for the banking facility which was granted to the 1st applicant. His opinion is that it created an equitable mortgage.

Mr. Kiiza deponed further that the parties reached a consent judgment and a schedule for payment was made. However, the applicant has defaulted and the default clause should apply as per the consent settlement order. In brief those are the arguments by the parties.

In order to have a good picture showing why this application was filed, a brief background of the relationship of the parties is important.

The first applicant was granted an overdraft facility by the 1st respondent in 1997. The facility expired in June 1998 and the 1st applicant defaulted in repayments.

As security for the loan, a mortgage deed was executed over the property on plot No.29 Block "W" Capri Point with Certificate of Title No.22508 Mwanza City by the 2nd Defendant.

Over and above this mortgage, the 1st Applicant deposited Certificate of Title No.033055/12 over Plot No.3 Block 'P' Rufiji Street Mwanza City with the 1st Respondent,

There is a dispute between the parties regarding the purpose for the deposit of the Certificate of this Title, but it is not my intention to indulge on this aspect given the circumstances under which the proceedings ended in this case.

The 1st Respondent sued the applicants for the 1st applicant's default to repay the loan and the others as guarantors for the loan.

The case settled in mediation. The applicants admitted a liability of T.shs 123,284,987/75. They were also required to pay interest at 20% from the date of filing the suit (5/6/2002 to 8/10/2003). Thereafter they had to pay interest at 7% until the liquidation of the debt.

A schedule for the repayment of the loan was also set and a default clause was also provided.

There is no dispute that the applicants failed to abide by the schedule of repayment of the loan as agreed during the mediation process. They defaulted to repay the loan.

The 1st respondent decided to go for execution. They managed to have the landed property on plot No. 29 Block W Capri Point Mwanza, with certificate of title No.22508 Mwanza City attached and sold but it did not realize the amount of the decree. It was the 2nd Respondent who did the execution work.

The 1st respondent did include the property on Plot No.3 Block 'P' Rufiji Street Mwanza as a second property for attachment and sale. It was attached. Before the property was sold, the Applicants filed this application seeking for stay of sale. The main reason for the application has already been given.

The Advocates who appeared for the parties in this application were ordered to file written submissions and both complied.

After going through the application and the submissions filed by each party, I must hold that this application has no merit. Even assuming that there was no mortgage in respect of the property on plot No.3 Block 'P' Rufiji Street, so long as the applicants defaulted to repay, the respondent is entitled to pursue execution by whatever method allowed by the law. Attachment and sale of immovable property is one method of execution of decrees under XXI rule 53 of the Civil Procedure Code, 1966.

There is nothing on record to show that execution by attachment and sale could not be carried out in respect of the property which forms the subject matter of this application. Moreover the applicants do not dispute that they defaulted to comply by the repayment schedule.

The application is dismissed with costs.

N.P.KIMARO,

JUDGE

30/05/2006

Date: 2.6.2006

Coram: Hon. N.P.Kimaro, Judge.

For the 1st Applicant } Absent

For the 2nd Applicant }

For the 1st Respondent } Mr. Mujulis

For the 2nd Respondent }

CC: R.Mtey.

Court: Ruling delivered today.

Order: The application is dismissed with costs. Sale should proceed.

N.P.KIMARO,

JUDGE

2/06/2006

1,019 – words.

jd

I Certify that this is a true and correct
of the original order judgement Ruling

Sign Subise

Registrar Commercial Court Dsm.

Date 5/6/2006