

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

**MISC. COMMERCIAL APPLICATION NO. 398 OF 2017
(Originating from Commercial Case No. 133 of 2014)**

DORIS MARTIN MINJA APPLICANT

Versus

DIAMOND TRUST BANK	1ST RESPONDENT
KAHELA TRADERS LIMITED	2ND RESPONDENT
ALEX YAKOBO KAHELA	3RD RESPONDENT
ASTERIA SUGWEJO KAHELA	4TH RESPONDENT
FIRST WORLD INVESTMENT COURT BROKER	5TH RESPONDENT

RULING

Date of the Last Order: 31/05/2018

Date of the Ruling 09/07/2018

SEHEL, J.

This is a ruling on preliminary objections raised by the 1st respondent against the applicant's application for objection proceedings. The 1st respondent raised six points of law which are:-

1. *The court has not been properly moved.*
2. *The application is time barred.*

3. *The application is bad for being omnibus.*
4. *The application is res judicata.*
5. *The application is bad as it contains no relief(s) sought.*
6. *The present matter is bad for being preferred by a party against a party herself.*

The hearing of the preliminary objection was done orally on 21st day of May, 2018. However, prior to the oral hearing both parties complied with the provisions of Rule 64 of the High Court (Commercial Division) Procedure Rules GN 250 of 2012 (hereinafter referred to as "the Rules") by filing skeleton arguments. Counsel Stanley Mahenge appeared to argue the objection on behalf of the 1st respondent while the applicant appeared in person, she had no legal representation.

Learned advocate Mahenge begun his submission by adopting his skeleton arguments and notified the court that he is dropping the third point of the preliminary objection. He will not make a submission on it.

For the first objection that the application is time barred, he said the applicant's application is for investigation of an attachment and postponement of an order for attachment of the property that had been attached to satisfy a decree dated 16th December, 2016. He argued any attempt to prevent execution process amounts to stay of execution as it was held in the case of **Tanzania Electric Supply Co. Ltd Vs Mfungo Leonard Majura and Others** Civil Application No. 210 of 2015 (unreported – Court of Appeal Tanzania)

"The request by the applicant to lift garnishee Order

nisi is part of the process of execution because in essence

it entails moving the court to stop the process of execution"

He further said the application is made under the Civil Procedure Act, Cap. 33 (hereinafter referred to as "CPC") but CPC does not provide for a time limit within which to file an application to investigate the attachment and the stay of execution therefore item 21 of Part III of the schedule to the Law of Limitation Act, Cap 89 has to be applied which provides for 60 days limit on any application

made under CPC, Magistrates Court's Act or any other written Laws where no period of limitation is provided for. To cement his argument, he referred the court to the case of **Blue Star Service Station Vs Jackson Musseti**[1999] TLR 80.

The learned advocate pointed out that the order for attachment was issued on 6th July, 2017 while the present application was made on 15th December, 2017 which is almost after a lapse of 5 months and 9 days contrary to the limit provided by the law. He therefore prayed for the application to be dismissed with costs.

The applicant being a layperson had nothing much to reply on the issue of time limitation. She simply adopted her skeleton arguments and said that she does not know about court procedures. In her skeleton arguments, it is stated that the objection proceedings are governed by Order XXI Rule 57-62 of CPC and that the limitation for objection proceedings is provided under CPC. The proviso to Order XXI Rule 57(1) of CPC specifically stated that "no such investigation shall be made where the court considers that the

claim or objection was designedly or unnecessarily delayed". The submission then continued to make an account on how the present application came into play and concluded by stating that the delay by the applicant was not inordinate and that she was neither negligent nor sloppy in taking action to file the present application. Therefore the filing of the objection should not be counted as unnecessarily delayed.

The counsel for the 1st respondent in his rejoinder insisted that the application is out of time thus it should be dismissed with costs.

On this objection, the court is invited to determine as to whether the application for investigation and postponement of attachment pending investigation made under Order XXI Rule 57(1) and 57(2) of CPC is time barred.

In dealing with this issue I wish to reproduce the provision of Order XXI Rule 57 of CPC that governs objection proceedings as correctly pointed by the applicant.

Order XXI Rule 57 of CPC provides:-

"(1) where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not likely to such attachment, the court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector and in all other respects, as if he was a party to the suit: Provided that no such investigation shall be made where the court considers that the claim or objection was designedly or unnecessarily delayed.

(2) where the property to which the claim or objection applies has been advertised for sale, the court ordering the sale may postpone it pending the investigation of the claim or

objection".

Rule 58 to Order XXI of CPC is also important in this connection and it is necessary to quote it in full:-

"The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached".

The above provisions of the law is similar to Order XXI Rules 58 and 59 of the Indian Code of Civil Procedure as they stood before 1976. These provisions were interpreted by Patna High Court in the Case of **Thakur Prasad Sah VS Shedeni Sah and Others**, AIR 1958 Pat 534 wherein the High Court of Patna when dealing with an appeal filed by the judgment debtor that the learned subordinate judge erred in going into the question of limitation in an applications filed under Order XXI Rule 58 of the Code of the Indian Civil Procedure, the Patna High Court after revisiting the provisions of Order XXI Rules 58 and 59 of the Code of the Indian Civil Procedure held:-

"In our opinion, the argument put forward on behalf of the

petitioner is well founded and must prevail. The Learned subordinate Judge had no jurisdiction to enter into question of limitation in dealing with the claim applications made under Order 21, Rule 58, Code of Civil Procedure. The question of limitation is beyond the scope of the enquiry held under Order 21, Rule 58, code of Civil Procedure. The only question at issue in these applications is the issue whether the property was or was not at the time of attachment in the possession of the judgment debtor or of some person in trust for him, or that being in the possession of the judgment debtor at that time, it was so so in his possession, not on his own account or as his own property, but on account of or in trust of some other person. That is the issue to be decided in the claim cases

and there is no justification on the part of the learned Subordinate Judge in releasing the attachment merely on the ground that the execution case was barred by Limitation".

Here in Tanzania, the Court of Appeal of Tanzania is Katibu Mkuu Amani Fresh Sports Club Vs Dodo Umbwa Mamboya and Another [2004] TLR 326 held:-

".....where a claim is preferred or an objection made to the attachment of any property, the Court is bound to investigate the claim or objection".

It follows then that I have no mandate to enter into examining questions of limitation after being moved under Order XXI Rule 57 of CPC, I am duty bound to investigate the claim or objection. My scope of jurisdiction is as provided under Order XXI Rules 57,58 and 59 of CPC and not to investigate about limitation of time. I therefore see no merit on the first point of preliminary objection.

Let me now turn to the second point of objection on res-judicata. It was submitted that the applicant had previously filed an application for stay of execution to this court, Misc. Commercial Application No. 238 of 2017 that was dismissed by Hon. Songoro, Judge on 2nd August, 2017 for being time barred. The counsel submitted that bringing another application which is in essence if granted will stay execution basing on the issue which had already been conclusively determined by this court is barred by the principle of res-judicata. He also said the applicant did file the same application for stay of execution in Misc. Application No. 331 of 2017 but it was struck out by Mruma, Judge on 8th November, 2017 because the court was not properly moved. Furthermore, he argued the issue that the mortgage of the property was made without the consent of the applicant was finally and conclusively determined by this court in Commercial Case No. 133 of 2014. Therefore the present application is res-judicata.

On this objection I associate myself with the submissions made by the applicant in her skeleton arguments that the issue to be

decided in the present application are not the same as in Misc. Commercial Application No. 238 of 2017 wherein Songoro, Judge was dealing with an application for stay of execution made under Order XXI Rule 27 of CPC while present application is made under Order XXI Rule 57 of CPC and it is for investigation and postponement of attachment pending investigation. Furthermore Misc. Commercial Application No, 331 of 2017 was not decided on merit thus it was not conclusively and finally determined. Regarding Commercial Case No. 133 of 2014, I have gone through the entire judgment and noted that the issue of consent was overruled on the ground that the applicant being an administratix of the late Gasper John Minja cannot raised an objection but she can later on file an objection as an objector and this is what the applicant has done. Therefore, the preliminary objection raised has no merit.

Fourth preliminary objection that the court is not properly moved was argued together with the fifth preliminary objection that no prayers is sought thus the application is bad. It was submitted that the applicant is seeking for investigation of the attachment of the

disputed property but aftermath relief after investigation is not sought as provided under Order XXI Rule 59 of CPC. It was the counsel's view that failure to request for a relief renders the application purposeless and of no merit at all and failure to cite proper provision of the law renders the application incompetent. He relied his submission in the holding of **Zakaria Milalo Vs Onesmo Mboma** [1983] TLR 240 where it was stated:-

"This rule is not dissimilar to Order 39 Rule 1 (2) of the Civil

Procedure Code. Surprisingly, however, neither of these rules requires the petition to embody a prayer for the relief or reliefs desired. Would mean that a prayer is unnecessary or undesirable? I find it difficult to say so. I think that even in the absence of express provisions to that effect it would be idle to suppose that such a prayer is not implied, otherwise the appeal would be without purpose"

The counsel therefore prayed for the application to be strike out with costs.

The applicant in her skeleton arguments wondered why the 1st respondent raised such objections because to her, the application is properly made under Order XXI Rule 57(1) and 57(2) of CPC that allowed the applicant to request for the court to investigate the claim or objection and for the court to order postponement of the sale of which the present application is seeking for.

From the submissions it is noted that the applicant only asked for investigation and postponement of sale pending investigation but she did not request for the release of the disputed property. As I said before, the applicant in her application invoked the provisions of Order XXI Rule 57 of CPC which starts with the following words:-

"where any claim is preferred, to, or any objection is made

....."

which means that any claim or objection made to the court, then the court has to investigate it. It does not matter on the manner

which the claim or objection is made. The case of **Zakaria (supra)** is distinguishable to the matter at hand. The said case was dealing with a memorandum of appeal and not objection proceedings. Therefore it is not relevant to the application at hand.

Therefore I concur with the applicants submission that the application is properly made and cited the proper provisions of the law. The objection have no merit.

Lastly is the objection on the applicant being a party to the suit. It was submitted that in terms of Section 99 of the Probate and Administration of Estates Act, Cap. 352 which provides that the executor or administrator of a deceased person is his legal representative, and all the property are vested in him as such the applicant who was the administrator of the late Gasper John Minja and appeared in Commercial Case No. 133 of 2014 is prevented from filing objection proceeding because she was a party in the main case. A case of Hassan **Twaibu Ngonyani Vs Tanzania Pipelines Ltd**, Civil Appeal No. 147 of 2008 (unreported – HC) was relied upon

where Shangwa, Judge (as he then was) held in objection proceedings a person objecting must not be a party to the case.

It was replied that the applicant was not a party rather she was appearing as a legal representative of the deceased Gasper John Minja.

In this objection though I agree that an objector should not be a party to the case and the applicant did appear in Commercial Case No. 133 of 2014 but her appearance therein was as a legal representative and not as a wife of the deceased. This is clearly stated by the trial judge in his typed judgment at page 6 when he said and I quote:-

"The administratrix of the estates of the late Gasper John Minja cannot play a double role here, as an administratrix of the of the estates and as an objector at the same time. What she was supposed to do, in my view, was to file an objection as an objector; not to bring such defence as an administratrix

of the estates.....”.

In that respect in Commercial Case No. 133 of 2014 the applicant was standing as an administrator of the deceased and not in person therefore she was not a party to the case. I thus see no merit on this objection.

In the end all the preliminary objections raised by the 1st respondent are dismissed with costs to the applicant.

It is so ordered.

Dated at Dar es Salaam this 9th day of July, 2018.



B.M.A Sehel

JUDGE

9th day of July, 2018