

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC COMMERCIAL APPLICATION NO. 187 OF 2018

(Arising from Commercial Case No.147 of 2016)

**ALPHONCE NICAS BUHATWA T/A COCO
ENTERPRISES.....APPLICANT**

VRS

DCB COMMERCIAL BANK PLC.....RESPONDENT

RULING

B.K. PHILLIP, J

This application is made under the provisions of Order XXI rule 66 and section 95 of the Civil Procedure Code, Cap. 33 R.E 2002, (henceforth "the CPC"). It is supported by an affidavit sworn by Alphonc Nicas Buhatwa. The applicant prays for the following orders;

- i. That this Honourable Court be pleased to adjourn and /or stop the sale of the house situated on Plot No. 1202 Block A Kimara Temboni and a house on Plot No. 115 Block A Mbweni JKT in execution of the decree in Commercial Case No. 147 of 2016 pending determination of this application.
- ii. Costs be in course.
- iii. Any other reliefs this honourable may deem fit to grant.

The application is resisted. A counter affidavit sworn by Jacob Danda has been filed in opposition to the application. The learned Advocates kashidye Thabiti and Alexander Mzikila appeared for the applicant and respondent respectively. I ordered the hearing of this application to be by way of

written submissions. Both counsels filed their respective written submissions as ordered.

In his written submission, Mr. Kashindye submitted that on 29th August, 2018, the applicant and the respondent entered into agreement for amicable settlement of their disputes in Commercial Case No. 147 of 2016 which was filed in court and a Court decree was extracted from the same. Mr. Kashindye submitted further that according to the settlement agreement the applicant was supposed to start making payments of the decretal sum (Tshs 301,206.50) on 1st November 2017, but he could not make any payment due to the fact that up to date the respondent has not activated the applicant's loan account instead he is insisting on disposing of the mortgaged property. The decretal sum was supposed to be paid in three installments.

In addition to the above Mr. Kashindye, submitted that in the course of composing his submission he noted that the provision of the laws cited in the chamber summons that is, Order XXI rule 66 of the CPC is wrong. The correct provision of the law is Order XXI rule 68(1) of the CPC, thus she prayed that this court be pleased adopt Order XXI Rule 68(1) of the CPC as part of the enabling provision supplementing section 95 of the CPC. She referred this court to the case of **Eastern Bakery Vs Castelino (1958), E.A.461** to buttress her argument. Finally, she prayed that the orders sought in this application be granted.

In rebuttal Mr. Mzikila started by distinguishing the case of **Eastern Bakery** (supra) from this application on the ground that in that case, the court was dealing with a plaint as defined in Order VI Rule 1 of the CPC, while in the matter in hand, is an application that has been made under the wrong provisions of the law, thus even the affidavit in support of the application has no legs to stand on. Mr Mzikila submitted further that, there are several decisions to the effect that wrong citation the laws is fatal, it

renders the application incompetent. Mr. Mzikila referred this court to the following case to buttress his arguments; **Elly Peter Sanya Vrs Ester Nelson, Civil Application No 3 of 2015** (Unreported), **Chama cha Walimu Tanzania Vrs The Attorney General ,Civil Application No. 151 of 2008,CAT,Dar Es Salaam** (unreported).Furthermore , Mr. Mzikila, submitted that wrong citation of the law is tantamount to non-citation of the law, thus the application is incompetent.

In addition to the above Mr. Mzikila submitted that the respondent has not stopped the operation of the respondent's loan account at any time before and after the judgment. That to date bank account for the loan is operating and interests are accruing from the outstanding loan amount. Mr. Mzikila prayed for the application to be dismissed.

Since there is the issue concerning the laws cited by the applicant to move this court, I must start by determining that issue first as it goes to the competency of this application before this court. Having read the submissions made the learned advocates and perused the court's record, I hasten to say outright here that this application is incompetent, since it is made under wrong provisions of the law, thus this court is not properly moved. I have taken into consideration the part of the submission by Ms. Kashindyee that this court should adopt the provisions of Order XXI Rule 68(1) of the CPC, on the reason that amendment is allowed provided that there is no injustices that will be occasioned to either party to the pleadings, with due respect to Ms. Kashindyee, amendment of pleadings cannot be entertained and be worked upon at this stage, since the same has to be sought under the relevant provisions of the law and once allowed it has to be effected before the hearing date, so that, whatever is amendment is allowed becomes part of the pleadings. The position of the law is that Parties are bound by their pleadings (See the case of **Yara Tanzania Limited Vs Charles Aloyce Msemwa t/a Msemwa Junior Agrovet, Kasimu Shodo Mazagaza and Barton Mwaituka Mwalembe, Commercial Case No. 5 of 2013**).

From the foregoing, as correctly submitted by the Mr. Mzikila, wrong citation of the law renders the application incompetent, therefore this application deserves to be dismissed and I hereby dismiss it with costs.

Dated at Dar es Salaam this 24th day of April 2019.



A handwritten signature in black ink, appearing to read "B.K. Phillip".

B.K PHILLIP

JUDGE