

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC CIVIL APPLICATION NO 66 OF 2019**

**(Originating from Commercial case No. 120 of 2012)**

**ASAC CARE UNIT LTD.....1<sup>ST</sup> DEFENDANT/J. DEBTOR**  
**AYOUB SALEHE CHAMSHAMA.....2<sup>ND</sup> DEFENDANT/J. DEBTOR**  
**SOUD AYOUB CHAMSHAMA.....3<sup>RD</sup> DEFENDANT/J. DEBTOR**  
**SOUD AYOUB CHAMSHAMA.....4<sup>TH</sup> DEFENDANT/J. DEBTOR**  
**BADRU AYOUB SALEHE .....5<sup>TH</sup> DEFENDANT/J. DEBTOR**  
**ESHE AYOUB CHAMSHAMA.....6<sup>TH</sup> DEFENDANT/J. DEBTOR**

**VERSUS**

**NATIONAL BANK OF COMMERCE LTD ..... 1<sup>ST</sup> RESPONDENT/D. HOLDER**  
**CDJ CLASSIC GROUP LIMITED.....2<sup>ND</sup> RESPONDENT/D. HOLDER**

**RULING.**

**B.K. PHILLIP, J**

This application is made under the provisions of Order XXI Rule 24(1) and 27 of the Civil Procedure Act Cap 33 of 2002. The applicant prays for the following orders;

- i. An order for stay of execution and the purported sale of the Applicants property situated on plot no. 66 at SHARIFF SHAMBA BUNGONI area ILALA DISTRICT DAR ES SALAAM bearing certificate title no. 186222/48 on 16<sup>th</sup> July, 2019 pending final determination of the case.

ii. Costs.

The application is supported by the affidavit deponed by the 2<sup>nd</sup> applicant, one Ayoub Salehe Chamshama. The deponent stated that currently there is Misc. Commercial Application No. 319/2015 pending in this court, the same is in respect of a dispute over the property which is the subject of this application. Furthermore, the deponent stated as follows; That on 16<sup>th</sup> June 2019 without due processes and lawful court order the respondent advertised in the newspaper a proclamation of sale of the applicants' property situated on plot No. 66 Sharrif Shamba Bungoni area, Ilala District, registered under Certificate of title No 186222/48. That the proclamation of sale is dated 9<sup>th</sup> June 2015, four years out of date, thus void *ab initio*. The deponent alleged that no notice to show cause was served to the applicants, thus, there is an abuse of the court's processes and the whole process was completely flawed.

On the other hand, the principal officer of the 1<sup>st</sup> respondent deponed a counter affidavit in opposition to the application for both respondents. He stated as follows; That the a suit subject of this application, namely Commercial Case No. 120 of 2012, which was between the respondents and the applicants was finally determined by this court and judgment entered in favour of the respondents on 15<sup>th</sup> March 2013, and in November 2013 an attachment order in respect of the premises on Plot No. 66, Shariff Shamba, Bungoni Area Ilala District, registered under Certificate of title No 186222/48 was issued in execution of the Court decree. Furthermore, the deponent stated that the said Misc. Commercial Application No 319 of 2015 was dismissed last year by Hon. Sehel J, as she then was, and the proclamation of sale at issue, was issued for the first time in 2015, but the sale could not take place due to the chain of applications that were pending in court. After the dismissal of those applications, the court re-issued the

order for proclamation of sale. The deponent refuted the allegations that the execution process is illegal. He contended that this application has no leg to stand on as there is no any pending application/ suit or appeal.

Due to time constraints, I ordered the application to be disposed of by way of written submissions. The learned advocate Mwitta Waissaka and Peter Bethuel filed the written submissions for the applicants and the respondents respectively.

In his submission the learned advocate Waissaka contended that the said application No. 319 of 2015 which was filed in this court by the 6<sup>th</sup> applicant herein is still pending in court as it was adjourned *sine die* following the 6<sup>th</sup> applicant's being sick. He insisted that the proclamation of sale at in question is an abuse of the court's process, since the last attachment order which was issued on 21<sup>st</sup> November 2013 has already expired, hence it cannot be acted upon without going back to court to ascertain its current status due to change of circumstances. He prayed that this application to be allowed.

In rebuttal Mr. Bethuel, submitted, that Misc. Commercial Application No.319 of 2015 which was filed by the 6<sup>th</sup> applicant is no longer pending, as it was finally determined by Hon. Sehel J as she then was, on 14<sup>th</sup> September, 2018 after it was adjourned *sine die* for a period of almost one year and the parties were put on notice to that effect. Mr. Bethuel submitted that for an order of stay of execution to be issued there must be either a pending suit or application for review/ revision or appeal. He was of the view that the instant application has no merit since there is no any suit or application for review/revision or appeal pending in court in respect of the property subject of this application.

In addition to the above, Mr. Bethuel contended that there was no any legal requirement to issue a notice to show cause to the applicants because execution process was already in place and in the knowledge of the applicant. Furthermore, Mr. Bethuel contended that the order for the attachment of the house on plot No. 66 Shariff Shamba, Bungoni Area, Ilala District was issued long time ago after the disposal of Commercial Case No. 120 of 2012 and that the auction of the house aforesaid was prevented by the presence of Misc. Commercial Application No. 319 of 2015 which as of now, it is not into existence.

Having analyzed the submissions made by the learned Advocates appearing herein, I wish to point out that in an application like the one at hand, the prayers sought by the parties are normally indicated in the chamber summons. In the instant application the chambers summons filed in court by the applicants has two prayers which I have indicated at the beginning of this ruling, to wit; an order for stay of sale of the suit premises pending final determination of the case and costs. According to what is stated in the affidavit in support of this application the prayer for an order for stay of execution is pegged on the existence of Misc Application No. 319 of 2015, which the applicants alleged that it is pending before this court. I have taken a judicial notice of the order of this court in the said Misc. Application No.319 of 2015, dated 14<sup>th</sup> September 2018 by Hon. Sehel J , in which she dismissed the application. Therefore, as correctly submitted by Mr. Bethuel, the said Misc Application No 319 of 2015 is not pending in this court anymore as it was dismissed since September last year. I am also inclined to agree with Mr. Bethuel that, since there is no any pending application for review/revision or appeal in respect of the judgment of this court in Commercial case No. 120 of 2012, this application is bound to fail as it has nothing to hinge on.

I have noted that the applicants' advocate have raised issues concerning the legality of the order for proclamation of sale. In my considered view those arguments are untenable as they are not part of the grounds indicated in the chamber summons. The only ground raised in the chamber summons is the existence of the case alleged to be pending. It has to be noted that parties are bound by what is pleading in the chamber summons. Without prejudice to what is stated herein above, it is my settled opinion that if the ground of complaint is illegality of the order for proclamation of sale then, the orders sought cannot be for stay of execution, since this court cannot grant an order for stay of execution of an illegal or inappropriate order for proclamation of sale, unless it is established that there is a pending case or application challenging the alleged illegal order for proclamation of sale. Thus, the whole issue boils down to the lack of any pending case/application on which this court can rely on in issuing the order for stay of execution sought.

In the upshot this application is dismissed with costs.

Dated at Dar es Salaam this 4<sup>th</sup> day of September 2019



**B.K. PHILLIP**

**JUDGE.**