

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO.87 OF 2019

(Arising from Commercial Case No 54 of 2018)

BETWEEN

NATIONAL BANK OF

COMMERCE LIMITED.....APPLICANT/DECREE HOLDER

VERSUS

FARM EQUIP (TANZANIA)

COMPANY LIMITED.....1ST RESPONDENT/J. DEBTOR

TANPERCH2ND RESPONDENT/J. DEBTOR

QUALITY GROUP LIMITED.....3RD RESPONDENT/J. DEBTOR

KANIZ MANJI.....4TH RESPONDENT /J. DEBTOR

YUSUFU MANJI.....5TH RESPONDENT/J. DEBTOR

RULING

B.K.PHILLIP, J

This application is made under the provisions of Order XXI Rule 70 (1) and (2), Order XLIII Rule 2, section 54, 68 (e) and 95 of the Civil Procedure Code Cap 33 R.E 2002. It is supported by an affidavit deposed by the applicant's legal counsel Mr. Dickson Ikingura. Upon being served with the application, the learned Advocate Yassin Maka, who appeared for the respondents, deposed an counter affidavit in opposition to the

application which he filed in court together with a notice of preliminary objection, to wit; that this application is time barred. The learned Advocate Joseph Nuwamanya, appeared for the applicant.

The applicant prays for the following orders;

- i. That this honourable Court be pleased to issue an order granting leave and/or permission to the Applicant, being the Decree Holder in Commercial Case No. 54 of 2018, to participate and bid for or otherwise purchase the landed property and assets on Plot Nos. 8 and 9, Block C, Ilemela Industrial Area Mwanza City, Land office No. 183122, under Certificate of Title No. 13515- L.R. Mwanza in the name of Tanperch Limited and landed property Plot No. 127, Block C, Ilemela Industrial Area Mwanza City, Land Office No. 135467, under Certificate of Title No. 10104 – L.R. Mwanza in the name of Tanperch Limited in the public auction set to be held by Silas Lucas Isangi t/a S.L. Isangi Auction Mart and Court Brokers of P.O. Box 10751 Mwanza on the date that the same shall be fixed for sale.
- ii. That the court be pleased to issue an order to the Applicant, after paying the necessary fees and costs of the auction, for set off of the outstanding amounts due to it as per the Decree of the Court in Commercial Case No. 54 of 2018 against the purchase price determined at the auction in the event the Applicant is announced the highest bidder in the auction of the landed property and assets on Plot Nos. 8 and 9, Block C, Ilemela Industrial Area Mwanza City, Land Office No. 183122, under Certificate of Title No. 13515-L.R. Mwanza and landed Property Plot No. 127, Block C, Ilemela Industrial Area Mwanza City, Land Office No. 135467, under Certificate of Title No. 10104-L.R. Mwanza both in the name of Tanperch Limited.
- iii. Costs of the Application to be provided for; and

- iv. Any other orders the Honourable Court deems fit and just to grant.

A brief background to this application is that in 2018, the applicant sued the respondents for recovery of outstanding loan amount to a tune of TZS 7,010,250,762.93 and TZS 8,971,942,842.30 being amounts due and payable by the first respondent to the applicant on the account of the overdraft facility and Import Loan facility respectively, among other things, vide Commercial Case No.54 of 2018. The case was filed under a summary procedure pursuant to Order XXXV of the Civil Procedure Code, Cap 33, R.E 2002, (herein after to be referred to as "the CPC"). On 23rd November 2018, a summary judgment was entered against the respondents for the amount claimed together with interests. Furthermore, the court ordered that in event the respondents/judgment debtors fail to pay the decretal amount then the landed properties placed as securities on plot No.8 and Block C, Ilemela Industrial Area, Mwanza City under certificate of Title No. 13515 – L.R. Mwanza, Plot No. 127, Block C. Ilemela Industrial Area, Mwanza City under the Certificate of Title No. 10104 – L.R. Mwanza, Plot No. 2410/5, Sea view, Dar es Salaam City under Certificate of Title No. 186045/82 and the fixed and floating assets of the 1st defendant as charged by the Debenture Instrument dated 03rd June 2015 shall be sold to obtain the decretal amount. Upon obtaining the aforesaid court decree the applicant moved the wheels of execution into motion and managed to obtain an order for proclamation for sale of the property situated on Plot No 127, Block "C" Ilemela Industrial Area, Mwanza City, C.T. No 10104-L.R Mwanza in the name of Tanperch Limited and Plot No.8 and 9, Block "C" , Ilemela Industrial Area, Mwanza City , C.T. No. 13515-L.R Mwanza in the name of Tanperch Limited.

Now, back to the application, since the application was filed under certificate of urgency, I ordered the counsels to submit on both the points of preliminary objection and on the merit of the application. Thus, in this

ruling I will start by making determination of the point of preliminary objection which in return will determine whether or not to I should proceed to determine the arguments made for the merit of the application.

Submitting for the point of preliminary objection, Mr. Maka argued that this application is time barred because it has been filed after the expiry of sixty (60) days from the date the copy of the decree intended to be executed was issued to the parties, that is 5th December 2018. He contended that since there is no specific time under the CPC for making applications like the one at hand, then, the time limited provided under item 21 of the third schedule of the law of Limitation Act, is applicable, that is sixty days. (60). Mr. Maka further argued that the time limit for enforcement of a decree is twelve (12) years. That is different from the decree's holder right to seek for permission to bid in an auction, he contended. He insisted that this application is made out of time, thus it deserves to be dismissed with costs. To cement his argument he referred this Court to the case of **The Director General NSSF Vrs Consolata Mwakisu, Civil Application No. 329/01/2017** (unreported) in which the Court of Appeal of Tanzania struck the application for being filed out of time.

In rebuttal, Mr. Nuwamanya submitted that the time limit for application for under the provisions of Order XXI Rule 70 (1) of the CPC starts running after the issuance of the order for proclamation of sale, thus this application is not time barred, he contended. Mr. Nuwamanya, further argued that the propositions made by Mr. Maka is not supported by any provision of the law and it is practically illogical, as it suggests that once the decree is issued, the time limit to apply for permission to bid in the auction starts running, that means before the decree holder applies for execution of the decree, which is illogical because the decree holder cannot start making an application like the one at hand even before knowing whether the application for execution will be allowed or not, he contended. He strongly argued that the enforcement of a decree is a

process with several steps to be taken one after another, the first step being to demand the decretal sum from the judgment debtor, and subsequent steps like making an application for execution if the decretal amount demanded is not paid, thereafter the procedural laws take their course until proclamation of sale is issued and a court broker is appointed. He distinguished the case of **Director General NSSF** (supra) on the ground that it was a matter on an application for revision which has a specific time limit provided in the law and according to his views is different from the application at hand whereby there is no specific time limited provided the under the law.

In rejoinder, Mr. Maka submitted that there is no any law which provides that the application for permission to bid by a decree holder has to be made after the issuance of a proclamation of sale. He was of the view that, since the proclamation of sale emanates from the decree and the time for execution and enforcement of the decree accrues from the date of the decree, then the time for an application for permission to bid to in an auction accrues from the date of the decree as well.

Having analyzed the submissions made by the learned advocates, I am of the view that this court is required to make a determination one issue that is; *"what is the time of accrual of the decree holder's right to apply for permission to bid in an auction"*.

My starting point is going to be the provisions of the law that grant the decree holder right to apply for permission to bid in an auction, that is Order XXI Rule 70 (1) of the CPC. As correctly observed by both counsels, the law does not provide for the time limit within which an application under the provisions of Order XXI Rule 70 (1) of the CPC should be made. However, reading the provisions of Order XXI Rule 65 (1) (1) (2) and (3) of the CPC, which provides for the issuance of a proclamation of sale, I am inclined to agree with Mr. Nuwamanya that the application for permission

to bid in an auction has to be done after the issuance of the order for proclamation of sale, because it is the order for proclamation of sale that gives the assurance that there is an auction to be conducted. It gives the details of the property, the time and place of the sale and other important information for the interested bidder in order to judge the nature and the value of the property. For easy of reference let me reproduce the provisions of Order XXI rule 65(1) and (2) of the CPC

Order XXI rule 65(1) and (2) of the CPC:

"65(1) Where any property is ordered to be sold by public auction in execution of a decree, the court shall cause a proclamation of the intended sale to be made in the language of such court.

*(2) The proclamation shall be drawn up after notice to the decree holder and the judgment debtor and **shall state the time and place of sale, and specify as fairly and accurately as possible:-***

(a) the property to be sold

(b) the rent (if any) payable in respect of the property

(c) any incumbrance to which the property is liable

(d) the amount for the recovery of which the sale is ordered

(e) every other thing which the court considers material for a purchaser to know in order to judge the nature and value of the property.

(Emphasis is added)

It is obvious that without having the necessary information about the auction including the assurance that an auction is going to be conducted as stipulated in Order XXI rule 65(1) and (2) of the CPC, one cannot start applying for leave to bid. Also, as rightly submitted by Mr. Nuwamanya, execution of a decree is a process, which involves some steps to be taken and necessary orders for the execution be issued. With due respect to Mr.

Maka, in my opinion, his proposition that immediately after issuance of a decree, the decree holders' right to apply to bid in an auction starts to run is not correct, since issuance of decree does not necessarily end up to an auction as parties might decided to settle the decretal sum amicably without involving auctioning of any property.

Form foregoing it is the finding this court that the time limit for applying for leave to bid in an auction accrues from the date of issuance of the order for proclamation of sale. The limit for making application under Order XX1 Rule 70 (1) of the CPC is sixty (60) days , since there is no specific time limit provided in the CPC, thus the provisions of item 21 of the third schedule of the law of Limitation Act, is applicable. Therefore, this application is not time barred, as it was filed before the expiry of sixty days from the date of issuance of the proclamation of sale. The point of preliminary objection is hereby overruled.

Now let me proceed with the determination of the arguments on the merit of the application. Submitting for the application, Mr. Nuwamanya adopted the contents of the affidavit in support of the application and proceeded to argue that due to the prevailing economic and financial circumstances whereby real estate market and value of landed property has been decreasing, and the scarcity of potential buyers, the applicant has been motivated to participate in the auction in question so as to ensure that the property is sold at a favourable and competitive price, which in return will enable the bank to clear the outstanding loan amount. Furthermore, Mr. Nuwamanya submitted that if a fair price for the property subject of the auction is obtained, the respondents also stand to benefit as substantial amount of the debt will be cleared. He contended that the respondents will not be prejudiced as the applicant will bid like any other bidder and all the terms and conditions pertaining to the auction will be equally observed. He referred this court to a text book titled "Mulla , Code of Civil Procedure, 17th Edition" at page 349, to buttress his arguments.

As regards the second prayer on sett-off of the outstanding amount against the purchase price to be obtained at the auction if the applicant emerges as the highest bidder, Mr. Nuwamanya submitted that, the rationale behind that prayer is that it will assist in reducing the costs for the transfer of funds from the applicant and to the court, and then back to the applicant again and other administrative costs in the transferring the money.

In addition to the above, Mr. Nuwamanya submitted that this court has powers to set up any terms and conditions which it deems fit and the applicant will abide to the same without fail. The whole process of the auction is controlled by the court broker thus, the process will be fair, contended Mr. Nuwamanya.

In rebuttal, Mr. Maka started by adopting the contents of his counter affidavit, and proceeded to submit that allowing the applicant to participate in the auction will create a conflict of interests because the decree shows that the loan at issue was secured by several properties, thus the applicant can recover the outstanding amount from other properties if this auction will not fetch enough money to clear the same. Furthermore, he argued that the applicant has not adduced any sufficient reason to move this court to grant the prayer sought. He contended that the grounds stated in the affidavit in support of this application are basically based on the deponent's personal opinion and analysis on a business/economic point of view, which are not fit to be made under oath. The said opinion on the real estate business in Tanzania has not been supported by any report from a competent authority, contended Mr. Maka. He prayed the paragraphs containing the alleged opinion and economic analysis be expunged from the court's record, thus should not form part of the affidavit in support of this application.

As regards the second prayer, Maka contended that since the applicant has not adduced sufficient reasons for the first prayer the second prayer should not be granted. He insisted that since there are other securities, the loan amount can be obtained through sale of other securities.

In rejoinder, Mr. Nuwamanya reiterated his submission in chief in support of this application. He further argued that the burden of showing good cause for the denial of the application falls on the one objecting, in this case the respondents. He insisted that the applicant has adduced sufficient reason for the grant of this application and that if this application is granted there will be no any conflict of interests as the law itself allows the decree holder to apply for permission to be allowed to bid. As regards the other securities in respect of the loan amount, he submitted that the same has no bearing in the current application. He insisted that the participation of the applicant in the auction will work in favour of the respondents.

As regards, the prayer to expunge some of the paragraphs in the affidavit in support of this application, Mr. Nuwamanya submitted that, the prayer is an afterthought. He strongly argued that all paragraphs in the affidavit at issue contain facts. There are no good reasons adduced by Mr. Maka to expunge those paragraphs in the affidavit. Mr. Maka has not brought any counter arguments against the contents of those paragraphs complained of, contended Mr. Nuwamanya.

The court order permitting a decree holder to bid an auction is a discretionary order. There are no hard and fast rules for grant of the order, however, that discretion has to be exercised judiciously as it is in other discretionary orders. The provisions of Order XXI rule 70 (1) (2) of the CPC does not provide any specific conditions to a fulfilled by a decree holder before being granted leave to bid. What does that mean?, to my understanding, it means what the decree holder is supposed to do is to

show interests and intention to bid in the intended auction. Looking at various text books on the interpretation and application of Order XXI rule 70 (1) (2) of the CPC I have noted that, the court can deny a decree holder permission to bid in an auction when there are good reasons submitted by the opposite party/ judgment debtor or on grounds found by the court suo motto. In the text book titled "**Mulla, Code of Civil Procedure, 18th Edition, Volume 2**" at page 2626, discussing the application of Order XXI Rule 72 of the India Code of Civil Procedure which is *in pari materia* to the provisions of Order XXI rule 70 (1) (2) of the CPC, the author says the following;

"granting leave to bid, is administrative in character. But since an order affects the property of the judgment debtor, it is not only just but also necessary that he should be notified of the application for permission by the decree holder. Leave should be granted after due caution and after considering objections, if any, raised by the judgment debtor. If such objections are raised, it is desirable that grounds for granting leave should be recorded".

Now, back to the application at hand, let me start by clearing the issue pertaining to Mr. Maka's prayer that some of the paragraphs in the affidavit in support of this application should be expunged. First of all, I am inclined to agree with Mr. Nuwamanya that prayer was made belatedly, as an afterthought. Mr. Maka was supposed to raise his concern just at the beginning, before the applicant's submission on the application was done, so that the applicant would have submitted basing on what is in the record after the court's order expunging the said paragraphs or declining to expunge the same. In my considered view expunging any paragraph after the applicant's advocate has submitted on the application, is not correct as the applicant will be prejudiced. The position of the law is very clear that any objection has to be raised at the earlier possible time, that is before the hearing. However, without prejudice to what is stated

herein above, no sufficient reasons have been submitted to move this court to grant the prayer. Thus the prayer is dismissed.

The major point of objection to the application that has been raised by Mr. Maka is on conflict of interests, however, he has not give this court clear explanations on the alleged conflict of interests and how it can be prejudicial to the respondents leaving alone the fact that the counter affidavit in opposition to this applications has not mentioned anything on the alleged conflict of interest. Generally the counter affidavit contains general denials of the contents of the affidavit in support of the application. In my considered view, since the law allows the decree holder to apply for leave to bid in the auction, then it is imperative that when conflict of interest is raised as a ground for objection, it has to be substantiated. In this application the ground for conflict of interests has not been substantiated, thus is hereby rejected.

As regards the concern that there are other securities for the loan, I think that alone cannot be a ground to deny the applicant the permission to bid and as correctly submitted by Mr. Nuwamanya, those other properties have no any bearing in this application which is specifically concern with the properties which have been indicated in the proclamation for sale, which are the subject of the auction at question, in which the applicant herein intends to bid.

On the other hand, I have analyzed the grounds stated by the applicant in this application and in my considered view they have merits. Looking at the value of the properties intended to be auctioned, that is Tshs. 14,203,000,000/= as indicated in the proclamation of sale, I am convinced that it might be a challenge to fetch a competitive price during the auction, thus allowing the applicant, which is a banking institution to participate in the bid, can be of help in getting a competitive price during the auction. I

believe that the more the number of potential bidders the better for the auction.

Having made the above finding that the grounds of objections raised by Mr. Maka have no merits, under the circumstances, I am satisfied that there are no good reasons to deny the applicant the permission to bid. Likewise, the second prayer for setting off the outstanding amount with the purchase price has merits as it is true that by setting off the outstanding amount with the purchase price, administrative costs involving transfer of the money will be reduced.

In the upshot this application is allowed. The applicant is ordered to abide by all the procedures and conditions pertaining to auctions as per the laws.

This application is granted. I give no order as to costs.

Dated at Dare Es Salaam this 20th day of September 2019.




B.K. PHILLIP
JUDGE