IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 130 OF 2019

(Originating from Commercial Case No. 174 of 2018)

BETWEEN

QUALITY CENTER LMITED.....APPLICANT

AND

EASTERN AND SOUTHERN AFRICAN

TRADE AND DEVELOPMENT BANK

t/a TRADE AND DEVELOPMENT (TDB).....RESPONDENT

Last Order: 23rd July, 2020

Date of Ruling: 19th Aug, 2020

RULING

FIKIRINI, J.

This application under certificate of utmost urgency has been brought under Order XXI Rule 57 (1), (2), Rule 58, and section 95 of the Civil Procedure Code, Cap. 33 R.E. 2002 (the CPC), seeking for the following orders:

1. The Court restrains the respondents from possessing Quality Center Shopping Mall, which is legally possessed and managed by the applicant.
2. The Court to remove Quality Center Shopping Mall from execution proceedings in Commercial Case No. 174 of 2018, until claims by the objector are investigated, heard, and determined.

3. An order that costs and incidental to this application abide by the results of the same.

4. *Status Quo* be maintained until claims of the objector/applicant are investigated and determined.

5. Costs of the application.

6. Any other order this Honourable Court may deem fit and justifiable to grant in the circumstances of this suit.

The application is supported by an affidavit of Ms. Esther Shadrack, learned counsel in which the Counsel deposes that the applicant was a lessee and property manager of Quality Center Shopping Mall (the QCSM) duly authorized to claim and collect rents from tenants of the QCSM (copies of invoices annexed as"QG-1"), with a separate mutually agreed terms on recovery method with the respondent as per annexture "QG-3", and that although the applicant was not a party to the Commercial Case No. 174 of 2018, but had been affected by the resulting judgment and decree of the court which was delivered on 1st August, 2019.

The counsel further deposes that the Court decision and the Court order that the respondent take possession of the property, the respondent has proceeded to order tenants to pay rent to her instead of the applicant, the act which the applicant deponed will cause her to suffer irreparable loss of not less than Usd. 500,000.0; to

suffer loss of business as some tenants have opted to leave and others have given notices, and that all these occurrences cannot be atoned by way of damages.

The counsel, also averred that the respondent's action was contrary to what the respondent and QCSM had mutually stipulated under Article VII (e) in the Facility Agreement as reflected in annexture "QG-3" would be their recovery method.

In his affidavit in reply, Mr. Pladius Mwombeki learned counsel opposed the application and instead contends that the legal owner of the property located on Plot No. 25, Pugu Road with Certificate of Title No. 18608/42 LO 23376 is Quality Group Ltd (QGL) who was the defendant in the Commercial Case No. 174 of 2018, and supported the averment with annextures CRB-1 (a) and (b). He also contends that the Quality Group Limited was a mortgagor and as well a guarantor for the Facility Agreement, provided by the respondent, to its sister company formerly known as Quality Trade & Distribution Ltd (QTD Ltd) currently known as Quality Extended Enterprise Ltd (the borrower). Mr. Mwombeki further contends that the respondent and the Quality Extended Enterprise Ltd, executed a Facility Agreement dated 2nd June, 2011, and QGL guaranteed the Mortgage holder with a mortgage deed that secured the Facility Agreement dated 7th June, 2011, and the other Facility Agreements with Mortgage deeds of variation which followed, the terms and conditions which bound the applicant as well. The Counsel

also contends that the borrower defaulted payment, and by 31st October, 2019, the amount outstanding in the Facility Agreement stood at Usd. 44, 429, 610.73 as reflected in annexture "CRB-4"

In his affidavit in reply, the counsel, also contends that on 24th January, 2017, the respondent, QGL and the borrower had entered into a Debt Acknowledgment and Settlement Agreement – annexture "CRB-5", neither the QGL nor the borrower serviced the Facility Agreement after the acknowledgment. And that default notices were served on the borrower on 31st May, 2018 and the QGL on 13th July, 2018 as featured in annexture "CRB-6." He contends that this prompted institution of Commercial Case No. 174 of 2018 in which after the judgment and decree the possession of the suit property was handed over to Receiver/Manager in line with the summary judgment, and decree, in accordance with the terms of the mortgage deed read together with the deeds of variations, the Facility Agreement and the laws.

The application was disposed of by way of written submissions. Mr. Clement Kihoko learned counsel filed submissions on behalf of the applicant, briefly arguing that the property in question belonged to the applicant and not the defendant in Commercial Case No. 174 of 2018 or QGL. The applicant besides legally owning the property was also a lessee and manager of the QCSM. The

invoices annexed as "QG-1) were a proof that the applicant was the owner and the lessee of the premises and therefore entitled to file for this objection proceedings under Order XXI Rule 57 and 58 of the CPC. It was further submitted by Mr. Kihoko that the applicant was aware of the Facility Agreement between Quality Group Ltd and the respondent, in which it was agreed that in case of default the mode of recovery was mutually agreed as per article VII (e) of the Facility Agreement. The agreement was 'the respondent will collect 50% of the rent from the QCSM, as averred in paragraph 8 of the affidavit in support and annexture "QG-3," therefore the act of the Receiver/Manager to collect the whole amount of rent from QCSM was contrary to the Facility Agreement and what parties agreed mutually. And that the applicant has no issues with collection of 50% by the Receiver/Manager and the remaining 50% by the applicant since this is what was agreed in the Facility Agreement.

On a different note, the applicant impliedly was applying for stay of execution assigning the following reasons that: *one*, there were triable issues of which if stay is not granted the applicant will suffer irreparable loss, citing the case of **Camila Lema v Abdalla Ukwaju & Another, Miscellaneous Land Application No. 434 of 2017**, where the Court considered on the balance of convenience who would suffer greater hardship and concluded in favour of the applicant. *Two*, he argued

that the applicant has already lodged an appeal before the Court of Appeal. A copy of the notice was annexed as QGL-2 to the affidavit in support. Strengthening his submission, the counsel cited the case **David Mahende v Salum Nassor Mattar & Another, Civil Application No. 160/01 of 2018,** where the Court of Appeal agreed that substantial loss may result to the party applying for stay of execution, if stay of execution is not granted the Court of Appeal decision if it is in favour of the appellant will be rendered nugatory. To cement his submission, he submitted that this application was brought promptly and without delay, maintaining that if the stay of execution is not granted the applicant will suffer more than the respondent. The counsel also submitted that the respondent was stated to have already instructed the tenants to pay rent, which has brought confusion and hardship to the tenants as they were not sure to whom they should pay the rent. This has as well made some tenants to vacate and some have issued non-renewal notices once their lease agreements were due.

For the foregoing the applicant was thus praying for the grant of the application as prayed in the chamber summons.

In reply, Mr. Mwombeki contended that the applicant has failed to show interest over the property by way of lease agreement, since she was mere lessee while QGL, who was the defendant and later the judgment debtor, was the legal and

lawful owner and not as stated by the applicant. It was his further contention that the respondent has created interest by way of mortgage as exhibited in "CRB -1 (a)" (Security) of which up to the time of instituting Commercial Case No. 174 of 2018 the outstanding amount was Usd. 44, 429, 610.73 as shown in annexture "CRB-4" .This amount has not been disputed by the defendant or the borrower and more to this, an acknowledgment of debt agreement was entered as indicated in "CRB-5", the fact which the applicant had admitted in paragraph 8 of the affidavit in support of the application. Also the applicant had admitted that the defendant in the Commercial Case No. 174 of 2018 pledged the property as collateral to the respondent.

Extending his submission, Mr. Mwombeki submitted that Clause VII (d) of the Facility Agreement did not restrict the respondent from taking over possession of the property. And after the borrower has defaulted in payment and the defendant failed to remedy the default after being served with a default notice, the only remedy left was for the respondent to take over possession after it was ordered by the Court.

Contesting the applicant's interest on the property, Mr. Mwombeki illustrated that the lease agreement between the applicant and the defendant was of 5 (five) years commencing on 1st January, 2012 up to 1st January, 2017. The lease has expired so

the applicant holds on to the property just by operation of law as the lease was silent on termination. However, since the said lease had exceeded 5 (five) years, it was thus subject to registration under section 8 (1) (a) & (b) of the Registration of Documents Act, Cap 177 R.E. 2002 (the Registration of Documents Act), which has not been done. Likewise, since the leased period had exceeded the fixed period of 4 (four) years pursuant to section 8 (2) (h) it was supposed to be registered with the Registrar of Lands. Without that under section 9 of the Registration of Documents Act, no transfer of right or interest in property could have been effected, argued the counsel.

Furthermore, non-registration of the instrument invalidated any disposition on a landed property as stipulated in various laws including section 62 (2) of the Land Act, Cap. 113 of 1999 as Amended by the Land (Amendment) Act No. 2 of 2004; Written Laws (Miscellaneous Amendments) Act No. 12 of 2002; Written Laws (Miscellaneous Amendments) Act (No. 2), Act. No. 11 of 2005; The Mortgage Financing (Special Provisions) Act No. 17 of 2008; Written Laws (Miscellaneous Amendments) Act No. 3 of 2009 and Written Laws Act. No. 2 of 2010 (the Land Act). In addition, he mentioned section 96 of the Companies Act, 2002 that as well require charged property be registered. The mortgage together with the deeds of variation were duly registered by the respondent and a copy of the certificate of

the registration of a charge was annexed as CRB 3 (a), (b), (c) and (d) and also registered as per section 57 of the Land Registration Act, Cap. 334.

In short securities were registered while the lease agreement was not and consequently no transfer was effected on any interest over the property to the applicant. The applicant cannot therefore claim anything. Similarly, lease agreement document under section 25 and 47 (1) of the Stamp Duty Act, Cap. 189 R.E. 2006, require stamp duty without which its admission was restricted. And since the document did not have the required stamps, was thus not admissible in Court, stressed Mr. Mwombeki. And also pointed out that QGL transferred the interest over the property in 2011, to the respondent, 6 (six) months before the applicant's purported lease agreement was entered between QGL and the applicant. Buttressing the submission, the counsel referred this Court to the cases of **Bank of Africa v Vita Foam (T) Ltd, Wilfred L. Masawe t/a MM Auctioneers & Debt Collectors Co. Ltd, Miscellaneous Commercial Application No. 282 of 2014, unreported, p.6** and **Eastern & Southern Africa Trade & Development Bank v Damatico General Supply & Chodry Co. Kahema t/a Lozandu Auction Mart (Court Brokers) & Maweni Limestone Ltd-Consolidated Miscellaneous Civil Applications Nos. 71 and 79 of 2017, unreported,** whereby the Court in all cases ruled in favour of those who had sealable interest over the property at the time of

attachment, which in the present case the applicant had neither sealable interest nor was she in possession of the property at the time of attachment but rather a trespasser, Mr. Mwombeki, bolstered his submission.

Reacting to the stay of the execution submission, it was his position that the submission could not stand as was not part of the prayers in the application and no affidavit sworn in that regard. Moreover, the applicant was not a party to the suit to enable her to make such application. Additionally, the remedy sought which is provided under Order XXI Rule 24, sub-rule (2) and (3) of the CPC, has not been met. Fortifying his submission, the counsel submitted that the submission, was out of context which even the overriding objective principle cannot salvage the situation. Stressing on his stance, he contended that the lease agreement, was not evidence of ownership by objector or evidence of legal transfer by the applicant or foundation to prove ownership. Also cannot be tendered into evidence in these proceedings on their own without any other material fact, that the applicant was entitled to or to have a legal equitable interest in the whole or part of any property attached in execution of a decree.

Taking up the two cited cases of **Camila Lema** and **David Mahende** (supra), he submitted that they were both distinguishable because both dealt with guidance on issuance of stay of execution which was not the case in the present application. The

conditions governing both applications were quite distinct from one another, and even those in the stay of execution have not been met by the applicant. Based on his submission he prayed for the dismissal of the application with costs and that the respondent be allowed to proceed with the attachment of the property to realize the outstanding amount as provided under XXI Rule 60 of the CPC.

I have carefully reviewed the rivalry submissions and in dealing with this application would wish to start with the stay of execution component which surfaced during the written submissions. This relief is not part of the reliefs prayed for in the chamber summons, nor was it reflected in the affidavit in support. Unlike the affidavit which is a substitute of oral evidence, and that like all evidence, affidavits are governed by the law of evidence, and any evidence is subject to evaluation, while, as a matter of law submissions are not evidence as stated in the case of **TUICO at Mbeya Cement Co. Ltd v Mbeya Cement Co. Ltd & Another [2005] T. L. R. 41.** Submissions are in actual fact clarification or explanation of contents of a document such as an affidavit in this instance.

The submission aside from lacking in merits as the Court is not properly moved but also stay of execution was not part of the relief sought. This Court cannot grant what is not before it for determination. The stay of execution submission is thus misplaced and will not be given any attention.

Reverting to the application itself, this Court is tasked with two issues for determination:

1. **Whether the suit property is not liable for attachment as indicated by the applicant,** and

2. **Whether the applicant has adduced evidence showing that at the date of the attachment he had some interest in, or was possessed of, the property attached.**

I will discuss both issues together since they are closely related. From the affidavit, counter-affidavit and the submissions that followed, it is evident that the property subject to attachment legally belongs to the defendant in Commercial Case No. 174 of 2018, Quality Group Limited. This is reflected in annexture CRB 1 (a) which is certificate of title, showing that between June, 2011 and March, 2015 the property was mortgaged to the respondent. The information is backed up by annexture CRB 1(b) which is the application for official search.

Also as averred in paragraph 4.2 of the counter-affidavit the defendant/QGL was in deed a mortgagor and guarantor of its sister company formerly known as Quality Trade and Distribution Limited, a company which is currently known as Quality Extended Enterprise Limited ("the borrower'), as it simultaneously pledged the

property as security to the respondent and as well it guaranteed the respondent with a Mortgage deed as surety, for the Facility Agreement provided by the respondent. The respondent and borrower (Quality Trade and Distribution Limited) executed a number of Facility Agreements the first one, dated 02nd June, 2011 as shown in annexture CRB-2 (a); the second dated 16th April, 2013 as exhibited in annexture CRB 2 (b); the third dated 21st March, 2014 as shown in annexture CRB 2 (c) and the fourth dated 04th February, 2015 as per annexture CRB 2 (d). In all the four Facility Agreements signed, the Quality Group Limited was a guarantor, as it guaranteed by the Mortgage deed the repayment of the Mortgage loan granted by the respondent. A Mortgage deed implies that in case the loan was not paid by the sister company (the borrower) as agreed, the respondent has a right to retain a lien on the mortgaged property and the right to foreclose upon the lien. This fact was never controverted by the defendant/ Quality Group Limited in Commercial Case No. 174 of 2018.

By way of mortgage QGL transferred an interest on the property to the mortgagee as exhibited in annexture CRB 1 (a). The applicant does not dispute this fact as in paragraph 8 of the affidavit in support she admitted that Quality Group Limited, the defendant in Commercial Case No. 174 of 2018 pledged the property as security to the respondent.

The relationship between the applicant and Quality Group Limited/ defendant, was the applicant was the lessee and manager of the Quality Center Shopping Mall whereas Quality Group Limited/defendant the owner and a lessor who rented the property to the applicant. In this kind of lease relationship the lessor retains the ownership of the property while generating a return on his invested capital.

Quality Trade and Distribution Limited *alias* Quality Extended Enterprise Limited ("the borrower') failed to service the Facility Agreement and the Quality Group Limited/defendant failed to remedy the default after being served with default notice. Prior to issuance of default notices, the respondent, Quality Group Limited ("the guarantor') and Quality Extended Enterprise Limited ("the borrower') entered into a Debt Acknowledgment & Settlement Agreement as reflected in annexture CRB-5. Both the guarantor and borrower acknowledged the indebtness of the borrower, and Quality Group Limited/defendant as the guarantor impliedly agreed to continue servicing the debt, which neither the borrower nor the guarantor bothered to service. The default notices were served on 31st May, 2018 to the Quality Extended Enterprise Limited ('the borrower') and to the Quality Group Limited/defendant on 13th July, 2018, as shown in annexture CRB-6. By then the Facility Agreement (mortgage value) stood at Usd. 44, 429, 610.73 as of 31st October, 2019 - see annexture CRB-4. Neither the Quality Group

Limited/defendant a party in the Commercial Case No. 174 of 2018, also a "Mortgagor" and as well as "the guarantor" nor the Quality Extended and Distribution Limited ("the borrower'), disputed the claimed amount.

The applicant has equally not disputed any of the above stated facts as deponed in the counter-affidavit, that Quality Group Limited pledged the property subject of this application as security to the respondent the fact which led her being sued and featured as a defendant in Commercial Case No. 174 of 2018. The Facility Agreement referred and relied on by the applicant, annexed as QGL-3 to the affidavit and as CRB 2 (b) to the counter-affidavit dated 16th April 2013, in particular Clause VII (e), whilst was accepted by the respondent but argued that it did not restrict the respondent from taking over possession of the property. The respondent relied on Clause VII (d) of the Facility Agreement. Reading from the two Clauses, I concur to the respondent's submission that while there was mutual agreement but the agreement was only feasible upon servicing of the Facility Agreement, short of that the restriction envisioned by the applicant diminished. Also as a matter of fact the respondent has not disturbed the tenants' tenancy, what he has done as asserted by the applicant collects the rent from tenants which is proper because the property prior to being leased was first mortgaged, thus tenants are protected, even if the landlord defaults on their loan from the bank.

From the account the applicant does not feature anywhere as owner of the property subject of possession in satisfying the Court decree. Under her status as a lessee, the applicant had only limited and unprotected rights, for the following reasons: **one,** the applicant has failed to show that she had interest created over the property by way of lease. The annexture QG-1, lease agreement signed on 01st January, 2012 and copies of invoices included fell short of establishing the claimed interest, mainly because, the lease agreement did not comply with other mandatory legal requirements as will be pointed out later on in this ruling. **Two,** the Quality Group Limited/defendant transferred interest over the property in June, 2011, through mortgage to the respondent as exhibited by annextures CRB-2 (a), (b), (c) and (d) and CRB-3 (a) and (b), even before the lease agreement entered between the applicant and Quality Group Limited, on 01st January, 2012. This being in compliance to section 57 of the Land Registration Act, Cap 334, the five (5) years lease agreement entered from 01st January, 2012 to 01st January, 2017, though silent on termination, but was subject to registration under section 8 (1) (a) and (b) of the Registration of the Documents Act, Cap. 117 R.E. 2002 (the Registration of Documents Act). In addition, the same was to be registered with the Registrar of Lands pursuant to section 8 (2) (h) of the Registration of Documents Act. None compliance bars transfer of right or interest in the property pursuant to section 9 of the Registration of Documents Act.

Three, the lease agreement is also subject to Stamp Duty Act, Cap. 189 R. E. 2006, in particular section 25 and 47 (1) of Act. Failure to have stamp duty paid as required under section 25, renders the admission of lease agreement under section 47 (1) of the Act, void. The document is therefore not admissible in the courts. From the narrative, it is thus apparent that while the mortgages or rather securities were duly registered the lease agreement was not. As such the lease agreement relied on did not transfer any interest if any over the property to the applicant and hence she cannot have valid claim over the property.

Four, under section 96 of the Companies Act, 2002 as well registration of the charged property was required, of which the applicant has failed to comply.

Under Order XXI Rule (1) of the CPC, the applicant was required to show how and why the suit property was not liable to attachment. For ease of reference the provision is reproduced herein below:

> *"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 liable 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..... "[Emphasis mine]

On the second issue pursuant to Order XXI Rule 58 of the CPC, the burden is placed on the applicant to adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached, the requirement which she has failed to fulfill.

Between the applicant and the respondent, the latter has been able to prove that she had legal right over the property by virtue of interest created by way of mortgage as exhibited by annexture CRB-1 (a) and also by the Mortgage deed of the QGL. The cases of **BOA** and **Eastern & Southern Africa Trade & Development Bank** (supra) have well illustrated where in both cases the Court has elucidated on sealable interest in personal property being legal or equitable interest in the property that can be disposed of according to the law, as it was the case in the Commercial Case No. 174 of 2018 between the respondent/plaintiff then and Quality Group Limited/ defendant, in which the Court on 1st August, 2019 entered judgment in favour of the respondent and ordered handing over possession of the property to the Receiver/ Manager.

The provision of section 95 of the CPC cited, was of no any assistance as the other two provisions specifically dealing with objection proceedings covered the application. Moreover, application of section 95 of the CPC is preferred and entertained when there is no specific provision providing for the relief sought. In the case of **Bunda District Council V. Virian Tanzania Ltd (2000) TLR 385,** the Court had this to say:

> *"The inherent power being wide and incapable of detention its limits should be carefully guarded. The power is intended to supplement the other provisions of the code and not to evade them or invent a new procedure according to individual sentiment."*

The fact there was sufficient provision to govern the application and relief sought application of section 95 of the CPC was uncalled for.

The applicant despite having an opportunity to controvert the respondent's assertion in the counter-affidavit as well as in the reply to the written submission, but was never bothered. There was neither a reply to the counter-affidavit nor rejoinder to the reply written submission to establish and/or prove ownership or right or interest over suit property.

Both the first and second issues which were examined together have been answered in negative, after the applicant has failed to establish that the suit property was not liable to attachment as well as adducing evidence showing that at the date of the attachment she had some interest in, or was possessed of, the property attached.

For the foregoing, I find this application devoid of merits and proceed to dismiss it with costs. It is so ordered.

P. S. FIKIRINI

JUDGE

19th AUGUST, 2020