

**IN THE HIGH COURT OF TANZANIA**  
**(COMMERCIAL DIVISION)**  
**AT DAR ES SALAAM**  
**MISCELLANEOUS COMMERCIAL APPLICATION NO. 58 OF 2020**  
**BETWEEN**  
**YUSUFU SHABANI MATIMBWA.....APPLICANT (PURCHASER)**  
**EXIM BANK (T) LIMITED.....DECREE HOLDER**  
**Versus**  
**DASCAR LIMITED.....1<sup>st</sup> RESPONDENT**  
**JOHAN HARALD CHRISTERN ABRAHIMSSON.....2<sup>nd</sup> RESPONDENT**

Last Order: 24<sup>th</sup> Aug, 2020

Date of Ruling: 24<sup>th</sup> Sept, 2020

**RULING**

**FIKIRINI, J.**

The applicant, Yusufu Shabani Matimbwa as a *bona-fide* purchaser of the property located at Jangwani, Beach Dar es Salaam City, Plot No. 16 with title No. 43835 from the 2<sup>nd</sup> applicant, Exim Bank Limited, is seeking for declaratory order of eviction of the 2<sup>nd</sup> respondent, John Harald Christern Abrahamsson, herein referred as judgment debtor and the owner, from the property subject of this application under rule 2(2) of the High Court (Commercial Division) Procedure Rules (the Rules), Section 95 and Order XX1 rule 93 of the Civil Procedure Code, Cap 33 R. E. 2019 (the CPC).

The affidavit of Mr. Sauli Santu Makori, learned counsel featuring for the applicant, supported the application, and the counter-affidavit of Mr. Kephass

Simon Mayenje, a counsel for 2<sup>nd</sup> respondent counsel opposed the application. The application was orally argued.

The essence of Mr. Santu's submission was that, the execution of the decree on Plot No. 16, Jangwani Beach, Dar es Salaam City, with title No. 43835 germinated from the decision in Commercial Case No. 51 of 2008 between the parties, in which the decision was in favor of the 2<sup>nd</sup> applicant, Exim Bank Limited, who was the plaintiff then.

The Court's findings in the Commercial Case No. 51 of 2008 were, the 2<sup>nd</sup> respondent was the owner of the property on Plot No. 16, Jangwani Beach, Dar es Salaam City, with title No. 43835 and had surrendered the title to the Exim Bank as security. The 2<sup>nd</sup> respondent had defaulted the repayment of the loan. The Court decided in favour of the 2<sup>nd</sup> applicant. As a decree holder, the 2<sup>nd</sup> applicant initiated execution of the decree process in her favour by a way of attachment and sale of the house on Plot No. 16, Jangwani Beach, Dar es Salaam City, with title No. 43835 to satisfy Court decree amounting to Tzs. 118,123,856/=. The sale was carried out and the property was purchased and later transferred to the 1<sup>st</sup> applicant for the consideration of Tzs. 300,000,000/=.

In the meantime, the 2<sup>nd</sup> respondent filed another suit in Commercial Case No. 64 of 2011 seeking Court's intervention to order the 2<sup>nd</sup> applicant/decreed holder Exim Bank to return the title deed of the said property to him, however the plaintiff's claims failed.

The 2<sup>nd</sup> respondent made a second attempt by filing an Appeal No. 147 of 2020, before the Court of Appeal of Tanzania in respect of Plot No. 16 with title 43835. However Mr. Santu argued that the Commercial Case No. 64 of 2011 in which the Court of Appeal granted the stay of execution and the Commercial Case No. 51 of 2008, from which the instant application emanated are two different cases and thus the order in the Commercial Case No. 64 of 2011, cannot restrain the applicant's rights to the purchased property, hence this ruling.

In his submission, Mr. Santu submitted that, the application is on the right of a *bona-fide* purchaser not being availed or allowed to exercise her rights. He went on making reference on section 135 of the Land Act, Cap. R.E. 2002 (Cap.113) on how the landlord is protected by the law. To strengthen his position, he cited the case of **Magret Andulile Bukuku v Nathaniel Mwakapiti, Land Case No. 40 of 2018** and **Suzan Warioba v Shida Dalawa, Civil Appeal No. 44 of 2017, p. 5**. Mr. Santu submitted that, the 2<sup>nd</sup> respondent has to be ordered to vacate the premises and the same be given to the purchaser, the current 1<sup>st</sup> applicant. He further urged that, no one can pass a good or better title other than the title holder who in this case is the Exim Bank, who had transferred it to the applicant. Paragraph 4 of the affidavit and annexure thereto proved that, the title has been transferred to the applicant.

He further submitted that, in the absence of the order from this court or Court of Appeal the applicant will not enjoy the property purchased *bona-fide*. And the application annexed under paragraph 5 of the counter affidavit of the 2<sup>nd</sup> respondent was not the order of this Court or Court of Appeal which may restrain the applicant's rights to the purchased property. Paragraph 2 (vi) and (x) of the counter affidavit of the 2<sup>nd</sup> respondent was misplaced and unfounded to the current application which emanated from Commercial Case No. 51 of 2008, since the attachment in Commercial Case No. 64 of 2011 was completely a different matter from the one at hand. This should be disregarded as it was misleading to this Court, he argued.

In additional to the above submission, Mr. Santu submitted that, there was a loss incurred or continued to be incurred since at the time the purchase of the property was done. The applicant bought the property for Tzs. 300,000,000/= as reflected in the certificate of sale since January 2017. The 1<sup>st</sup> applicant has never enjoyed the fruits of his money and the 2<sup>nd</sup> respondent still enjoys the property even after realizing that they do not have good title to the property yet remained in the property without any legal justification. He went on urging the Court to order the respondents to pay rent of Tzs. 500,000/= per months from January 2018 to the date of the eviction of the respondents from the purchased property as they have alienated the *bona-fide* purchaser from the property unjustly.

Based on the authorities cited, the submission made and the provisions of the law highlighted, Mr. Santu urged the Court to grant the application so as to let the applicant enjoy the property purchased *bona-fide*.

Mr. Mayenje learned counsel strongly contested the application based on the following reasons; *first*, argued that oral submission should be confined to the pleaded facts in the affidavit in support of the application. Looking at the skeleton arguments filed on 19<sup>th</sup> August, 2020, the counsel pointed out that the applicant's advocate has confined himself on the three issues which have not been pleaded in the affidavit deponed. And that instead were based on the submission from the bar.

Examining, the cited cases, Mr. Mayenje urged that, they were distinguishable. The established facts in the affidavit and the counter affidavit were different from the cited cases. Looking at paragraph 1, 2, & 3, and specifically paragraph 3, the applicant was praying for the respondent to pay the house rent from January 2018 to the date of the eviction order, a claim which required proof. Moreover, the prayer was on specific amount which has neither been reflected in the affidavit or skeleton arguments. It was therefore a submission from the bar which this Court cannot give weight.

In additional to the above submission, Mr. Mayenje submitted that, there was an order for stay of execution of an appeal pending hearing and determination of Appeal No. 147 of 2020 before the Court of Appeal of Tanzania in respect of

Plot No. 16 with title 43835 subject of the present application. Annexure 2 was in reference to Commercial Case No. 64 of 2011, in which the suit property is Plot No. 16, Title No.43835 Jangwani Beach and the plaintiff in that case is the present 2<sup>nd</sup> respondent in this application.

Extending his submission, the counsel submitted that, Civil Application No. 21 of 2016 and Commercial Case No. 64 of 2011 were the same except in Civil Application No. 21 of 2016 the 2<sup>nd</sup> respondent was the applicant, and the application in the Commercial Case No. 64 of 2011 was for stay of execution. The Court of Appeal ordered execution to be stayed. It was Mr. Mayenje's submissions that, the order for stay of execution was in respect of Plot 16 with title No. 43835, at Jangwani Beach which is the suit premises referred in both Commercial Case No. 51 of 2008 and Commercial Case No. 64 of 2011, of which the Court of Appeal has already issued stay of execution order pending hearing and determination of the Appeal No. 147 of 2020. There was also pending revision No. 146/16 of 2018, which was challenging the sale of Plot No. 16 with the title No. 43835. Therefore, ordering eviction of the 2<sup>nd</sup> respondent will render the revision irrelevant.

Winding up his submission, Mr. Mayenje argued that this Court cannot order contrary to the Court of Appeal order staying execution on Plot No. 16 with title No. 43835. This application should therefore be dismissed with costs urged, the counsel.

Rejoining, Mr. Santu reiterated his earlier submission that, the current application emanated from Commercial Case No. 51 of 2008, therefore different from the one in Commercial Case No. 64 of 2011. The order in Commercial Case No. 64 of 2011 cannot stop the applicant who is a *bona-fide* purchaser to enjoy the fruits of his purchase, since the two cases were different and with different parties. In the present application the parties are **Exim Bank v Dascar Ltd & Another** while in Commercial Case No. 64 of 2011, the plaintiff was **Johan Harald Christern Abrahamsson**, who is currently the **2<sup>nd</sup> respondent v Exim Bank & 3 Others**.

Mr. Santu challenging Mr. Mayenje's submission, argued that, the respondents' counsel did not cite any law which restrained the *bona-fide* purchaser from enjoying right of the property he has purchased. And that the applicant was protected under section 135 of the Land Act, which exonerated the *bona-fide* purchaser from any litigation while there was a decree holder. The execution in Commercial Case No. 51 of 2008, has already been accomplished and the title was already in the name of the applicant, Yusuph Shabani Matimbwa.

Concluding his submission, Mr. Santu urged the Court to grant the prayer in chamber summons as nothing was stopping the *bona-fide* purchaser to own his property.

Thorough and careful examination of the chamber summons, relief sought, affidavit in support and against, and the oral submissions by the counsels on

behalf of the parties, I find the only issue for determination before this Court of law, is **whether the application deserves granting or not.**

Before I deeply engaged in determination of the application, I noted the following facts as not in dispute: **One**, that the judgment in Commercial Case No. 51 of 2008 was entered in favour of the plaintiff, the Exim Bank Ltd, currently the 2<sup>nd</sup> applicant; **Two**, that the 1<sup>st</sup> applicant, purchased the property in issue from the decree holder through a public auction conducted on 17<sup>th</sup> December, 2017, as evidenced by the certificate of sale dated 17<sup>th</sup> January 2018; **Three**, that it is on record that, Miscellaneous Commercial Application No. 58 of 2020, which originated from Commercial Case No. 51 of 2008, the Commercial Case No. 64 of 2011, the Miscellaneous Land Application No. 1084 of 2017, the revision in Civil Application No. 19/16 of 2018 and the Restraining Application No. 565 of 2018 against the registration of transfer, and the eviction from the said property and the Land Case No. 39 of 2018, were all related to the house located on Plot No. 16 with Title No. 43835 at Jangwani Beach Dar es Salaam City. **Four**, that there is an order for stay of execution in Civil Application No. 21 of 2016, dated 30<sup>th</sup> July, 2019 pending the hearing and determination of an Appeal No. 147 of 2020 before the Court of Appeal also in respect of the same property.

Turning back to the merits and demerits of the application, the applicant has assigned three reasons, which he wanted this Court to consider: **one**, that the



applicant as a *bona-fide* purchaser was alienated and restricted from enjoying the right to the property purchased; **two**, in the absence of orders either of this Court or Superior Court restraining the applicant from enjoying the purchased property, no one can stop the applicant from accessing the property. **Three**, that the applicant had injected money in purchasing the property, which if not allowed to enjoy the property it will be a loss.

Going by the undisputed facts, it is indeed correct that the 1<sup>st</sup> applicant is a *bona-fide* purchaser who was alienated and restricted from enjoying the right of the property purchased as averred in paragraph 9 of the affidavit. As for the other two reasons advanced, I am in agreement with Mr. Mayenje that, they are simply statements from the bar which besides being discouraged by the Court cannot be afforded any weight. **See: Registered Trustees of the Archdiocese of DSM v The Chairman Bunju village Government & Others, Civil Appeal No. 147 of 2006, at p.7.**

Also it is well known legal stance that, submission is not evidence but an explanation or clarification or illustration of what has been deposed in the affidavit, therefore for it to carry weight it has to be in the affidavit. In the case of **Transafrica Assurance Co. Ltd v Cimbria (EA) Ltd [2002]** the Court of Appeal of Uganda held that:

*“As is well known a statement of facts by counsel from the bar  
Is not evidence and therefore, court cannot act upon.”*

Sworn or affirmed affidavit being a substitute of oral evidence, must contain all the facts known to the deponent to be true and like all evidence, affidavits which are basically governed by the law of evidence are therefore subject to evaluation on its content. This means, for a fact to be considered, it has to feature in the affidavit and not otherwise. The fact that, it was submitted in the skeleton arguments is akin to testimony from the bar.

It is thus clear that the applicant as a *bona-fide* purchaser alienated and restricted from enjoying the right of the property purchased, is the only reasons which is not contested as to have been raised in the affidavit in support. The rest though not part of the affidavit but are facts not contested, such as that applicant is protected under section 135 of the Land Act and that the Commercial Case No. 51 of 2008 and Commercial Case No. 64 of 2011 are different cases with different parties, despite the fact that the suit premises on Plot No. 16, Jangwani Beach, Dar es Salaam City, with title No. 43835, is a subject matter in both cases. However, currently there is an order for stay of execution by the Court of Appeal from the Civil Application No. 21 of 2016, pending hearing and determination of Appeal No. 147 of 2020.

Even though the respondents counsel has not cited any law which restrained the *bona-fide* purchaser from enjoying right of the property which he has legally purchased, but that does not stop logic and common sense to be applied. Under the circumstances the Court in dispensing justice should avoid unnecessary

confusion and inconveniences to parties; this Court being junior to the Court of Appeal, justice and procedure in place demands that, the order of stay of execution issued by the Court of Appeal take precedence over the applicant would be desired order of eviction of the 2<sup>nd</sup> respondent from this Court preferred under Order XXI Rule 93 of the CPC. Moreover, the Court of Appeal decision granting stay of execution albeit in a different case in which the applicant is not a party came before the present application. The stay of execution order being granted on 30<sup>th</sup> July, 2019, it is therefore in all fours reasonable and appropriate to wait for the Court of Appeal decision one way or the other on the suit property which the applicant in the present application lays claim.

In additional the property subject of the controversy is immovable property which eventually if the decision is not in favour of the 2<sup>nd</sup> respondent, the applicant will then get to enjoy his *bona-fide* purchaser rights. And if not, still he will have recourse by way of compensation in monetary terms, including the loss incurred.

Having considered all the stated above and admitting that, the property which the applicant wants this court to make execution order is the same property the Court of Appeal made an order of stay of execution pending hearing of Appeal No. 147 of 2020, pending before the Court of Appeal. It is therefore without

doubt that, this Court has no power to interfere with or ignore the Court of Appeal decision but to enhancing it.

In the light of the above, the application is dismissed without costs. It is so ordered.



P.S. FIKIRINI

JUDGE

24<sup>th</sup> SEPTEMBER, 2020