

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

Misc. Commercial Appl. No. 64 of 2021
(Arising from Commercial Case No.58 of 2021)

**ST JOHN UNIVERITYOF
TANZANIA.....APPLICANT**

VERSUS

**JEFFERY INDUSTRIES
SAINI LTD.....1st RESPONDENT
ST. MARKS COLLEGE
TEACHING CENTRE..... 2nd RESPONDENT**

RULING

Date of Last Order: 21/05/2021
Date of Ruling: 03/06/2021

NANGELA, J:.

It is customary that a party who receives a judgment in its favour will likely take steps to enforce that judgment in Court, especially when the other party fails to comply with its terms. In money judgments, such monetary debts can be realized by way of garnishee proceedings.

Garnishee proceedings are a form of judgment enforcement procedure involving money related matters.

It involves a special procedure invoked to compel a third party (for instance a bank) who is in possession of the asset of the judgment debtor to forfeit the said asset to the judgment creditor to the tune of the debt in question.

This application (and the main suit from which it arisen) has a nexus to garnishee proceedings. The same was brought to the attention of this Court under a Certificate of Extreme Urgency. For the sake of clarity, and based on the pleadings, I will set out some brief factual background to it.

Sometime in 2011, the 1st Respondent filed a case in this Court, **Commercial Case No.51 of 2011** in which the Defendant was named as St. John University of Tanzania, St. Marks College Teaching Center. In that case, a decision made in favor of the 1st Respondent. In the year 2016, the 1st Respondent moved to execute the Decree and, this Court, on 19th April, 2016, issued a Garnishee Order Nisi whereby the Applicant was made a party whose accounts were the subject of the Garnishee Order Nisi.

With such developments, the Applicant filed objection proceedings (***Application No.38 of 2020***) before this Court, (Fikirini J, (as she then was)). On 20th April 2021, this Court ruled in favour of the 1st Respondent and dismissed the application, thereby

issuing a Garnishee Order Absolute. The Applicant was, thus, informed of the order and has come to this Court by way of filing Commercial Case No.58 of 2021 and this Application.

The Applicant filed this Chamber application under Section 68 and 95 and Order XXXVII RULE 1 of the CPC, Cap.33 R.E 2019, as well as under Rule 2(2) of the High Court (Commercial Division) Procedure Rules, GN. No. 250 of 2012 (as amended in 2019) seeking for the following orders:

1. That this Court be pleased to grant *Ex-parte interim injunctive* Order to the Applicant meant to maintain *status quo* to the parties pending the hearing of this Application.
2. That this Court be pleased to grant, *Inter Partes*, an temporary injunctive Order to the Applicant meant to restrain the Respondents, their Agents, or workman, bank, from attaching and remitting money from the CRDB bank account *No.01J182426400* Dodoma Branch owned by the Applicant, pending the hearing of the main suit.
3. That, this Court be pleased to grant temporary injunctive Order to the Applicant to restrain the execution of

the Garnishee Order Absolute issued by this Court for remittance of TZS 72,000,000, pending the hearing of the main suit.

4. Costs of this Application.
5. Any other relief (s) (sic) this Honourable Court may deem fit and just to grant.

The chamber application has been supported by an affidavit of Allen Metetemela, a Principal Officer of the Applicant.

On 19th May 2021, the parties appeared before this Court. On the material date, the Applicant enjoyed the services of Mr David Elisha and Halifa Kiango, learned advocates, while the Mr Emmanuel Kessy appeared for the Respondent.

Since the Respondent was served with the application belatedly, Mr Kessy applied for time within which he could file his counter affidavit. I granted him that opportunity because he has asked for just a day, i.e., up to 20th May 2021. The Court made a further order that maintained the status quo pending the hearing and determination of this application.

On 25th May 2020, the parties appeared before me for the hearing. Mr Halifa's submission was that the order of temporary injunction needs to be granted because

there is pending in Court, **Commercial Case No 58 of 2021**, which was filed by the Applicant.

He submitted that, the restraint orders are meant to halt the Respondent from effecting the Garnishee Order Absolute issued by this Court in respect of TZS 72,000,000/-. This respective amount arose from a decree of this Court in the **Commercial Case No.51 of 2011** in which the Respondent was the decree holder.

Adopting the contents in the affidavit of Mr Mtetemela in support of the application, Mr Halifa's contended that, as a matter of principle, an Applicant for orders of temporary injunction must show, that:

1. there is a prima facie case pending in Court.
2. The Applicant stands to suffer irreparable loss if the application is denied; and
3. On the balance of convenience, the Applicant stands to suffer more than the Respondent.

To support his submission, Mr. Halifa referred to this Court, the case of **Atilio v Mbowe, (1969) H.C.D 284**. He submitted that, the above key elements apply to this application, noting that, the pending **Commercial**

Case No. 58 of 2021 which reveals serious dispute, a *prima facie* case between the parties. He also placed reliance on the Court of Appeal Decision in the case of **Abdi Ally Salehe vs. ASAC Care Unit Ltd and 2 Others, Civil Revision No.3 of 2012, CAT, (DSM) (Unreported)**.

As regards whether the Applicant stands the chance of suffering an irreparable loss, Mr Halifa submitted that, that aspect is also fully met in this application. He argued that, if the garnishee order absolute is to be put to effect, it was definitely paralyze the operations of the Applicant. He contended that, if the order will be effected, the Applicant, as an educational institution, will lose experienced and qualified teaching staff as well as students, both current and in-coming. He argued that, that loss is not easily remediable by way of award of damages and the institution might be closed by the Tanzania Commission of Universities (TCU).

He further sought support from the case of **Valence Simon Matunda (Suing via a Power of Attorney of Musa Yusufu Mamuya) vs. Sadallah Philip Ndosy abd 2 Others, Misc. Land Application No.55 of 2019**. In that case, this Court was of the view that an irreparable loss can also arise where the dispute between the parties will be rendered nugatory. Mr Halifa

contended, therefore, that, if the orders sought will not be granted, the dispute pending in this Court will be rendered nugatory.

As regards the balance of convenience, it was Mr Halifa's submission that, it is the Applicant who stands to suffer if the orders sought are not granted. He prayed, therefore, that this Court should grant the application.

For his part, Mr Kessy was very brief. He submitted that the application is misconceived because this Court is being asked to disrespect its own orders issued in **Misc. Comm. Application No.38 of 2021**.

According to Mr Kessy, this Court, (Fikirini J., as she then was) ordered that, execution should proceed by granting a garnishee order absolute. In view of that order, he argued that, the 1st Respondent cannot be restrained and the process cannot be interfered with. He submitted further that, as a matter of law, the Court cannot be moved to issue an injunctive order against its own final execution orders.

He referred this Court to the case of **National Housing Corporation (NHC) vs. Peter Kassidi and 4 Others, Civil Application No.243 of 2016, CAT (DSM) (unreported)**, and urged this Court to struck out the application.

As his second line of argument, Mr Kessy submitted that, the application should be struck out because it has failed to meet the requisite principles applicable to an application for injunctive orders. He was of the view that, the filing of the **Commercial Case No.58 of 2021** is not in itself a sufficient ground.

It was his further contention that, the Court must also be satisfied that the rest of elements applicable to the grant of an injunctive order of the Court are present in the case, one being whether the Applicant will suffer irreparable damages. He referred to this Court the case of **Abdi Ally Salehe (supra)**, at page 8, and submitted that, the Court is bound to make further investigation once the Court is satisfied that there is a *prima-facie* case.

According to Mr Kessy, the Applicant's claim that there will be irreparable loss if the orders sought will not be granted is unsupported and hearsay. He argued that the submission that the Applicant will face the wrath of the Tanzania Commission for Universities is unsupported and not pleaded in the affidavit, hence, a mere afterthought. He therefore urged this Court to dismiss the Application.

In a brief rejoinder submission, Mr Halifa reiterated his earlier position. He contended that the Applicant has

correctly moved this Court under Order XXXVII Rule 1(a) and Section 68(e) and 95 of the CPC, Cap.33, R.E 2019. He contended that, even if the Garnishee Order Absolute has not been put into effect, the Respondent cannot be stopped from effecting it.

He distinguished the case of **National Housing Corporation (NHC) vs. Peter Kassidi and 4 Others, (supra)** relied upon by the Respondent's counsel noting that the facts in that case are different from those in the present application. It was argued that in the present case the Applicant was not a party to the **Commercial Case No.51 of 2011** and, thus, was not in a position to file for a stay of execution but has rather filed a fresh suit.

Mr Halifa argued that, the Applicant stands to be protected by this Court even if there has not been proof as regards the impending collapse of operations of the Applicant if the Garnishee Order Absolute will be implemented. However, relying on the case of **Abdi Ally Salehe (supra)**, he contended that the risks are of future damages or anticipated risks, so to speak.

Having heard the rival submissions, the issue which this Court is called upon to resolve is whether the Court should grant the orders sought in this Application. Associated with that question is the issue whether having

issued the garnishee order absolute this Court can revisit it.

In this Application and upon reading the affidavit of the Applicant, it shows that the Applicant has applied for the orders in the chamber application based on the suit which is pending in this Court. It is also claimed in paragraph 14 of the supporting Affidavit that, the Applicant was never a party in the **Commercial Case No.51 of 2011**.

As I look at the history of this case, however, I find that this Court, (Fikirini, J., as she then was) when dealing with Misc. Commercial Application No. 38 of 2020, had an ample time to consider whether the Applicant was a party to the **Commercial Case No.51 of 2011**. That ruling of this Court has never been overturned and was the basis of the garnishee order absolute.

With that in mind, the next question is whether in this Application I can put on hold the execution of that garnishee order absolute. In my view that cannot be possible. It is trite, that, by its nature, garnishee proceedings are different from other court proceedings. They are peculiar in as much as they are carried out in stages. The first stage is that of garnishee order nisi. That stage is ex parte stage between the Court and the judgment creditor.

Once the Court is satisfied that there is a third party who is holding money due and accruing to the judgment debtor, the Court will call upon such a third party to show sufficient cause why the judgment debtor's money in the third party's hands should not be paid over to the judgment creditor.

In our case, that stage is over and cannot be re-opened as an order nisi was issued. The second stage was for the garnishee to show cause regarding why the order nisi should not be made absolute. That stage as well was done before her Ladyship Fikirini, J., (as she then was). Now, can anything be done by this Court in respect of the order absolute?

Legally speaking, once a *garnishee order absolute* is made, there would be nothing left before the court in the matter. At such a final stage, the court is done with the determination of the matter between the parties as far as the proceedings are concerned and, for that matter, it becomes **functus officio** because, there would be nothing left to be determined by the same court.

To my understanding, it means that, the Court can no longer revisit or review the order or let alone putting it on hold as I am called upon to do. The available option is therefore to challenge the decisions of the Court by way of an appeal to the higher Court.

It is from that understanding I hereby take a position, in agreement with Mr Kessy, that, this Court cannot, at this stage, be called upon to stop the Judgment Creditor from enjoying the fruits of the judgment entered in her favour. This means that, the 1st Respondent cannot be restrained and, since the process has gone to its finality, there is nothing more left in the court for it to turn back and interfere with the process.

The only available remedy is for the Applicant to seek for an appeal in the Court of Appeal as if the Applicant so wishes. I therefore decline to grant the orders sought, for reasons already explained herein.

In the upshot I dismiss the application with costs.

It is so ordered.

DATED at DAR-ES-SALAAM, this 3rd JUNE 2021



A handwritten signature in blue ink, appearing to read "Deo John Nangela".

**HON. DEO JOHN NANGELA
JUDGE**