

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 51 OF 2021

(Arising from Commercial case No. 16 of 2017)

AZANIA BANK LIMITED..... APPLICANT /OBJECTOR

VERSUS

SOLOHAGA COMPANY LIMITED.....1st RESPONDENT

YARA TANZANIA LIMITED.....2nd RESPONDENT

SANTANA INVESTMENT LIMITED.....3rd RESPONDENT

RULING

K. T. R. Mteule, J

22/09/2021 & 07/12/2021

This ruling is in respect of objection proceedings filed by the applicant/objector **AZANIA BANK LIMITED** seeking for the release of properties attached in Commercial Case No. 16 of 2017 and restrain the intended transfer.

I will briefly narrate some undisputed facts of the background of the matter. The 2nd Respondent herein, **YARA TANZANIA LIMITED** was the Plaintiff in Commercial Case No. 16 of 2017, suing the 1st



Respondent **SOLOHAGA COMPANY LIMITED**. Upon filing a Deed of Settlement, on 30th November 2017 the suit was marked settled and the terms stipulated in the said deed of settlement were adopted to be a decree of the court.

Subsequently thereto, on 17th August 2018 the 2nd respondent lodged an Application for Execution of the Decree emanating from the settlement deed in Commercial case No.16 of 2017 and sought for the attachment and sale of movable assets said to be owned by the 1st Respondent which comprised motor vehicles, trucks, and trailers. By the orders of this court the 3rd Respondent (Court Broker) was engaged and sold the said movable assets through a public auction and the purchase price was subsequently paid to the 2nd respondent. Thereafter, the court issued Certificate of Sale to declare the sale absolute.

The applicant, **AZANIA BANK LIMITED** filed these Objection Proceedings alleging that the said assets were wrongly attached. This application is lodged under **Order XXI Rule 57(1),58 and 59, Section 95 of Civil Procedure Code [Cap 33 R.E 2019] (CPC)** and any other provisions of the law. The application is seeking for orders to release the properties attached against the 1st 2nd and 3rd respondents, their servants, assignees, agents, workmen or whomsoever the 1st, 2nd, and 3rd respondent may act through to be restrained from their intended



transfer of the properties. The applicant is seeking for Costs and any other relief the court may deem fit and just to grant.

In the affidavit in support of this application which was deponed by EUGINE KIMARO the applicant stated that on 3 June 2017, he received a letter from the 3rd Respondent copied to the applicant indicating that there was a Commercial Case No. 16 of 2017 filed against the 1st Respondent through which the 3rd Respondent did sell the Chattel mortgages and was seeking court's direction to the applicant to facilitate swift transfer.

That upon perusal of the case file, it was discovered that some trailers and trucks were sold to various purchasers to realise a decree in Commercial Case No. 16 of 2017. Mr. Eugene Kimaro swore further that upon looking at the attachment Order, Proclamation of sale and certificate of sale it was observed that they originated from orders of this court in Commercial Case No. 16 of 2017 whereas the applicant was not a party and the 1st Respondent failed to disclose the contractual agreement entered between the applicant and the 1st respondent in respect to properties.

According to Mr. Eugene Kimaro, the cars and trailers with registration numbers T.867 DEZ, T.166 DFF, T.143 DFF, T.134 DFF, T.198 DFF, T.859 DEZ, T.183 DFF, T.170 DFF, T.131 DFF, T.164 DFF, T.504 DEZ,

T.138DFF, T.197 DFF, T.205 DFF, T.194 DFF, T.248 DFF, T.204 DFF AND T.254 DFF are wholly belonging to the applicant as a title holder and this ownership was confirmed with search through Tanzania Revenue Authority.

It is further deponed in the affidavit that the applicant entered into a mortgage agreement of USD 1,566,000 which was advanced to the 1st Respondent vide a letter of offer dated 1st December 2015 where the 1st Respondent signed a Chattel transfer instrument pledging the sold trucks and trailers as security for the loan.

In further statement in the affidavit, Mr. Eugene Kimaro claimed that shall the properties be transferred, the applicant will suffer irreparable loss of TZS 5,105,185,611.57 being outstanding balance and interests.

The 2nd and the 3rd Respondents filed counter affidavit in which all the substantive allegations were disputed. According to the counter affidavits for the 2nd and the 3rd Respondents, the search in the Tanzania Revenue Authority revealed that the motors vehicles belonged to the 1st respondent. They wondered as to how the Applicant never responded to all court processes and notices prior to the sale. That the sale is already declared absolute with a certificate of sale already issued.

The application was argued by a way of Written Submissions. Submissions by the applicant were drawn and filed by Adelaide Kinabo.



She started by challenging issuance of the certificate of sale in a sale which was concluded while the title cannot pass to the buyers as the they are in hands of a different holder. In the submission, Mr. Kinabo maintained that the title of the attached properties belonged to the applicant as per the attached Annex ABL 4 and ABL 3 in the affidavit. In further submissions, Ms. Adelaide reiterated what was stated in the affidavit on the issue of ownership of the applicant to the properties and the search conducted in TRA vide Annex ABL 4 to the affidavit.

In alternative, the applicant asked that if the court find the provision of **Order XXI Rule 57(1) of the CPC** don't match with this application, then the Court invoke Section 95 of the CPC to dispense justice to the applicant who is the actual title holder.

In reply, Mr. Ruben Robert advocate for the 2nd Respondent started by explaining the whole process from the time of filing the Commercial Case No. 16 of 2017 to the conclusion of the execution process. He submitted that after the Judgment was entered in favour of the 2nd Respondent an application for execution of decree was lodged where she sought for attachment of 1st Respondent's movable assets (trucks). That the Application for execution was granted and the 1st Respondents' trucks were attached, sold and certificates of sale was issued by the Court accordingly and money obtained from sale was paid to the 2nd Respondent and the Court Brokers' bill of costs taxed and paid



accordingly. He was surprised by the Applicant filing these objection proceedings alleging wrong sale of the attached assets.

The 2nd Respondent embarked on addressing some points of law to wit:

- (a) That this application is misconceived as there is no any pending attachment or sale.
- (b) That this application is bad in law for being hopelessly overtaken by events.
- (c) That the instant application is bad in law as the purported securities lack legal backing.

On the **first** point of law the 2nd Respondent was of the view that the application is misconceived for there being not any pending attachment or sale in Commercial Case No.16 of 2017 which is an essential legal prerequisite for objection proceedings.

Citing **Order XXI Rule 57(1), 58 and 59, Section 95 of Civil Procedure Code [Cap 33 R.E 2019]**, under which the application was brought, the 2nd respondent continued to submit that under these provisions, "**attachment**" is a key element in which either an objection or a claim to investigate against may be preferred.

According to Mr. Robert, the court process having completed to the point of issuing certificate of sale, then the application is dead on arrival as it is premised on provisions which presupposes pendency of



attachment which is lacking. To cement his position, the 2nd Respondent's counsel cited **Sarkar Code of Civil Procedure, Vol. 2 11th Edition; St. Marys International Academy Limited v. Asile Ally Saedy & 6 Others, Misc. Land Application No. 703 of 2009 (unreported)**. In this case, according to Robert, this court while faced by the same issue at page 5 held: -

".....Therefore, the decree in land case no. 115 of 2011 has already been executed and this court has no powers to undo the already executed decree."

Further quotation from the case stated thus:

*"There is also no order that this court can issue to undo the already executed decree..... **Objection proceedings, as correctly submitted by the first respondent counsel aim at challenging attachment of a property in execution of court order. The main relief is release of the attached property and not declaration of payment.**"*

The counsel for the 2nd Respondent continued to insist that the above position is equally endorsed in the case of **Abdallah Salum Lukemo and 18 others v. Sifuni A. Mbwambo & 208 others Misc. Land case Application No. 5-7 of 2019 (unreported)** where at page 6

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and 7, this court highlighted three prerequisites for competent Objection Proceedings to be among other things pendency of attachment in execution of a decree. It is the 2nd Respondent's submission that since the application sought assets to be released from attachment in commercial case No. 16 of 2017, this prayer cannot stand in absence of any pending attachment.

On the **second** point of law the counsel for the 2nd respondent argued that this application is bad in law for having hopelessly overtaken by event to the extent that granting it will serve no practical purpose. The counsel reiterated that the attachment is already done, and the sale conducted with Certificates of sale issued to declare the sale absolute and the purchase price already paid to the 1st respondent with the costs of the Court broker already paid. The counsel referred to St. Mary's case (supra) and the **Court of Appeal case of Joto Ally vs Lucas Komba and Another** where it was held:

"... we are firmly of the view that since execution has been carried out, we cannot make an order to stay it and if it caused substantial loss to the applicant, there is no order that can undo it."

The 2nd Respondent's Counsel therefore asked for the court to dismiss the application for being overtaken by event.

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On the **third** point of law that **the instant application is bad in law as the purported securities lack legal backing**, the 2nd respondent challenged the applicant's statement in the affidavit that the assets attached and sold in the execution in respect of Commercial case No.16 of 2017 should be released because they are subject to chattel mortgage. The 2nd Respondent's submission gave two aspects to argue against the Applicants assertion:

Firstly, that the properties are company's assets and cannot be offered to secure loan under **Chattel Transfer Act, Cap 210 R.E 2002** as the 1st Respondent is a company incorporated under the **Companies Act Cap 212 R.E 2002**. The counsel cited Section 2 of **Cap 210** which is the relevant provision to define chattels as follows:

" ... chattels means any movable property that can be completely transferred by delivery, and includes machinery stocks, and the natural increase of stock as herein after mentioned crops and wool but does not include (1) title deed, things in action, other than a debt or negotiable instrument (b) shares and interests in the stocks, fund or securities of any government or local authority (c) shares and interest in the capital or property of any company or other cooperate body; (d) debentures and interests

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coupons issued by any government or local authority, or company or other cooperate body."

It is the submission of the 2nd Respondent that from the above definition the property of a company or other cooperate body are expressly excluded from meaning of chattels and that a company incorporated under the **Companies Act Cap 212 R.E 2002** cannot legally create a Chattel Mortgage, nor can it charge its Movable Property under the purview of the Chattels Transfer Act (supra). According to Robert, there is exclusion of company's movable assets in purview of Chattels Transfer Act and the Companies Act Cap 212 R.E. 2012 has adequate provision on how company's assets can be charged as a security. He cited Section 97(1) of the Companies Act enlisting the types of charges that a company can create and register at the registrar of companies among them is the fixed and floating charges on companies' assets including movable assets under section 96 (1) (2) of the Companies Act.

It is Mr. Robert's submissions that since the properties sold were the Assets owned by the 1st Respondent and that the 1st Respondent is the company incorporated under the Companies Act Cap 212 R.E. 2002 and since the law as submitted knows no creature in the name of chattel mortgage as far as the companies Act are concerned, then what was purportedly Transacted by the Applicant in the mortgage was illegal.

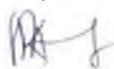


Secondly, it is further submission by Mr. Robert that it is Illegal under the Companies Act Cap 212 R.E. 2002 for a company to allow its assets to secure a director's personal loan. That even the purported credit facility was never extended to the 1st Respondent but to a third party known as **Deodat Mexon Siwale** as evidenced in **annexure ABL 5** to the affidavit. He further referred to **Annexure ABL 3** to the affidavit collectively which consists of motor vehicle registration cards showing the 1st respondent being the owner thereof. He submitted further that it was illegal and totally contrary to the law for the company (1st respondent) to guarantee the personal loan of its director one Deodat Mexon Siwale.

Mr. Robert cited Section 200 (1) of the Companies Act Cap 212 R.E 2002 which provides

"it shall not be lawful for accompany to make a loan to a director of a company or director of its holding company or in either case a connected person or to enter into any guarantee or provide any security in connection with a loan made to such a director or connected person as above by any other person....."

In Robert's view, what the above provision outlaws is what transpired between the applicant, the 1st Respondent and the 1st Respondent's



Directors. The 2nd Respondent humbly called upon the court to find that the purported security transaction was illegal to the extent that it was issued by the company to secure Directors' loan contrary to section 200 of the Companies Act.

While urging the court to denounce and the any applicant's action to do anything in relation to the purported securities in issue as tantamount to blessings an illegality the 2nd Respondent supported his argument by **Active Mobile Spare Limited v. Crane Bank limited [2009] 1 E.A 1** at page 2 paragraph F. The court held thus:

"It is trite law that court will not condone or enforce illegality"

That the court proceeded at page 12 paragraph E by quoting with approval the words in **Scott v. Brown Doering, Mc Nab and Co. [1892]2 Q.b 724 at 724** thus:

".....No court ought to enforce an illegal contract or allow itself to be made as the instrument of enforcing obligations alleged to arise out of contract or transaction which is illegal if illegality is duly brought to the notice of the court and if person invoking the aid of the court is himself implicated in the illegality...."

The 2nd Respondent finally submitted that the instant application is incompetent as the purported securities are not securities in the eyes of



law hence the applicant should not be allowed to invite this court to shield it from its illegal securities transaction.

Having addressed the points of law, the Mr. Robert proceeded to attack the Applicants' submission. He pointed out that there is no pending attachment, that the sale was conducted in compliance with the court orders and that certificate of sale were accordingly issued to declare the sale absolute. According to Mr. Robert, with these admitted facts the application is not competent before the Law as already submitted previously.

Mr. Robert continued to reiterate arguments supporting that the objection is overtaken by events and added that Annexure ABL 3 collectively show that the owner of the assets sold in Commercial Case No. 16 of 2017 is Solohaga Company Limited. According to the 2nd Respondent, it is evident in Annexure ABL 4 and ABL 2 in the affidavit that the Applicant become title holder of the assets since April 2020 while the proclamation of sale was issued in July 2020 and Certificate of sale in December 2019 all well before the Applicant became title holder.

The 2nd Respondent considered the applicants arguments on the outstanding debt as irrelevant in this matter. He further considered irrelevant the Applicant's allegation that the procedure of attachment



was not followed. In alternative, he contends that the procedures were fully complied with.

Mr Robert attacked the Applicant's request on application of Section 95 of the CPC. Referring to **Tanzania Electric Supply Company (TANESCO) vs Independent Power Tanzania Limited (IPTL) and 2 Others, [2000] TLR 324 page 327**, he contended that S. 95 does not confer Jurisdiction to Court.

The 3rd Respondent Santana Investment Limited made a reply to the applicant's submissions and averred that all the attachment procedures were complied with by the 3rd Respondent. Citing Rule 9 of the Court Brokers and Process Servers Rules 2019, the 3rd respondent submitted that 14 days notice was issued to the 1st Respondents and then published a notice of Auction in Uhuru News paper of 2nd August 2019 and further notice was published in Uhuru News Paper on 18th September 2019 for the Auctions which took place in Mbeya and in Dar es Salaam. The 3rd Respondent concluded that as a Court Officer, he was implementing orders of the court in the execution process and all the procedures were followed.

The Applicant filed a rejoinder in which, although admitting that the provision of **Order XXI Rule 57(1)** requires objection proceedings to be entertained where there is an attachment but insisted that annexure



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ABL 4 ABL 3 to the Affidavit evidence that the properties belonged to the applicant at the time of attachment being security to the loan advanced to the 1st Respondent.

Re-joining on the issue of this application being overtaken by event, the counsel for the applicant is of the view that the since the 3rd Respondent through **Annexure ABL 1** has asked the Court to compel the applicant to facilitate smooth transfer of the assets to the buyers, then nothing is overtaken by event since the title could not transfer to the buyers. He distinguished the case of **St Marys International Academy** case from the instant application in the sense that in St. Marys, title had already passed while the title in the attached properties in this case could not pass as the holder was the applicant.

Mr. Mziray challenged the asserted illegality of the mortgage transaction arguing that the instrument was registered that's why the applicant was allowed to enter her name as a title holder.

He further argued that the properties were supposed to be registered jointly in the name of the Applicant and the 1st Respondent as per page 3 of Annexure ABL 5. Mr. Mziray denied that the allegation that the loan was disbursed to Deodatus Siwale and submitted that the same was disbursed to the 1st Respondent who is the Company.



From the affidavits, counter affidavits and submissions by the parties, the following are issue for determination is **Whether the applicant has established sufficient cause to warrant release of the trailers and trucks attached and sold in the execution proceedings in Commercial Case No 37 of 2017.**

The Applicant's view is that although the attachment and sale has been already done, nothing is overtaken by event since transfer has not been affected for the title holder is the applicant. The Respondent maintains that the fact that the sale is already done, and certificate of sale thereof issued declaring the sale absolute, then nothing can this court do to reverse the process. In 2nd Respondent's review, the application is overtaken by event.

I find this an appropriate time to reproduce the provisions of Order XXI Rules 57 – 59 of CPC which guide these objection proceedings. They provide: -

"57 (1) 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 the party to a suit.

(2) Where the property to which the claim or objection applies has been advertised for sale, the court ordering the sale may postpone it pending the investigation of the claim or objection.

Provided that no such an investigation shall be made where the court considers that the claim or objection was designedly or unnecessary delay

58. The claimant or objector must adduce evidence to show that at the date of attachment he had some interest in or was possessed of the property attached.

"59. Where upon the said investigation the court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgement debtor or of some person in trust for him or in the occupancy of the tenant or other persons paying rent to him ,or that being in the possession of the judgement debtor at such time it was so in the possession not in his own account or as his own property but on account of or in trust for some other person ,the court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment."



The words in these provisions apparently talk about attachment of movable properties and the proviso to Rule 57 warns the Courts on conducting the investigation when the objection proceedings are unnecessarily delayed.

It is not in dispute that the execution which is being objected by these proceedings is already concluded by this court, and that certificate of sale is already issued to declare the sale absolute. In this application, being there no pending attachment, and the sale having concluded, I am guided by the reluctance of the Court of Appeal to undo an already executed decree. (See **Juto Ally vs Lukas Komba & Another (Civil Appeal No.84 of 2017) TZCA, Delivered on 02 November 2020. (MKUYE. J.A., MWANPAMBO, J.A. And KITUSI. J.A.) (Also cited in St. Marys (Case Supra).** At page 5 of the decision, their Lordships stated: -

"We are firmly of the view that since execution has been carried out, we cannot make an order to stay it and if it caused substantial loss to the applicant, there is no order that can undo that."

The applicant knowing that Rules 59 may not be relevant, has tried to convince the Court to rely on Section 95 of the CPC. It is a well-established position that where there are specific provisions of Law to guide a procedure, Section 95 of the CPC cannot be invoked as that



section is not meant to confer jurisdiction to the Courts. **(See Aero Helicopter (T) Ltd v. F.N Jansen [1990] TLR 142 at P. 145 and TANESCO vs IPTL (Supra)** I could not be convinced by this applicant's argument. Moreover, I consider it as the applicant's concurrence to the argument that her application is not tenable under the provision of Rule 59 of Order XXI of the CPC.

In upshot the execution having been concluded and sale declared absolute, I find that this application is overtly overtaken by events and the same cannot be reversed through this kind of application under **Order XXI Rules 57 – 59 of CPC**. This finding is sufficient to conclude this matter. Dealing with the other debated arguments will be of no use for determination of this application.

Consequently, the application is dismissed with costs. It is so ordered.

Dated at Dar es Salaam this 7th December 2021



KATARINA T. REVOCATI MTEULE

JUDGE

7/12/2021