

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(COMMERCIAL DIVISION)**

**AT ARUSHA**

**MISCELLANEOUS COMMERCIAL APPLICATION NO. 1 OF 2023**

**(Arising from commercial case no. 3 of 2022)**

**THE REGISTERED TRUSTEES**

**OF MPESA TRUST FUNDS.....APPLICANT**

**Versus**

**STEPHEN MAHENDEKA MGANGA.....1<sup>st</sup> RESPONDENT**

**BESTWAY CAPITAL MANAGEMENT**

**LIMITED (BCM).....2<sup>nd</sup> RESPONDENT**

Date of Last Order: 20/04/2023

Date of Ruling: 28/04/2023

**RULING**

**MKEHA, J:**

The applicant is moving the court to vacate its Garnishee Order Nisi in respect of Account No. 20110046021 in the names of **TRUSTEES OF MPESA TRUST FUNDS** held at NMB PLC for reasons that, the bank account and the funds therein do not belong to the judgment debtor in

Commercial Case No. 3 of 2022. The application is made under Order XXI rule 57 (1) of the Civil Procedure Code. It is supported by an affidavit sworn by Ms. Jacqueline Kalaze, Head of the Legal Affairs Department of the applicant. Despite service of the application to both respondents, only the 1<sup>st</sup> respondent filed a counter affidavit, sworn by Ms. Upendo Msuya learned advocate. No appearance was made on behalf of the 2<sup>nd</sup> respondent. As such, the application proceeded ex parte against her.

In terms of the applicant`s affidavit and the submissions made in court by Mr. Juvenalis Ngowi learned advocate for the applicant, the attached bank account does not belong to the 2<sup>nd</sup> respondent who is the judgment debtor. According to the affidavit and the submissions by the learned advocate, the bank account belongs to the applicant and it keeps money for the applicant`s customers who are M-PESA customers.

The learned advocate went on to submit that, the applicant had never been part to Commercial Case No. 3 of 2022 which resulted into a judgment in favour of the 1<sup>st</sup> respondent. As such, according to Mr. Ngowi learned advocate, the applicant had no any liability under the decree sought to be executed. In view of the learned advocate, the attachment order would affect third innocent parties whose monies were being kept

into the account in accordance with the Electronic Money Regulations of 2015.

While conceding that the 2<sup>nd</sup> respondent had deposited TZS 100,000,000/= into the attached account on 17<sup>th</sup> February, 2021, the learned advocate was quick to react that, after the deposit of the said amount of money, she (the 2<sup>nd</sup> respondent) proceeded disbursing substantial part of the deposit leaving only TZS 25,098/= as on 23<sup>rd</sup> February, 2022. According to the applicant`s position, no further deposit was made by the 2<sup>nd</sup> respondent. This is in terms of Paragraph 2 of the affidavit in reply to the 1<sup>st</sup> respondent`s counter affidavit. The learned advocate for the applicant concluded his submissions in chief by pressing for lifting of the Garnishee Order Nisi.

Ms. Upendo Msuya learned advocate submitted in reply that, all what the court had attached were the 2<sup>nd</sup> respondent`s funds and not M-PESA customers` funds. The learned advocate insisted that, the attached bank account belonged to **THE TRUSTEES OF M-PESA TRUST FUNDS** and that; the judgment debtor was one of the beneficiaries and owners of M-PESA. According to the learned advocate, there was no evidence to the

effect that, the money deposited by the 2<sup>nd</sup> respondent in February 2021 had been withdrawn from the attached account.

The only determinative issue is **whether the applicant has succeeded proving that she had an interest in the attached bank account at the time of attachment.** There is no dispute that the applicant has never been part to Commercial Case No. 3 of 2022 whose decree is under execution. The attached account is being operated in the names: TRUSTEES OF MPESA TRUST FUNDS and not any other name suggesting that it belongs to the 2<sup>nd</sup> respondent/judgment debtor. It was the 1<sup>st</sup> respondent`s position through Ms. Upendo Msuya learned advocate that, the attached account keeps the beneficiaries` monies and that, the 2<sup>nd</sup> respondent was one of the said beneficiaries. According to the 1<sup>st</sup> respondent`s learned advocate, the 2<sup>nd</sup> respondent had deposited TZS 100,000,000/= into the attached account in 2021 and that, it was the said amount of money that was subject to the court`s attachment order. While the applicant acknowledged the said deposit, it was deposed on behalf of the applicant that, after the said deposit, the 2<sup>nd</sup> respondent disbursed almost the whole of the deposited amount leaving only TZS 25,098/= as on 23<sup>rd</sup> February 2022. This fact remains uncontroverted. This is because;

the 2<sup>nd</sup> respondent who would have proved with precision her balance in the attached account at the time of attachment chose not to defend herself against the present application. This leads me into concluding that, the applicant has succeeded proving that she had interest in the attached bank account and was actually constructively possessed of the attached funds at the time of the attachment.

It is for the foregoing reasoning I hereby make the following order: The Garnishee Order Nisi earlier issued against Bank Account Number 20110046021 for payment of the decretal sum of TZS 138, 350,000/= be immediately lifted. It is so ordered. No order is made as to costs.

Dated at DAR ES SALAAM this 28<sup>th</sup> day of April 2023.



**JUDGE**

**28/04/2023**

**Court:** Ruling is delivered in the presence of the parties' advocates



  
**P. MKEHA**

**JUDGE**

**28/04/2023**