

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISCELLANEOUS COMMERCIAL APPLICATION NO. 53 OF 2023**

(Arising from commercial case No. 47 of 2020)

**BETWEEN**

**NAM ENTERPRISES LIMITED..... 1<sup>st</sup> APPLICANT**

**STEPHEN KORDINI LUKUMAY.....2<sup>nd</sup> APPLICANT**

**ALEX STEPHEN LUKUMAY.....3<sup>rd</sup> APPLICANT**

**ELIAS STEPHEN KORDIN LUKUMAY.....4<sup>th</sup> APPLICANT**

**NAMNYAKI STEPHEN LUKUMAY.....5<sup>th</sup> APPLICANT**

**Versus**

**FIRST NATIONAL BANK TANZANIA LIMITED.....1<sup>st</sup> RESPONDENT**

**YONO AUCTION MART & COMPANY LIMITED.....2<sup>nd</sup> RESPONDENT**

Date of last order: 2<sup>nd</sup> May 2023

Date of Ruling: 2<sup>nd</sup> May 2023

**RULING**

**MKEHA, J**

The applicants in the present application are moving the court for an order of postponement of sale of their properties located at Plot No. 47 Block J, Kariakoo Area within Ilala Municipality in Dar es salaam City and Plot No. 5,

Block 22 located at Majengo Area Dodoma Municipality, both registered in the name of the 2<sup>nd</sup> applicant, Mr. Stephen Kordin Lukumay. The application was filed immediately after issuance of an order for proclamation of sale by the executing court on the 1<sup>st</sup> day of March, 2023. The application is made under Order XXI Rule 81 (1) and section 95 of the Civil Procedure Code. It is supported with an affidavit sworn by Mr. Elias Stephen Kordin Lukumay, the 4<sup>th</sup> applicant. On the other hand, the application is contested through a counter affidavit sworn by Mr. Edmund Mwasaga, Principal Officer of the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent did not file a counter affidavit. Neither did he appear in view of challenging legality of the application. As such, the application proceeded ex parte against the 2<sup>nd</sup> respondent.

In terms of the affidavit supporting the application and the oral submissions made by Mr. Ramadhan Karume learned advocate for the applicants, the judgment debtors intend to lease the attached properties to a number of tenants. The learned advocate submitted that, the applicants intend to raise some funds from the intended leases and other sources to enable them pay the decretal sum within 250 days from the date of the order postponing the said sale.

Mr. Joseph Kipeche learned advocate contested the application. In the counter affidavit of the 1<sup>st</sup> respondent and the submissions by the learned advocate, it was submitted that, the applicants had to satisfy the court that, there was an alternative means of satisfying the decree. According to the learned advocate, a mere intention to lease the attached properties was not enough. The learned advocate for the 1<sup>st</sup> respondent submitted that, there was not even a slightest mention of the expected collections from the expected tenancies hence it was unbelievable that the decretal sum of USD 329,656.28 would be paid if sale was to be adjourned for 250 days.

The only determinative issue is **whether postponement of sale can be ordered to enable the judgment debtor to raise the decretal sum when the decree sought to be executed is a mortgage decree or any other decree of a similar nature** .There was no denial on part of the applicants to the fact that, the facilities extended to the first applicant were at all times secured by first legal mortgages over properties on Plot No. 47, Block J located at Kariakoo Area, Ilala Municipality in Dar es salaam City and Plot No. 5 Block 22 at Majengo Area, Dodoma city , both registered in the name of Stephen Kordin Lukumay, the 2<sup>nd</sup> applicant.

These are the properties which are concerned with the executing court's prohibitory orders and proclamation of sale. Two properties are sought to be auctioned in execution of a mortgage decree.

It is true that under Order XXI rule 81(1) of the Civil Procedure Code an order postponing sale can be issued by the executing court to enable the judgment debtor to raise the amount for satisfying the decree. However, Rule 81 of the Civil Procedure Code does not apply to a sale of property directed to be sold in execution of a decree for enforcement of a mortgage. The rationale behind this principle is that, in the case of a mortgage-decree, the right of sale does not depend upon the attachment in execution, but sale is confirmed by the decree as it is always implicit in the mortgage deed. READ: sub-rule (3) of rule 81 of Order XXI of the Civil Procedure Code. See also: Sections 127 (1), (2) (a) and (d), 132 (1) to (4) and 134 (1) (a) to (g) of the Land Act, Chapter 113 of the laws.

For the foregoing reasoning, I hold the application to be unmeritorious. I proceed to direct Her Worship the Deputy Registrar to appoint a qualified court broker to proceed with the execution of decree from where the exercise stopped. The application is dismissed with costs.

Dated at Dar es salaam, this 2<sup>nd</sup> day of May, 2023.



  
**C.P.MKEHA**

**JUDGE**

**02/05/2023**

**Court:** Ruling is derived in the presence of Mr. Ramadhan Karume  
learned advocate for the applicant.



  
**C.P.MKEHA**

**JUDGE**

**02/05/2023**