IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
MISC. COMMERCIAL APPLICATION NO. 33 OF 2023
[Arising from Commercial Case No.70/2021]

EAST AFRICAN DEVELOPMENT BANK ..... APPLICANT

VERSUS

NAURA SPRING HOTEL LIMITED.....1ST RESPONDENT

IMPALA HOTEL LIMITED.....2ND RESPONDENT

PALAGIA AUYE.....3RD RESPONDENT

RANDLE MREMA.....4TH RESPONDENT

Last Order: 17/05/2023
RULING : 02/06/2023

RULING

NANGELA, J.

The Applicant herein filed this application by way of a chamber summons supported by an affidavit sworn by her learned advocate, Mr. Gabriel Simon Mnyele of Mnyele, Msengezi and Co. Advocates. The matter was filed under Article 108 of the Constitution of the United Republic of Tanzania, 1977 as amended, section 95 and Order XXXVII Rule 2 (1) and (2) of the Civil Procedure Code, Cap.33 R.E

2019 and section 2 (1) and (3) of the Judicature and Application of Laws Act, Cap.358 R.E 2019.

The Applicant seeks for the following Orders:

EX PARTE ORDER:

1. That, this Honourable Court be pleased to grant *ex-parte* interlocutory order to prevent the Respondent from leasing the hotel building known as **Naura Spring Hotel** situated at Plot 59/2,60 and 61, pending determination of this application.

INTER PARTES

2. That, this Honourable Court be pleased to grant permanent injunctive order to prevent the Respondent from leasing the hotel premises situated at plots 59/2, 60 and 61 popularly known as Naura Spring Hotel.
3. That, this Honourable Court be pleased to summon the 3rd and 4th Respondents personally to show cause as to why they should not be committed to prison for contempt of Court Order, that is, the

Prohibitory Order Dated 14th day of December 2022 by advertising for lease of the **Naura Spring Hotel** situated at Plot No.59/2, 60 and 61 while knowing that it is under attachment.

4. The Respondents be condemned to pay Costs of this application.

Before the hearing of this application on merit, the Respondent raised preliminary objections, some in alternative to others, to wit, that:

1. This Honourable Court lacks Jurisdiction to entertain the Applicant's prayers by virtue of section 38 of the Civil Procedure Code, Cap.33 R.E 2019.
2. That, this application is bad for including a relief that is related to a criminal offence chargeable under the Penal Code, Cap.16 R.E 2022.
3. That, the application *in limine* is bad in law and improperly brought and hence unmaintainable on the ground that, this Court *ipso facto* is not seating in execution proceedings in this matter.

4. The current application is premature in the sense that, the Respondents called for expression of interest and not actual leasing, leaving a vital element of *actus reus* missing.
5. That the Applicant does not have a cause of action against the 2nd, 3rd, and 4th Respondents in light of the now settled position of separation of the Company from individuals within it as held in **Solomon vs. Solomon and Co.** [1897] AC 22.

When the parties appeared for hearing on the 30th of March 2023, having duly filed and exchanged the requisite pleadings, the hearing of the preliminary objections raised by the Respondent's Counsel could not proceed as the Respondent's counsel, who was connected from Arusha, could not virtually participate in the hearing due to poor Internet connectivity experienced on the material date.

This Court directed the parties to proceed by way of written submissions and both the application and the preliminary objections were to be argued together. The parties have duly filed their submissions as ordered.

The preliminary objections were jointly argued by Mr. Emmanuel Sood and Mr. Richard Valerian Massawe, learned advocates. In their written submissions, the two seem to have argued only the first, second and third grounds jointly and did not argue the rest. In short, the gist of these objections filed in this Court is limited to forum. They posited that, the question that needs to be looked at is whether the issue of intention to lease, leasing or sale of an attached property falls within or outside the scope of section 38 (1) of Cap.33 R.E 2019. In other words, was it not appropriate for the matter to have been filed under section 38 (1) of the CPC?

Relying on Mulla, *The Code of Civil Procedure, Vol.1, 16th edn.* at page 679, the learned counsels for the Respondent argued that an attached property can still be subject to lease, and the lessee becomes the representative of the judgement debtor within the meaning of section 38 of the CPC, and, thus, the section applies in a question of lease of the attached property. From that construction of theirs means, therefore, they contend that, the appropriate provision should have been section 38 of the CPC.

As regards the contempt issue, it was also the contention of the Respondent's counsels that, contempt be it criminal or civil must arise in proceedings. They placed reliance on **Halsbury's Law of England**, 4th Edn. at p.64, where it is stated that:

> "The general rule is that a party in contempt, that is a party against whom an order for committal has been made, cannot be heard or take proceedings in the same cause until he has purged his contempt nor while is in contempt can be heard to appeal from the order made in the cause."

They submitted, therefore, that, if the orders sought are to be granted and the execution Court is unaware of, the same will affect the execution procedure and, that is why section 38 of the CPC is essential. Their argument trailed, therefore, that, the present application is bad in law and improperly brought and, hence, unmaintainable on the ground that, *ipso facto* this Court is not seating in execution proceedings in this matter.

Citing the case of **Felix Mosha and Two Others vs. The Capital Markets and Securities and Hon. Attorney General**, Misc. Civil Cause No.16 of 2021, at p.10, they argued that this application is improperly before the Court.

In that case of **Felix Mosha** (supra), the Court was asked orders like what this Court has been asked to issue, orders to show cause why imprisonment orders should not be issued to a judgement debtor for contempt of Court upon failure to execute an order of the Court. Having looked at the matter and the various cases cited in support; the Court had the following to say:

> "The cases cannot therefore be authorities for procedure that Counsel for Applicants has proposed herein. If the Applicants desired to proceed under section 124 of the Penal Code, they were perfectly entitled to do so, but they should have instituted or cause to be instituted a criminal proceeding under the Criminal Procedure Act, in criminal court with competent jurisdiction."

On that account, they urged this Court to dismiss this application with costs. Responding to the submissions made

by the Respondent's counsels, it was the submission of Mr. Gabriel Simon Mnyele, the learned counsel appearing for the Applicant, that, the objections raised and argued by the learned counsels for the Respondents do not reflect the reality of the law but befits an academic discourse.

Mr. Mnyele submitted that, section 38 of the CPC deals with all matters that may arise in relation to the process of execution of the decree with regards to the execution, discharge, and its satisfaction. He referred to this Court the decision of the Court of Appeal in the case of **CRDB Bank vs. George Mathew Kilindu**, Civil Appl. No. 24 of 2010 which discussed the provision in detail.

He argued that this present application has nothing to do with execution, discharge, or satisfaction of the Decree. According to Mr. Mnyele, however, the conduct of which the Applicant wants the 3rd and 4th Respondents be held accountable for as being contemptuous has no nexus with execution proceedings. He argued that it is the contemptuous conduct of the 2nd and 3rd Respondents in contravention of an order of Court that prohibited them to deal with the property in a manner whatsoever.

He has referred this Court to **Y. RAMA**, ***Treaties on the Law of Execution,*** Asia Law House, Hyderabad at page 82 (discussing section 42 of the Indian CPC) where the learned author noted that:

> "The question regarding satisfaction or discharge of the decree in section 47 covers the question of excitability or non-excitability of decree…. The expression relating to execution would apply to a dispute arising in relation of execution of the decree after or before it had been executed. The expression "questions arising in section 47 means such question that can be properly arise or be raised in execution of the decree."

From that context, he surmised that, the issue of contempt has nothing to do with execution of the decree and the objection raised must be overruled.

As regards the issue of mixing of criminal and civil matters, which forms part of the 2nd ground of objection, Mr. Mnyele submitted that, there are two categories of contempt, civil and criminal contempt. He argued that, in punishing the contemnor under the civil proceedings, the Court exercises its

inherent jurisdiction to impose penal sanctions to preserve its authority.

Reliance was placed on the Court of Appeal decision in the case of **Yusuph Shaban Luhumba vs. Happliness John & 3Others**, Civil Appl.No. 304/14 of 2022. In that case, the Court of Appeal stated, on page 5 of its decision, that:

> "We subscribe to the trial judge that; Courts of law have inherent powers to enforce the obedience of their lawful orders. In exercise of such powers, therefore, Courts of law are mandated, where necessary, to impose penal sanctions to compel obedience of its orders. The rationale behind the law is not only to protect the orderly administration of justice from being abused but to maintain public trust of the supremacy of the rule of law."

Mr. Mnyele cited a decision of this Court as well (Mapigano, J (as he then was) in the case of **Tanzania Bundu Safaris Ltd vs. Director of Wildlife & Amother** [1996] TLR 246 where it was held that:

> "The Prime object of contempt proceedings is to vindicate the rule of law, rather than to punish an individual. The punitive jurisdiction of the Court to punish for contempt is based on the fundamental principle that, it is for the good of public and the parties that such orders should not be despised or slighted."

Mr. Mnyele contended that, the 2nd objection should as well be overruled since there is a plethora of cases which show that Courts have exercised those powers to punish recalcitrant parties, such as the case of **Bundu Safaris** (supra); the case of **PBPA vs. The Managing Director City Bank (T) Ltd**, Misc. Civil Appl.No.357 of 2021 (unreported), and **Sultan Ali Bin Hilal Elesri vs. Mohamed Hilal and Another**, Misc. Civil Case No.64 of 2014 (unreported).

As regards the issue of prematurity of the application due to non-exhaustion of civil remedies, he contended that, the same is without merit since all enabling provisions cited in the Chamber summons are of civil nature. He equally

relied on the Case of **Felix Mosha** (supra) and contended that; the matter would have been criminal if it had been instituted under the procedure provided for under the Criminal Procedure Act.

As regards the objection that the matter lacks cause of action against the 3rd and 4th Respondents, Mr. Mnyewe was equally vocal about that assertion urging this Court to overrule it because, the impleading of the 3rd and 4th Respondents in this application did not require the piercing of the veil of incorporation of the 1st Respondent and the 4th Respondent has no status in the 1st Respondent.

He contended that; the 4th Respondent was impleaded because of his contemptuous conduct. Relying on the case of **Bright Technical Systems and General Supplies Limited vs. Brave Engineering and Construction Company Ltd and Another,** Misc. Commercial Appl. No.132 of 2020, (unreported), he contended that, directors of a company are liable for the execution of a Court decree issued against the Company.

As regards the submission that the application is premature as the Respondents had only asked for expression

of interest and no actual leasing had taken place, and, thus, that, there is a lack of *actus reus*, it was Mr. Mnyele's submission that, the concept of *actus reus* is misapplied here as it relates to criminal law.

Finally, Mr. Mnyele submitted that, the submission that this Court is not sitting as in execution proceedings is also misconceived and should not detain the Court. He contends that, the jurisdiction of the Court to execute decrees and deal with all matters arising from execution under section 38 (1) of the CPC is distinct from the Court's jurisdiction to cite a party in the proceedings for contempt of the Court. He therefore urged this Court to dismiss the objections in their entirety.

The Respondents filed rejoinder submissions and maintained the earlier position. They also filed their submission to oppose the application. I need not go to that lengthy submissions at this early stage since the first issue which I am called upon to address is whether the objections have any merit so far.

As agreed earlier, if the objection will be found to be meritorious, then the matter will end up here and be laid to

rest. If this Court finds otherwise, I will proceed to look at the parties' submission on merit. That was a position made clear from the beginning.

To begin with, and, as I look at the objections filed by the Respondents, I find it pertinent to start by looking at the first objection. Although the Respondents have framed the first objection from "*a lack of jurisdiction approach*", I think the appropriate framing should have been from another angle of refusal by the Court to exercise its jurisdiction having been improperly moved since, as a matter of fact, and even in law, this Court is a Court vested with jurisdiction by law.

The question therefore is whether exercise of its jurisdiction can be invoked under the provisions cited by the Applicant in the Chamber Summons. Put differently or in other words round, the issue is whether the current application ought to have been filed under section 38 (1) of the CPC as the Respondents seem to be arguing. For sake of clarity, section 38 (1) of the CPC provides as follows, and I quote:

> "38(1) All questions arising between the parties to the suit in which the decree was passed, or their representative, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by separate suit."

In their submissions, the Respondents' counsels have argued that the real question that needs to be looked at is whether an expressed intention to lease, lease or sale of an attached property is an issue falling within the ambit of section 38 (1) of the CPC. They have relied on **Mulla** (supra) at page 679.

In my view, the key issue with determinative effect is whether the application ought to have been brought within the ambits of section 38 (1) of the CPC or not given that the property in question is still a subject of attachment arising from execution proceedings.

In Mulla, **The Code of Civil Procedure** (supra), at pg.679 the learned author has made it clear that:

> " A purchaser, *lessee* or *mortgagee*, from a judgment-debtor, of property belonging to the judgment-debtor and attached in execution of a decree against him, is a "representative" of a judgment debtor, within the meaning of this section, for the property being under attachment at the date of purchase, lease or mortgage, the purchaser, *lessee* or mortgagee is bound by the decree so far as the interest transferred to him is concerned."

From the foregoing, I tend to agree with the Respondents submission that, section 38 (1) of the CPC does apply to this application and ought to have formed its basis. The attached property can be a subject of a lease agreement and the lessee will equally be bound by the decree so far as the interest transferred to him is concerned.

But, to say the least, what was expressed, and as per the submissions made by the learned counsels for the parties herein, is an intention to lease the property, which property is subject of attachment order, meaning that, the same has

not been leased. Does that act constitute a conduct for which orders of the Court to show cause why the Respondents should not be punished for contempt of Court may be warranted?

If my earlier findings as per Mulla (supra) stands, i.e., where a property subject to a decree is leased will still be affected by a Court decree to the extent of the interests so transferred to the lessee, and, hence, the conclusion that, the same can still be subjected to a lease, I do not see where the issue of contempt arises where no lease has been executed.

But even if such an issue was to be present, I still find that, the thresholds that need to be met to warrant making a finding that there is contempt are high. As this Court observed in the case of **Felix Mosha** (supra):

> "the Court's power to punish for contempt is a power that, we, as Judicial Officers, are enjoined to exercise in very rare circumstances. It is, indeed, a fundamental principle of the rule of law that Court orders must be obeyed. That is the rationale for the powers we possess

> to punish for contempt. However, its employment must be weighed against the Court's duty to exercise restraint, unless there exist strong reasons for it. And the burden of proof, which lies on the applicant should be somewhere below the beyond a reasonable doubt, but certainly above a balance of probability."

From that understanding, I find that, the question could very well be settled by the executing Court under section 38 (1) of the Civil Procedure Code, Cap.33 R.E 2019 and this application ought to have been brought under the jurisdiction of Court based on that provision. I thus uphold the first objection.

Since the first objection was premised around that question and I find merit in it, I see no reasons as to why I should pronounce myself on the rest. In the upshot, this Court settles for the following orders:

1. That, this application is hereby dismissed with costs for the afore stated reasons.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 02ND DAY OF JUNE 2023

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DEO JOHN NANGELA
JUDGE