

**IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT ARUSHA**

**MISCELLANEOUS COMMERCIAL APPLICATION NO. 19 OF 2022**

(Arising from Commercial Case No. 1 of 2021)

**TIB DEVELOPMENT BANK LIMITED .....1<sup>ST</sup>APPLICANT**

**ATTORNEY GENERAL .....2<sup>ND</sup>APPLICANT**

**VERSUS**

**HANSPAUL INDUSTRIES LIMITED .....1<sup>ST</sup>RESPONDENT**

**MOUNT MERU FLOWERS LIMITED ..... 2<sup>ND</sup>RESPONDENT**

**ALLAN REUBEN MOLLEL**

**(FIRST WORLD INVESTMENT COURT BROKERS,**

**AUCTIONEERS, DEBT COLLECTOR .....3<sup>RD</sup>RESPONDENT**

**RULING**

Date of last Order: 21<sup>st</sup> February, 2023

Date of Ruling: 24<sup>th</sup> February, 2023

**MKEHA, J.**

The applicants are moving the court so that it may be pleased to investigate and find that the landed property known as 20 units of Green Houses Located at Farm No. 105/1 Nduruma Area Arumeru District with 16.184 Hectors together with Generators and Motor vehicle Reg No. T 219 CTL Make Land

Cruiser is not liable to attachment and sale in execution by the 1<sup>st</sup> respondent in satisfaction of the decree of the High Court, Commercial Division at Arusha in Commercial Case No. 01/2021. The applicants are asking the court to release the aforesaid property from attachment and sale. The application is made under Order XXI Rules 57 (1), 58 and 59 as well as section 68 (e) of the Civil Procedure Code. The chamber summons is supported with an affidavit sworn by Mr. Menson Ngahatilwa, Principal Officer of the 1<sup>st</sup> Applicant.

On the other hand, the application is resisted through counter affidavits sworn by Mr. Mohan Krishna Mandadi, Principal Officer of the 1<sup>st</sup> Respondent and that of Mr. Allan Reuben Mollel, the 3<sup>rd</sup> Respondent. Notwithstanding the fact that the second Respondent was served with the application, she filed no counter affidavit.

During hearing of the application, Ms. Jaquiline Kinyasi and Ms. Greener Mwakyoma learned State Attorneys represented the applicants. Mr. Richard Massawe learned advocate represented the 1<sup>st</sup> Respondent. Mr. Gwakisa Sambo learned advocate represented the 3<sup>rd</sup> Respondent.

In the affidavit supporting the application and the submissions by Ms. Kinyasi learned State Attorney it was stated that, on diverse dates the Government advanced in favour of the 2<sup>nd</sup> Respondent and Tanzania Flowers Limited credit facilities to support their horticulture business. That, the 1<sup>st</sup> applicant was an agent of the Government for management and recovery of the government's credit facilities. That, the 1<sup>st</sup> Applicant also advanced various banking facilities in favour of the 2<sup>nd</sup> Respondent and Tanzania Flowers Limited. Copies of Credit Facility Agreement, Mortgage Deed and Debenture deed was attached to the Applicants' affidavit as Annexure TIB 1 to be part for the affidavit.

In terms of paragraph 6 of the affidavit, as of 26/07/2022, the outstanding debt of the 2<sup>nd</sup> Respondent and Tanzania Flowers to both the Government and the 1<sup>st</sup> Applicant stood at TZS 33,229,604,506/= According to Ms. Kinyasi learned advocate, before the 1<sup>st</sup> Respondent obtained the decree against the 2<sup>nd</sup> Respondent, the latter had created mortgage over the farms and also issued debenture to secure the liabilities. According to the learned advocate, after default of the 2<sup>nd</sup> Respondent and Tanzania Flowers Limited to repay their respective loans as per relevant loan agreements, the 1<sup>st</sup> Applicant for itself and on behalf of the Government appointed a Receiver Manager over the assets of the two companies with instructions to recover

the secured debts. The properties subject of an attachment order in Commercial Case No. 1 of 2021 form part of the assets of the 2<sup>nd</sup> Respondent put under receivership in terms of section 126 9a) of the Land Act on or about 5<sup>th</sup> August, 2021. The Deed of Appointment of Receiver Manager of the 2<sup>nd</sup> Respondent, which is part of paragraph 10 of the Applicants' Affidavit (Annexure TIB 2) indicates that, up to when the receiver manager got appointed on 05/08/2021, the 1<sup>st</sup> Applicant was the registered holder of the Debenture dated 2<sup>nd</sup> July, 2009 (inclusive of all variations) and the Mortgage dated 2<sup>nd</sup> July 2009 (CTS Nos. 15434 & 19569 registered on 3<sup>rd</sup> August 2009 under File Document No. 25488) over Farms Nos. 105/1/1 and 105/2/1 respectively all created by **MOUNT MERU FLOWERS LIMITED** in favour of **TIB DEVELOPMENT BANK LIMITED**. In view of the learned State Attorney, the applicants had sufficient interest in the attached property warranting lifting of the attachment order.

Mr. Massawe, learned Advocate for the 1<sup>st</sup> Respondent commenced his reply submissions by adopting the contents of the 1<sup>st</sup> Respondent's affidavit to be part of his submissions. The learned Advocate submitted that whereas the basis of the application was creation of a mortgage and debenture which are

charges required to be registered, the same had not been registered rendering them void. In terms of paragraph 5 (b) of the 1<sup>st</sup> Respondent's affidavit BRELA Search Report dated 05/08/2022 indicates that regarding registered charges, the status was as here under:-

*"The company has filed various documents to make changes in the company, but the same are not registered due to anomalies such as some annual returns were not reported on annual returns".*

According to Mr. Massawe, learned Advocate, the Applicants had no interest in the attached property because of invalidity of the debentures and mortgages which were not registered. Regarding the contents of paragraph 10 of the Applicants' affidavit the 1<sup>st</sup> Respondent attacked the Applicants as to why would they appoint a Receiver Manager on the properties owned by Tanzania Flowers Limited while the contract was between the 1<sup>st</sup> Applicant and 2<sup>nd</sup> Respondent.

Mr. Sambo, learned Advocate for the 3<sup>rd</sup> Respondent adopted the skeleton arguments of the 3<sup>rd</sup> Respondent, the submissions by Mr. Massawe learned

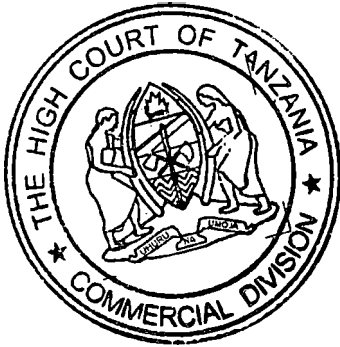
Advocate and the affidavit of the 3<sup>rd</sup> Respondent to be part of his reply submissions on behalf of the 3<sup>rd</sup> Respondent. The learned Advocate went on to submit that, the Applicants' affidavit had nothing indicating interest of the property. In view of applicants in the attached the attached the learned Advocate, in the absence of registration, the Applicants could not enjoy rights of a secured creditor. Regarding the contents of paragraph 10 of the Applicants' affidavit, the 3<sup>rd</sup> Respondent insisted that the attached properties namely, green houses were not part of the securities.

The only issue for determination is whether the Applicants have proved that at the date of attachment, they had some interest in or were possessed of the property attached. In terms of the search report from BRELA dated 05/08/2022, which forms part of the first applicant's affidavit, the charges alleged by the applicants had not been registered. The position of the law is clear that a charge created over a security becomes void if it is not registered under the relevant laws. And when a change is not registered no right of priority of payment can be successfully claimed by the creditor. Therefore, it is my holding that the applicants did not successfully prove the alleged interest within the meaning of the law. The matter does not end there.

Under Rule 58 of Order XXI of the Civil Procedure Code, the objector has to prove having interest in or being possessed of the property attached at the time of attachment. See: **SOSTHENESE BRUNO & ANOTHER VS. FLORA SHAURI, CIVIL APPEAL NO. 249 OF 2020, CAT, AT DAR ES SALAAM.**

Whereas the attachment order was issued by this court on 13/10/2022, it is not disputed that the property has been under receivership of **Mr. Daniel B. Welwel** since the 5<sup>th</sup> August, 2021. Under paragraph 11 of the Applicants' affidavit facts regarding taking possession of the attached property are made certain. Whether the appointment of the said receiver manager complied with the law or not is not the subject of the present application. Therefore, for a reason that the applicants were in possession of the attached property when the attachment order was issued, I hold the application to be Meritorious. I proceed to make an order that the prohibitory order and attachment orders in respect of the 2<sup>nd</sup> Respondent's properties dated 13<sup>th</sup> October, 2022 be lifted. I make no order as to costs.

Dated at ARUSHA this 24<sup>th</sup> day of February, 2023.



  
**C.P. MKEHA**

**JUDGE**

**24/02/2023**

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



  
**C.P. MKEHA**

**JUDGE**

**24/02/2023**