

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

MISC. COMMERCIAL APPLICATION NO. 105 OF 2023

BETWEEN

NMB BANK PLC.....APPLICANT

VERSUS

YARA TANZANIA LIMITED.....1ST RESPONDENT

LEONARD DOMINIC RUBUYE T/A

RUBUYE AGRO CHEMICAL SUPPLIES.....2ND RESPONDENT

RULING

Date of last order: 31/05/2024

Date of ruling: 14/06/2024

MKEHA, J.

The applicant has preferred the instant application under Order XXI rule 57(1) & (2) (1) and section 95 of the Civil Procedure Code. The application is by way of a Chamber Summons supported with an affidavit of one Sharifa Karanda, the applicant's Acting Head of Legal Services. According

to the Chamber Summons, the applicant seeks the following orders from this court:

1. That, this court be pleased to investigate the correctness of the attachment and prohibition of the landed property on plot No. 183, Block B, registered under Certificate of Occupancy, Title No. 46284 located at Tegeta Area, Kinondoni Municipality, Dar es Salaam, in execution of judgment and decree in Commercial Case No. 29 of 2016 at the instance of the 1st respondent.
2. That, this Honourable Court be pleased to order and declare that the attachment for purposes of intended sale of landed property on plot No. 183, Block B, registered under Certificate of Occupancy, Title No. 46284, located at Tegeta Area, in Kinondoni Municipality, Dar es Salaam is contrary to the law and void.
3. That, this Honourable Court be pleased to postpone the intended sale pending investigation and issue permanent injunction order against the 1st Respondent, and/or, their agents from attaching for sale the land in dispute until the mortgage filed under File Document No. 168917 in favour of NMB BANK PLC, the Applicant above is discharged.

In opposition, the respondents filed their respective counter affidavits. In addition to its counter affidavit, the 1st respondent filed a notice of preliminary objection. The objection contains five (5) points of law, namely;

1. That, prayer one in the Chamber Summons is untenable for being preferred as revision in disguise.
2. That, prayer two in the Chamber Summons is untenable for being contrary to the power vested to this Court under Order XXI Rule 57(1) and (2) of the Civil Procedure Code.
3. That, prayer three in the Chamber Summons on permanent injunction is untenable for being inappropriate.
4. That, prayer three in the Chamber Summons is untenable for being premature as there is no any advertisement for sale made for this court to postpone.
5. That, the application is untenable and bad in law for containing omnibus prayers.

Hearing of the preliminary objection was conducted by written submissions. The applicant and the 1st respondent were represented by Messrs Makaki Masatu and Erick Denga learned counsel.

Submitting in respect of the 1st point of objection, the 1st respondent's counsel argued that, since the prayer is to investigate correctness of attachment and prohibitory order of this court, then this suggests that, the order was incorrectly issued or that, there are apparent irregularities in the said order. While acknowledging existence of the prohibitory order duly issued by this court on 12th May 2023, the 1st respondent disputed the prayer for investigating correctness of the aforementioned order. In the 1st respondent's view, determination of this prayer would tantamount to this court revising its own order in which it has no jurisdiction to do so for being functus officio. To buttress this argument, the case of **MS. SYKES INSURANCE CONSULTANTS CO. LTD V. MS. SAM CONSTRUCTION CO. LTD**, CIVIL REVISION NO. 8 OF 2010, was cited.

Regarding the 2nd point of objection, the 1st respondent's counsel submitted that, Order XXI Rule 57(1) of the Civil Procedure Code does not give power to this Court, sitting in objection proceedings, to be able ordering its previous order, as being void. In support thereof, the 1st respondent cited the case of **ABDALLAH ALLY T/A OTTAWA ENTERPRISE (1987) V. TABATA PETROL STATION CO. LTD AND**

ANOTHER, CIVIL APPEAL NO. 89 OF 2017 whose ratio decidendi is to the effect that, jurisdiction is conferred by a statute.

Regarding the 3rd point of objection, it was submitted that, there is no law providing for permanent injunction relief against the judgment debtor's properties as opposed to temporary injunction. In view of the learned counsel, the 3rd prayer was untenable.

Submitting in respect of the 4th objection, the 1st respondent's counsel argued that, the prayer to postpone sale pending investigation had been prematurely made as there was no proclamation of sale in respect of the suit premises. On this, the 1st respondent relied upon Rule 57(2) of Order XXI of the Civil Procedure Code. The decision in **BISHOP DR. EDWARD JOHNSON MWAIKALI V. THE REGISTERED TRUSTEES OF EVANGELICAL LUTHERAN CHURCH IN TANZANIA AND OTHERS**, MISC. CIVIL APPLICATION NO. 14 OF 2022 was as well cited.

Regarding the 5th point of objection, the 1st respondent's counsel submitted that, there were four different prayers which had been mixed together in a single Chamber Summons, some of which could not be granted by this court but the Court of Appeal. This, according to the 1st respondent's

counsel, was an abuse of court process as well as a breach of the rule against omnibus applications. In support thereof, the decision in **MOHAMED SALIMIN V. JUMANNE MAPESA**, CIVIL APPLICATION NO. 103 OF 2014 was cited.

Submitting in opposition of the 1st point of objection, the applicant's counsel argued that, the objection wa incompatible with the parties' pleadings and the law on preliminary objections because the chamber summons and the affidavit in the instant application had not pleaded the facts on irregularity of the attachment order. The applicant cited the locus classicus case of **MUKISA BISCUITS MANUFACTURING COMPANY LTD V. WEST END DISTRIBUTORS LTD** [1969] E.A. 696, in support of this argument.

The applicant went on to contend that, the first prayer in the chamber summons sought to investigate the claim on attachment of the landed property on Plot No. 183 Block B, registered under Certificate of Occupancy No. 46284. That, since the applicant was not party to the proceedings from which the attachment order was issued, it had the right to institute objection proceedings in terms of Order XXI Rule 57(1) of the Civil Procedure Code. The case of **KATIBU MKUU AMAN FRESH CLUB V.**

DODO MAMBOYA AND ANOTHER [2004] TLR 326, was referred to in support of this assertion.

Submitting on the 2nd objection the applicant asserted that, prayer two in the chamber summons ought to be read together with the affidavit in support of the same, as well as the provisions under which the application was made. The applicant emphatically stated that, the applicant was not asking for consideration on merits of judgment, but exercising its right to objection proceedings. To back up this position the applicant relied upon the cases of **CHOTABHAI M. PATEL V. CHAPRABHI PATEL** [1958] EA 743 and **SOSTHENES BRUNO & ANOTHER V. FLORA SHAURI**, CIVIL APPEAL NO. 249 OF 2020.

As to the 3rd objection the applicant submitted that, it was incorrect on part of the 1st respondent to claim that the applicant's prayer number three was for permanent injunction. The applicant stood firm that, the said prayer was not for permanent injunction.

Submitting on the 4th objection the applicant was of the firm view that, the same raised factual issues which required proof hence, it defeated the whole purpose of a preliminary objection. The case of **MOHAMED**

ENTERPRISES (T) LIMITED V. MASOUD MOHAMED NASSER, CIVIL APPLICATION NO. 33 OF 2012 was referred to, in support of the postulation.

The applicant finalized its submissions in respect of the 5th objection by stating that, it was not correct that the chamber summons was flooded with four different prayers. That, the said chamber summons contained only three prayers. Regarding the position in **Mohamed Salimin's** case (supra), the applicant strongly maintained that, the same was inapplicable to the instant application as matters discussed therein were under the Court of Appeal Rules and that, the nature of the prayers in the said case were said to be vague and difficult to comprehend. The applicant proceeded to contend that, combining prayers in a single Chamber Summons had not been prohibited. In support of this contention, the applicant cited the cases of **TANZANIA KNITWEAR LTD V. SHAMSHU ESMAIL** (1989) TLR 48; **MIC TANZANIA LIMITED V. MINISTER FOR LABOUR AND YOUTH DEVELOPMENT**, CIVIL APPEAL NO. 103 OF 2004; **RUVU GEMSTONE MINING CO. LIMITED V. RELIANCE INSURANCE COMPANY (T) LTD**, MISC. COMMERCIAL CAUSE NO. 21 OF

2016; and **OTTU ON BEHALF P.L. ASENGA & OTHERS V. AMI T. LTD,**
CIVIL APPLICATION NO. 20 OF 2014.

Therefore, the applicant concluded on this point of objection by stating that, since the prayers were related and interdependent, this court ought to proceed to determine and grant the same accordingly. To fortify this assertion, the applicant cited the case of **JUSTINE F. BUFURE V. HAJI R. MWIKALO,** CIVIL APPEAL NO. 292 OF 2023. In the end, the applicant implored this court to dismiss all the preliminary objections for want of merits.

In rejoinder submissions the 1st respondent reiterated what had been submitted in chief. Therefore, it serves no useful purpose to reproduce the said rejoinder submissions.

The 1st objection challenges the use of somewhat statutory words '*to investigate the correctness of the attachment order and prohibition of ...*'

In view of the 1st respondent the words suggest that it was wrong for the executing court to issue the attachment orders. That is entirely wrong. The words used in the chamber summons are mere ordinary words used to move the court to investigate the genuineness of the objector's claims

having trace in the wording of rule 57 (1) of Order XXI of the Civil Procedure Code. I thus hold the 1st objection as wanting in merits. The same is dismissed.

Regarding the 2nd , 3rd and 4th objections, the mere fact that the executing court would not be justified to hold its own order as being void cannot be a basis of preferring a preliminary objection aimed at persuading the court not to hear the objection proceedings on merits. In any case, whenever the objector succeeds, the executing court is justified to order lifting of its former order for attachment or issuing any other appropriate order depending on the circumstances of the case. Until then, this court cannot at the moment decide on what would be the resultant order. Whether the reliefs sought in the chamber summons (prayer Nos. 3 and 4) are grantable through objection proceedings or not, cannot be the basis of shutting down the objector's path to this court. What remains central in the application is the fact that the application and the supporting affidavit suggest that the applicant had an interest in the attached property at the time of attachment. This is what objection proceedings are concerned with. It is only through availing a chance of being heard to the parties, the interest if any would be revealed or otherwise. If the requisite interest

would be established, the fact that the application involved other prayers which would not be grantable would have no bearing to the ultimate results of the application. The 2nd, 3rd and 4th objections are dismissed for being unmeritorious.

Regarding the 5th point of objection, there is no provision of the law which bars omnibus application. There is no law that bars combination of distinct reliefs in one application. There is also no hard and fast rule of practice developed by courts to discourage combination of two or more distinct reliefs in one application. All what the courts discourage is combination of several reliefs in one application, which are governed by different laws with different yardstick or timelines. Actually, the courts encourage combination of reliefs in one application to avoid multiplicity of applications, provided the reliefs are not diametrically opposed to each other. See: MIC TANZANIA LIMITED VS. MINISTER OF LABOUR AND YOUTH DEVELOPMENT AND THE ATTORNEY GENERAL, CIVIL APPEAL NO. 103 OF 2004, CAT (Unreported)

In the present application, the main reliefs being asked are: investigation on the objector's claim and postponement of sale. I agree with the 1st respondent's counsel that Proclamation of Sale has not been issued.

However, that is the consequential order on failure of the objection proceedings and depending on the contractual terms between the 1st and 2nd respondents, the former might be tempted to effect sale without recourse to court orders. Both reliefs are grantable under the same law, the Civil Procedure Code. I therefore hold that the application is not omnibus. The 5th objection is dismissed for being unmeritorious.

For the foregoing reasoning, both preliminary points of objection are dismissed for being unmeritorious. I make no order as to costs.

DATED at DAR ES SALAAM this 14th day of JUNE 2024.



C. P. MKEHA
C. P. MKEHA

JUDGE

14/06/2024

COURT: Ruling is delivered in the presence of Mr. Samson Lukumai learned advocate for the 1st respondent and Mr. Michael Mkenda learned advocate for the 2nd respondent.



C. P. MKEHA
C. P. MKEHA

JUDGE

14/06/2024