

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC LAND APPLICATION NO. 995 OF 2017

*(Arising from Land Case No. 210 of 2015 and Misc Application No. 71 of 2016
and Misc Land Application No. 985 of 2017)*

EXIM BANK (T) LTD.....APPLICANT
VERSUS
NATIONAL FURNISHERS LTD.....RESPONDENT

RULING

11/4/2018 & 26/6/2018

MZUNA, J.:

Exim Bank (T) Ltd the applicant herein, has filed this application against **National Furnishers Ltd** (to be referred herein after as the respondent) praying among others for interim/interlocutory orders to stay and/or put in abeyance the implementation of an order by the Deputy Registrar pending hearing and determination of application in Misc. Land Application No. 985 of 2017 now pending in court. The application is preferred under Section 68(e) and 95 of the Civil Procedure Code, Cap 33 RE 2002 and is accompanied by the affidavit deposed by Mr. Edmund Mwasaga. There was also filed a counter affidavit sworn by Vicas Varma.

Before hearing could proceed, the respondent through Mr. Seni S. Malimi, the learned counsel filed an objection on a preliminary point of law to the effect that the application is defective for wrong and/or non citation of proper provisions of the law.

The respondent through Mr. Gabriel Simon Mnyele, the learned counsel objected it.

By consent of the parties, it was agreed that hearing should proceed by way of written submission. The raised preliminary objection and the application were consolidated. The main issue (s) are :-

1. Whether there is wrong citation of the applicable law?

2. If the first issue is answered in the negative whether interim/interlocutory orders to stay the order by the District Registrar should be allowed?

The background story to the case is that after the respondent herein had failed to satisfy the decree in the Land Case No. 210 of 2015, the applicant initiated execution proceedings vides Miscellaneous Land Application No. 71 of 2016 for a decretal sum of USD 2,079,867.88. The mode of execution applied for by the applicant was attachment and sale of the respondent's property over Plot No. 1354 and 1353, Msasani Peninsular, Dar es salaam with certificate of Title No. 41285 and 41332, by way of public auction.

The applicant's application for execution was granted by the Honorable court and a Court Broker, M/s Rhino Auction Mart was appointed by the court. Further, the said court Broker was granted proclamation of sale and on 30th September, 2017 an auction was conducted.

In the said auction, the applicant who is a decree Holder had initially sought leave of the court and was granted, emerged the highest bidder for the purchase price of USD 4,005,000.00 The applicant being the purchaser in the auction, deposited with the court the required 25% of the bid that is \$ 1,001,250.00 (Say us Dollars One Million One Thousand Two Hundred fifty only).

The applicant being the decree holder and also the purchaser of the auctioned property, wrote to the executing court applying for a set off of the remainder of the decretal sum which was yet to be deposited in court. The said set off was premised on another alleged loan by the respondent to the applicant. This alleged loan is not part of the decree sought for execution. The said loan was on account of Kawe Apartments Limited, which is not part of the decree in Land Case No. 210 of 2015.

Further, the said alleged loan is subject of a suit in Land Case No. 413 of 2016 between the respondent, Kawe Apartments Limited and the applicant. The said suit is pending in this court.

On the 30th October, 2017 the executing court, Hon. Mahimbali, Deputy Registrar ruled that the set off applied for by the applicant should only be confined to the decretal sum in execution and not otherwise. The executing court further ordered that the reminder of the sum after the allowed set off be deposited in court in a period of two (2) days from the 30th October 2017.

The applicant, being dissatisfied with the decision of the Deputy Registrar filed the instant application.

In other words, the order which is being challenged in Misc. Land Application No. 985 of 2017 is that of the Deputy Registrar for the deposit of U\$ 923,882.12 for the simple reason that it was made ex parte and without application until they are heard in full. It is therefore being sought that they be heard. Before such hearing, there arose a preliminary objection. The application and the preliminary objection have been consolidated.

The argument raised in the raised preliminary objection by Mr. Seni Malimi the learned Counsel is that the prayers sought for by the applicant through her application cannot be supported by the cited provisions of section 68(e) and

section 95 of the Civil Procedure Code, Cap 33 RE 2002. That the said provisions of law do not confer powers on the Honourable court to grant the orders sought.

That for the said provisions to be invoked they presuppose existence of a suit while the root of the application is execution proceedings and not a suit. That since the matter arises out of execution, it cannot be treated as if it was an interlocutory issue pending determination of a suit. That, it falls squarely under Section 38 (1) of the Civil Procedure Code, Cap 33 RE 2002.

The learned counsel referred to the case of **CRDB Limited v. Mathew Kilindu and Another**, Civil Application No. 74 of 2010, at page 6 and 7. He insisted that in the absence of the suit there is wrong citation.

As for the provisions of section 95 of the CPC, the learned counsel submitted that such provision is applicable where there is no provision governing the subject matter. He made reference to the case of **Aero Helicopter (T) Ltd v. F.N Jansen** [1990] TLR 142 at P. 145.

That, there is wrong and/or non citation of enabling provisions of the laws and therefore the application is incompetent and the same should be struck out in view of what was held in the case of **Edward Bachwa and 3 others v. The attorney General and Another**, Civil Application No. 128 of 2006, unreported.

On his part, Mr. Mnyele, the learned counsel submitted that he cited section 68(e) and 95 of the Civil Procedure Code as enabling provisions for this application because the application by its nature is for an interlocutory order. That, according to Black's Law Dictionary, "***interlocutory order***" means "**an order that relates to some intermediate matter in the case, any order other than the final order.**" That the orders that have been sought are interlocutory pending the determination of Miscellaneous Land Application No. 985/2017.

It was his view that any pending proceedings may suffice to entitle a litigant to apply for interlocutory orders. Further that it has not been disputed that the application has been made under the auspice of Miscellaneous Land Application No. 985/2017. He prayed for the court to be very liberal in interpreting what constitute a suit. It was his view that not every suit need be instituted by a plaint. That, section 22 of the Civil Procedure Code recognizes the fact that a suit may be filed either by the plaint or in any manner as may be presented. He referred to the case of **Honourable Attorney General V. Reverend Christopher Mtikila**, Civil Appeal No. 20/2007 where after reviewing various definitions of suits from various sources the court had the following to say at page 9:-

"It is eminently clear from these definitions that suits are proceedings of a civil nature in a court of law involving two or more parties on a dispute or claim which needs to be adjudicated upon, to determine or declare the rights of the disputing parties. The procedure for instituting and conducting such proceedings is in accordance to the Civil Procedure code or as provided under any other written law. "

From that definition, he further said, Application No. 985/2017 is in itself a suit under which interlocutory orders can be sought and granted.

Lastly he touched on section 95 of the Civil Procedure Code that it provides for utilization of inherent powers of the court. He admitted in principle that section 95 of Civil Procedure Code will only apply where there is no specific provision of the law that will cater for a particular situation citing the case of **Bunda District Council v. Viriam Tanzania Ltd** [2000] TLR 385.

That there is no specific provision of law that provides for powers of the court to put in abeyance or to stay the implementation of the Registrar's order that directed the applicant to deposit the proceeds of sale within 48 hours. He is therefore of the view that section 95 requires the court to exercise its powers where it is necessary for the ends of justice. That in order for justice to be done it is necessary to stay the Registrar order while the order is being assailed in another proceedings because if the same is not stayed, the former application will be rendered redundant and only of academic importance.

As for the applicability of section 38(1) of the CPC, he submitted that it is not applicable. In any case, he further said, the order which is being challenged relates to execution which was completed when the sale by auction was done. That, it does not relate to the satisfaction or discharge of the decree in accordance to the Provision of the O. XXI Civil Procedure Code because satisfaction or discharge of the decree refers, in so far as money decrees are concerned when money payable is fully paid to the judgment debtor. That the order prayed for has nothing to do with that. It is concerned with the stay of an order that the applicant believe to be illegal. He prayed for the court to dismiss the preliminary objections and hold that the provisions cited are proper in the circumstance.

That the cited case of **CRDB Bank Limited v. George M. Kilindu And Another** (supra) in support of section 38 (1) of the Civil Procedure Code is distinguishable from the facts of this case and did not lay down the general principles of law to that extent. He prayed for the preliminary objection to be dismissed.

By way of rejoinder the learned counsel reiterated his submission in chief and said that the application is incurably defective as there is no enabling provision which was cited.

Let me start with the first point, the question is whether there is wrong citation of the applicable law? The second question is whether Misc. Land Application No. 985 of 2017 is a suit, if not is it precluded from being determined on that account only as an interlocutory order?

Mr. Mnyere the learned counsel concedes that though it is not a suit in a proper sense, however for the purpose it was intended it should be treated as such.

The two posed questions are dependent on the second point, what is meant by a suit? I must confess, the learned counsels have made thorough research on this point and similar points relevant to the raised preliminary objection and the pending application in general. However, I find it proper to adopt the definition of a **suit** as stated in **Black's Law Dictionary**, 8th Edition.

Suit means:-

"Any proceeding by a party or parties against another in a court of law."

It goes further to define **Proceeding** to mean:-

*"The regular and orderly progression of a law suit, **including all acts and events between the time of commencement and the entry of judgment.**"*

That definition is in agreement with the definition of a suit as stated in the case of **Honourable Attorney General Versus Reverend Christopher Mtikila** (supra) where **the term suit** was defined as:-

"It is eminently clear from these definitions that suits are proceedings of a civil nature in a court of law involving two or more parties on a dispute or claim which needs to be adjudicated upon, to determine or declare the rights of the disputing parties. The procedure for instituting and conducting such proceedings is in accordance to the Civil Procedure code or as provided under any other written law. "

In other words, suit must *prima facie* have proceedings the end result of which is a judgment. After judgment there must be a decree and one is expected to file an appeal. The application of section 22 of the CPC, with due respect to Mr. Mnyere, the learned counsel does not cover situations he was talking about, that is matters arising from execution. That is covered under section 38 (1) of the CPC and therefore, there cannot be temporary order of injunction in the absence of a suit (see Oder XXXV11 Rule 1 (a) and 2 (1) of the CPC).

The application without beating around the bush would therefore fall under section 38 (1) of the CPC because as Mr. Seni Malimi has said, it arises from the execution and therefore there cannot be application for temporary

injunction in the absence of the suit. Section 38 (1) of the CPC reads as follows:-

"(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 a separate suit.

Section 68 (e) of the CPC which Mr. Mnyere cited as a substitute reads as follows:-

In order to prevent the ends of justice from being defeated the court may, subject to any rules in that behalf-

"(e) Make such other interlocutory orders as may appear to the court to be just and convenient." (Emphasis mine).

That provision envisages situations where court can order interlocutory orders where it deems fit and just. These are discretionary powers which however the court must be properly moved. The correct approach was to use section 38 (1) of the CPC as well stated in the case of **CRDB Limited V. Mathew Kilindu and Another (supra)** at pages 6 and 7 that:-

"...Section 38 (1) of the CPC governs the situation under discussion... (it does not) provide any such exception as contended..."

Having found that there is a specific provision to cover for the matter then Section 95 of the CPC is inapplicable. I am guided by the decision in the case of **Aero Helicopter (T) Ltd vs F.N. Jansen** (supra) that:-

"It is to be remembered that the inherent power of the High Court under section 95 of the Code is exercisable were (sic) the law has made no provision governing the particular matter at hand." (Emphasis mine)

It is for that reason Mr. Seni Malimi asked for the court to invoke the case of **Edward Bachwa and 3 others v. The attorney General and Another** (supra) and proceed to strike out the application.

This court finds that the order was made ex parte without the other party being heard and in fact without satisfaction of the decree in the auction which was conducted. Failure to accord the other party right to be heard is something which no court of law worth such a name can condone. However court cannot act without being moved.

Paragraphs 12 and 13 of the affidavit in support of the chamber application which is a core of the said application reads as follows:-


1. If the money is deposited in the Judiciary account, the respondent may collect the same at the detriment of the applicant. Since the respondent is impecunious the applicant will suffer losses that will

not be remedied. The facts averred in paragraph 12 of the affidavit have not been denied in substance by the respondent.

2. That the respondent is still indebted to the applicant in her capacity as a guarantor to the loan that was granted to its sister company styled as Kawe Apartment limited the matter that is sub judice in the commercial court.
3. Application No. 985/2017 hinges on non-implementation of the Deputy Registrars order. It means that if the Deputy Registrar order is not stayed (and is implemented) the substratum of this application will be gone, the application will be made redundant and more academic without practical significance.
4. In any case the respondent will not be prejudiced if an order is granted.

There may be good cause but the mode in which it was sought is what is being challenged. There is an issue or question between the parties in the application that relate to execution discharge or satisfaction of the decree thus warranting the invocation of section 38(1) of CPC not the cited provisions.

For the above stated reasons, I allow the raised preliminary objection and proceed to strike out the application No. 995 of 2017 for wrong citation of the applicable law with costs.


M. G. MZUNA,
JUDGE. 26/6/2018

26/06/2018

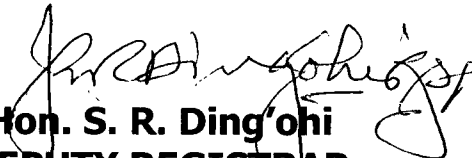
Coram: Hon. S. R. Ding'ohi DR

For applicant: Absent

For respondent: Mr. Tazan, advocate

B/C:

COURT: Ruling delivered this 26th day of June, 2018 in the presence of Mr. Tazan, the advocate for the respondent and in the absence of the applicant and for her advocate without notice.


Hon. S. R. Ding'ohi
DEPUTY REGISTRAR
26/06/2018