

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

**MISC LAND APPLICATION NO. 170 OF 2022**

(Originating from Land Case No. 99 of 2021)

**JULIANA ARMSTRONG JERRY ..... APPLICANT**

**VERSUS**

**INTERNATIONAL COMMERCIAL OF TANZANIA .... 1<sup>ST</sup> RESPONDENT**

**ARMSTRONG NICO JERRY .....2<sup>ND</sup> RESPONDENT**

**SKYMAX ELEVATORS LTD ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

19/5/2022 & 08/06/2022

**A. MSAFIRI, J**

The applicant has filed this application seeking for the orders that, this court be pleased to investigate the claim and entertain the objection proceedings by denying the purported attachment and sale attempt or revoke any attachment order thereto, and consequently further revoke the mortgage in respect of the property at dispute.

The application is brought under Order XXI, Rule 57 (1) and 57(2), 58 and 59 and Section 95 all of the Civil Procedure Code, Cap 33 R.E. 2019. It is supported by the affidavit of the applicant. *Alle*

In filing her counter affidavit, the 1<sup>st</sup> respondent also raised preliminary objections to the effect that;

- i) That, this application is hopelessly filed out of time without the leave of the Court.
- ii) That, the application is omnibus containing three unrelated and independent applications in one prayer which are:
  - a) Investigating and entertainment of the objection proceedings.
  - b) Revoke any attachment.
  - c) Revoke the mortgage in respect of the property in dispute.
- iii) This being private sale and in absence of the court order for execution, this Court has no jurisdiction under the provisions of Order XXI Rule 57(1), 57(2), 58 and 59 to entertain objection proceedings as there is no court order in respect of execution of a decree.

The preliminary objection was disposed of by way of written submissions. The submissions by the 1<sup>st</sup> respondent in support of preliminary objections were drawn and filed by Thomas Eustace Rwebangira, learned advocate, while the submission in opposing the preliminary objections was drawn and filed by Titus Aron, learned advocate.

Submitting on the 1<sup>st</sup> limb of preliminary objection, Mr. Rwebangira submitted that, this application for objection proceedings is time barred. He said that this application is made under Order XXI Rule 57 (1), 57(2), 58 and 59 and Section 95 of the Civil Procedure Code (herein as CPC) which does not provide for time limit. However, the First Schedule, Part III, Item 21 of *Allo.*

the Law of Limitation Act provides for the sixty days within which the application shall be brought.

The counsel argued that, in the applicant's affidavit, she stated that she became aware of the intended sale on 22/01/2022. In his opinion, the time should then be computed from that date by which the applicant has stated in her affidavit. He cited numerous authorities to support his argument and urged the Court to dismiss the application with costs.

On the 2<sup>nd</sup> limb of application, the counsel for the 1<sup>st</sup> respondent submitted that, the applicant has combined three different prayers which are for distinct reliefs and are falling under different provisions of law and procedures. He argued that, the prayer of objection proceedings is covered under Order XXI rule 57 of the CPC. It applies where there is application for execution to the Court and an order of the Court ordering the attachment and sale. He said that, the first prayer of investigation of the objection was enough under Rules 57, 58 and 59 of the CPC.

He contended that, the second prayer for revocation of attachment order is separate prayer and in absence of execution order, the prayers cannot be combined together. He said further that, the third prayer for revoking the mortgage deed in respect of the disputed property is a substantive prayer which cannot be granted in absence of a main suit.

On the third limb of preliminary objection, Mr. Rwebangira submitted that, this court has no jurisdiction to grant the requested prayers. He pointed that, according to the contents of the applicant's affidavit, she was made *Alles*.

aware of the intended sale of the disputed property through social media, and through a later dated 15/01/2022. In his opinion, this was a private sale by public auction.

He argued that, the jurisdiction of this Court on objection proceedings is under the provisions of Order XXI Rule 57 read together with Rules 58 and 59, and this is where there is an order of execution through Court process. In absence of that order, the Court has no jurisdiction. He prayed for the dismissal of the application with costs.

In reply, the counsel for the applicant started his submission by pointing out that the 1<sup>st</sup> respondent failed to comply with the court's order which insisted that the written submissions should be limited to three pages only where the 1<sup>st</sup> respondent's submission is four pages. He prayed for the court to dismiss the filed submission with costs.

Submitting in opposition of the 1<sup>st</sup> limb of preliminary objection, the counsel for the applicant stated that, after realizing the intended sale of property in dispute, the applicant filed a case disputing the sale. The case was admitted in court on 26/01/2022, was struck out on 31/3/2022, therefore, the time computation should start to run from the date the application was struck out i.e. on 31/3/2022.

On the second limb of preliminary objection, the counsel for the applicant submitted that this objection is baseless as it is clear that the chamber summons outlined prayers where the court is moved to determine. He added *Ally*.

that, even if the prayers were omnibus, it is trite law for the court to hear and determine omnibus application whenever the prayers are interrelated or interlinked as it is in the case at hand.

To cement his point, he cited among others, the case of **Gervas Mwakafila & 5 others vs. the Registered Trustees of Moravian Church in Southern Tanganyika**, Land Case No. 12 of 2013 (unreported). He prayed for the Court to hear and determine the application on merits.

On the third limb of preliminary objection, the counsel for the applicant stated that, in its counter affidavit, the 1<sup>st</sup> respondent has attached the deed of settlement with a settlement decree. That, this clearly stipulates that the sale of property in dispute is execution of a court decree. He added that the High Court of Tanzania is vested with unlimited jurisdiction to hear and determine all matters relating to land including objection proceedings. He prayed for the preliminary objections to be overruled and application to be heard on merit.

In rejoinder, the 1<sup>st</sup> respondent mostly reiterated his submissions in chief and added on the ground of time limitation that, when the previous application was struck out, it was as if there was nothing on record. He pointed out that, time has to be computed from the date the applicant was made aware of the challenged intended auction on 22/01/2022.

Having considered the contending submission of both sides, before embarking on determination of the preliminary objections, I have to deal

*Alle.*

with the fact pointed out by the counsel for the applicant that the 1<sup>st</sup> respondent's written submission did not comply with the Court schedule order on limitation of pages. Instead of filing three pages written submission, the 1<sup>st</sup> respondent has filed a four pages written submission.

Without wasting much time, in the circumstances that the party in written submission has exceeded the number of page limit ordered by the court, then the remedy is not to dismiss the whole filed submission but for the court to disregard the exceeded submissions. And this is what I have done i.e. I have disregarded the fourth page which has exceeded in the 1<sup>st</sup> respondent's submission.

The second step is to determine the issue whether the raised preliminary objections by the 1<sup>st</sup> respondent has merit.

Starting with the first limb that the application is time barred, this application is made under provisions of the CPC which does not provide for time limit. However, in the Law of Limitation Act, under the Schedule, Part III, Item No. 21, it provides for 60 days limitation upon which the applications can be filed.

In the present application, the applicant has stated that she became aware of the intended sale of the property in dispute on 22/01/2022. She promptly filed an application for objection proceedings on 26/01/2022 which was struck out by this court on 31/3/2022.

*Alls.*

The counsel for the 1<sup>st</sup> respondent is contending that, the present application is time barred contrary to the provisions of the Law of Limitation Act as it was filed beyond the sixty days (60) from the time the applicant is said to have been aware of the intended sale.

According to the 1<sup>st</sup> respondent, the fact that there was an application which was filed on time but was struck out, does not preclude the fact that the current application is time barred as the former application is none existent in this Court.

In this, I agree with the submissions that since the first application which was filed by the applicant on 26/01/2021 was struck out, then the same ceased to exist in court and cannot be used in computing the time.

In the case of **Bin Kuleb Transport Company Limited vs. Registrar of Title and 3 others**, Civil Application No. 522/17 of 2020, CAT at Dar es Salaam (unreported), the Court of Appeal in determination of fact that the first application in that matter was struck out, was of the view that with the striking out of the first application, it was as if it had never existed which entitled the applicant to file the second application.

In the application at hand, the first application cannot be counted since it does not exist as it was struck out. In the circumstances, what the applicant was supposed to do was to file for an extension of time to file the present application. For this reason, I find that the first limb of the preliminary objection has merit and I sustain it.

*Adle.*

The second limb of preliminary objection is that, the 1<sup>st</sup> respondent is claiming that this application is omnibus for combining three unrelated and independent applications.

The applicant has strongly opposed the claims and stated that the claims are baseless, and even if the prayers contained in the chamber summons were omnibus, then the Court can hear and determine the same if they are interrelated or interlinked.

The issue here is whether the prayers in the chamber summons are interrelated or interlinked.

In the chamber summons filed by the applicant, the following are inter parties prayers;

1. *" This Honourable Court be pleased to investigate the claim and entertain this objection proceeding by denying the purported attachment and sale attempt or revoke any attachment order thereto, **and consequently further revoke the mortgage in respect of the property at dispute thereof, and***
2. *Costs of this application be provided for."*  
**(Emphasis added).**

It is my finding that the prayers of investigation of the claim and revocation of an attachment order are compatible i.e. they are interrelated.

In those prayers made under the provisions of Order XXI, of the CPC, the Court is moved to investigate claims and objection raised.

*Atls.*



Rule 57(1) of the same Order provides thus;

*“Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the court shall proceed to investigate the claim or objection .....*”

Basing on the above provisions, the prayer of investigation and entertainment of objection proceedings is interlinked with the prayer of revoking any attachment. This is because the court has to investigate first the claims that the property in dispute is not liable to such attachment and then if satisfied, the court shall make an order releasing the property from the said attachment. In other words this is revocation of attachment as it is put by the applicant in chamber summons.

However, I agree with the submission by the counsel for the 1<sup>st</sup> respondent that, the third prayer of revoking the mortgage deed in respect of the property in dispute is a substantive prayer. It is my view that the revocation of the mortgage deed is a separate and distinct issue which can be pursued after determination of an objection proceedings on merit.

In the premise, I find that the second limb of preliminary objection has merit and I sustain it.

Since the first and second limbs of preliminary objections are sustained and hence capable of disposing of the application, I need not go further in determination of a third limb of preliminary objections.

*Alle*

I accordingly struck out the application with costs.

Date at Dar es Salaam this 08<sup>th</sup> day of June, 2022.



**A. MSAFIRI**

**JUDGE**

