

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 134 OF 2022**

*(Originating from Execution No. 63 of 2021, High Court, Land Division)*

**GEORGE WILLIAM NASSORO.....1<sup>ST</sup> APPLICANT**

**LENASIA WILLIAM.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**EFC TANZANIA MICROFINANCE BANK.....1<sup>ST</sup> RESPONDENT**

**TAMBAZA AUCTION MART..... 2<sup>ND</sup> RESPONDENT**

*Date of last order: 19/5/2022*

*Date of ruling: 08/6/2022*

**RULING**

**A. MSAFIRI, J.**

On the 30<sup>th</sup> day of March 2022, the applicants lodged an application in this Court by way of chamber summons under Order XXI Rules 57 and 59, sections 93 and 95 of the Civil Procedure Code [CAP 33 R.E 2019] (the CPC) and Section 68 (1) of the Land Registration Act [CAP 334 R.E 2019], for the following orders;

- i. That this Honourable Court be pleased to lift its orders of attachment and sale of the property with **TITLE NO. 49393**, Aelle.*

**PLOT NO. 09, BLOCK 32A** located at Kinondoni in the name of **LUCY WILLIAM** (deceased), the said order was issued by this Honourable Court on 14<sup>th</sup> February 2022 in Execution No. 63 of 2021, before Hon. W. A. Hamza, Deputy Registrar.

- ii. That, this Honorable Court be pleased to investigate the ownership of property attached for sale and to order for the release of the said property in the said dispute.
- iii. That, this Honorable Court be pleased to order for enlargement of time for the payment of the outstanding loan as agreed in the Deed of Settlement entered by the 1<sup>st</sup> applicant to the 1<sup>st</sup> respondent dated 10<sup>th</sup> March 2021.
- iv. Any other and further orders as this Honourable Court will deem just and equitable to grant.
- v. Costs of this Application be provided for.

The application has been taken at the instance of Mmanga & Co Advocates and it is supported by an affidavit sworn by Rehema Shomari Mmanga, learned advocate for the applicants herein.

The respondents contested the application by lodging joint counter affidavit.

*Aelle*

On 19<sup>th</sup> April 2022, this Court ordered the application to be disposed of by way of written submissions whereby Rehema Mmanga and Cleophas James learned advocates represented the applicants and the respondents respectively. The scheduling order for lodging written submissions was duly complied with by the parties hence this ruling.

On submission in chief, the applicants having adopted the affidavit in support of the application contended that, this Court should investigate the ownership of the property attached for sale and to order for release of the said property in dispute and lift the order of attachment and the sale of the property with title No. 49393, Plot No. 09, Block 32A located at Kinondoni in the name of the late **LUCY WILLIAM**, (the property).

The applicants contended further that the property forms the estate of the late **LUCY WILLIAM** who passed away on 28/5/2006, hence it is not liable for attachment because it does not belong to the applicants and moreover the said property is subject of the probate. The applicants contended further that mortgaging the property to the 1<sup>st</sup> respondent herein is contrary to Section 101 of the Probate and Administration of the Estates Act [CAP 352 R.E 2019]. *Actle.*

On further submission, the applicants maintained that they were ready to pay the outstanding loan as per the settlement deed entered into by the parties on 10/3/2021 but due to Covid-19 pandemic which affected the 1<sup>st</sup> applicant's business, payment could not take effect. Hence the applicants pray for an enlargement of time under Sections 93 and 95 of the CPC so as they can pay the outstanding loan.

The applicants have cited the decision of the Court of Appeal in **Andrew Athuman Ntandu & another v Dustan Peter Rima (as administrator of the estate of the late Peter Joseph Rima**, Civil Application No. 551/01 of 2019 CAT (Unreported), in which good cause has to be shown for the Court to exercise its discretion for extension of time, whereas in the present application the applicants have demonstrated good cause for extension of time because of Covid -19 pandemic. Hence the applicants pray for three months extension of time to pay the outstanding loan.

On reply the respondents, having adopted the counter affidavit, contended that the present application lacks merits. The respondents submitted further that for an application of objection proceedings like the present one, there are three (3) pre-conditions which must be established. *Atls*.

These conditions are stipulated under Order XXI Rule 57 (1) and 2 and Rule 58 of the CPC.

According to the respondents, the first condition is that there must be an attachment of the property which is not likely to such attachment being made by the decree holder. The respondents maintained that the first condition has not been established because parties in the present matter executed a settlement deed in which it was agreed that in the event of default, the property should be sold to satisfy the settlement deed which was adopted as the decree of the Court.

As to the second condition, the attachment should be made in execution proceedings which in the present there are execution proceedings No. 63 of 2021 pending before the Deputy Registrar. Hence the second condition has been established.

The third condition is that the objection proceedings ought to be made by persons who were not party to the suit. The respondents submitted that the applicants herein were parties to the Land Case No. 368 of 2017 hence they cannot bring the application for objection proceedings. To fortify their stance, the respondents have cited the case of **Aman Fresh Club v Dodo Ubwa & another** [2004] TLR 326. *Aelle*

The respondents contended further that the said conditions are cumulative and they must all be established for an application of objection proceedings to succeed. The respondents have cited the decision of this court in **Abdallah Salum Lukemo & 18 others v Sifuni A. Mbwambo & 208 others** Miscellaneous Application No. 507 of 2019 (unreported) in which it was held that;

*"It is mandatory that all three conditions are met before a person is heard in the objection proceedings. Failure to meet among the three criteria above renders the whole application incompetent. In our case the applicants are missing two of the three mandatory conditions for their application to stand."*

On further submission, the respondents have contended that the applicants have attached a letter dated 6/7/2017 on their submission. The respondents maintain that it is improper to put attachment on the submission because submissions are not evidence. To fortify their point the respondents have referred to the decision of **Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Company Ltd v**

*Adls*

**Mbeya Cement Company Ltd & another** [2005] TLR 41 in which it was held that;

*"It is now settled that a submission is a summary of arguments. It is not evidence and cannot be used to introduce evidence."*

Finally regarding the applicants' prayer for extension of time within which to pay the outstanding loan, the respondents contended that this Court does not have powers to grant such prayer because the matter was finalized through a private arrangement between the parties hence the applicants are bound by the said arrangement. The respondents prayed the application to be dismissed with costs.

On rejoinder the applicants essentially reiterated their submission in chief and maintained that the decision **Abdallah Salum Lukemo & 18 others v Sifuni A. Mbwambo & 208 others** [supra] is distinguishable with the circumstances in the present matter because this application was instituted after the execution proceedings while in the referred decision the objections proceedings were instituted prematurely before the execution proceedings. *Adls.*

The applicants admitted they were parties to the Land Case No. 368 of 2017 but they were not issued with the notice to show cause against the execution rather they were only served with the execution order hence the applicants have *locus standi* to object the execution order.

The applicants maintained further that as the property is not liable for execution this court should exercise its discretion and determine the application.

Having gone through the submissions of the parties, rival and in support of the application, the point for my determination is whether the present application is maintainable.

It is on record that the 2<sup>nd</sup> applicant instituted Land Case No. 367 of 2017 against the 1<sup>st</sup> applicant and the respondents for reliefs *inter alia* that sale of the plaintiff's (2<sup>nd</sup> applicant) inheritance property located at Kinondoni area in Dar es Salaam on Plot No. 09 Block 32A done by the 1<sup>st</sup> and 2<sup>nd</sup> defendants (the respondents herein) is null and void.

It is further discerned that parties herein reached a settlement which was lodged in court on 11<sup>th</sup> March 2021 and the same was adopted as the decree of the court. *Adele*.



Among other things agreed by the parties, the 1<sup>st</sup> applicant acknowledged to be indebted to the 1<sup>st</sup> respondent for an outstanding loan at the tune of Tshs 72,000,000/= which the 1<sup>st</sup> applicant agreed to pay in two installments of Tshs. 27,000,000/- and Tshs. 45,000,000/= payable on 9<sup>th</sup> June 2021 and 9<sup>th</sup> January 2022 respectively.

It appears, as contended in the applicants' affidavit in support of the application, the 1<sup>st</sup> applicant did not pay the outstanding amount as agreed the reason being COVID-19 pandemic which caused difficulties in doing business. Such failure to honour the settlement deed, prompted the 1<sup>st</sup> respondent to lodge an application for execution and on 14<sup>th</sup> February 2022 it was ordered the property to be attached to satisfy the decree.

Back to the present application, there are three aspects which need to be addressed.

First, the respondents have maintained that the applicants have attached annexures to their submission which is a letter dated 6/7/2017 marked as '**SUB –ANNX-1**'. The respondents maintained that it is improper to attach annexure to the submissions and reference was made to the decision of **Tanzania Union of Industrial and Commercial Workers** *Alls.*

**(TUICO) at Mbeya Cement Company Ltd v Mbeya Cement Company Ltd  
& another [supra].**

It is trite law that annexures should not be attached to the written submission as the party against whom they are produced will have no chance to cross examine the party producing them. In the decision referred to me by the respondents, the Court observed:

*"It is now settled that a submission is a summary of arguments. It is not evidence and cannot be used to introduce evidence. In principle all annexures, except extracts of judicial decisions or textbooks, have been regarded as evidence of facts. Their annexure to submissions has been condemned by several decisions of this court."*

The court added

*"...where there are such annexures, they have to be expunged from the submission and totally disregarded. I will do the same in respect to the annexures attached to Mr Nyangarika's written submissions. All the documents*

*Adle.*

*annexed to his submissions are accordingly expunged;  
and shall be ignored."*

It is for that reason the letter dated 6/7/2017 marked as '**SUB – ANNEX-1**' is expunged and disregarded.

Second, I will proceed to determine the 3<sup>rd</sup> prayer in which the applicants are praying for an extension of time within which to pay the loan amount. The respondents maintained that this court does not have powers to grant the said prayer because it was reached after the private arrangement between the parties. On rejoinder, the applicants did not say anything to counter the respondents' submission as to whether the court has powers to grant the prayer sought.

As I have stated before, parties reached to a settlement which was lodged in court on 11<sup>th</sup> March 2021, with the payment schedule stated above. Now the settlement deed was adopted as the court's decree and the suit was finally determined. It follows therefore that the court became functus officio as the matter was finally determined. The Court cannot reopen the matter and grant further period for payment of the outstanding loan. Consequently the third prayer in the chamber application is hereby *Acbs*.

rejected because as rightly maintained by the respondents, this court lacks powers to grant the same.

Thirdly, the respondents have questioned the competence of the application because the conditions required for it to be determined have not been cumulatively established. According to the respondents as the applicants were parties to the Land Case No. 367 of 2017 it was improper for them to prefer objection proceedings.

In the decision of this Court **Abdallah Salum Lukemo & 18 others v Sifuni A. Mbwambo & 208 others** [supra] cited by the respondents, there are three conditions which must be established for application of objection proceedings to be maintainable, these are;

- i. There should be an attachment of the property which is not likely to such attachment, made by the decree holder.*
- ii. The said attachment should be made in an execution proceedings,*
- iii. The objection proceedings are made by a person who was not the party to the suit.*

From the respondents' submission only one condition has been met that is the second condition because there are indeed objection

*Atle*

proceedings lodged in court. I agree with the respondents that the other two conditions have not been established. Beginning with the property sought to be attached, it is expressly stated in the settlement deed which was duly signed by the parties that in the event of default the property shall be disposed so as to satisfy the decree and the sale has to be made by an order of the court.

Hence the contention that the property is not liable for attachment is not supported by the record because parties voluntarily agreed that the property will be attached and sold if the 1<sup>st</sup> applicant defaults in paying the outstanding loan which he is now seeking an extension of time. The contention regarding its ownership is also an afterthought.

As to whether the applicants can lodge the present application, the respondents have referred to me the decision of the Court of Appeal in **Aman Fresh Club v Dodo Ubwa & another** [supra] in which it was stated that the application for objection proceedings are only opened for strangers and third parties who were not parties to the original case. In the instant case the applicants were parties to the Land Case No. 367 of 2017 whereby the 2<sup>nd</sup> applicant was the plaintiff while the 1<sup>st</sup> applicant was the third defendant. Hence they cannot bring the objection proceedings as

*Adls.*

they had a chance to object any disposition or transactions touching the property in the said case.

In upshot and for the foregoing I find the application incompetent before the court and it is hereby struck out with costs.

Dated at Dar es Salaam this 8<sup>th</sup> day of June 2022



**A. MSAFIRI.**  
**JUDGE**