

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

**MISCELLANEOUS COMMERCIAL CAUSE NO. 286 OF 2014
(Arising from Commercial Case No. 44 of 2011)**

HASSAN SAID KIPUSSI APPLICANT

VERSUS

**KCB BANK TANZANIA LIMITED
DAR ES SALAAM PROCUREMENT
AND SUPPLIES LIMITED**

HASSAN HAILE ABDI

MARIAM SHEDREW SOUD

UNYAGALA AUCTION MART & COURT BROKERS

ABDULRAHMAN SHARIF MAHMOUD

..... RESPONDENTS

26th November, 2015 & 18th February, 2016

RULING

MWAMBEGELE, J.:

The applicant Hassan Said Kipussi has filed this application seeking the indulgence of this court for intervention over the attachment and proclamation of sale of a house standing on Plot No. 961 Mbezi Kawe, Dar es Salaam under Certificate of Title No. 49681. The application has been taken under the provisions of Order XXI rules 57 (1), (2), 58, 59 and Order XLIII rule 2 and sections 68 (e) and 95 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002. It is supported by an affidavit of Hassan Said Kipussi.

The background facts to the present application are relevant. I wish to restate them at the outset. They go thus: this application stems from Commercial Case No.- 44 of 2011 in which KCB Bank; the first respondent herein, was the plaintiff and Dar es Salaam Procurement and Supplies Ltd, Hassan Haile Abdi and Mariam Shrew Soud; the second, third and fourth respondents herein, were the defendants. That suit; a summary suit, was based on overdraft facilities advanced to the first defendant (the second respondent herein) to which the second and third defendants (the third and fourth respondents herein) acted as guarantors. The house standing on Plot No. 961 Mbezi Kawe, Dar es Salaam under Certificate of Title No. 49681 (henceforth "the disputed house") was mortgaged as security.

That suit was decided in favour of the plaintiff on 12.08.2011 after the defendants failed to appear and thus having failed to seek leave of the court to defend the summary suit. The defendants unsuccessfully applied to have the decision set aside as an application to impugn that default judgment was dismissed with costs on 06.11.2012.

After that, the execution process was set into motion; on 13.09.2011 the security was attached and on 22.10.2014, this court made the following order:

"Proclamation for sale to issue against the suit property described as Certificate of Title No. 49681 located at Plot No. 961 Mbezi Kawe, Dar es Salaam in the name of Hassan Haille (sic) Abdi; the second J/Debtor."

On 06.11.2014 the applicant filed this application. He was not a party to that suit; that is, Commercial Case No. 44 of 2011, but in an affidavit supporting the application, he deposes that he bought the disputed house from Abdulrahman Sharif Mahmoud (the sixth respondent herein) and craves leave of the court that it should not be subjected to attachment and sale in satisfaction of the decree in Commercial Case No. 44 of 2011. The application has been argued by written submissions. Both written submissions were timeously filed.

In the written submissions for the application, the learned advocate for the applicant reiterates what is in the affidavit of the applicant by submitting that the applicant purchased the house under dispute on 29.01.2014 from Abdulrahman Sharif Mahmoud; the sixth respondent herein, and that immediately after the purchase he became into possession of the same and has initiated the transfer process. That the transfer has been consented to by the office of the Commissioner for Lands thereby signifying that the sixth respondent herein was a lawful owner of the disputed house.

On the above premises, the applicant's counsel submits that the sale of the property which was to be conducted on 16.11.2014 in satisfaction of the decree in Commercial Case No. 44 of 2011 is not proper as it has been made in respect of the property of the applicant who was not a party to that suit and is not indebted to the first respondent. The learned counsel has cited ***Ahmed Ally Salum Vs Ritha Baswali & another*** Civil Application No. 21 of 1999 (unreported) and ***Peter Adam Mbeweto Vs Abdallah Kulala and Mohamed Mweke*** [1981] TLR 335 in support of his arguments.

Against the application, the learned counsel for the first and fifth respondents argues that an order for attachment was given by this court and this court ordered on 13.09.2011 prohibiting any disposition thereof and making it illegal any action of purchasing or receiving it as a gift. He submits further that this application is not tenable as the applicant at the time had no interest whatsoever in the disputed house. The learned counsel relies on section 60 of the CPC to drive home the point that at the time of attachment on 13.09.2011 the disputed house was in exclusive possession of the third judgment debtor and therefore the applicant cannot be granted the orders sought in that doing that will amount to allowing the judgment debtors to benefit from their own wrongs thereby occasioning injustice and irreparable loss to the first respondent.

I have subjected the learned arguments of the learned counsel for the parties to serious scrutiny they deserve. It is not disputed that the disputed house was the subject of mortgage over overdraft facilities advanced to the second respondent by the first respondent. It is also not in dispute that after Commercial Case No. 44 of 2011 was decided in favour of the first respondent, the disputed house was attached in satisfaction of the decree. By an order of this court dated 13.09.2011 which was made pursuant to Order XXI rule 52 of the CPC, the third respondent who was the second judgment debtor in Commercial Case No. 44 of 2011, was prohibited and restrained from, *inter alia*, transferring ownership of the disputed house. For ease of reference, let me reproduce the attachment order:

¹¹ Prohibitory order (o. 21 r. 52)

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

AT DAR ES SALAAM

COMMERCIAL CASE NO. 44 OF 2011

KCB BANK TANZANIA LTDDECREE HOLDER

VERSUS

**1. DAR ES SALAAM PROCUREMENT
AND SUPPLIES LIMITED
2. HASSAN HAILE ABDI
3. MARIAM SHDREW SOUD** }J/DEBTORS

To:

**HASSAN HAILE ABDI – 2ND JUDGMENT DEBTOR.
P.O. BOX 14300 – DAR ES SALAAM.**

WHEREAS you have failed to satisfy a decree passed against you on the 12th day of August, 2011, in Commercial Case No. 87 of 2009, in favour of the above-named Plaintiff for Tshs. 507,210,574/= and costs Tshs. 5,000/=

IT IS ORDERED that you, the said **HASSAN HAILE ABDI – 2ND JUDGMENT DEBTOR** be, and **you are hereby, prohibited and restrained, until the further order of this Court, from transferring or charging the property specified in the schedule hereunto annexed, by sale, gift or otherwise, and that all person be and that they are hereby, prohibited from receiving the same by purchase, gift or otherwise.**

Given under my hand and the seal of the court, this 13th
day of September, 2011.

.....
REGISTRAR

SCHEDULE

By attachment of the following property: Plot No. 961 CT
No. 49681, MBEZI KAWE DARE SALAAM IN THE NAME OF
Hassan Haile Abdi.”

[Emphasis supplied].

The above discussion shows that the disputed house was the subject of mortgage and in exclusive possession of Hassan Haile Abdi; the third respondent herein who was the second judgment debtor in Commercial Case No. 44 of 2011 as at 13.09.2011 when it was attached and prohibitory orders given by this court regarding its estrangement from him.

I am not persuaded by the argument fronted by the learned counsel for the applicant to the effect that the applicant is a bona fide purchaser and that he should be protected as was the case in the **Ahmed Ally Salum** and **Mbeweto** cases (supra). These cases are plainly distinguishable from the facts of the present case. In both cases the bona fide purchasers for value referred to had bought properties in public auctions. In **Mbweto**, the court had ordered sale of a *shamba* in satisfaction of a decree. After the sale, the decree the subject of execution was reversed and therefore the legal basis for the court to auction the *shamba* was lost. The court of appeal felt that there was need to protect the *bona fide* purchaser for value and held that he

acquired good title to the *shamba* and that there was no need to disturb his title.

Likewise in ***Ahmed Ally Salum*** the applicant was the highest bidder in a public auction which was conducted in execution of a decree. Following ***Mbeweto***, the court reiterated the need to have the bona fide purchaser for value protected.

The two cases are therefore quite distinguishable from the case at hand. In the case at hand, the applicant bought, if at all, the disputed house which was not free from encumbrances and, worse more, while there was an order of this court to the effect that it should not be estranged from the second judgment debtor; the third respondent herein. I think, without deciding, the applicant did not acquire good title to the disputed house when he purported to buy it from the sixth respondent on 16.11.2014, about 38 months after the order of this court dated 13.09.2011 prohibiting that course.

All said, I find this application seriously wanting in merit and proceed to dismiss it with costs to the first and fifth respondents.

Order accordingly.

DATED at DAR ES SALAAM this 18th day of February, 2016.

J. C. M. MWAMBEGELE
JUDGE