

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CASE NO. 150 OF 2019

(C/F High Court Commercial Case No. 133 Of 2014)

BETWEEN

DORIS MARTINE *(as Administrator of*

The Estate of the late GASPER JOHN MINJA).....**APPLICANT**

Versus

DIAMOND TRUST BANK TANZANIA LTD.....**1st RESPONDENT**

KAHELA TRADERS LIMITED.....**2nd RESPONDENT**

ALEX YAKOBO KAHELA.....**3rd RESPONDENT**

ASTERIA SUGWEJO KAHELA.....**4th RESPONDENT**

FIRST WORLD INVESTMENT COURT BROKERS.....**5th RESPONDENT**

Last Order: 23rd Apr, 2020

Date of Ruling: 17th June, 2020

RULING

FIKIRINI, J.

The applicant, by way of chamber summons and pursuant to Order XXI Rules 81 (1) & (2) of the Civil Procedure Code, Cap. 33 R.E. 2002, moved this Court seeking for the following orders:

1. That, this Honourable Court be pleased to postpone the sale and discharge/release of the property located at Plot No. 34, Block “GG” Kijenge area Arusha City which was pointed by this Honourable Court and issue an alternative order by directing the 5th respondent to attach the processing chemical fertilizer machines which belongs to the 2nd, 3rd and 4th respondents installed in a leasing godown belonging to one Msama Kosan Msama which is located at Muriet Ward previously Sombetini Ward within Arusha City in satisfaction of the claim of the decree holder in Commercial Case No. 133 of 2014.

2. Any other relief (s) which this Honourable Court deem fit to grant.

The application is supported by the affidavit of Doris Martin, in which she gave the state of the affairs and what transpired up to filing of this application. In her affidavit she averred that after her late husband’s passing on one Gasper John Minja, she and her son were appointed administrators of the deceased estate. Sometime in February, 2014 she was informed by the 1st respondent that in 2012 the 2nd, 3rd, and the 4th respondents took a loan which was secured by one Gasper John Minja, the applicant’s deceased husband by pledging the house on Plot No, 34 Block “GG” in Kijene Area. Since the borrowers had failed to service the loan, the 1st respondent instituted a suit as Commercial Case No. 133 of 2014. The Court decided in favour of the 1st respondent for the sum of Tzs. 82,335,332 and thus the

pledged house was to be attached and sold for the 1st respondent to recover the debt loan.

Not aware of what transpired leading to the premises which she considered a matrimonial property to be pledged by her late husband as security for the loan taken by 2nd, 3rd, 4th respondent, on 17th September, 2019, she reported the matter with Police claiming forgery, and was issued with a police report book number AA/RB/970/19. And that when still pondering on what to do, the applicant coincidentally came across the information that the 2nd, 3rd and 4th respondents own chemical fertilizer machines installed at a leasing godown belonging to one Msama Kosan Msama, located at Muriet ward. Based on the findings she was thus requesting this Court to grant of her application that instead of attaching her house, the only property she had, the machines belonging to the 2nd, 3rd and 4th respondents be attached and sold to repay the bank loan they took which was secured using the matrimonial property, of which she was the beneficiary. Annexed to the affidavit are copies of the marriage certificate, death certificate and letters of administration all marked as MD-a, b and c. Also a copy of official search marked as MD1-a and b; a copy of judgment in Commercial Case No. 133 of 2014 marked as MD2-a and b; Police RB marked as MD3 and a copy of Msama Kosan Msama affidavit marked as MD4-a and b.

The 1st respondent filed counter- affidavit deponed by one Ives Mlawi-Principal Officer and Company Secretary of the 1st respondent who is in-charge of the present claim. The Principal Officer controverting the applicant's averment that after the delivery of the Court judgment, the applicant filed a number of applications as reflected in paragraph 5 of the counter-affidavit item (a) to (i), in which the applicant lost in all. In paragraph 6 the deponent also stated that since the judgment was delivered the applicant has been all out to frustrate the execution of the decree which was in favour of the 1st respondent.

At the hearing parties were urged to file written submissions. The applicant who fended for herself filed hers, while the learned Counsel Mr. Paschal Mshanga who advocated for the 1st respondent filed for his client, and even the 2nd, 3rd and 4th respondents filed a joined written submission, despite not having any counter-affidavit having been filed.

The applicant in her submission she essentially repeated all what had been stated in her affidavit. On the other hand the 1st respondent in their submission opposing the application, submitted that the cited provision of the law, that is Order XXI Rule 88 (1) & (2) of the CPC. The applicant who fended for herself filed hers, while the learned counsel Mr. Mshanga who advocated for the 1st respondent filed for his client, and that whilst it gives the Court discretion to order postponement of the

sale, but that provision has criterion under which the discretion can be exercised by the Court, which are, when: (i) the amount decreed may be raised by mortgage; or by lease; or by private sale, of the property. The provision did not provide for discharge or release of the property as envisioned by the applicant, submitted the counsel.

Stressing on the position, it was Mr. Mshanga's submission that this was not the first time the applicant files an application of this nature. In Miscellaneous Commercial Application No. 398 of 2017 – AC- 1, she applied for the Court to investigate and release the property liable for execution, the application which was dismissed.

Challenging the applicant's affidavit, he contended that it did not show that the applicant may raise the amount decreed either by way of mortgage, lease or private sale, which would have allowed the Court to assess and if satisfied grant the application. The Court despite being availed with such discretionary powers which it should exercise judiciously, it has been tasked with duty of confirming the mortgage, lease or sale of the property privately, under sub-rule (2). Fortifying his position further, Mr. Mshanga referred this Court to Order XXI Rule 83 (1) & (2) of the Indian Code of Civil Procedure, which is *pari matiria* with Order XXI Rule (1) & (2) of the CPC. Expanding his submission, he referred this Court to the author **Binod Mohan Prasad in Mulla, The Code of Civil Procedure, 17th Ed.**

Vol-III, p. 365-366, where postponement of sale has been elucidated and how sub-rule 2 can be applied.

The application before the Court apart from lacking in fulfilling the requirement under the cited provision of the law used in moving this Court, it has as well brought on board an application not supported by the provision. Instead of stating how she would mortgage, lease or sale the property, she was applying for issuance of attachment order in respect of a property out of the one in order for sale. The fact in all the applications filed following the judgment in Commercial Case No. 133 of 2014, were dismissed and not in her favour, for the applicant to continue filing applications of this nature was an abuse of Court process and in due course denied the 1st respondent justice to enjoy decree in his favour, through the delays, submitted Mr. Mshanga. He as well invited the Court to invoke section 22B (c) of the CPC, which came into being after the amendment and section 97 of the Arbitration Act, 2012, Act No. 2 of 2020, which amended the CPC, that the Court can declare a litigant vexatious, for being habitual and persistent but without ground institute endless applications.

The 2nd, 3rd and 4th respondents in their submission contested the application as to have failed to comply to the Probate and Administration of Estates Act, Cap. 352 R.E. 2002, in particularly sections 71, 99 and 100, which require both appointed administrators to sue or apply for remedies and not one of them without the other.

The only logical place to start my examination of the application, and see if, it deserves granting or not, is through Order XXI Rule 81 (1) & (2) of the CPC. For ease of reference the order is reproduced below:

Section 81 (1):

“ Where an order for sale of immovable property has been made, if the judgment debtor can satisfy the court that there is reason to believe that the amount of the decree may be raised by the mortgage or lease or private sale of such property, or some part thereof, or of any other immovable property of the judgment debtor, the court may, on his application, postpone the sale of the property comprised in the order for sale on such terms and for such period as it thinks proper, to enable him to raise the amount. [Emphasis mine]

Section 81 (2):

In such case the court shall grant a certificate to the judgment debtor authorizing him within a period to be mentioned therein, and notwithstanding anything contained in section 51, to make the proposed mortgage, lease or sale.”

Going by the specification in the above reproduced provisions, the intended person is the applicant and no one else. And the exercise includes options of either mortgaging the property, leasing it or selling it privately, all geared towards obtaining money to satisfy the Court decree albeit through the judgment debtor's involvement which is different from Court appointed court brokers being assigned the task. The applicant in her application instead of furnishing the Court with sufficient reasons as to why the provision of Order XXI Rule 81 (1) and (2) of CPC, should be put into application, has come with a prayer of attachment of a different property not subject to the Court order.

This Court cannot grant the application for a number of reasons: *one*, the Court order was in respect of a house on Plot No. 34 Block "GG" Kijenge area, Arusha and not any other property be it that of the applicant or some else. *Two*, the affidavit of Msama Kosan Msama, did not specify what made him believe the property or machines were those of the 2nd and 3rd respondents. The fact that the two rented his godown is not in itself concrete proof that the machines belonged to them. *Three*, in order for what the applicant wished should have occurred would be probably suing the 2nd, 3rd and 4th respondents, so to get the right to attach their property to settle the bank debt loan, if at all the decision in the intended suit would be in her favour.

From the foregoing, I am without a doubt of the conclusion that the applicant's application is devoid of merits and consequently proceed to dismiss the application, with no order as to costs. It is so ordered.



A handwritten signature in black ink, appearing to read "P. S. FIKIRINI". The signature is written in a cursive style with a long horizontal stroke extending to the right.

P. S. FIKIRINI

JUDGE

17th JUNE, 2020