

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC COMMERCIAL APPLICATION NO.94 OF 2019

(Originating from Commercial Case No.19 of 2018)

MTI INVESTMENT LIMITED.....APPLICANT

VS

CHOBO INVESTMENT COMPANY LIMITED.....RESPONDENT

RULING

B.K.PHILLIP, J

The applicant herein lodged this application under the provisions of section 42 (d) and Order XXI Rule 40 (b) and (c) and XXXVIII rule (1) (a) (b) (c) and (d) of the Civil Procedure Code, Cap 33 R.E 2002 , (herein after to be referred to as "the CPC"), praying for the following orders;

- i. That this honourable court may be pleased to issue an order directing any Officer of the Respondent Company to attend to Court for purposes of being orally examined as to whether any or what debts are owing to the judgment debtor and whether the judgment debtor has any or what other means of satisfying the Decree in Commercial Case No. 19 of 2018.*
- ii. That this honourable court may be pleased to issue an order for appointment of a receiver of the respondent in respect of*

execution of the decree issued against the respondent in Commercial Case No. 19 of 2018.

- iii. This honourable court may be pleased to remove the management of the respondent from management of any property owned by the respondent and from management of the affairs of the respondent.*
- iv. That this honourable court may be pleased to commit ANY and all property owned by the respondent as may come to light during the hearing of this application and after appointment to the possession, custody or management of the appointed receiver.*
- v. That this honourable court may be pleased to confer upon the receiver appointed all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the properties, collection of rent and profits thereof, application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the court thinks fit.*
- vi. Costs of this application be for.*
- vii. Any other order that this court may deem fit and just to grant.*

The application is supported by an affidavit sworn by the learned Advocate Kheri Rajabu Mbiro. The principal officer of the respondent Mr. John Chobo, swore an affidavit in opposing the application.

A brief background to this matter is that the applicant is a decree holder in Misc Commercial case No. 19 of 2018, in which this court registered the arbitral award that was granted in favour of the applicant as a decree of

this court. The Order for registration of the award as a court decree was issued ex-parte. The respondent has unsuccessfully made efforts to set aside the aforesaid court decree. The last attempt by the respondent to set aside the said ex-parte decree was through application No.260 of 2018 which was dismissed by this court on 11th July 2019. The applicant through this application is moving the wheels of execution for the aforesaid court decree into motion.

In the affidavit in support of this application it is deponed that the applicant has been communicating with the respondent's officers regarding the payment of the decretal, which is to a tune of Tshs. 2,596,929,556/= and through those communications it has come to the knowledge of the applicant that the respondent does not have landed properties or funds in its bank account that could be used to clear the decretal sum. The deponent deponed further as follows; That most of the properties belonging to the respondent are machinery and similar items which are registered as floating Charges in favour of Equity bank Tanzania Limited due to credit facilities received by the respondent from the Equity Bank Tanzania Limited. That the execution of the court decree in the normal modes which involves attachment of the properties of the respondent is not viable as it appears that the respondent has numerous debts with registered floating charges in favour of other creditors. Mr. Mbiro has deponed that it is just and equitable for this court to issue an order requiring the respondent's principal officer to appear in person in court and inform the court the manner in which he intends to satisfy the decree.

of the court or in the alternative appoint a receiver of the respondent's factory/machinery since the respondent's factory is still operational.

On the other hand, in the counter affidavit in opposition of this application the deponent states that the applicant's allegation that the respondent is having numerous debts are mere fabrications and having no truth. That the applicant's prayer's for appointment of a receiver is not doable as it will cause chaos in the respondent's industry. The deponent also states that the respondent has already filed a notice of appeal against the decision of this court in application No. 260 of 2018 and filed an application for leave to appeal to the Court of appeal vide Misc Commercial Application No. 70 of 2019. Moreover, the deponent states that this court cannot entertain this application while the respondent has already lodged the notice of appeal to the Court of Appeal.

I ordered the application to be disposed of by way of written submissions. The learned advocate Kheri Rajabu Mbiro and Carolyn Jackob Muro filed the written submissions for the applicant whereas the learned Advocate Lenin M. Njau filed the submission for the respondent.

Submitting in support of the application, the applicant's advocates pointed out that Order XXI Rule 40(b) and (c) of the CPC gives this court powers to summon the judgment debtor to appear in court so as to examine the ability of the judgment debtor in paying the decretal sum and give him an opportunity to say in which manner he intends to satisfy the court decree. They proceeded to submit that the applicant herein has applied for appointment of a receivers among other orders, because most of the

respondent's properties are registered in Floating Charges in favour of Equity Bank Tanzania Limited. The learned Advocates contended that the respondent has not disputed that he does not own any landed property and that his movable properties are registered in floating charges in favour of the Equity Bank Tanzania Limited. The applicant's advocates hold a firm view that the above explained circumstances are enough to show that there is a need for appointment of a receiver of the respondent's factory to enable the applicant herein to obtain the decretal sum to a tune Tshs 2,596,929,556/=. To cement their arguments, The learned advocates referred this court to *Mulla in the Code of Civil Procedures 6th Edition*, in which, while writing on import of section 51 (d) and Order XL Rule 1 of the Indian Code of Civil Procedures which is in *Pari materia* with Section 42 (d) and Order XXXVIII Rule 1 of the CPC, the author said that appointment of a receiver is granted on the ground that there is no effective remedy for execution at a given situation. Moreover, the applicant's advocates cited the case of **Roko Investment Company Limited and CRDB Bank Pic, Commercial Application No 17 of 2013**, in which this court said the following;

"the court can make an order for appointment of a receiver when it is just and convenient for the given circumstances and that appointment of a receiver is likely to benefit the decree holder and the judgment debtor rather than a sale of attached property."

The applicant's advocate proceeded to submit that the appointment of a receiver will not only enable the applicant to obtain the decretal sum but

also will not deprive the respondent the opportunity to continue with his business.

In addition to the above, the applicant's advocate contended that up to date there is no any appeal filed against the decree subject of this application and even if there would be one, the same cannot operate as a bar to the execution of the court decree. The only thing that can bar execution of the Court decree is the presence of an application for stay of execution or order for stay of execution and in this case there is none, contended the applicant's advocates. To bolster their arguments they cited the case of **TBS Vs Anita Kivera Maro, Civil Application No. 244 of 2017** (unreported).

On the other hand the respondent's advocate relying on the decision of the Court of Appeal in the case of **Aero Helicopter (T) Ltd Vs F.N Jansen (1990) T.L.R 142** and **Tanzania Electric Supply Company Limited Vs Dowans Holdings (Costa Rica), Dowans Limited (Tanzania), Civil Application No. 142 of 2012** (unreported), submitted that, since the respondent has lodged a notice of appeal against the decision of this court in which his application for setting aside the ex-parte decree was dismissed, then, he has initiated the process for appealing to the Court of Appeal and this court ceases to have jurisdiction over this matter. Mr. Njau also referred this court to the case of **Ahmed Mbaraka Vs Mwanachi Engineering and Contracting Co Ltd , Civil Application No 299 of 2014** (unreported) in which the court said the following;

"The constitution is clear that any litigant is entitled to right of appeal. The constitution is supreme. This means that the officer signing the order authorizing the execution to be carried out must comply with the provision of the law. He/she must ensure that before signing the document authorizing execution to be carried out, there is neither appeal pending, nor none of the parties has initiated the appeal process....."

It is the contention of Mr. Njau that the arguments by the applicant's advocate that the respondent has not applied for stay of execution of the Court decree is misconceived because the application for stay of execution is supposed to be lodged at the Court of Appeal and the same could not be lodged since the leave to appeal to the Court of Appeal was not yet obtained. To support his assertion he cited the case of **Wankira Bethuel Maise and National Housing Corporation Vs Kaiku Foya (1999) T.L.R 348** in which the Court held that;

"Where leave to appeal to has not been sought and obtained an application for stay of execution pending appeal is not properly before the court."

He proceeded to submit that the leave to appeal has been granted by this court while this application was pending in court.

As regards the applicant's prayer for appointment of a receiver, Mr. Njau admitted that the provisions of section 42 (d) and Order XXXVIII Rule 1 of the CPC confers discretionary powers to this Court to appoint a receiver. However, he argued that those powers must be exercised judiciously,

certainly by taking into consideration the circumstances of the case. Mr. Njau submitted that the appointment of a receiver is rarely used as it is most of the time considered to be the ruthless remedy. To cement his arguments he referred this court to *Mulla in the Code of Civil Procedure 16th Edition, Volume IV* at page 3783 where he was commenting on the application of Order XL Rule 1 of the Indian Code of Civil Procedure which is in *pari materia* with section 42 (d) and Order XXXVIII Rule 1 of the CPC, in which he said the following;

"the appointment of a receiver is recognized as one of the harshest remedies which the law provides for the enforcement of rights and is allowed only in extreme cases and in circumstances where the interests of creditors are exposed to manifest peril. A receiver is not to be appointed unless there is some substantial background for such interference, such as, a well founded apprehension that the property in suit will be dissipated or other irreparable mischief may be done, unless the court appoints a receiver."

Mr. Njau further submitted that the above position as explained in *Mulla in the Code of Civil Procedure 16th Edition, Volume IV*, is the position in our jurisdiction too. To cement his argument, he cited the case of **Aloyce Mushi and Epimak S.makoi Vs Ibrahim Kusundwa and 3 others, Misc. Land application No. 601 of 2018**, (unreported) in which the court said the following;

"Circumstances to which a receiver may be appointed can be categorized into two, one is to preserve property from some danger

threatening it and two is to allow someone who has right over the property to obtain the benefit of that right where ordinary legal remedies are not effective.”

He contended further that it is a trite law that he who alleges must prove. He was of the view that the applicant has not managed to prove that the two purposes for granting an order for appointment of a receiver as explained in the case of **Aloyce Mushi** (Supra) have been met. Mr. Njau insisted that what is stated in the affidavit in support of this application are mere speculations and hear say as the deponent seems to depone on things which he was informed by other people without ascertaining the source of those information. He proceeded to submit that the applicant has failed to prove that the respondent does not possess other properties apart from his factory which the applicant did not even state where it is located. In short, Mr. Njau contended that the allegations made by the applicant on the respondent's properties or funds are not substantiated. Not only that, he also contended that the prayer for appointment of a receiver is not supported by any doable and practical plan that can convince this court that under the circumstances it is the most appropriate way of executing the court decree at issue, bearing in mind that the complications that might arise in the management of the property. Mr. Njau pointed out that issues such as remuneration of the receiver and in case of mismanagement of the property by the receiver who is going to be liable, remain unanswered as the applicant has not said anything on the same.

In rejoinder, Mr. Mbiro, submitted that the proper and current position of the law as far as the effect of filing a notice of appeal is concerned was stated by the Court of Appeal in the case of **TBS vs Anita Kivera Maro** (Supra), in which the Court of Appeal said that the observations made in the case of **Mbaraka** (Supra) was just an *obiter dictum*. Mr Mbiro reiterated his submission in chief and insisted that the two conditions for appointment of a receiver as stated in the case of **Prim Aloyce Mushi**, (Supra) have been met in the application in hand. He contended that the applicant is unable to execute the decree except through appointment of a receiver. Moreover, Mr. Mbiro submitted that what is deponed in the affidavit in support of this application is not hear say as it is supported by the documents for the debentures over the respondent's machines from the Registrar of Companies attached to the affidavit in support of this application.

Mr. Mbiro reputed the alleged complications and management of the respondents' factor/business if at all this court decides to appoint a receiver. He contended that in case of any mismanagement of the property by a receiver then, the appropriate legal steps will be taken against the receiver as per the provisions of Order XXXVIII Rule 4 of the CPC and as regards the remuneration of the receiver, he submitted that the court by a special order has powers to fix the remuneration of the receiver. He insisted that the appointment of a receiver will not deprive the respondent of his property since the aim of the receiver is just to ensure that the applicant's debt is fully paid.

Having analyzed the submissions made by the learned advocates and perused the court's records, I have noted that both counsels are in agreement that the provisions under which this application is made confer discretionary powers to this court to grant the order for appointment of a receiver and summoning the respondent to appear in court for giving clarification on his properties and how he can satisfy the court decree. Also, it is not in dispute that the applicant is a decree holder in Commercial Case No. 19 of 2018 and respondent lodged a notice of intention to appeal against the decision of this court in Misc Application No 260/2018, in which this court dismissed the respondent's application to set aside the ex-parte decree in Commercial Case No. 19 of 2018.

Having stated the basic facts which are not in dispute, I am of a settled opinion that before going to the merit of this application I am supposed to determine the following issues *i) whether the application is competent since Mr. Njau has contended that the applicant has not given any description of the respondent's properties intended to be in place under management of the receiver ii) whether the filing of the notice of appeal to the Court of Appeal bars this court from proceeding with the hearing of this application for execution of the court decree in Commercial Case No.19 of 2018, (iii) whether the applicant has adduced sufficient reasons to move this court to grant the prayers for appointment of a receiver of the respondent's properties.*

Starting with the first issue, in his submissions Mr. Njau contended that the applicant has failed to state the location of what he described as "Plant and Machinery" which he wants to be placed under the management of a

receiver. Mr Njau's contention aforesaid deserves the attention of this court bearing in mind that this is an application for execution of the Court Decree. In my considered view, it is imperative that this application has to be in conformity with the provisions of the CPC pertaining to execution of the Court decree by attachment of movable/immovable properties. Here, I have in mind the provisions of Order XXI Rules 11 and 12 of the CPC and for this matter, I think the applicable Rule is Rule 12 since Plant and Machinery referred to in this application fall under a category of immovable properties. Since the applicant prays the receiver to be appointed to manage the respondent's factory, it is obvious that the Plants and Machineries are installed somewhere either in the respondent's premise or rented premises. For easy of understanding the coming discussion let me reproduce the provisions of Order XXI Rule 12 of the CPC hereunder;

"(1) where an application is made for the attachment of any immovable property belonging to a judgment debtor, it shall contain at the foot.

- (a) a description of such property sufficient to identify the same and, in case such property can be identified by a title number under the land Registration Act, such title number and*
- (b) a specification of the judgment debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same*

(2) where an application is made for the attachment of any land of which an estate has been registered under the Land Registration Act, the court may require the applicant to produce an official search issued under section 97(2) of that Act relating to that land."

The above quoted provisions of the laws, state clearly that the property intended to be attached has to be properly identified. I wish to add here that similarly, if the mode of execution is by appointment of a receiver the property need to be properly identified and sufficient information about the property should be given to the court.

Looking at the affidavit in support of this application, I am in agreement with the learned Advocate Njau that the applicant has not provided any detail or description of the properties intended to be placed under a receiver. This can be clearly seen in the chamber summons. For ease of understanding what I am saying here, let me reproduce the relevant part of the prayers made by the applicant in the chamber summons;

- i. This honourable court may be pleased to remove the management of the respondent from management of **any property owned by the respondent** and from management of the affairs of the respondent.*
- ii. That this honourable court may be pleased to commit **ANY and all property owned by the respondent as may come to light during the hearing of this application and after appointment to the possession, custody or management of the appointed receiver.***

iii. *That this honourable court may be pleased to confer upon the receiver appointed all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the properties, collection of rent and profits thereof, application and disposal of such rents and profits and the execution of documents as the owner himself has, or such of those powers as the court thinks fit.*

(emphasis is added)

From the foregoing, it is evident that the prayers made by the applicant are vague as there are no sufficient descriptions of the property intended to be placed under the management of a receiver to enable this court to determine the application. In fact, I have noted that in all cases cited by the learned advocates in this application, the properties intended to be placed under management of a receiver were properly identified, for instance, in the case of **Prim Aloyce Mushi** (supra), the property intended to be placed under the receiver was a house for rent located on Plot No 13 Block 30, Nyamwezi Street Kariakoo, with Certificate of Title No. 32350 registered in the name of Prim Alouce Mushi and Epimark S. Makoi, whereas in the case of **Roko Investment Company Limited**, (supra) the properties intended to be placed under management of a receiver were identified as follows;

- i. Plot No. 27 which in Shinyanga held under certificate of title No. 14900.
- ii. Plant and machinery houses on Plot No. 4 Block H, Igunga, Tabora held under certificate of title no. 14013.

- iii. Motor vehicle (Scania Mode P2x42RN38, with Registration No. T.616 ARP Engine No. 51056730)
- iv. Motor vehicle Scania Model 12 with Registration No. T735 AAB Engine No. 5105670.
- v. Motor vehicle Scania 93 M with Registration No. T114 AHJ Engine No. 4694315.
- vi. Motor vehicle Scania Trailer with Registration No. T654 AGN.
- vii. Motor vehicle Scania Trailer with Registration No. T. 828 AMZ.

I think I do not need to over emphasize that the orders of the court have to be clear and precise to avoid unnecessary confusion to the parties or create any ambiguity. Thus, this court cannot issue an order for appointment of a receiver in respect of properties which are not properly identified.

In addition to the above, the first prayer made by the applicant in this application reads as follows;

"That this honourable court may be pleased to issue an order directing any Officer of the Respondent Company to attend to Court for purposes of being orally examined as to whether any or what debts are owing to the judgment debtor and whether the judgment debtor has any other means of satisfying the Decree in Commercial Case No. 19 of 2018"

I have no doubt that the above prayer is made under the provisions of Order XXI Rule 40 (b) of the CPC since that is the only relevant provision of

the laws among all other provisions cited by the applicant in his chamber summons. For easy of reference let me reproduce the provisions of Order XXI Rule 40 of the CPC hereunder.

XXI Rule 40;

" Where a decree is for the payment of money the decree holder may apply to the court for an order that:-

- (a) the judgment debtor*
- (b) in the case of a corporation, any officer thereof, or*
- (c) any other person,*

be orally examined as to whether any or what debts are owing to the judgment debtor and whether the judgment debtor has any and what other property or means of satisfying the decree, and the court may make an order for the attendance and examination of such judgment debtor, or officer or other person, and for the production of any books or documents."

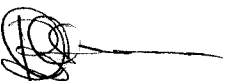
From the wording of the above provision of the law, In my opinion the first prayer made by the applicant is incompatible with the second prayer, since the above quoted provision of the law, pre-supposes that summoning the judgment debtor to appear in court is done before the decree holder applies for the attachment or placement of any of the judgment debtor's properties under a receiver. My observation herein above is based on the fact that once an application for execution of the court decree is made, it means that the decree holder has already satisfied

himself/herself that the properties indicated in the application for execution are into existence and belongs to the judgment debtor. I think the import of Order XXI Rule 40 (b) is that the decree holder can obtain necessary information pertaining to the status of the judgment debtor in term of the liabilities facing him/her and the properties he/she owns as well as his/her capability of satisfying the court decree, before embarking on the execution of the court decree.

From the foregoing, it is the finding of this court that this application is fatally defective for the reasons explained herein above. The above being said, I do not see any plausible reason to proceed with the determination of the remaining two issues I have enumerated herein above. Thus, I find myself constrained to strike out this application as I hereby do. This application is struck out with costs.

Dated at Dar es Salaam this 3rd day of June 2020.




B.K. PHILLIP
JUDGE