

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

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 81 OF 2020

(Arising from Commercial Case No. 18 of 2016)

BETWEEN

KURINGE REAL ESTATE CO. LTD.....APPLICANT

Versus

BANK OF AFRICA (T) LTD.....1st RESPONDENT

WILSON SIMON NGUI.....2nd RESPONDENT

MR. CHARLES K t/a

CDJ CLASSIC GROPU LTD.....3rd RESPONDENT

Last Order: 14th July, 2020

Date of Ruling: 20th July, 2020

RULING

FIKIRINI, J.

This is a ruling in respect of a notice of preliminary points of objection as regards to the following two (2) points of objections raised by the 1st respondent:

1. That pursuant to Order XXIII Rule 1 (3) of the Civil Procedure Code, Cap. 33 R. E. 2002 (the CPC) this Court has no jurisdiction to entertain the applicant's application, and
2. That the applicant's application is abuse of Court process.

The objection was argued by way of written submissions. Mr. Jonathan Mbuga and Mr. Francis Makota learned counsels filed submissions for their respective parties. Giving brief background to the suit subject of these objection proceedings, it was Mr. Mbuga's submission that this application was preceded by Commercial Case No. 18 2016 between the 1st and 2nd respondents, namely Bank of Africa (T) Ltd and Wilson Simon Ngui, which was won by the 1st respondent. After the 2nd respondent failing to satisfy Court order by not paying the 1st respondent, execution proceedings were initiated and Plot No. 696 Block "C", Sinza with certificate of title no. 96163, was among the property to be attached and auctioned. Before the auction could proceed Ms. Hellen Mkindi moved this Court vide Miscellaneous Commercial Application No, 03 of 2017, the 2nd respondent's wife objecting the execution. The application was dismissed and auction was ordered to proceed.

Yet the auction could not proceed as another application was filed as Miscellaneous Commercial Application No. 01 of 2019, the applicant herein being a party moving the Court by way of objection proceedings, claiming she was the owner of the disputed plot. This application was straight withdrawn by Mr. Kusalika who was then counsel for the applicant, without stating the reasons for doing so. An order for leave to re-file was declined by this Court. The order has not been revised. In the meantime, another objection proceedings was filed vide

Miscellaneous Commercial Application No. 122 of 2019, this time the applicant being Sandra Wilson Ngui, the 2nd respondent's relative. The application was dismissed with orders that execution to proceed as ordered. The 3rd respondent was assigned to carry out the execution process. Again, the execution process could not be carried out due to the present application Miscellaneous Commercial Application No. 81 of 2020, which was preferred by Kuringe Real Estate, the present applicant.

Submitting on the points of objection raised, it was Mr. Mbuga's contention that the Court order declining leave to re-file the application restricted and prohibited another application by the party who had earlier opted to withdraw the suit or application without leave or liberty to do so, over the same subject matter against the same parties. In support the case of **Jenings Brandly v A & F Contractors Ltd & Another [2003] 2 E. A. 452** as well as **M/S Food Association Ltd v Baraka Mukundi, Revision No. 7 of 2009**, in which restriction or prohibition pursuant to Order XXIII Rule 1 (3) of the CPC was illustrated.

Extending his submission Mr. Mbuga stated that the applicant has previously moved this Court vide Miscellaneous Commercial Application No. 1 of 2019, in respect of the same subject matter against the same parties which was withdrawn with leave to refile declined. The action taken by the applicant was thus not proper, he stressed, since it was legally restricted and prohibited for the applicant to do so.

He concluded that this Court was therefore not clothed with jurisdiction to entertain this application due to the above shortfall and hence he prayed for the application to be dismissed with costs.

Taking caution in case it will be argued that the provision did not cover applications, Mr. Mbuga invited this Court to borrow wisdom from the case of **Tanzania Motor Services Ltd & Another v Mehar Singh t/a Thaker Singh, Civil Appeal No. 115 of 2005, CAT-(unreported)** which was quoted in **Mzee Mujengi Josephat Abdarahamani Ngwao v The Guardian Ltd, Miscellaneous Civil Application No. 279 of 2015 (unreported)**, where the Court stated:

“Where the courts pondered on what amounts into a suit in law to include applications.”

Taking up on the second point that the application was abuse of the court process, it was Mr. Mbuga’s assertion that whereas there was no hard and fast rule on what act or omission done by the parties before the Court which would amount to abuse of court process, but it was dependent on circumstances surrounding each case, underscoring his submission by citing the case of **Sandra Wilson Ngui v Bank of Africa (T) Ltd & 2 Others, Miscellaneous Commercial Application No. 122 of 2019**, where the Court considered filing several applications seeking the same order amounted to abuse of the court process.

In conclusion, Mr. Mbuga pressed the Court to decline the application as the same application was once attempted in Miscellaneous Commercial Application No. 01 of 2019, the application which was withdrawn without reasons adduced. Leave to re-file was refused. He thus prayed the Court to dismiss the application with costs, as it was abuse of Court process and moreso, this Court has no jurisdiction.

Replying to the submission, Mr. Makota for the applicant first picked on the omission in the citation which instead of the Civil Procedure Act, Cap. 33 R.E. 2002 was cited as Civil Procedure Act, Cap. 33 of 2009. Responding to the submission it was his contention that the applicant had lawful title to the property after successfully purchasing it by public auction from the National Bank of Commerce PLC (NMB) as per annexure –VCL 2 to the affidavit in support of the application. Denying the knowledge of the previous applications, except Miscellaneous Commercial Application No. 01 of 2019 in which she was a party, in relation to that application, it was submitted that the application was withdrawn by Mr. Augustino Kusalika the previous counsel on the reasons stated in the withdrawal order. Re-filing of an application could not occur as there was no execution process which followed. So the applicant had to wait until the process was initiated once again, citing the case of **Katibu Mkuu Amani Fresh Sports Club v Dodo Ubwa Mamboya & Another [2004] T. L. R. 326**, that objection proceedings can only be filed when there is an attachment order of the property

which was in the interest of the objector. According to Mr. Makota parties under objection proceedings should be invited to adduce evidence so that the Court could arrive at a proper and fair decision to both parties. The applicant was not a party to the main suit so this was her opportunity, impressed the counsel.

Deliberating on Order XXIII Rule 1 (3) of the CPC submitted on by Mr. Mbuga for the 1st respondent, it was Mr. Makota's submission that the present application fell under an exceptional provision of Order XXIII Rule 4 of the CPC, which deals with execution proceedings. According to him, all the cited cases and provisions of the law cited were distinguished to the application at hand. He further submitted that there was no time limit in objection proceedings since the application was to be filed when an order for attachment has been made to the property which the objector has interest. The case of **Katibu Mkuu** (supra) was referred once more.

Furthering the submission, Mr. Makota invited the Court to look at Article 107 A (2) (e) of the Constitution of the United Republic of Tanzania of 1977 as amended from time to time, arguing that for the interest of justice all parties should be heard, their claims investigated so as to arrive at a just decision. On the second point, the applicant controverted the point as misconceived and did not hold water. Miscellaneous Commercial Application No. 01 of 2019 was withdrawn without leave to refile, but the fact there was no ongoing attachment the applicant had thus to wait until when there was fresh proceedings. Also it was submitted that other

applications which existed did not relate with the applicant such that could be considered as the abuse of the court process.

On the strength of the submission it was prayed that the points of objection be overruled with costs.

In rejoinder the 1st respondent basically reiterated her earlier submission that the execution proceedings which propelled this application was a fresh application but the reissuance of order to the 3rd respondent was only done so that the process which was blocked by Miscellaneous Commercial Application No. 01 of 2019, could continue. Mr. Mbuga maintained that the action was not only improper but also abuse of the Court process.

It was Mr. Mbuga's further argument that allowing the application before the Court to proceed on assumption that, what the applicant contended was correct, the assertion disputed by the 1st respondent, then the chances were even this application can be withdrawn with no leave and later on upon beginning execution be re-filed to infinite on suggestion that Order XXIII Rule 1 (3) of the CPC, was not applicable in objection proceedings including the current application before this Court. He argued that the applicant's submission was wrongly premised and therefore be disregarded for lack of merit.

On the issue of the applicant's knowledge that the plot in dispute was subject to Court order at the time she purchased the property, it was Mr. Mbuga's submission that, first, when the Miscellaneous Commercial Application No. 01 of 2019 was filed the 1st respondent filed counter-affidavit in opposition of the application, stating that the plot in dispute was subject to Court order and the person who sold it to her was aware of the said Court order. Second, the 1st respondent went on stating that even if the applicant was not aware, the fact disputed by the 1st respondent, but in the counter-affidavit filed in this application and submission in chief, a copy of decision in Miscellaneous Commercial Application No. 03 of 2017 (copy attached), it was clearly ruled out that the plot in dispute was subject to order of the attachment, the facts which were sufficient for the applicant to take judicial notice of the stated Court order, which therefore stopped the applicant from claiming otherwise.

Mr. Mbuga reiterating his position, he prayed for the application be dismissed with costs.

It is undisputed fact that there has been before this Court an application of this nature filed vide Miscellaneous Commercial Application No. 1 of 2019. The application was between the same parties and it was on the same subject matter. On 16th October, 2019, Mr. Kusalika learned counsel sought to withdraw the matter without assigning any reasons for doing so. The application was not

objected to by Mr. Mbuga counsel for the respondent. The trial Judge granted the prayer with leave to re-file declined. That order has not been revised or reviewed, which means it is still standing and valid. In the meantime, following the withdrawal order, naturally the Court would have re-issued its execution order which was previously blocked by the above cited objection proceedings preferred by the applicant. It is therefore not proper for the applicant to bring the same application.

To allow this application, it will mean the applicant is allowed to endlessly bring and withdraw the same application as she desires. This besides wasting Court's precious time but it will render the provisions of Order XXIII Rule 1 (3) of the CPC, meaningless and going by the applicant's version not applicable to objection proceedings, the assertion totally disputed.

The applicant in paragraph 3 of her affidavit deponed to be lawful owner of the disputed property after purchase from National Microfinance Bank (NMB) as exhibited by annexure VLC-2, showing the applicant as current owner. Under paragraph 6 of the counter-affidavit the 1st respondent has clearly averred that fact. Also during the existence of Miscellaneous Commercial Application No. 1 of 2019, this issue was raised via counter-affidavit filed by the 1st respondent that the plot in dispute was subject to Court order. Again the same stance is reflected in the decision in Miscellaneous Commercial Application No. 3 of 2017. As stated by

Mr. Mbuga these were sufficient facts for the applicant to take judicial notice of the aforesaid Court order, which she has opted to ignore by saying she was not aware, the account, which I, entirely agree to.

Mr. Makota's submission relying on Order XXIII Rule 4 of the CPC, though valid and made sense but not in relation to the present application which was withdrawn for the reasons best known to the applicant and of which leave to re-file was declined, the order which has not been vacated. The order that the execution should proceed was not a fresh order as she would construe it, but an already order in place which had to be suspended to allow room for the Miscellaneous Commercial Application No. 1 of 2029 to be heard and determined. The case of **Katibu Mkuu Amani** (supra) is relevant as far as objection proceedings are concerned but as stated above in the absence of an order vacating the order dated 16th October, 2019, this application becomes superfluous. The applicant's argument that after the withdrawal of the application she had to wait for another attempt to attach her property to be opportunity for her to again file another fresh objection proceedings application, is misplaced.

Similarly, application of Article 107A (2) (c) of the Constitution, whilst highly commended but with limitations. Close scrutiny of the Article does not give a vibe that parties should avoid prescribed procedures or abuse Court process. See: **Francisca Mbakileki v Tanzania Harbors Corporation, Civil Reference No. 14**

of 2004, CAT at DSM (unreported). Therefore, though substantive justice is being promoted over technicalities, yet it does not mean parties should skip and/or disregard the procedures in place as well as misuse Court avenues availed to them by having multiplicity of applications on the same subject matter and between the same parties albeit without leave as it was the case in the present application where leave to re-file though prayed but was not granted

In light of the above, I find the preliminary points of objection raised are without merits and proceed to sustain them and dismiss the application with costs.



A handwritten signature in black ink, appearing to read "P. S. FIKIRINI".

P. S. FIKIRINI

JUDGE

20th JULY, 2020