

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 10 OF 2020

(Arising from Commercial Case No. 05 of 2016)

SALMA ABDALLA ALI.....APPLICANT/OBJECTOR

Versus

UMRAT ALI MOHAMED

(Suing as Administratrix of the Estate of the

late Omary Juma).....1st RESPONDENT

e-CONSTRUCTION CO. LIMITED.....2nd RESPONDENT

SAID MBARAKA.....3rd RESPONDENT

Last Order: 02nd July, 2020

Date of Ruling: 16th Sept, 2020

RULING

FIKIRINI, J.

The genesis of this application is the decision in Commercial Case No. 5 of 2016 in which the 1st respondent, Umrat Ali Mohamed (*suing as Administratrix of the estate of the late Omari Juma*) sued the 2nd respondent, e-Construction Co. Limited and 3rd respondent, Said Mbaraka for breach of contract, for payment of the sum of Tzs. 407, 000,000/=, payment of the sum of USD. 10,000. equivalent of Tzs.

21,500,000/= per month from the 26th August, 2011 when the contract was made till the final payment being loss of income and *mesne* profit, damages and costs of the suit. On 26th October, 2017, this Court entered judgment in favour of the 1st respondent.

The decree issued has, however, not been executed due to twists and turns encountered. To further the complication already in place Salma Abdalla Ali who claims to be the 3rd respondent's wife, filed this objection proceedings application pursuant to Order XXI Rule 57 (1) and (2); 58; 59 and section 95 of the Civil Procedure Code, Cap. 33 R.E. 2002 as Amended (the CPC). The applicant is contesting the attachment and sale of the landed property situated on Plot 104 Block "A" with LO No. 282014 in Kigogo Area, in Dar Es Salaam. The application is supported by her affidavit in which she claimed being the 3rd respondent's wife, whom she reported as being sick for sometimes. And that she is contesting the attachment and sale for the following reasons: (i) that the property was a residential house where she and her five (5) children live; (ii) that the property was matrimonial property in which she has interest, and (iii) that she and her children will suffer irreparable loss. Her affidavit was supported by that of Rashid Ali Luoga-resident in the area since 1985 and chairman of Kigogo Kati

area since November, 2019, deponed knowing the applicant and her family as permanent residents in his area of leadership.

The 1st respondent disputed both affidavits but for that of Rashid Ali Luoga filed on 30th January, 2020, she stated that there was no proof that Rashid Ali Luoga, had all the facts related to the property, the applicant and her claims. And even if so, yet since Rashid Ali Luoga became chairman in November, 2019, he can therefore not be conversant with the facts of what happened prior to his coming into office argued the Counsel. She also averred that Mr. Luoga had nothing which shows knowing the applicant or the 3rd respondent prior to becoming a Chairman.

At most for being a chairman in the area he should have procured and produced before the Court the 3rd respondent as he was subject to arrest for detention as a civil prisoner. The applicant's affidavit besides stating her claim, was accompanied with annextures "A" and "B" a copy of a marriage certificate and title deed to the property; annexture "C" children birth certificates; annexture "D" a document from the government leader in the area; annexture "E" proclamation of sale issued and signed by this Court dated 14th January, 2020.

The 1st respondent annexed several annextures but the most important was annexture UMA-1-the search report showing that the property has been registered in the 3rd respondent's name.

The application was orally argued on 02nd July, 2020 in which Mr. Mackanja Manono and Mr. Roman Masumbuko both learned counsels appeared on behalf of their respective parties. Mr. Manono adopted the affidavits sworn and Mr. Masumbuko equally adopted counter-affidavit and skeleton arguments filed, both prayed the filed documents be made part of their submissions, the prayer which this Court without any qualm granted and adopted.

In his submission Mr. Manono put forward two grounds in support of the application that the attached property subject of this application was a residential house belonging to the applicant and the 3rd respondent, as averred in paragraphs 2,3,5,7 and 8 of the applicant's affidavit as well as paragraphs 3 and 4 of the area chairman Rashid Ali Luoga's affidavit. Mr. Manono further submitted that pursuant to section 48 1(e) of the CPC, the property was exempt from attachment and sale, it being a residential house. Bolstering his submission, he cited the case of **NBC v Cosmas M. Mukoji [1986] T. L. R. 127**.

The second ground was that the property aside from being a residential house it was a matrimonial property in which the applicant had interest. Also considering the fact that the applicant was not a party to the Commercial Case No. 05 of 2016, the property should therefore not be liable to attachment, argued the Counsel.

Again to fortify his submission he cited the case of **Mrs. Nurdin Mbaraka v Awadh Abeid Iyala and Another [2002] T. L. R. 188.**

Finally, it was his submission that the 1st respondent in her counter-affidavit has not objected to the fact that the said property was a residential house, the fact therefore stands unchallenged. In view of his submission Mr. Manono was content that the applicant has been able to successfully establish that the property subject to attachment was a residential house and he thus prayed for the application and prayers in the chamber summons be granted.

Mr. Masumbuko in his reply submitted that the applicant has failed to establish two (2) key requirements required: one, that she had interest in the matter, and two, that she was possessed of the property. And that this was due to the fact that the 3rd respondent's affidavit who is the owner and the only one who can establish ownership was missing. Illustrating more on the 3rd respondent, Mr. Masumbuko requested the Court, so that it can go on record, that all efforts to serve the 3rd respondent who has not appeared in Court proved futile. And to him that indicated that the facts stated by the applicant were not true, as per the search carried out as reflected in UMA-1, the property has been registered in the 3rd respondent's name and mortgaged to Amana bank who has not objected the attachment. The property can therefore be attached and sold.

Boosting his submission, he referred this Court to the case of **Katibu Mkuu Amani Fresh Sports Club v Dodo Umbwa Mamboya & Another** [2004] T. L. R. 326, in which the Court's duty was stated to be investigating on ownership of the property in question. The fact which the applicant's counsel seemed to confuse, as he brought in application of section 48 1 (e) of the CPC which was completely a different thing, submitted Mr. Masumbuko. Section 48 1(e) was not for objection proceedings, but for setting aside the attachment on the pretext it was matrimonial property and counted the submission as irrelevant, since there was no affidavit by the 3rd respondent who knew the status of the marriage, as the two could be divorced. More to this was that this Court had no powers to determine matrimonial issue including confirming the validity of marriage between the applicant and the 3rd respondent, considering that the 3rd respondent has failed to file any counter-affidavit regarding the marriage claimed to have been contracted in Zanzibar.

On the cited cases of **NBC** and **Nuridin Mbaraka** (supra), Mr. Masumbuko discussed the cases as distinguishable to the facts in the present circumstances whereby the husband has himself failed to file an affidavit or appear in Court and prove that the property under his name is a residential house. He, on the same breath submitted that nowhere the property has been decreed as a matrimonial

property, and even if it were then the Court can still sell 50% belonging to the 3rd respondent.

Mr. Masumbuko in winding up his submission submitted that the 1st respondent/deed holder who is a widow has no place to live since the passing on of her husband. The 3rd respondent/judgment debtor illegally benefitted from the 1st respondent's husband and amassed wealth from the proceeds of the contract including the attached property and on the basis the deed of settlement in Commercial Case No. 05 of 2016, was signed by the 1st and 3rd respondents. Urging the Court to dismiss the application with costs, he implored that this application was a collusion to circumvent the execution process.

In a brief rejoinder, Mr. Manono aside from agreeing on principles in the cited case of **Katibu Mkuu** (supra) on Court's duty in objection proceedings under Rule 57 (1) of the CPC, in which the objector is required to show that the property was not liable to attachment or not and that could be so because to statutory limitation or other interests, and in the present application the applicant contested the attachment under section 48 1 (e) of the CPC, that the property was residential house. Buttressing his stance, he argued that in law an affidavit was sufficient evidence on its own and in this instance the applicant by way of an affidavit has

been able to establish that the property is not liable for attachment and sale and hence pray for the grant of the application.

I am quite in agreement with Mr. Manono that affidavit on its own is sufficient evidence. However, like all evidence, is governed by the law of evidence, and is subject to evaluation. I will thus examine this application relying on the affidavits and counter-affidavit deponed; and the accompanying annexures and further illustrations made vide skeleton arguments filed by Mr. Masumbuko and oral submissions made by the counsels for the parties before the Court.

In her application the applicant claimed the property was not liable to attachment as it is a residential house as well as matrimonial asset which she had interests and that if the property is left to be attached and sold she and her family will suffer irreparable loss. This evidence is contested by the 1st respondent in her counter-affidavit that the execution is against the 3rd respondent in whose name the property has been registered and who has not filed an affidavit to contest it.

The only issue for determination is whether the applicant has a legal status of stopping the execution proceedings germinating from the Commercial Case No. 05 of 2016, which led to attachment of the house on Plot No. 104 Block "A" Kigogo Area, registered in the name of the 3rd respondent, Said Mbaraka Khamis.

In fulfilling the requirements under Order XXI Rule 57 (1) and (2) of the CPC, the applicant has to establish that the property liable to attachment does not belong to the judgment debtor but another person including the applicant herself or that she had some interest in the property at the date of attachment. From the availed evidence and as exhibited by search report annexed as UMA-1 to the counter-affidavit, the attached property is registered in the 3rd respondent's name. The applicant has not refuted or controverted this fact. The 3rd respondent being the sole owner, he is the only one who can come to Court and state otherwise, the option he chose to ignore. And since there was no any other proof to contradict this evidence, the applicant's interest and claim in the property becomes mere unsupported claim, as the property remains to be personal property of the 3rd respondent. In the case of **Hadija I. Arerary v Tanzania Postal Bank, Civil Appeal No. 135 of 2017, the Court of Appeal (unreported)**, the Court held that:

“..... TPB was entitled to sell the mortgaged property since the Appellant failed to establish that she was the spouse of the mortgagor considering that the mortgaged property was registered in the sole name of the mortgagor,”

[Emphasis]

The facts of the above cited case were that the Postal bank granted a loan to the borrower who issued a title deed of another person (guarantor and mortgagor) as collateral. In his affidavit, the mortgagor deponed that he was single. Unfortunately, the borrower defaulted payments hence; Postal bank exercised its rights to sell the mortgaged property to recover the debt. The appellant, claiming to be the wife of the mortgagor, disputed the sale of the property claiming that her consent as a wife was not sought before the property was subjected to mortgage.

This is the exact same position taken in the **Katibu Muu Amani Fresh Sports Club** case (supra), where proof of ownership was insisted. Although the facts are not exactly the same but there is close resemblance. On the basis of the evidence availed to Court, the applicant cannot in any way claim interest in the property registered in the 3rd respondent's name, as the sole owner. Meaning the property is not jointly owned. There was equally nothing suggesting that the property is a residential house as stated by the applicant and/or matrimonial property in which she has vested interest.

Whereas the marriage between the applicant and the 3rd respondent as reflected in annexure "A", is essentially not being challenged, but without the 3rd respondent's affidavit supporting the assertion, the applicant's claim remains unsubstantiated. As correctly submitted by Mr. Masumbuko, who knows if the two were still

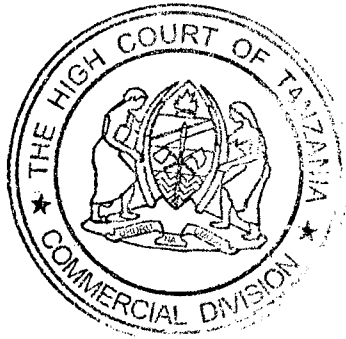
married and not divorced. And if they are divorced then this Court would not be the proper one for her to claim her rights. If not, still it is important for the 3rd respondent to say something, which he has not. To worsen the situation, the 3rd respondent has not even entered Court appearance, despite several services including by way of substituted service. Also in her affidavit the applicant in paragraph 4 averred that her husband has been sick for sometimes, but without stating as to his whereabouts or furnishing this Court with the proof of the alleged sickness. This application by the applicant and the absence of the 3rd respondent who had been served several times and even issued with arrest warrant by this Court, highly suggests a collusion between the two to circumvent the execution process. On this aspect I share Mr. Masumbuko's stance and this Court will not sit by to allow such practices to grow deep and become a norm.

Mr. Manono's submission that the applicant has under paragraphs 2,3,5,7 and 8 of the affidavit in support been able to establish that the property is residential and therefore section 48 1 (e) should be applied, and that the property should not be attached and sold, is not supported. The applicant has failed completely to establish her interest on the property either way, be it a residential and/or matrimonial property. Even with the affidavit of Rashid Ali Luoga yet there was no proof to that effect.

The case of **NBC** (supra), though is relevant but not in the circumstances surrounding this application. It could be true that the applicant was not part of the Commercial Case No. 05 of 2016, but since the property was registered in the 3rd respondent's sole name, the applicant's interest and claim over the property have no place. The case of **Mrs. Mbaraka** (supra) referred by the applicant, likewise, is distinguished. In that case aside from the failure by the magistrate to determine the objection proceedings one way or the other, but it was also evident that in actual fact the property did not belong to **Mrs. Mbaraka** alone and the mortgage involved was not beneficial to other beneficiaries. Unlike in this case whereby the property is singly owned by the 3rd respondent and is being attached to execute a Court decree resulting from *ex-parte* judgment in Commercial Case No. 05 of 2016. The 3rd respondent is thus entirely responsible and the applicant's claim that the property is not liable to attachment lacks merit.

In summing up, I am more in agreement with Mr. Masumbuko's submission that the applicant has failed to establish her interest in the property. The property subject of attachment is registered in the 3rd respondent's name and the reason for the attachment is based on the execution proceedings resulting from the Commercial Case No. 05 of 2016 in which the 3rd respondent was a party.

In the upshot, this application is devoid of merits and thus dismissed with costs. It is so ordered.



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

P. S. FIKIRINI

JUDGE

16th SEPTEMBER, 2020