IN THE HGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

DAR ES SALAAM.

MISC. COMERCIAL APPLICATION NO. 122 OF 2019

(ARISING FROM COMMERCIAL CASE NO. 18 OF 2016)

SANDRA WILSON NGUI..... APPLICANT.

VERSUS

BANK OF AFRICA (T) LIMITED..... 1ST RESPONDENT.

WILSON SIMON NGUI.....2ND RESPONDENT.

CDJ CLASIC GROUP LIMITED..... 3RDRESPONDENT.

Date of Last Order: 17/03/2020
Date of Ruling: 17/04/2020

RULING.

MAGOIGA, J.

The applicant, **SANDRA WILSON NGUI** by chambers summons under the provisions of Section 68 (e) and Section 95 Order XX1 Rules 57(1) and (2), 58 and Order 24(1), XXXVII1 Rule (1) (a) all of the Civil Procedure Code, [Cap 33 R.E.2002] and any enabling provisions of the law, instituted this application against the above named respondents jointly and severally praying for the following orders, to wit:

1. That this Honourable Court be pleased to investigate the claim or objection by applicant /objector against attachment and sale of the house located Saranga/Kimara, Matangini, Kinondoni Municipality,Dar es- salaam in execution of a decree in favour of Decree holder in Commercial Case No 18 of 2016.
2. That this Honourable Court be pleased to postpone the execution of the decree pending determination of the objection.
3. Costs of the application be provided for.
4. Any other relief as this honourable Court may deem fit to grant.

The chamber summons was accompanied by affidavit of one, SAMUEL SHADRACK NTABALIBA with certificate of urgency, starting the reasons why this application should be granted as prayed.

Upon being served with the chamber summons and affidavit, the first respondent through Mr. Jonathan Mbuga, learned advocate, filed a counter affidavit stating reasons for opposing the grant of the orders sought in the chamber summons. The 2nd respondent filed a counter affidavit. Equally, reply to counter affidavit was dully filed.

The facts pertaining to this application as gathered from the records are not complicated. In 2012 the 1st and 2ndrespondents entered into loan term

facility amounting to Tshs 200,000,000/ and Home Equity Loans, amounting to Tshs 160,000,000/ together were extended to 2nd respondent. The facts go that the loan was secured by two mortgages of land, **first,** Plot No. 696 Block C, Sinza in Dar-es-salaam with Certificate Title 96163 **second** plot No 1019 Block 43 Kijitonyama Area, Dar-es-Salaam with certificate title No. 100853.

The facts went on that in early May 2013, the 2nd respondent repaid term loan facility save for Home Equity Loan, and he requested return of the Title deed No 96163 which was pleaded as a security for his term loan.

Inadvertently, instead of discharging only Title deed No 96163 but even title No. 100853 was also discharged. Despite the fact that the 2nd respondent being aware that the said title deed was erroneously discharged proceeded to pledge the said title deed to ECO Bank with registration No 153548 on 22nd August 2013.

It was further stated that the 2nd respondent failed to make payment in Home Equity Loan amount, which remained unpaid and the principal sum and interest bulged to the tune of Tshs. 109,678,253/=. In the circumstances, the 1st respondent instituted Commercial Case No 18/2016 as recovery measure to be paid the unpaid amount. On 29th June 2016

parties agreed to settle the matter out of court and settlement deed was recorded and on 20th July 2016 thereby a court decree was issued by Mansoor, J. It was ordered that plaintiff shall hold and retain all legal securities namely Plot No 48 Block B Mlandizi Kisiba-Costal Region as shown in registered survey plan No E/359/487 REG No 61784 and unregistered property located at Saranga/Stop Over, Kinondoni Municipality, Dar-es-Salaam and that the said properties will be subject to execution of the decree in case decretal sum will not be paid as agreed.

Apparently, the 2nd defendant did not honour the repayment schedule recorded on 20th July 2016. This prompted the decree -holder to apply for the execution of the decree by the sale of mortgaged property on unregistered property located at Saranga/Stop Over, Kinondoni Municipality Dar-es-Salaam. The said application was met with objection proceedings No. 3 of 2017 which commenced on 4th October 2017 before Songoro J (as he then was) by one, Hellen Mkindi, the wife of 2nd respondent, as an applicant objecting the attachment of the property and the said application was dismissed on 12th October, 2017. Again another application No 122/2019 was commenced by Kuringe Real Estate Company Limited against 1st respondent and it was withdrawn with no reasons following that

withdraw then proclamation of sale was issued against the property but again which has been met by this application by the sister of the 2nd respondent.

When this application was called for hearing, it was ordered to be argued by way of written submissions. The counsel for parties complied with the scheduled order of filing written submissions for and against, paving way for this ruling. Let me record my thanks for their industrious input on this matter. I honestly commend them.

At all material time the applicant has been enjoying the legal services of Mr. Samuel Shadrack, learned advocate. On the other hand, the 1st respondent has been enjoying the legal services of Mr. Jonathan Mbuga, learned advocate while 2nd respondent was not represented. The third respondent being a court broker never bothered to participate in this proceeding for obvious reasons.

Mr. Shadrack arguing in support of the application recited the provisions under which this application was preferred, and prayed that his affidavit be adopted to form part of his written submissions. According to Mr. Shadrack, the main complaint for preferring this objection proceedings is that the applicant bought the house in dispute from one Mwanvita Mohamed Jahu

on 4th October 2007 situate at Saranga ward at Kimara Matangini area which is different from the property of the 2nd respondent which is located at Kimara ward, Stop Over. Mr. Shadrack went on to submit that Saranga, Stopover is in Ubungo District and is a different area from Kimara Matangini where the disputed house is located. The learned counsel, therefore, invited the court to investigate the claim of the applicant because the purported house is located at Saranga –Stop-over while the applicant house is located at Saranga, Kimara Matangini which is different location.

Counsel for applicant went further to submit that the applicant has never ever mortgage or guaranteed the 2nd respondent despite that are blood related brother and Sister. Furthermore, on the same point counsel for applicant submitted that the 1st respondent has power to attach and sale only properties which are mortgaged or guaranteed the loan. According to Mr. Shadrack, the ownership of the land can only be proved by document and the applicant has annexed a sale agreement and agreement survey plan proving his ownership.

On that note, it was the prayer of Mr. Shadrack in concluding his submissions that this Court be pleased to grant an order sought in the chamber summons.

On the other hand, Mr. Mbuga, learned advocate for 1st respondent in reply to the submissions by Mr. Shadrack strongly and vehemently opposed this application, and in doing so, prayed that his counter affidavit be adopted to form part of their written submissions.

Mr. Mbuga started his submission by giving out historical background of this application showing that the house in dispute is the same house whereby the second respondent is employing technical delays to obstruct the fruits of justice using unwarranted applications by way objection proceedings. Mr. Mbuga pointed out that no misallocation of the place and the house.

On the issue of ownership, it was the reply and the opposite view of the counsel for 1st respondent that the provision of Order XX1 Rule 57 and 58 of the Civil Code gives court the power to investigate on the claim in respect of attachment of the property and see if viable or not viable then allow or dis-allow execution. It is not the duty of the court at this stage to pronounce who is rightful owner of the property. Mr. Mbuga pointed out that what the applicant is alleging in her affidavit is misconception of the law, though there is no law on how the court should carry out investigation, the question which should be answered is whether on the date of attachments who was in possession of the property to cement his point cited the case of

Harilal & CO Vs Buganda Industries L.t.d (1960) EA 318 ,whereby the court held that court should investigate the question of possession of attached property and if satisfies that the property was in possession of the objector it must be found whether he held on his own account or trust for judgment debtor.

Therefore, according to Mr. Mbuga, the question for determination is possession and not question for ownership. Further on the same point the learned counsel submitted that if the court decides to determine the issue of ownership there is no enough evidence to prove that the applicant is the owner of attached property because the sale agreement annexed does not specifically refer the property as owned by the applicant. The said agreement provides general reference where it is located and no reference as to what was sold to applicant and that the transfer has not been done to date. To bolster his case he cited the **Julitha Lucas Nkya vs Emmanuel Mwati Mgoo, Land Appeal No 79 of 2017at pages 12 and 13.**

On the issue of security or guarantee on the loan by applicant to 2nd respondent it is not the case here. The 2nd respondent is duty bound to disapprove that the same because he himself is the one who brought documents and evidence regarding the possession of the house and it was

among other properties listed and mentioned in the decree. As such, therefore, the allegations that the applicant did not borrow from 1st respondent or secured loan to 2nd respondent is immaterial at this stage. The learned counsel went on to submit that this issue cannot be dealt at this stage but ought to be dealt with when court dealing with ordinary suit.

Lastly but not least, counsel for 1st respondent submitted that, the instant application is abuse of court process, as the records reveal that there are number of applications on the same matter such Misc application No 3/2007 which was commenced by the wife of the applicant one Hellen Mkindi and on same property and the counsel for applicant was Mr. Samuel Shadrack. The first application was dismissed by Songoro J (as he then was) the second application was Misc Application No 122/2019 before Magoiga J, it was commenced by Kuringe Real estate Co L.T.D, and Mr. Samuel Shadrack was a legal representative of the 2nd respondent but that application was withdrawn with no reasons. Now come the instant application which was commenced by the sister of 2nd respondent and her legal representative is Mr. Samuel Shadrack. According to Mr Mbuga this is contrary to settled principle that there must be end of litigation and the decree holder must enjoy fruits of justice. The learned counsel referred me to the **book by**

Odunga Digest on Civil Law and Procedure volume one paragraph 1-2,1-3 and 1-4 in which the author underscores that courts to guard against frequent abuse of the court process and obviate actions likely to cause abuse of the court process because filing several applications seeking the same order amounts to an abuse of the court process.

Lastly, the counsel for 1st respondent submitted that it is matter of law that counsel could not have double role in the application as the party to case and counsel. Further on the point he submitted that applicant is new to this application that being the case, Mr. Samuel Shadrack does not qualify to swear affidavit of applicant particularly on the matter of facts which are contentious by doing so the counsel for applicant has played double role and therefore her prayers are not supported by proper affidavit. To buttress his point he cited the case of **Alistides A Kashasira Vs Prof Anna Tibaijuka & 2others, Misc Civil Application No. 44 of 2015** where the Court held that the law allow the counsel to depose facts in the proceedings in which he used to attend on behalf of his client, but not to new client like applicant and therefore the act of counsel to swear in applicant's affidavit it is a hearsay evidence.

Finally, Mr. Mbuga invited this Court to dismiss this application with costs

On the other hand, the 2nd respondent in reply to the submissions of the counsel for applicant prayed that his counter affidavit which he filed on 16th October 2019 be adopted to form part of his written submissions.

On the point of security, he strongly opposed and submitted that he has never mortgage the house of the applicant located at Sagara, Kimara Matangini. According to the 2nd respondent, the house he mortgaged is the house on plot no 48,Block C Sinza with Certificate of Title No 96163 and having managed to pay the whole loan it was discharged and he deposited as collateral to another bank.

In rejoinder, Mr. Samuel Shadrack on the point of being counsel of the wife and family he submitted that parties are distinct different and the properties are different and on the issue of ownership he submitted the contention that the court has no duty to declare who is rightful owner is misconceived because in the course of investigation of the claim the court must answer the question whether the attached property was deposited as collateral and who is the owner. The learned counsel pointed out that the cited case of **Harilal & CO Vs Buganda Industries L.t.d (1960) EA 318** is distinguishable because investigating attached property the question of ownership is unavoidable. Further on the same point he submitted that the

house is located at Saranga –Stop over while the applicant house is located at Saranga –Kimara Matangini, so the contention that the sale agreement does not specifically refer to property in question is unfounded argument in the circumstances because Saranga /Kimara Matangini is well known. On the case of **Julitha Lucas Nkya vs Emmanuel Mwati Mgoo, Apeal No 79 of 2017** is distinguishable because ownership of the landed property can be proved by sale agreement.

On point of defective affidavit, counsel for applicant submitted that the affidavit sworn by Samuel Shadrack Ntabaliba falls in the category of interlocutory application and he has indicated in the verification clause that it is true to the best of information I got from the applicant which is the requirement of the law. Therefore, Mr. Shadrack concluded that the cases cited are distinguishable on the ground that he has specifically verified that the information was obtained from the applicant.

Finally, Mr. Shadrack submitted that basing on the argument put forward invites this court to investigate the claim and grant application as prayed.

This marked end of hearing of this application.

Having accurately summarized the very powerful and engaging submissions made by the learned counsel for parties, the task of this court now is to determine the merits or otherwise of this application.

Guided by the provisions under which this application is made but which I need not quote in extensor here, let me put myself clear that when the court is dealing with an objection proceedings the law is obvious the court should concentrate on the question of possessions of the property the subject of attachment and then decide whether the judgment debtor is in possession of the property on his own behalf or on account of or in trust or some other person. If the property is in actual possession of some other persons other than the judgment debtor, the court has to decide whether that possession is in trust for or on behalf of judgment debtor. The court should not be concerned with the question of title unless it necessary for its decision on the question of possession.

Back to the instant application, I have gone through the record, including Commercial Case No. 18 of 2016 record and come across with the decree of my learned sister Monsoor, J dated 20th July 2016 which was a result of the consent settlement order reached by the parties in commercial case No 18/2016. It is clear as day light that in the decree the disputed property

was put as security under paragraph 7 of that decree. Not only that but I am convinced that it was after the failure to honour the consent agreement that the decree holder proceeded to apply for execution of the decree. And it was during that process whereby that property was attached in execution of decree and to be sold in satisfaction of the decree in question. Also, I have gone through the record and found out that different proclamations for sale were issue by this court at different dates; the **first** one was a proclamation for sale dated 6th December 2017 which disclosed the property to be attached Saranga Stop over Kinondoni Municipal Dar-es-salaam,Plot No 696 Block 'C' Sinza with title 96163 and house Plot No 48 Block 'B' Mlandizi Kisabi Coast Region, which was objected by 2nd respondent wife in Misc Application No 3 of 2017 and the application was dismissed. **Second,** another proclamation for sale dated 28th November 2018, disclosed the property to be attached Saranga- Stop over Ubungo Municipal Dar-es-salaam and house Plot No 48 Block 'B' Mlandizi Kisabi Coast Region was objected by Kuringe Real Estate Company Limited in Misc application No 122 of 2019 which was withdrawn. The third proclamation of sale was issued on 5th September 2019 which disclosed the property to be attached

situate at Saranga Stop over Kinondoni Municipal Dar-es-salaam, which is the subject of this ruling.

Guided by the above records which are clear as day light without much ado and having considered all affidavits and counter affidavit and written submissions of the parties in this application, I am convinced that the instant application is devoid of any useful merits. Indeed as correctly submitted by the learned counsel for 1st respondent is an abuse of the court process. I will endeavor to explain. The argument that the house is in Ubungo district and not Kinondoni is without any merits because Ubungo district was part of Kinondoni until 2015 when same came into existence. The instant application is and clearly show is a design by close family members of the 2nd respondent to bring unnecessary multiplicity of applications to obstruct the 1st respondent from enjoying the fruits of justice. This cannot be accepted by the court of law. Indeed, I condemn this uncalled conduct on the part of the 2nd respondent in the circumstances of this application. The first application was dismissed by Songoro, J (as the then was) but they never bothered to take further action instead they opted to change parties and bring the same application. **Two,** the property which the applicant alleged belong to her is the same property which was

objected by the wife of the 2nd respondent in Misc application No 3 of 2017 and the counsel for applicant was one Mr. Samwel Shadrack, also there was another application by Kuringe Real Estate Company Limited in Misc application No 122 of 2019 which was withdrawn and Mr. Samwel Shadrack was counsel for 2nd respondent and again this application in hand whereby the applicant is the sister of the 2ndrespondent and Mr. Samwel Shadrack is the counsel for applicant. All these three applications were objecting the attachment of the same property which is unregistered house located Saranga Stop -over Kinondoni Municipal Dar-es-salaam. In this situation it is my considered opinion that the investigation which this court was called to do, was indeed, unnecessary for the whole application was tainted and calculated to delay decree holder from enjoying the fruits of justice same the previous one were.

Furthermore, the instant application is not maintainable because the objector had not said if at the time of attachment she was in possession of the suit property rather she has concentrated in ownership of the mortgaged property instead of helping the court to know who was in possession at the time of attachment between Objector and judgment debtor which is a requirement of Order XX1 Rule 57 as it was stated by His

Lordship, Mukhi J. in the case of **G.R. Bhande v B.R. Ihadav** AIR 1974 Bom 155 by saying that it is substantially clear that on a proper construction of these Rules the question to be decided is whether on the date of the attachment it was the judgment debtor who was in possession or it was the objector who was in possession and further when the court comes to a finding that the property was in the possession of the objector, then the court must proceed further to find whether that possession of the objector was on his own account for himself or as trustee or on account of the judgment debtor. It requires to be over-emphasized that the direction of the investigation, which the court has to carry out, points to possession being the criteria. It is, of course, possible that in the course of such an investigation as to who is in possession of the property subjected to attachment, the question of some legal right or interest or title may also arise and if such legal right affects the determination of the question as to who is the real person in possession in fact or in law, then such a legal right or interest will naturally have to be taken into account. But it is also settled law that complicated questions as to title are not to be gone into under summary procedure of investigation.

Lastly, it is important to restate that the applicant and judgment debtor are blood sister and brother. This fact has not been controverted. There is no way the decree holder could have been made aware of the property of the applicant and record it in the decree of this court. Be as it may be, still the disputed property belongs to the 2nd respondent and it was made as security in deed of settlement which was recorded before this court. Having defaulted, the judgment debtor cannot succeed to avoid liability and likewise this application is considered abuse of the court process and cannot succeed. It is therefore dismissed in its entirety with costs. Having so hold, I direct that execution to proceed and the 1st respondent to be able to realize the fruits of justice.

It is so ordered.

Dated at Dar es Salaam this 17th day of April, 2020.

S. M MAGOIGA
JUDGE.
17/04/2020.