

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 38 OF 2020

(Arising from Commercial Case No. 51 of 2011)

BETWEEN

ST. JOHN UNIVERSITY OF TANZANIA..... APPLICANT

Versus

JAFFERY INDUSTRY SAINI LIMITED.....1st RESPONDENT

ST. JOHN UNIVERSITY OF TANZANIA-ST. MARKS

TEACHING COLLEGE CENTRE.....2nd RESPONDENT

Last Order: 16th Mar, 2021

Date of Ruling: 20th Apr, 2021

RULING

FIKIRINI, J.

The applicant, St. John University of Tanzania moved this Court under Rule 2 (2) of the High Court (Commercial Division) Procedure Rules 2012 (the Rules), Order XXI Rule 57 & 59 of the Civil Procedure Code, Cap 33 R. E. 2019 (the CPC) and all other enabling provisions of the law asking the Court to investigate and examine whether the applicant was a party to the Commercial Case No.51 of 2011 between the respondents and whether the applicant's bank account No. 01J1082426400 CRDB Bank Dodoma branch was liable for attachment.

The application was orally heard, whereby, the 2nd respondent did not enter appearance. Mr. Emmanuel Kessy learned counsel who appeared for the 1st respondent opposed the application with a support of the counter affidavit while the applicant enjoyed the legal service of Mr. Khalifa Kyango assisted by Mr. David Pallangyo learned counsels.

Both counsels as a support to their submissions adopted their respective kinds of affidavits, whereas Mr. Kyango adopted, the affidavit of Allen Mtetemela, the Principal Officer of the applicant, and the replies to the counter affidavit, Mr Kessy for the 1st respondent adopted her counter affidavit to oppose the application. Mr. Kyango also adopted his skeleton argument filed under Rule 64 of the Rules.

Mr. Kyango main question was whether the applicant was a party to the Commercial Case No.51 of 2011 and if the Court was satisfied that the applicant was not a party then it should make an order to lift the *Garnishee Order Nisi* which was issued against the applicant. And in determining that should look into the pleadings, judgment, decree and proceedings. Referencing his submission to the suit instituted before this Court asserted that the claim was against one party named as St. John University of Tanzania- St. Marks Teaching College Centre. Throughout the proceedings and later in the judgment and decree that was the

name which featured. The same party was the one who entered into deed of settlement with the respondent in Commercial Case No. 51 of 2011. To this end it was the applicant submission that, from the document and the Court records it was obvious the suit involved the 1st respondent and 2nd respondent of this application and never involved the applicant.

Mr. Kyango went on submitting that, the applicant was only seen at the execution stage and named in the *Garnishee Order Nisi* issued by the Court. Stressing on how the law operates, he argued that execution was to be made from the judgment and decree and not otherwise, therefore naming a party in the *Garnishee Order Nisi* who was nowhere to be found in the pleadings including judgment and decree was totally wrong and an error, underlined the counsel.

On strength of his submission, he submitted that, much as the applicant was not a party to the case, the *Garnishee Order Nisi* was erroneously made and should be lifted. To buttress his position, he cited the case of **Katibu Mkuu Amani Fresh Sports Club v Dodo Umbwa Mambaya & Another, Civil Application No. 88 of 2002 [2004] T.L.R. 327**

Mr. Kessy for the 1st respondent strongly opposed the application, and accordingly prayed the application be dismissed for the lack of merit and

Garnishee Order Nisi to be granted so as to allow 1st respondent to enjoy the fruits of the decree. Admitting that the Court in determining whether the applicant was a party to the case it has to go back to the pleadings, plaint, written statement of defence and proceedings and was his submission that, going through the annexures to the written statement of defence and counter affidavit and annexure JAF-1, they all disclosed that they were drawn by St. John University of Tanzania, Mazengo Campus, Kikuyu East, P. O. Box 47 Dodoma. Also that the drawer of the written statement of defence in the Commercial Case No. 51 of 2011 was the applicant and therefore by this record it was clear that the applicant was a party to the case, if was not then he could not have filed the defence.

On top of that, paragraph 8 of the counter affidavit indicated that the applicant was a party to the Commercial Case No. 51 of 2011 as exhibited by JAF-3 which was the plaint. Additionally, Allen Mtetemela was the defendant's advocate and he made appearance in Commercial Case No. 51 of 2021 and was the one who signed the referred written statement of defence as an advocate at that particular time, yet now disputing the applicant not being a party to the Commercial Case No. 51 of 2011 which was totally a lie and cannot be accepted.

He went on submitting that, if one goes through the decree both names appear, St. John University of Tanzania as the Principal Officer and St. Marks Teaching College Centre as its campus, in Dar Es Salaam. Mr. Kessy further urged that, the assertion that the applicant was not a party but came about at the execution stage was only for the purposes of defeating justice. And if the applicant contested that fact it should have been said so in their written statement of defence. So far nothing was said during the conduct of the matter.

In his rejoining submission, Mr. Kyango responded by stating that it was not principle in law that a drawer must be a party to the case. Advocates normally draw and file suits but are never party to the suit. The applicant and 2nd respondent are all belonging to the Anglican Church.

Dealing with the written statement of defence drawn by Allen Mtetemela as the head of Legal service for both the applicant and 2nd respondent, he submitted that, despite the fact that the written statement of defence was drawn by Allen Mtetemela, that did not extinguish the fact that the two were separate entities, even though both the applicant and the 2nd respondent's name were parties in Commercial Case No. 51 of 2021. He therefore reiterated his prayer that the *Garnishee Order Nisi* be lifted.

I have carefully examined the rivalry submissions. There are so far only two issues for determination: One, is **whether the applicant was a party to the Commercial Case No. 51 of 2011**, and two, is **whether the applicant Bank account No. 01J1082426400 CRDB Bank Dodoma branch is liable for attachment.**

Let me start with the first issue, whether the applicant was a party to the Commercial Case No. 51 of 2011. Close examination of the records of proceedings in Commercial case No. 51 of 2011, it is evident that, **one**, the plaint which was filed by the 1st respondent, by then a plaintiff, on 14th June 2011, showed that the 1st respondent sued the applicant and 2nd respondent together as a defendants. **Two**, likewise, the written statement of defence filed on 18th July, 2011 indicated the same when it was titled

"Jeffery Ind. Sain Ltd versus St John University of Tanzania & Another"

Three, the deed of the settlement signed by the parties on 16th June, 2016 was between the applicant and the 2nd respondent together on one side and the 1st respondent on the other. **Four**, a written statement of defence as reflected in annexure JAF-1 used the applicant's name and St. John University of Tanzania's logo. In additional at the end of the document there was a precaution reading as follows:

"All correspondence should be addressed to Vice - Chancellor St John University of Tanzania."

Therefore, the assertion that, the applicant was not a party to the case has no legal basis because of all the pointed out facts above. But even without the above pointed out facts, still it is evidently clear that, St. Marks College Teaching Centre is a campus and the Principal Office is St. John University of Tanzania. **Two**, there is no evidence of exclusion clause of liability submitted before this Honourable Court which separates the applicant and the 2nd respondent.

It is settled legal position that in determining who is a party to the case the Court has to look on pleadings and its annexures, the position held by the two counsels and which I equally subscribed too. In the case of **Makori J.B Wassaa, Joshua Mwaikambo & Another [1987] T.L.R 88**, the Court of Appeal of Tanzania has this to say:

"a party is bound by his pleadings and can only succeed according to what he has averred in the plaint and in evidence, he is not permitted to set up a new case." [Emphasized mine]

It is without doubt that as per the Court records of proceedings it is indeed clear that the applicant was a party to the Commercial Case No. 51 of 2011. As stated in the above cited case a party is bound by his

7 | Page

Investment Ltd, Commercial Case No. 103 of 2012 (unreported). In the present situation it is uncontroverted fact that, the judgment debtor has neither satisfied the Court decree nor attached any execution order stopping this Court to proceed with the execution as prayed.

The essence of executing a decree is to let the decree holder to enjoy the fruits of the judgment in her favour and not to suffer and hustle to execute the decree in her favor. It is therefore not proper to grant the relief sought by the applicant that of objecting the grant of the application.

In the light of the above, the application brought by the applicant is hereby declined and dismissed with cost for the lack of merit and *Garnishee Order Nisi* applied be granted and the execution to proceed as prayed. It is so ordered.



A handwritten signature in black ink, appearing to read "P. S. FIKIRINI". The signature is written in a cursive style and is positioned above the printed name.

P. S. FIKIRINI

JUDGE

20th APRIL, 2021