

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC. COMMERCIAL APPLICATION NO. 168 OF 2020**

*(Arising from Commercial Case No. 11 of 2015)*

**DIAMOND TRUST BANK TANZANIA LIMITED.....PLAINTIFF**

**VERSUS**

**MAZONGERA BUILDING CONTRACTORS LTD.....1<sup>ST</sup> DEFENDANT**

**SALUM SULEIMAN ALI.....2<sup>ND</sup> DEFENDANT**

**SULEIMAN SALUM.....3<sup>RD</sup> DEFENDANT**

**MASOUD SALUM.....4<sup>TH</sup> DEFENDANT**

**AND**

**SALUM SULEIMAN ALLY.....OBJECTOR**

**RULING**

*Hearing date on: 07/5/2021*

*Ruling date on: 10/5/2021*

**NGWEMBE, J:**

This ruling emanates from the application instituted by the Objector Salum Suleiman Ally, through his advocate Roman Selasini Lamwai, seeking among others, the following Orders:-

- 1. An Order staying the execution through prohibitory order of the decision of the High Court Commercial Division in Commercial Case No. 11 of 2015 pending the hearing and final determination of the objections raised herein;*
- 2. Set aside the order of the High Court in Commercial Case No. 11 of 2015 prohibiting and restraining the 2<sup>nd</sup> defendant from transferring the properties with CT No. 123616 Plot No. 72, Block U Ilala Municipality, Dar es Salaam;*
- 3. Costs of this application.*

The Objector moved this court to grant those orders by citing Order XXI Rule 57 (1) & (2) of the Civil Procedure Code. The Chamber Summons is supported by an affidavit affirmed by the Objector herein. In the course of pleadings, the four (4) Defendants through their advocate Thomas Joseph Massawe, resisted the application by filing an affidavit in opposition, while the Plaintiff, Diamond Trust Bank Tanzania Limited through learned advocate Stanslous Ishengoma did not file any document in opposition of the application.

In turn on the hearing date of this application, parties were well-represented by learned counsels, while the Objector was represented by learned advocate Roman Selasini Lamwai, the Plaintiff was represented by



learned advocate Stanslous Ishengoma, and the Defendants were jointly represented by learned counsel Thoman Joseph Massawe. On the first day of hearing, that is, on 4<sup>th</sup> May, 2021, the Objector, denied to have involved in any bank transaction with the Plaintiff and the bank was not sure if the one they dealt with was the Objector or another person. At the same time the learned advocate Massawe representing all Defendants, refused to have a client like the Objector, instead he has a different client called Salum Suleiman Ali as opposed to Salum Suleiman Ally. Thus raised a predicament of proper identification of parties before the court may proceed to hear and determine the application. As such, this court adjourned the hearing to another date with instructions to all counsels to appear in court on that hearing date, with all their clients.

On the hearing date, that is on 7<sup>th</sup> May, 2021, counsels appeared in court with their clients and the bank appeared in court with bank officers who are responsible with loan transactions. While Mr. Lamwai came with the Objector Mr. Salum Suleiman Ally, Mr. Thomas Massawe appeared with Suleiman Ali (2<sup>nd</sup> Defendant) and other Defendants. The Objector and 2<sup>nd</sup> Defendant appeared in court with their identification cards. While the Objector had the National Voters Card, the 2<sup>nd</sup> Defendant had a company (Mazongera Building Contractors Ltd) identity Card bearing his name of Salum Suleiman Ali and title as Managing Director together with his photograph. For proper identification among the two, the bank officers together with their counsel Mr. Ishengoma, properly identified the 2<sup>nd</sup> Defendant as their client who took loan from the Plaintiff. Thus, concluded



the Objector is a stranger to Commercial Case No. 11 of 2015 and his properties are not subject to attachment and sale by the Plaintiff.

Accordingly, Mr. Ishengoma conceded to the objection proceedings and to all prayers comprised in the Chamber Summons save on prayer for costs. In turn Mr. Lamwai—learned counsel, quickly rejoined by accepting the admission made by the counsel for Plaintiff, but insisted costs should be granted. Justified his argument for costs by advancing reasons, that his client has suffered dearly on preparation of all necessary pleadings, documentations annexed to the application, filing fees and costs of engaging an advocate for negligence of the Plaintiff. Therefore, costs should redress him to where he was prior to the mistakes committed by the Plaintiff.

Responding on same, Mr. Thomas Masawe likewise, argued that the Defendants joined with other parties that, the prayers in the Chamber Summons may be granted. Submitted further that, the Defendants were brought in this court, while had no issue in controversy with the Objector. Therefore, costs should not be directed to his clients who are innocent in anyway.

Responding to the prayer for costs, Mr. Ishengoma, humbly prayed this court should not grant costs to the Objector on the reason that, had the Objector endeavored to meet with the decree holder (Plaintiff), surely this application could not have been filed in court. Above all, the conduct of the bank throughout was facilitative as they have done here in court by conceding to the objection proceedings. Rested by submitting that, to

order the Plaintiff to pay costs will amount into punishing the bank, while throughout has demonstrated good cooperation.

In the circumstances of this application, and bearing in mind what has transpired in this court, I have no slight doubt, first the Objector and the 2<sup>nd</sup> defendant are two different natural persons. Though their names have similarities save only the spelling of the last name (Ally and Ali), but the two are different and are not related. The 2<sup>nd</sup> Defendant admitted to have loan transaction with the Plaintiff, but the Objector and his properties have nothing to do with the Plaintiff. Thus, concludes that the Objector is a stranger to the plaintiff (Diamond Trust Bank) as well as in the Commercial Case No. 11 of 2015. Accordingly, a court decree in the referred Commercial case, cannot be enforced to a stranger. Conclusively the attempt to execute this court's decree against the Objector/none party to the suit was null and void.

Consequently, I proceed to grant all prayers comprised in the Chamber Summons save on prayer for costs, which require more consideration as I intend to do it hereunder.

On costs, the Objector has prayed for award of costs of this application. Usually, costs are justified based on disturbances incurred, collection of all necessary documents relevant to the application, procurement of legal representation in court, instruction fees, preparation of necessary documents to initiate the application, filing fees, transport costs and appearance in court from the first day to the last, (the list is not exhaustive). Considering all these facts and the nature of the action, the



trial court, may exercise its discretionary powers to grant it or otherwise depending on the circumstances and nature of the matter before it. Despite the fact that to grant costs is purely under the discretionary powers of the court, yet such discretion must be exercised judiciously to avoid misuse or abusive of powers or ultra vires of that discretion. The term judiciously means upon being satisfied with cogent reasons to grant or otherwise.

Considering deeply on the grounds advanced by learned counsels, I agree with Mr. Thomas Massawe, that the Defendants, had nothing to do in this application and are not the source of what forced the Objector to seek protection of his properties in this court. Thus, costs should not be directed to his clients. It is sensible because they were not among the wrong makers which brought this action in court.

More so, the advocate for the Plaintiff, argued quite convincingly, that costs should not be granted to the Objector, for obvious reasons, that the Objector failed to show cooperation to the Plaintiff in its exercise to execute this court's decree. In the contrary, I think the Plaintiff was under strict duty to know the features of its debtor, place of domicile, properties placed as securities, where they are located and proper cooperation with neighbours and leaders around where the properties are subject to attachment and sale. Obvious attachment of properties of an innocent person is unacceptable and unjustifiable.

All being said, the old precedents developed certain guiding principles in relation to costs as appears in the case of **Premchand, Rechand Ltd, Vs.**

**Quarry Services of East Africa & Another, [1972] E.A. 162, at page 164** and in the case of **George Mbugusi & Another Vs. A.S. Maskini [1980] T.L.R. 59** the court held:-

*"Costs should not be excessive or oppressive, but only such as are necessary for the condition of litigation"*

Usually costs are intended to bring the winner to the position he was prior to the institution of the suit. However, the amount therein is always subject to evidential proof in a different jurisdiction, (Jurisdiction of the taxing Master).

Therefore, in the circumstances of this application and for the reasons, so stated, justice demand that costs should be granted to the Objector. Conclusively, all prayers in the Chamber Summons are granted with costs. Costs shall be paid to the Objector by the Plaintiff alone.

Order accordingly,

**Ruling** delivered in Chambers of Commercial Court at Dar es Salaam this 10<sup>th</sup> day of May, 2021.



**P.J. Ngwembe**

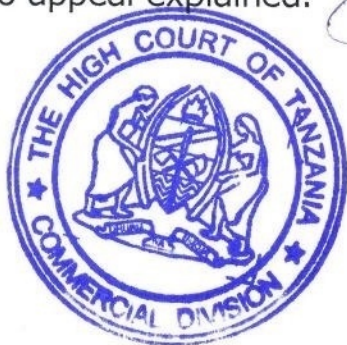
**Judge**

**10/5/2021**

**Court**, this ruling is delivered in chambers of Commercial Court Division – Dar es Salaam, this 10<sup>th</sup> day of May, 2021, in the presence of Ms. Mary Lamwai counsel for the Objector, Stanslous Ishengoma for Thomas

Massawe Advocate for the defendants and Stanslous Ishengoma advocate for the Plaintiff.

Right to appeal explained.



A handwritten signature in blue ink, appearing to be "P.J. Ngwembe".

**P.J. Ngwembe**

**Judge**

**10/5/2021**