

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 139 OF 2021

(ARISING FROM COMMERCIAL CASE NO. 113 OF 2018)

SKYWARDS CONSTRUCTION

COMPANY LIMITED APPLICANT

VERSUS

ECOBANK TANZANIA LIMITED 1ST RESPONDENT

BENBROS MOTOR'S LIMITED 2ND RESPONDENT

YASSER MOHAMED ES-HAQ 3RD RESPONDENT

NOUFAL MOHAMED ES-HAQ 4TH RESPONDENT

YUSRA MOHAMED ABDULLAH ES-HAQ 5TH RESPONDENT

NOEL ESTATE COMPANY LIMITED 6TH RESPONDENT

Date of Last Order: 06.10.2021

Date of Ruling: 29.10.2021

RULING

MAGOIGA, J.

The applicant, SKYWARDS CONSTRUCTION COMPANY LIMITED by way of chamber summons under the provisions of Order XXI rules 57(1) and (2), 58 and sections 95 and 68(e) of the Civil Procedure, [Cap 33 R.E. 2019] and any enabling provision of the law praying for this court be pleased to grant the following orders, namely:

EX-PARTE ORDERS.

1. To issue an interim order staying of execution of the decree issued/ arising from Commercial Case No. 113 of 2018 in judgement dated the 13th day of August 2021 delivered by Hon. Magoiga, J of the High Court (Commercial Division) by desisting the respondent and their agents from effecting an execution order thereof or attachment and sale of properties owned by the 1st respondent in question, namely plot No. 72 Mikocheni Industrial Area, Dar es Salaam with Certificate of Title No. 38353 and L.O. No.91343 pending hearing and determination of the application for objection proceedings filed by the applicant herein;
2. Any other relief(s) this court deem fit to grant for the interest of justice

INTERPARTES.

1. To investigate and release from attachment and sale of the landed property located at Plot No. 72 Mikocheni Industrial Area, Dar es Salaam, with Certificate No. 38353 and L.O. No.91343 from the execution proceedings arising from judgement in Commercial Case No. 113 of 2018 delivered by Hon. Magoiga, J of the High Court



(Commercial Division) as the same if it is left to proceed will defeat and affect the interest of the applicant to which she is having in the 2nd respondent's landed property in question without being so heard or being taken care thereto;

2. Costs of this application be provided for;
3. Any other relief(s) as this Court may deem fit and just to grant.

The chamber summons was accompanied with affidavit stating the reasons why this application should be granted as prayed.

Upon being served with the chamber summons and affidavit, the 1st and 6th respondents, through one, Hope Liana filed a joint counter affidavit stating the reasons why this application should not be granted.

The facts of this application as gathered from the affidavits of the applicant are that, in 2014 the applicant and 2nd respondent entered into construction agreement of an office Block and assembling yard for assembling the trailers and buses at the 2nd respondent landed property located at Plot No. 72, Mikocheni area, Dare es Salaam with certificate of title No. 38353 and L.O. No.91343 for period of 1 year at price of USD.1.2 million. Further facts were that, the applicant did her part as agreed but the 2nd defendant failed to pay



the amount agreed leaving an unpaid amount of UDS.1,208,000.00 and that it was agreed, among others, that in case of failure to pay the money, the disputed landed property will be sold, the proceed from the sale be used to pay the applicant's claim.

It was against the above background, the applicant upon learning that the 2nd respondent has been adjudged through Commercial Case No. 113 of 2018 for failure to honour the loan with 1st respondent in which the said loan was secured by the disputed property by way of legal mortgaged, instituted this objection proceedings against the attachment and sale of the disputed landed property, hence, this ruling.

The applicant is enjoying the legal services of Mr. Killeyi Mwitasi, learned advocate. On the other hand, the 1st and 6th respondents are enjoying the legal services of Mr. Jonathan Wangubo, learned advocate. And the 2nd -5th respondents are enjoying the legal services of Mr. Roman Masumbuko Lamwai, learned advocate, but who were inactive in prosecuting this dispute despite being served and their counsel attended during hearing. They remained observers to this application.



When this application was called on for orders on 1st day of October, 2021, given the fact that same was filed under certificate of urgency, I declined to entertain ex-parte orders and instead I granted an interim order for maintaining status quo pending the hearing of the application inter parties. I equally directed that parties' learned advocates to file their respective counter affidavits and reply to counter affidavits be done within a span of 5 days and set the application for hearing on 06.10.2021.

Mr. Mwitasi arguing the application reiterated the provisions under which this application was preferred and adopted the contents of the affidavit supporting this application. Basically, the oral arguments of Mr. Mwitasi were replica of the contents of the affidavit. The learned advocate for the applicant cited the case of BUKOBA MUNICIPAL COUNCIL vs. MANTRAC TANZANIA LIMITED AND THREE OTHERS, MISC. COMMERCIAL APPLICATION NO. 92 OF 2019, HCCD, (DSM) (UNREPORTED) in which it was held that, two requirements for granting objection proceedings are some interest in the property, and possession of the property in dispute during attachment. Also was the case of ALLY LINUS AND OTHERS vs. TANZANIA HARBOURS AUTHORITY [1998] TLR 5 in which it was held that it



is not desirable to disregard other decisions by fellow judges unless coupled with reasons for differing.

In the affidavit, at paragraphs 3-7 the deponent gave the historical relationship between the applicant and the 2nd respondent and how the disputed landed property was developed by the applicant at an agreed consideration of USD.1.2 million. Despite complying with the agreement, the applicant was just paid part of the money agreed leaving unpaid amount to the tune of USD.1,208,000 which is comprised of principal sum and interest. Other key term in the agreement under clause 11 was that, in case of failure to pay the money as agreed, the landed property was to be sold, the proceeds from the sale be used to pay the applicant's claim. As from paragraphs 8- 18 the applicant tried to establish her interest in the disputed property through follow-ups of the money and unfulfilled promises by the 2nd respondent as no money has been paid from the claimed balance and interest as agreed.

The applicant stated that, later on, he learnt that the same landed property was put as security for the loan advanced by the 1st respondent to the 2nd respondent and same has been adjudged and is subject to be execution process. Further, if execution is left to proceed, the disputed property will be

sold without due regards to the interest of the applicant. According to the deponent, once the landed property is sold, then, will defeat the interest of the applicant and prayed that the reliefs prayed in the chambers summons be granted.

On the other hand, Mr. Wangubo prayed to adopt the joint counter affidavit that was filed by the 1st and 6th respondents stating the reasons why this application should not be granted. Basically, Mr. Wangubo's submissions, like that Mr. Mwitasi, was replica of the contents of the counter affidavit. However, the learned advocate added that according to section 9 of the Registration of Documents Act, [Cap 117 R.E.2019] a document affecting land if not registered is invalid. Another legal issue raised was that Order XXI Rule 58 cannot be read in isolation of Rules 59 and 60 of the CPC. According to Mr. Wangubo, once a document is registered under section 57 of the Land Registration Act, [Cap 334 R.E. 2019] confers the lender with all powers over the mortgaged property. Mr. Wangubo went to distinguish the case BUKOBA MUNICIPAL COUNCIL (supra) to the circumstances we have here.

According to the deponent, she had nothing to comment on the history of the relationship given by the applicant and the 2nd respondent based on fact

that she was not privy to their contract of construction. The deponent went on as well to give the historical relationship of the 1st respondent and 2nd respondent which led to institution of Commercial Case No. 113 of 2018, which ended up in favour of the 1st respondent. The reason given in the counter affidavit is that, no registered interest or encumbrance superior to that of the registered interest of the 1st respondent by legal mortgage on the disputed property. As to the clause 11 of the agreement, was the reply that notwithstanding the said clause, same is subject to and is inferior to the 1st respondent registered interest and no way can sale by applicant be performed against the registered interest of the 2nd respondent.

Further reply on the contending interest, was that the applicant has no interest capable of being protected at the time of creation of the registered mortgage and issuance of the prohibitory order by the court to the 2nd respondent. Lastly, that the applicant is not in possession of the landed property and has no interest recognized and protected by law visa vis that of the 1st respondent.

On that note the deponent concluded that the applicant is not entitled to the orders sought in the chamber summons.



In rejoinder, Mr. Mwitasi argued that the contract between the applicant and the 2nd respondent was not a mortgage and need not be registered. According to Mr. Mwitasi, the contract was among the exceptions which need not be registered and it was misleading by Mr. Wangubo to argue that all documents affecting land need to be registered. Mr. Mwitasi concluded that, mortgagor can still be challenged and upon investigation, the applicant's interest can be taken care of and pressed that the application be granted as prayed.

The task of this court now is to determine the merits or other wise of this application. However, before going into that, I find it apposite to state the position of law and intention of the law in respect of claim to or objection to proceedings in order to release any attachment or sale of property in execution of a decree. Starting with rules 57 (1) and 58 of Order XXI of the CPC which this application was pegged, for easy of reference as provides as follows:

Rule 57(1) Where any claim is preferred to or any objection is made to the attachment of any property attached in execution of a decree on the ground that such property is not liable to such attachment, the court shall proceed to investigate the claim or

objection with the like power as regards the examination of the claimant or objector and in all other respects, as if he was a party to the suit. (Emphasis mine).

Provided that no such investigation shall be made where the court considers that the claim or objection was designedly or unnecessarily delayed.

Rule 58-The claimant or objector must adduce evidence to show that at the date of attachment he had some interest in, or was possessed of the property attached. (Emphasis mine).

Going by the provisions of sub rule (1) of rule 57 of CPC, in my considered opinion, the intention of the parliament in enacting this provision was meant to give the court powers to investigate the claim or objection geared towards releasing the property subject of dispute from attachment or sale in execution of a decree.

Under rule 58 of Order XXI of the CPC, in my further opinion, this provision is clear casts legal burden to the claimant or objector to prove the claim or objection by adducing evidence to show that at the time of attachment he had interest in, or was possession of the property in dispute.



Further reading of the provisions relating to investigation of claim to or objection is rule 59 which provides that where the claimant or objector has satisfied the court that, the property is not liable to attachment and sale, shall make an order releasing the property in whole or in part. Rule 60 is also clear that, the court should disallow the claim to property attached, if at the time of the attachment, was in possession of the judgement debtor as his own property and not on account of any other person. Rule 61 provides that when the court is satisfied that the property in dispute is subject to mortgage or charged (as in this application) in favour of some person not in possession and think fit to continue the attachment, it may do so, subject to mortgage or charge. And lastly, Rule 61 provides for a remedy of institution of a suit to establish the right to a property to a party against whom the order in objection proceedings is made and that the order shall be conclusive and it cannot be appealed against.

What I gathered from the above provisions is that, when court is handling an application of this nature (of any claim or objection) the purpose to achieve is that such property is not liable to attachment.

With the above legal background, now the issue that I am due to determine, is whether in the circumstances of this application, the applicant has



satisfactorily established with evidence that he has interest or claim capable of protected requiring the court to order release from attachment and sale of the property in dispute. Having carefully and dutifully considered the rivaling arguments of learned advocates for parties and the relevant law as stated above along with annexures in support of the application, I am with respect to Mr. Mwitasi, inclined find that this application has to fail. The reasons, I am taking this stance are not far-fetched. One, the interest of the applicant, if any, was pegged on annexure 2 but upon investigating it dutifully, I find it leaves a lot to be desired on the part of the applicant such as:

One,

- i. The employer who is 2nd respondent according to that annexure, in particular, clause 2 was to fund the project and payments were to be done by installments according to the progress of the work as per the request and approval of the employer or the consultant. No such progress of the work was submitted at least to prove that indeed the project was carried and completed as agreed.
- ii. The above stance is supported by clause 3 which shows that the employer was to retain 12% of the total construction costs and the



retention was to be paid after the elapse of 3 months. No point in time the applicant told the court that they changed terms and was the one who funded the project and claim back the money. Indeed, the contract is self contradictory to what is stated in the affidavit and annexure 2 that applicant funded the construction and is claiming now the project money.

- iii. Clauses 9 and 10 gives the claimant remedy to enforce her claim, if any, by taking legal action but never bothered to take legal action but just kept writing letters alone.
- iv. No specifications and drawing were put forward and their respective quotations to justify the claim as shown in the contract.
- v. Payments were done on cash basis which brings another doubt if at all such big sum amount can be paid out of banks or remain to be just creation of the applicant and 2nd to 5th defendants to suit their interest at the detriment of the 1st respondent.

The total accumulation effect of the above reasons is that, the contract and other annexures were created to defeat the execution which is ongoing and the applicant has utterly failed to prove any tangible interest in the land.



Two, as correctly argued by Mr. Wangubo, the claim, if any, of the applicant interest, if any, is inferior to the registered claim of the registered land in favour of the 1st respondent as such cannot halt execution.

Three, according to rule 58 of Order XXI of the CPC, in the absence of recognized interest and the fact that the applicant is not in possession of the property in dispute when execution was initiated this court is tied up to reject this application.

In the foregoing, this application must be and is hereby not granted. Consequently it is hereby dismissed with costs.

It is so ordered.

Dated at Dar es Salaam this 29th day of October, 2021.



S. M. MAGOIGA

JUDGE

29/10/2021