

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM  
LAND CASE NO. 46 OF 2020**

**SAIDA MOHAMED MBARAKA LITANDA.....1<sup>ST</sup> PLAINTIFF  
CHRISTINA NTUMIGWA MWAKIFULEFULE.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**EQUITY BANK TANZANIA LIMITED.....1<sup>ST</sup> DEFENDANT  
MKONGOWO TRADING COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT  
PETER RODRICK NGOWO.....3<sup>RD</sup> DEFENDANT  
HALIMA RODRICK NGOWO.....4<sup>TH</sup> DEFENDANT  
CDJ CLASSIC GROUP LIMITED.....5<sup>TH</sup> DEFENDANT**

**RULING**

**I. MAIGE, J**

The dispute at hand is on the validity and legality of mortgage of houses at plot numbers 2063 Block “B” at Kimara, Ubungo, Dar es Salaam with CT No. 93404 and KND/MKN/MIKA35/328 located at Mikocheni Area Kinondoni within Dar Es Salaam with Residential License No. KND 027982, together “the suit properties” in favour of the first defendant to secure a loan procured by the second defendant. The **suit properties** are refutably in the names of the the third and fourth defendants. They are the ones who executed deeds

of guarantee with the first defendant creating the mortgages on the properties.

The plaintiffs represent themselves as the legal wives of the third and fourth defendants. They jointly challenge the creation of the mortgages on the **suit properties** and the consequential attachment to be illegal and ineffectual for want of spousal consents. Among the substantive reliefs sought is nullification of the attachment and intended sale of the **suit properties**.

It would appear from the factual averments in paragraph 11 of the plaint and the annexure thereof that, the **suit properties** were, on 5<sup>th</sup> day of March 2020, attached in execution of the decree of this Court in Land Case No. 96 of 2013 wherein the the first defendant was the decree holder and the second, third and fourth defendants judgment debtors.

Therefore, in their written statement of defense, the first and sixth defendants have doubted if the instant suit is not premature. In the conduct of this matter, they have been represented by advocate Justine Magafu who presented the written submissions in support of the preliminary objection. His submission was based on the presupposition that for a third party to be entitled to institute a suit to challenge attachment and sale of the property in execution of a decree he was not a party in, he must first attempt to lift the attachment by way of objectional proceedings in terms of order XXI

Rule 57(1) and (2) of the CPC. The counsel placed reliance on the authority of the Court of Appeal in **KATIBU MKUU AMANI FRESH SPORTS CLUB VS. DODO UBWA MAMBOYA AND ANOTHER, CIVIL APPEAL NO. 88 OF 2002, CAT, UNREPORTED.**

On his part, Mr. Mahay who appeared for the plaintiffs submits, in the first place that, the preliminary objection is premature in so far as it is based on unascertained facts. He places reliance on **MUKISA BISCUIT MANUFACTURING CO. LTD VS. WEST END DISTRIBUTORS LTD (1969) E.A.696** to the effect that “a preliminary objection consists of a point of law which has been pleaded or which arise by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit”.

In the alternative, it is his submissions that, both the two remedies set in order 21 rule 62 of the CPC have been utilized. He therefore prays that the preliminary objection be overruled.

I have duly considered the rival submissions. From the factual averment in paragraph 11 and the annexure thereto which is a notice of attachment, I have no doubt that, the attachment of the **suit properties** was in execution of the decree of this Court in Land Case No. 96 of 2013. It no doubts falls within the purview of the provision order 21 rule 57 of the CPC which provides as follows:-

*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.*

In the circumstance therefore, I will not agree with the plaintiffs and their counsel that the point under discussion does not arise in the pleadings by the plaintiffs themselves. It is therefore a preliminary objection properly so called.

The issue which I have to determine therefore is whether a suit by a third party challenging the attachment of a property in execution the decree can be instituted before first initiating objectional proceedings in terms of order 21 rule 57 of the CPC. I think the answer is certainly no. Under Order 21 rule 57 it is clear, a third party whose property has been attached in execution of a decree he is not a party in, can institute an objectional proceedings to have the attachment lifted. Under rule 62 thereof, it is apparent, the order made out of an objectional proceedings is conclusive subject only to a result of a suit if any. The suit envisaged is covered under order XX1 rule 62 of the **CPC** which provides as follows:-

*62. Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, **subject the result of such suit, if any, the order shall be conclusive.***

It would appear to me from the said provision that, the right to pursue a suit in relation to the attached property is only available

after determination of an objectional proceedings on merit. Therefore, in **Kheli Said Omari vs. Apel Petroleum Lime with others, Land Case No. 77 /2018** where the plaintiff filed a fresh suit upon his application for objectional proceedings being struck out on technical ground, this Court struck out the suit for being premature. In so doing, the Court made the following statement which I subscribe to:

*In view of the foregoing discussions therefore, I entirely agree with Mr. Emmanuel that, unless an objection proceeding at the Commercial Court is determined on merit, any attempt by this Court to determine the legality of the attachment of the **suit property** would have the effect of interfering with the decision of the Commercial Court.*

In this case, while the plaintiff alleges in pleadings that the **suit properties** were attached in execution of a decree of this Court, he has not pleaded any fact that he had, prior to the institution of the suit, lost a claim on objectional proceeding. He has not done so also in his written submissions. In the premise, I agree with the first and sixth defendants and their counsel that the suit is premature. It is accordingly struck out with costs.

Dated this 6<sup>th</sup> day of November, 2020



**I. MAIGE**

**JUDGE**

**06/11/2020**

**Date 06/11/2020**

Coram – Hon. C.M. Tengwa, DR

For the 1<sup>st</sup> Plaintiff: Present

For the 2<sup>nd</sup> Plaintiff

For the 1<sup>st</sup> Defendant

For the 2<sup>nd</sup> Defendant

For the 3<sup>rd</sup> Defendant

For the 4<sup>th</sup> Defendant

For the 5<sup>th</sup> Defendant

For the 6<sup>th</sup> Defendant

Kefas Mayeye, Advocate

**RMA:** Bukuku

**ORDER:**

Ruling delivered today in the presence of the 1<sup>st</sup> Plaintiff and 1<sup>st</sup> to 6<sup>th</sup> Defendants and in the absence of 2<sup>nd</sup> Plaintiff.



**C.M. Tengwa**  
**DEPUTY REGISTRAR**  
**06/11/2020**