

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB - REGISTRY OF MWANZA
AT MWANZA
MISC. LAND APPLICATION NO. 33 OF 2022**

*(Arising from Land Case No. 23 of 2018 High Court (T) Mwanza Sub-registry at
Mwanza)*

MONARCH INVESTMENT LIMITED APPLICANT

versus

CRDB BANK PLC.....1ST RESPONDENT

CITY LAND COMPANY LIMITED.....2ND RESPONDENT

RULING

2nd & 11th May, 2022

Kahyoza, J.:

This ruling is in respect of **Monarch Investment Limited's** application inviting this Court to make findings and order that there are serious questions of arising out of execution of the decree under section 38 and rule 64 of Order XXI of the Civil Procedure Code, [Cap. 33 R.E. 2019] (the CPC). After making the findings, **Monarch Investment Limited (the Company)** prayed for an order compelling **CRDB BANK PLC** (the Bank) to observe the procedure for executing of court decrees. In the alternative, the Company prayed for an order directing **City Land**

Company Limited (the auctioneer) to adhere to the terms and conditions under the Bank's letter dated 4th May, 2022.

The Bank and the auctioneer filed through their advocate, Mr. Galati a counter affidavit opposing the application. They also raised a preliminary objection with two points of objection that-

- 1) As there is no application for execution which is pending in this Court and this application being an application to move the court to make a findings and order that there are serious questions arising out of execution on a decree dated 9th February 2021, this application is not tenable, frivolous and an abuse of the court process.*
- 2) That the court has no powers to make the order asked for under the provisions of Order XXI Rule 64 of the Civil Procedure Code, Act [Cap. 33 R.E. 2019].*

We heard the preliminary objection and the application on merit as the application was filed under the certificate of urgency. I shall first dispose the preliminary objection, as it is settled that a court seized with a preliminary objection is first required to determine that objection before going into the merits or the substance of the case or application before it. See the decision of the Court of Appeal in **Shahida Abdul Hassanali v. Mahed M.G. Karji**, Civil Application No. 42 of 1999 (CAT Unreported).

The Court of Appeal observed in **Bank of Tanzania Ltd V. Devran P. Valambia** Civil Application No. 15 of 2002 (CAT) (unreported) that-

"The aim of a preliminary objection is to save the time of the court and of the parties by not going into the merits of the application because there is a point of law that will dispose of the matter summarily."

To appreciate the current dispute, I find it apt to state albeit briefly the background as follows; the Company obtained a loan from the Bank. In 2018, the Company sued the Bank praying for permanent injunction restraining the Bank from attaching or selling the Company's collaterals until the structured and agreed action plan of repaying the outstanding loan is honoured or until the procedural laws are complied with. The Bank opposed the Company's claim. To cut the long story short, disputed ended amicably, parties settled the dispute out of court and registered the settlement. The Court issued a decree in accordance to the agreement the Company and the Bank filed and registered.

The Court decree that-

- 1) The Plaintiff shall pay a total of Tzs. 1,2 Billion as full and final satisfaction of the loan balance of Tzs. 5.84 Billion within a period of 12 months effective from February, 2021.*

- 2) *All payment shall be made through account number 0157501839400 in the name of NPA Recovery Accounts. Mwanza Branch.*
- 3) *The 1st Defendant will have no further recourse against the borrower and the guarantors upon payment of the sum of Tzs. 1.2 Billion referred to in clause 1 of this deed.*
- 4) *The 1st Defendant shall discharge and release title deeds in respect of all properties (listed under item I – iv above) upon full payment of the agreed amount of Tzs. 1.2 Billion.*
- 5) ***Failure to pay in full the agreed full and final amount of Tzs. 1.2 Billion within 30 days counting from the date of expiration of 12 months the 1st Defendant shall be liberty to forfeit already paid funds, selling all mortgaged properties and apply the proceed to settle customer's entire loan balances without any further notice.***
- 6) *In circumstances under clause 4 above, upon sale of mortgaged properties, no part of proceeds shall be given to either the plaintiff or its guarantors unless the proceeds from sell satisfy the sum of Tzs. 5.84 Billion which is the outstanding balance before full and final arrangement.*
- 7) *Upon successful sale of the mortgaged property, the 1st Defendant shall have no further recourse against the customer and guarantors in respect of the loan liabilities in the Deed of Settlement.*

8) The plaintiff shall ensure that the property is well maintained and kept in good condition with all the fixtures, fittings and furniture in good order until the loan is full repaid.

9) Each party shall bear its own costs so far incurred in this case. (Emphasis provided)

It is from the above background; this Court is called upon to consider and determine the preliminary objection and the application on merit. I will commence with the first limb of the preliminary objection that the application is not tenable, frivolous and an abuse of the court process. The respondent's advocate Mr. Galati contended that there is no application for execution which is pending in this Court, hence the current application being an application to move the court to make a findings and order that there are serious questions arising out of execution of a decree dated 9th February 2021 is not tenable.

The applicant's advocate opposed vehemently the preliminary objection. He contended the Company filed the application under section 38 of the CPC, which provides that all questions arising from or relating to the execution of the decree or discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit. He contended that there is no dispute that the Company and the Bank

were parties to the suit. He submitted that if the decree holder desires to execute the decree may apply to the court, which passed the decree or she can do so on her own. He argued that given the position of the law matters relating to the execution of the decree can be determined by this Court.

It is not in dispute that the Bank obtained a decree against the respondent. The decree emanated from the parties' settlement, which they filed and the Court registered it. Thus, the decree encompasses the parties' terms of settlement. One of the terms of the agreement between the Company and the Bank, which is also one of the clauses of the decree, is that *"failure to pay in full the agree full and final amount of Tzs. 1.2 Billion within 30 days counting from the date of expiration of 12 months, the 1st Defendant shall be at liberty to forfeit already paid funds, **selling all mortgaged properties, and apply the proceeds to settle customer's entire loan balances without any future notice**".*

It is axiomatic from what the Company and Bank agreed, and the Court decreed, that upon the Company's default, the Bank will be at liberty to sell all mortgaged properties. The Court's decree arising from the parties' agreement, did not stipulated that upon the Company's default the Bank may execute the decree or say the usual default cause will follow.

The agreement and the decree were unequivocal that upon the Company's default the Bank is at liberty to sell the collaterals. The Bank took action to enforce her right under the decree that is to sell the mortgaged properties. Thus, although the Bank has no pending application for execution, she is executing one of the clauses of the decree of this Court that permits her to sell collaterals.

The Company requests this Court to make findings under section 38 and rule 64 of Order XXI of the CPC and to order that there are serious questions arising out of execution of the decree. Section 38 of the CPC is applicable when there are questions arising between the parties to the suit relating to the execution of the decree. Section 38 of the CPC provides that-

38.-(1) All questions arising between the parties to the suit in which the decree was passed, or their representative, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

(2) The court may, subject to any objection as to jurisdiction, treat a proceeding under this section as a suit or a suit

as a proceeding and may, if necessary, order payment of any additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

There is no doubt that the Company and the Bank were parties to the suit (Land Case No. 23 of 2018. The Bank did not file an application for execution of the decree, hence there is no application pending before this Court for execution. It is uncontested that one of the clauses of the decree permits the Bank to sell the mortgaged properties without recourse to the court, which passed the decree. Thus, by commencing the process of selling the mortgaged property, the Bank was executing or discharging the decree. I therefore find that the Company had justification to request the Court to resolve issues relating to discharge or execution of the decree. Consequently, I overrule the first point of preliminary objection.

I now, move the second point of preliminary objection, that the court has no powers to make the order asked for under the provisions of Order XXI Rule 64 of the CPC. Mr. Galati submitted that the applicant cannot move the Court for orders make findings under rule 64 of Order XXI of the CPC as it a directive rule.

The applicant's advocate submitted that the application was instituted under section 38 and rule 64 of Order XXI of the CPC. He added that Order XXI provides for execution procedures.

Reading section 38 of the CPC, I find it settled that the Court may be moved to consider whether there are questions arising between the parties to the suit in which the decree was passed, or their representative, and relating to the execution, discharge, or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit. Subsection (2) of section 38 states that *the Court may treat a proceeding under this section (section 38) as a suit or a suit as a proceeding*. That phrase implies that a suit or proceeding may be filed under section 38 of the CPC. Since the Company moved the Court to give orders not only under Order XXI Rule 64 of the CPC but also under section 38 of the CPC, I find no merit in the second limb of the preliminary objection that the court has no powers to make the order asked for under Rule 64 of Order XXI of the CPC. Section 38 of the CPC permits a party to commence a suit or a proceeding as implied under subsection (2) of section 38 of the CPC.

In the end, I overrule both points of preliminary objection.

I will consider the application on merit. The Company's advocate submitted that his client learned that the Bank engaged the auctioneer to sell the mortgaged properties. He contended that the Bank directed the auctioneer to advertise the sell in the widely circulating newspaper. The auctioneer defaulted to comply with the direction and advertised the auction in Raia Mwema Newspaper, which allegedly is not a widely circulating newspaper. He submitted that the Court has mandate to scrutinize the execution of the decree. To support his contention, he cited the case of **Balozi Abubakari Ibrahimu and Another V. Ms. Benandays Limited and 3 Others**, Civil Revision No. 6 of 2015 at Court of Appeal of Tanzania.

The Bank's advocate Mr. Galati submitted that one of the terms of settlement was that the Company should pay Tzs. 1.2 billion within the period of 12 months effective from 22/2/2021. The Company ought to have paid the agreed and decreed amount by January, 2022. He contended that the agreement provided further that upon the Company's default the Bank shall be at liberty to sell all the mortgaged property and apply the proceeds to settle the customer's balance without further notice. He contended that is what the Bank attempted to do. He contended that

the bases of the application are; **one**, that the Bank ought to have applied to the court to execute the decree; and **two**, that, the advertisement in Raia Mwema was contrary to the directions the Bank gave to the auctioneer. He submitted the grounds advanced to support the application do not hold water because; **one**, the Bank attempted to sell the property under her right und the mortgage. He also added that the Bank attempted to auction the properties under the deed of settlement.

The Bank's advocate argued further that the assertion that Raia Mwema Newspaper had not widely circulating newspaper was based on speculation as there was no proof.

In addition, the Bank argued vide her advocate that given the contents of paragraph 6, even if the auctioneer sells properties at giveaway prices, the Company does not stand to suffer.

In his rejoinder, the Company's advocate Mr. Rutakyamirwa submitted that the Bank was not exercising her rights under the mortgage as she did not comply with sections 126-134 of the Land Act, [Cap. 113 R.E. 2019]. He contended further that the Bank was not exercising her rights under the deed of settlement on the ground that after the deed of

settled is recorded it becomes the court's decree. He added that the court's decree is executed by the court that passed it. He countered the contention that even if the properties are sold at a giveaway price, the Company will not suffer as the Bank will not have any other remedy against the Company. He submitted that the Bank may have recourse against the Company under clause 8 of the decree.

I wish to state that I whole support the assertion of the Company's advocate that once a deed of settlement is registered it becomes a decree of the court. See rule 3 of Order XXII of the **CPC**. However, I do not share the same views that in the circumstance of this case, it was compulsory for the Bank to apply to this Court to execute the decree. The one of the terms of the agreement, which is also one of the clauses of the decree provided in no uncertain term that upon the Company's default to pay Tzs. 1.2 billion within one year, the Bank will be at liberty to sell the properties of the customer. The decree gave the Bank mandate to sell the Company's properties. The decree did not state that upon the Company's failure to pay Tzs. 1.2 billion, the Bank will be at liberty to apply for execution. Thus, without much ado, I find that the Bank had mandate to sell the Company's properties under the decree without applying to the Court for assistance.

The Company challenges the process of selling her properties because the auctioneer defaulted to comply with the Bank's directive of advertising in the widely circulating Newspaper. He submitted that the advert was published in Raia Mwema which is not widely circulating Newspaper. As Bank's advocate submitted the Company did not tender evidence to prove that the Raia Mwema was not a widely circulating Newspaper. The averment in the affidavit supporting the application was a mere speculation. I cannot base this Court's ruling on speculation.

The Company's advocate submitted that the Raia Mwema was not circulating widely like Mwananchi or Daily News, newspapers. The submission of the Company's advocate is short of proving that Raia Mwema was not a widely circulating newspaper. Even if the advocate proved by his submission that Raia Mwema was a widely circulating newspaper, still it would not rescue a sinking ship. It is settled as persistently held by the Court of Appeal, that submissions are not evidence. I will mention a few where the Court of Appeal took a position that submissions are not evidence, **Dr. A Nkini & Associates Limited V National Housing Corporation**, Civil Appeal No 75/2015, **Republic vs. Donatus Dominic @ Ishengoma & 6 Others**, Criminal Appeal No. 262

of 2018, **Morandi Rutakyamirwa vs. Petro Joseph** [1990] T.L.R 49] and **Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman Bunju Village Government**, Civil Appeal No. 147 of 2006. In **Registered Trustees of the Archdiocese of Dar es Salaam's** case the Court of Appeal stated the following in relation to submissions: -

"With respect however, submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."

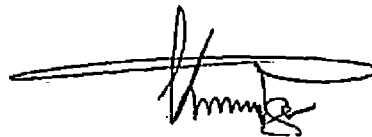
I find no merit in the contention that Raia Mwema Newspaper is not a widely circulating newspaper.

Before I pen off, I wish to advise the Bank that the advertisement in the Newspaper ought to cover at least a quarter of a page. The intention of making advertisement is to inform the public that there will be an auction and invite them to tender. That purpose cannot be achieved by publishing a tiny advert, which hardly readable.

In the end, I find that the Bank had mandate to sell without applying to the court for assistance and that the applicant did not prove that Raia Mwema Newspaper is not a widely circulating Newspaper. Consequently, I find the application without merit and dismiss it with costs.

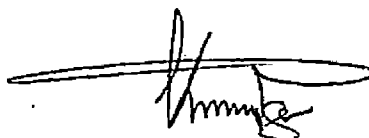
It is ordered accordingly.

DATED at Mwanza this 11th day of May, 2022.



J. R. Kahyoza
JUDGE

Court: Ruling delivered in the presence of advocate Mr. William Muyambi holding Mr. Mutakyamirwa's brief for the applicant and Dr. G. Mwaisondola advocate for the respondent. B/C Jackline (RMA) Present.



J. R. Kahyoza
JUDGE
11/5/2022