

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
MISC. COMMERCIAL APPLICATION NO. 110 OF 2022**

YUSUPHU HAMISI KITUMBO.....APPLICANT

VERSUS

MAENDELEO BANK(T) LIMITED.....1ST RESPONDENT

MEMO COMPANY LIMITED.....2ND RESPONDENT

RULING.

Date of last Order:10/08/2022

Date of Ruling : 31/8/2022

MARUMA, J.

This application has been brought under certificate of urgency requesting this Court to exparte to lift up attachment and postpone the sale of the Applicant's house situated at Plot No 264, Block JJ Kanyenye Area Tabora Municipal Tabora Tanzania pending determination of the Application inter-parties therein. The reason for the lifting up is because of the pending application for extension of time to file revision, Civil Application No. 209/16 of 2022 which is before the Court of Appeal of

Tanzania in respect of Judgment and proceedings in Commercial Case No. 15 of 2021.

The application is brought under the chamber summons supported by the affidavit of Yusuph Hamis Kitumbo and on the respondent side in opposing of the application filed a reply to counter affidavit by one George Kihongozi.

To support the prayers sought, Mr. Augustino Kusalika, Advocate for the applicant adopting the affidavit of the applicant, submitted that the prayer is made under the provisions of the law that is section 68 (e), section 95 and order XXI rule 57(1) & (2) of the CPC. He submitted that the reasons for this application are demonstrated in paragraphs 3,4,5,6,7 and 8. He submitted that since there is an application for revision at the Court of Appeal in respect to Commercial Case No.15 of 2021 of which the orders of attachment and sale have been issued against the applicant's property. He requested this Court to exercise its wisdom to lift up the attachment and postpone the sale of the applicant's property pending the outcome of the civil application 209 of 2022. He prayed for the application be granted without costs.

Opposing the application, Mr. Kennedy Mgongolo advocate for the respondent adopting the content of affidavit to form part of his submission and proceed to argue that the reasons adduced by the applicant in paragraphs 3, 4,5 and 6 were not true. He explained that the facts that the applicant was not aware of the main case has been countered through paragraph 3 of the counter affidavit which established that there was an application by the applicant asking for the leave of this court to defend summary suit. Another ground countered this application is paragraph 6 of affidavit which did not particularize the loss and just produced mere words which the court cannot rely upon.

He further went on to submit that the provisions of section 68 (e) and section 95 together which the application is brought, the two are not jurisdictional provisions in the sense that they do not give powers to this Court for the prayers sought. He made reference to the case of **Kibo Executive Lodge Limited & Another vs CRDB BANK LIMITED & 3 Others**, Commercial Case No. 16 of 2015, at page 12 & 13 where the High Court referred the decision of the Court of Appeal which discussed section 68 and 95 that the sections save for inherent powers of the court but not Jurisdictional. He argued that the Court at

any rate cannot be moved by these provisions. In regarding to Order XXI rule 57(1) and (2) of the CPC, he submitted that these provisions give the Court powers to investigate any claim presented to the Court by a third party who may be adversely affected by attachment. He clarified that in the instant case the applicant herein is not a third-party rather is a party to the main case and he is aware of the case as per annexure MD-1 to the 1st respondent counter affidavit. He argued therefore that the applicant being a party this rule cannot applied.

Besides, he argued that the affidavit supporting the application did not adduce facts as to how the property is not liable for attachment as it was discussed in the case of **Sosthenes Bruno & Another vs Flora Shauri**, Civil Appeal No. 249 Of 2020. The Court of Appeal discussed the applicability of order XX1 rule it held to the effect that the provision relates to investigation of the claim by the 3rd party who was not a party to the case. He submitted that in the premises the order sought in the chamber summons is not backed up by any provision of the law.

Moreover, he submitted that the applicant's reason that there is pending application for extension of time at the Court of Appeal. The

same has never been a reason to postpone a sale issued out of execution. He advised that the only remedy for the applicant is to apply for stay of execution. He therefore, prayed that the application be dismissed with costs for lack of merit.

Rejoins the submissions made, Mr. Kusalika insisted his submission in chief in support of the application and argued that the counsel did not tell the Court what are enable provisions for this application where the applicant is seeking for lift up of attachment and postpone the sale of applicant's property. He insisted that order XXI rule 57 (1) & (2) are provisions appropriate for determination of the application based on the nature of the application and prayed for the same to invoke the provisions of section 68 and 95 for lifting the attachment and postponed of the sale of the applicant's property for the following reasons:

1. There is an application at the Court of Appeal on the same matter which is Application No.209 of 2022
2. There is application before this Court seeking for extension of time to set aside the summary Judgement before Nangera,J scheduled for ruling on 24th August 2022.

3. Presence of the overriding principle under section 3A & 3B for this Court to exercise its wisdom to postpone the sale pending determination of the applications in this court and at the Court of Appeal.

It was the counsel submission that the two applications referred herein that they are two distinct applications as the application for extension of time is to look for proceedings and judgment. But the later application is to stay the order of this court thus why the application in hand is the appropriate application as the sale process has started.

In determining the merit of the application based on the arguments raised by the parties' counsel. The issue to be determined whether the facts stated in the affidavit provide sufficient good reasons to grant the prayers sought.

However, before proceeding to the substance of the application I have to highlight the issue of applicability of the provisions cited in this application. The application has been brought under order XXI rule 57 (1) & (2) of the CPC and section 68 (e) and section 95 of the CPC. Reading rule 57 (1), it provides that;

"...(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.."

It is true that the provisions of order XXI rule 57(1) are applied to the person who is not a party to a case as stipulated in the case of **Sosthenes Bruno & Another vs Flora Shauri**, Civil Appeal no, 249 of 2020 at page 12. In this application the applicant is not a third party but he is a party to the case. So, in that context the, applicant is excluded from being covered by the above provision. However, in his submission in rejoinder, he clarified that he is before this Court seeking an order to stay the order of this court as the sale process has started. Taking into account the spirit of substantive justice and the guidance provided by the Court of Appeal on position of wrong citation that it will not renders the matter incompetent before the Court as it was held in the case of **Othumani M. Othuman and Another Versus Tanzania**

Investment Oil and Transport Co. Ltd, Civil Application No.134

of 2004. It was held that,

"...An incompetent application is not necessarily a nullity." As such where non citation of the relevant provision of law does per se go to the root of the application but it is merely a matter of technicalities that of itself does not render an application incompetent and thus a nullity. Time and again it has been insisted that in carrying out its function of administration of justice courts of law should aim at administering substantive justice without undue regard to technicalities.."

On the position above, I am of the view that the same spirit should apply to focus on the substance of this application since the applicant is the owner of the property under the sale. Besides, the respondent's counsel did not mention the proper provision which should the applicant apply or stated the effect for the same. Therefore, this issue should detain this court to proceed to determine the matter on merit.

Coming back to the facts adduced by the applicant in paragraphs 3, 4, 5 and 6. Starting with the ground that the applicant was not aware of the Summary Judgment dated 17th September 2021 as indicated

under paragraph 3 of his affidavit. The applicant submitted further that, by being dissatisfied with afore stated decision the applicant intends to challenge the modality of which the service was made to him by the respondent hence condemned un heard. I find this fact with no merit as opposed by the respondent that the applicant was aware on what was going on in respect of Commercial Case No.15 of 2021. This is evidenced by the Misc. Application No. 49 of 2021 whereby the applicant requested the Court to grant unconditional leave to appear and defend against the summary suit. Also, the facts in the respondent affidavit that the applicant entered an appearance through his lawyer one Fatuma Kazimoto on 14th June, 2021 and 19th July, 2021. All these facts established that the applicant was aware of the Commercial Case No. 15 of 2021.

On the issue that there is a pending application No.209 of 2022 at the Court of Appeal for extension of time to file an application for revision respect of Judgment and Proceedings of Commercial Case No. 15 of 2021 following the proclamation for sale of this by Court and notice of public auction which is to be made on 9th July 2022. Also, the application for extension of time to set aside the summary Judgment

before Nangera,J scheduled for ruling on 24th August 2022. Looking at the trend of all these applications by the applicant are aimed to frustrate the sale process which have been commenced. In the real sense this amount to the abuse of court processes and is against the spirit of this Court to ensure that litigations are determined in its finality.

The applicant's submission that, this Court should exercise its wisdom to lift the attachment and postpone the sale of the applicant's property pending the outcome of the civil application 209 of 2022 which is yet to be determined by the Court of Appeal. Considered the presence of the overriding principle under section 3A & 3B of the CPC as he requested the court to apply in his favour. I am of the different observation and turn the request to the applicant to consider the due process which had already set into motion as he admitted that the sale process has already started. Moreover, he was aware of the suit against him as it reflected in his affidavit in the Application No. 49 of 2021, thus lifting up the attachment and postpone the sale in essences is to stop execution proceedings that has already been allowed to proceed in Commercial Case No. 15 of 2021. This will also amount to an abuse the application of section 3B (2) of the CPC in regard to the overriding

principle which also requires that;

3B (2) "...A party to civil proceedings or an advocate for such a party shall have a duty to assist the Court to further overriding the objective of this Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court..."

In the view of the aforesaid that, since there is no any good cause advanced by the applicant to warrant the prayers sought. This application has no merit and is accordingly dismissed with costs.

Dated at Dar es Salaam this 31st day of August, 2022.



Z.A.Maruma.

JUDGE