

IN THE HIGH COURT FOR ZANZIBAR

HOLDEN AT TUNGUU

CIVIL APPLICATION NO. 21 OF 2023

(ARISING FROM CIVIL CASE NO. 53 OF 2015)

BETWEEN

MANGROVE BEACH HOTEL LIMITED APPLICANT

AND

PAOLO FUMIGALLI 1ST RESPONDENT

HAJI RAMADHAN ALI 2ND RESPONDENT

JUMA RAMADHAN ALI 3RD RESPONDENT

RULING OF THE COURT

Dated: 10th May, 2023

S. HASSAN (J)

The applicant herein above has moved this Court under **Order XXIV Rule 50 (1), (2) and Rule 51 and 52 of the Civil Procedure Decree Rules, Cap 8** of the Laws of Zanzibar seeking for the following orders:

- (a) That, this honorable court be pleased to postpone the process of joining the 1st Respondent as part of the company (applicant) pending the objection
- (b) That, this honorable court be pleased to postpone the freezing of the Applicant Account No. US \$ 0150012775 which is at Exim Bank, Zanzibar at Mlandege.

(c) Any other order(s) which this honorable court deems just and reasonable to the Applicant.

In this application, the Applicant is under the legal services of Advocate Mr Hassan Kijogoo, while the 1st Respondent is under the legal services of Advocate Abdulhaliq Aley while the 2nd and 3rd Respondents entered appearance in persons and are unrepresented.

The 1st Respondent raised the total of 18 preliminary objections against the application in hand as follows:

1. That the Application is hopelessly time barred
2. That the application is overtaken by event
3. That the application is res – subjudice to application No. 113 of 2022 High Court of Zanzibar which is still pending before Hon Justice Abdulhakim A. Issa
4. That the application is re-judicata to application No. 100 of 2022 High Court of Zanzibar which was dismissed before Hon Justice Abdulhakim A. Issa
5. That the application is res-judicata to an application No, 112 of 2021 High Court of Zanzibar which was dismissed summarily before Hon Lady Justice Rabia Mohamed
6. That the application is bad for court is functus officio
7. That there is misjoinder of parties
8. That the court has not been properly moved to assume jurisdiction
9. That the application is bad as there is nothing pending on a purported objection as prayed
10. That the application is misconceived as the company cannot have shares in her own name (same company)
11. That the application is bad in law for there is no company resolution to institute this application
12. That the application is bad for the company (applicant) cannot make an application all shareholders and directors of the same company
13. That the application is bad in law for the deponent is neither a director, secretary or an agent of the corporation

14. That the application is bad in law for the deponent did not swear as the requirement of the law in the said affidavit
15. That the application is bad in law for the advocate who prepared the said application did not indorse his signature
16. That the application is bad in law for the affidavit accompanying application contains prayers
17. That the application is bad in law for the same has not attached the orders or ruling freezing the said account
18. That the application is an abuse of court process

As it is usually the practice of the court where a notice of preliminary objection is lodged, the court allows the parties to make submission on the preliminary objection first before going into the merit of the matter in hand.

On the 28/3/2023 when the matter was called for orders, the parties preferred to make written submissions to the preliminary objections. At this juncture I must indeed commend and acknowledge the excellent work provided by both advocates in their written submissions in supporting and opposing the preliminary objection. The 2nd and 3rd Respondents did not file their submissions to the preliminary objection.

To begin with, I find it appropriate and convenient to begin with point 8th of the preliminary objection before addressing the rest of the points if needed so. In this point the 1st Respondent has raised the issue that the court has not been properly moved to assume jurisdiction. Since the 1st Respondent has raised the issue of jurisdiction, this court has a duty to ask itself whether it has the jurisdiction to act on the matter placed before it for determination.

For instance in the case of **Tanzania Revenue Authority v. Tango Transport Company Ltd, Civil Appeal No. 84 of 2009** (unreported) the Court of Appeal stated the following in regard to the jurisdiction of a court:

" Principally, objection to the jurisdiction of a court is a threshold question that ought to be raised and taken up at

the earliest opportunity, in order to save time, costs and avoid an eventual nullity of the proceedings in the event the objection is sustained"

Moreover, in the case of **Richard Julias Rukambura v. Issack Ntwa Mwakajila and Others, Civil Appeal No. 3 of 2004** (unreported) the Court of Appeal held as follows:

" There is authority, therefore, that on a fundamental issue like that of jurisdiction a court can sou moto, raise it and decide the case on the ground of jurisdiction without hearing the parties"

So the issue of jurisdiction of the court is very fundamental and in dealing with this point, I wish to reproduce the provision that governs the objection proceedings which the applicant has moved this court for Orders as enable provision for his application which is **Order XXIV Rule 50 (1) (2) and Rule 51 and 52 of the CPD (Rules) Cap 8** which provides as follows:

50 (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 respect, as if he was a party to the suit:

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

(2) Where the property to which the claim or objection applies has been advertised for sale, the court ordering the sale may postpone it pending the investigation of the claim or objection.

51. 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.

52. Where upon the said investigation the court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of a judgment debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment.

The above quoted provision has set **three conditions** to be met prior to the investigation of claims or objections by the court as follows:

Firstly, there should be *an attachment of the property* which is not likely to such attachment made by the decree holder. In the present application there is no any attachment of the property made by the respondents (decree holders) in respect of the applicant's properties. According to the applicant affidavit (paragraphs 3-8) the applicant has only stated on the frozen of the Bank Account No. 0150012775 and nothing on the attachment of any property. The records of the court shows that, the decree holders attempted to attach the properties of the judgment debtor and on the **15/09/2021** Hon Hussein Makame Hussein, Deputy Registrar of the High Court gave Ruling on the said application and Ordered the following:

" 1st and 2nd Defendants are entitled to pay the plaintiff the sum of USD 25,000, together with prayers in the second amended plaint as shown prayer A and O within 14 days from the date of delivery this Ruling"

The above Ruling of the Deputy Registrar is clear that the attempt to attach properties made by the decree holder was denied in execution of the Decree in the case **No. 53 of 2015**, pursuant to the Decree of **Lady Justice Hon. Rabia Mohamed given on 15th day of February, 2019** which reads as follows:

'' I think Plaintiff should be awarded a fair amount of damage which I assess at USD 25,000

From the foregoing reason I hereby grant the prayers as appears in the second amended plaint as shown from prayers a to g and o''

From the above Decree, there is no any other Order of the court which granted an attachment of properties after the initial application to attach properties made by decree holder was denied by the Deputy Registrar of the High Court. Hence, it is the view of this court that, the applicant has failed to meet the first Condition and therefore, I am of view that, the applicant has advanced the cart before the horse.

Secondly, the attachment should be made in ***an execution proceedings***. Advocate Abdulhaliq for the 1st Respondent contended that, there was no execution proceedings instituted in respect of the judgment and decree given in the case No. 53 of 2015. On the other hand, the applicant has submitted that he is challenging the mode of execution of its property. Having gone through the case file records, I agree with the advocate for the 1st Respondent that, the records show that there is no an ***execution proceedings*** instituted in respect of the judgment and decree given in the case No. 53 of 2015.

The issue of execution proceedings has be raised and determined in many cases for instance, in the High Court case of **Dorice Keneth Rwakaterere v. Nurdin Abdallah Mushi and 5 others, miscellaneous Application No. 300 of 2019** (unreported) the court stated the following:

'' In an objection proceedings the executing court has an obligation of investigating the claim to see the objector

has proved to have possession or interest in the attached property"

Since there is no any proof that, there is indeed any execution proceedings pending before the Court, this court lacks jurisdiction to determine this application. The applicant was required to lodge the objection proceedings or claim against the decree holdres in respect of the execution proceedings to attached properties to enable the executing court to investigate the claim and determine whether the objector has proved to have possession or interest in the attached property. Therefore this Court has not been moved to sit as *executing court*, neither there is any *execution proceedings* pending before this Court.

Furthermore, the applicant has not described the type of property which is subject to attachment by the decree holder to move this court to investigate, and therefore there is nothing to object or investigate as held so in the case of **Aman Fresh Club v. Dodo Ubwa and another [2000] TLR, 326** where it was held that:

" where a claim is preferred or an objection made to attachment of any property, the court is bound to investigate the claim or objection."

Hence, the applicant has also failed to meet Condition two.

Lastly, the objection proceedings or claims are made ***by a person who was not part to the original case***, apart from what has been stated by the applicant in paragraph 4 of the affidavit, where the applicant has stated that he was not part to the original case, the applicant has failed to meet the threshold of the other two conditions.

In that respect, it is the view of this court that this application is pre matured and falls shorts of conditions set by **Order XXIV Rule 50 (1) (2) and Rule 51 and 52 of the CPD (Rules) Cap 8.**

It is mandatory that all the above three conditions are met before a person can be heard. In that regard this court agrees with advocate of the 1st respondent that this court lacks jurisdiction to entertain the application at hand. In the absence of

attachment order and *execution proceedings* to the properties of the applicant made by the decree holder, the applicant has nothing to object or claim investigation by the court.

I therefore hold that, this application is indeed misconceived and well premature and this court lack jurisdiction to entertain it.


On the basis of the above analysis, I sustain point 8th of the preliminary objection and hold that this court lack jurisdiction to determine the application in hand.

Furthermore, I do not see the need or desire to address and discuss the remaining objections raised by the 1st Respondent. The finding made herein on 8th preliminary objection is enough to dispose the entire application.

In the end, I hereby dismiss this application with costs.

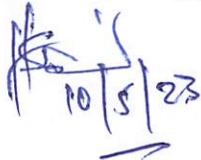
Ordered accordingly.

Dated: **10th May, 2023**


S. HASSAN (J)
10/05/2023

Court:

The right of appeal is explained to the aggrieved party.


10/5/23