

IN THE HIGH COURT OF ZANZIBAR
HELD AT VUGA
MISC CIVIL APPLICATION NO. 22 OF 2011
FROM ORIGINAL DECREE IN CIVIL CASE NO 32 OF 2008
HIGH COURT AT VUGA

- 1 SEIF SLEYUM SEIF**
- 2 HAJI ALI HAMAD**
- 3 ALI HAFIDH ALI**
- 4 ALI KILUPI IBRAHIM.....APPLICANTS**

VERSES

- 1. HAJI JUMA FUNGO**
- 2. NASSER RASHID NASSER.....RESPONDENTS**

RULING

Date of last Order: 03/04/12

Date of Ruling: 29/05/12

Mwampashi, J.

This is an application made under Order LI rule 1(2) of the Civil Procedure Rules. Cap. 8 by the applicant Mr. Haji Juma Fungo. The applicant who is a decree holder in High Court Civil Suit No. 32/2008 had applied before the High Court Registrar for the execution of the decree by attachment and sale of the property (bar) known as Cholo Bar situated at Nungwi. The applicant's

application for execution of the decree was rejected by the Registrar on 05/09/2011 following a successful objection proceedings filed by the respondents herein namely Mr. Seif Sleyum Seif, Haji Ali Hamad, Ali Hafidh Ali and Ali Kilupi. The respondents' main point of objection for the decree to be executed in the manner applied for by the applicant (decree holder) was that the property sought to be attached and sold does not belong to the decree debtor one Mr. Nasser Rashid Nasser. The applicant, having been dissatisfied with the Registrar's order i.e that the sought property is not liable for the attachment and sale in execution of the decree in question, has now presented this application seeking for the Registrar's order to be set aside.

According to the Chamber Application which is supported by the affidavit of the applicant, orders in the following form are being sought by the applicant;-

- i. The Honourable Court be pleased to set aside the order of the Registrar of the High Court given on the 05th September, 2011 in the above cited objection proceedings application which released and lifted the attachment of Cholo Bar situate at Nungwi.
- ii. The Honourable be pleased to order the continuation of attachment and sale of the attached property for want of evidence for lifting the attachment and the warrant of execution.

ALTERNATEVELY

- iii. The Honourable be pleased to order that a proper investigation be done by another officer of the Court.

- iv. Costs of this application be ordered to follow the event.

Mr. Suleiman Shaaban Fadhil learned advocate, who has represented the applicant, has firstly asked the affidavit filed in support of the application to be adopted as part of his submission for the application. He has argued that as stated in paragraph 6 of the supporting affidavit the Registrar conducted no hearing before reaching at his decision. Mr. Fadhil has further submitted that no evidence or document was tendered to prove the respondents' allegations that the attached property belongs to them which is contrary to the relevant law and against the principle that who alleges must prove as it was held in the case of **Kwinga Masa v.s Samwel Mtubatwa** [1989]TLR 103.

Mr. Fadhil has also attacked the counter affidavit filed by one of the respondent because there is no evidence that other respondents have authorized him to depose on their behalf. He has also argued that paragraph 10 of the counter

affidavit contains matter of law making it defective. Here the court has been referred to the case of **Phantom Modern Transport Ltd v.s DT Dobie (TZ) Ltd**, Civil Ref. No 15/2001. CA (Unreported). It has further been argued by Mr. Fadhil that notwithstanding that the counter affidavit is defective still the application is not time barred because though the order of the Registrar was made on 05/09/2011 the relevant proceedings and the ruling were not supplied to the applicant till on 11/10/2011. He has therefore insisted that the application filed on 10/11/2011 cannot be time barred.

Mr. Rajab Abdalla learned advocate for the respondent has asked the court to dismiss the application because it was not filed within the prescribed 30 days from the date of the order by the Registrar. He has argued that the period of limitation should be computed from the date of the order and not from the date the applicant was supplied with the relevant proceedings. Mr Rajab Abdalla has further submitted that the applicant was supposed to ask the court for extension of the limitation time before filing his application and because he did not do so then the application is time barred and should be dismissed.

As on the argument that the deponent of the counter affidavit had no authority to depose on behalf of other respondents it has been argued by Mr. Rajab that the deponent needed no such authorization from his fellow respondents. He has referred the court to the case of **Augustine Meshack & 5 Others v.s Makisi**

Nginana & 2 Others, Misc. Civil Appl. No 112/1994 wherein the High Court of Tanzania held that an affidavit filed by one applicant on behalf of others is not defective the holding which was approved by the Court of Appeal **in Haidar Thabit Kombo & 10 Other v.s Abass Khatib Haji & 2 Others**, Civil Application No 2/2006, CA Zanzibar (unreported).

Submitting against the merits of the application it has been argued by Mr. Rajab that record show that the Registrar properly heard the objection proceedings. He has further submitted that the parties were heard and the respondents managed to show that attached property was not liable for the attachment as it was not belonging to the decree debtor. Mr. Rajab has insisted that the affidavit and the counter affidavit filed for and against the objection proceedings contained the required evidence for the Registrar to make his decision.

Mr. Rajab has admitted the fact that paragraph 10 of the counter affidavit contains arguments of law but he has defended himself by arguing that he had no way of raising the point that the application is time barred. He has either argued that the fact that paragraph 10 contains matters of law does not make the whole affidavit defective but the said paragraph.

Starting with the complaint by Mr. Suleiman learned advocate for the applicant that the counter affidavit is incompetent for being supported by the affidavit of

one respondent who has not presented evidence to show that he had been authorized to depose on behalf of other respondents this court agrees with Mr. Rajab learned advocate for the respondent that on the strength of the position of law taken in the case of **Augustino Meshack** and affirmed by the Court of Appeal in **Haidar Thabit Kombo** the counter affidavit filed in opposing the application is not incompetent. One of several applicants or respondents can depose in an affidavit or counter affidavit on facts for and on behalf of other applicants or respondents and such affidavit or counter affidavit is proper unless such other applicants or respondents do disassociate themselves from the contents of such affidavit or counter affidavit. No one among the other three respondents has disassociated himself from what has been deposed by the 4th respondent on their behalf and for that reason the counter affidavit deposed by him is competent.

On the fact that paragraph 10 of the counter affidavit contains matters or legal argument this court agrees and as it had been conceded by Mr. Rajab that the paragraph really has offended the law in as far as affidavits are concerned. This court however does not agree with Mr. Suleiman that the defect makes the whole affidavit defective. Paragraph 10 of the counter affidavit can be expunged and it is in fact hereby so expunged leaving the substantive part of the counter affidavit intact for the court to act upon it.

Even though paragraph 10 of the counter affidavit has been expunged still the raised question of whether the application has been filed within the prescribed period of limitation or not cannot be overlooked by the court. The issue being an issue of law can be raised at any time and the court is bound to consider it no matter how it has been raised. I would start by reproducing what is provided under the relevant provision i.e Order L1 rule 1(3) of the Civil Procedure Rules, Cap. 8 of the Laws of Zanzibar;-

'Every such application shall be made within thirty

days after the order of the Registrar unless such

time shall be extended by the High Court or Judge

or magistrate as the case may be'

It is not in dispute that the order of the Registrar being complained of in this application was made on 05/09/2011. It is also the agreed fact that this application at hand was filed on 10/11/2011. It is therefore clear that by 10/11/2011 when the application was being filed sixty (60) days had elapsed. The argument by Mr. Suleiman the learned advocate for the applicant is that there had been a delay in supplying them with the proceedings and the ruling that has caused them to delay in filing the application. It is further argued by him that the prescribed period of thirty days of limitation should not be computed from the date of the order of the Registrar but from the date they were availed with the required proceedings and ruling i.e on 11/10/2011. On the other hand it is Mr. Rajabu's argument that the period should be computed from the date the order was made and that the applicant needed to apply first for the extension of time before filing the application.

It is a considered view of this court that whatever good reason an applicant may have for failing to make his application within the prescribed period of limitation the requirement under sub-rule 3 of rule 1 of Order L1 that there shall be an extension of time allowing the application to be filed out of the prescribed period by the High Court or Judge or Magistrate as the case may be is mandatory. The application of that mandatory provision is not automatic. Record show that after the order had been made by the Registrar on 05/09/2011 the applicant did on 16/09/2011 request for certified copies of the ruling and proceedings. Time did

not automatically stop running against the applicant after the order had been made by the Registrar so the computation of the period of limitation should be from the date of the order and not otherwise. Once time has begun to run, no subsequent disability or liability stops it. The applicant having failed to file his application within 30 days from the date the Registrar made the order it was upon him to ask for extension of time within which to file the application before filing it. I also think that it would have been prudent for the applicant to have even stated in the supporting affidavit the fact that the application was being filed out of the prescribed period of limitation and that there are good grounds upon which exemption from the law of limitation is claimed. The fact that the application was filed out of time entitles the same to be dismissed for being time barred.

Lest I am wrong in holding that the application is time barred still it cannot be said, as Mr. Suleiman advocate for the applicant argues, that the decision by the Registrar was erroneously reached. It cannot be said that there was no enough information or evidence before the Registrar as it is required by Order XXIV rules 50 and 51 of the Civil Procedure Rules, Cap 8 of the Laws of Zanzibar for him to decide whether the attached property was liable for attachment or not. There was no need for the Registrar to conduct a full hearing as it is suggested by Mr. Suleiman. To my understanding rule 50(1) does not require that a full or thorough hearing or trial must be conducted where there is a claim or objection

to any attached property in execution of a decree on a ground that such property is not liable to such attachment. It all depends on the circumstances of each case. Where there is enough information or evidence in form of affidavit or other documents enabling the court to decide whether a property attached is legally liable for attachment or not then summary investigation or trial is enough. It should be noted that although the proceeding under rule 50(1) has been made analogous to a suit, it is nonetheless and in actual sense not a suit.

All what is required for an objector who complains that his property is not liable for attachment and who desires for his property to be released from the attachment is to prove or show as it is provided under rule 51 of Order XXIV that at the date of attachment he had interests in or was possessed of the property attached. So under rules 50(1) and 51 the issue is not on a right and title to the property attached but on possession of or interest in the property attached at the date of the attachment. The question here becomes whether the objectors did present any evidence before the Registrar to show that on 02/08/2011 when the attachment order was being issued they had interests in or were possessed of the property attached.

The Registrar reached at the decision that the attached property is not liable for the attachment because the property attached was not in the decree debtor's possession at the date of the attachment after considering the affidavit filed in

support of the objection, the counter affidavit filed in opposition and after considering oral conversation conducted by him with the parties. I have gone through the supporting affidavit with its annexures as well as the counter affidavit filed by the applicant in opposing the objection and came to a conclusion that there were enough materials and evidence for the Registrar to reach at the decision he made. It should be remembered that an affidavit or counter affidavit is a substitute for oral evidence. That being the law therefore the Registrar was not legally bound to conduct further oral hearing when the affidavit and counter affidavit contained all what was needed in enabling him to make the decision. The respondent (Objectors) managed to show that at the date of the attachment the property attached i.e Cholo Bar was in their possession and also that they had interests in the property. It has also been noted by this court that according to the execution form filed by the applicant/decree holder before the Registrar the property sought by him to be attached is Cholo Bar. From this it appears that what was being sought to be attached was a property in form of a business being carried in the name of Cholo Bar. It was not stated or clarified that what was being sought to be attached was a building. It is also clearly stated in the said form by the applicant himself that the business sought to be attached is under new management. This again was another piece of evidence justifying the finding that the property attached is not liable to attachment in execution of the applicant's decree.

For the above given reasons this application fails and it is hereby dismissed with costs.

Sdg: Abraham Mwampashi, J.

29/05/2012.

Delivered in court this 29th day of May, 2012 in the presence of Mr. Omar Mmadi (adv) for the applicant who is also present and in the presence of Mr. Rajabu Abdalla (adv) for the respondents.

I CERTIFY THAT THIS IS A TRUE COPY OF ORIGINAL.

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REGISTRAR

HIGH COURT

ZANZIBAR.

/mbs.

