

**IN THE HIGH COURT OF ZANZIBAR**

HOLDEN AT VUGA

CIVIL CASE NO. 62 OF 2012

NASRA JABIR SALIM

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PLAINTIFF

**V E R S U S.**

1. MANAGING DIRECTOR

PEOPLE'S BANK OF ZANZIBAR LTD

ZANZIBAR

2. MANAGING DIRECTOR

MAJEMBE AUCTION MART LTD

ZANZIBAR

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DEFENDANTS.

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**R U L I N G.**

Rabia H. Mohamed, J.

**NASRA JABIR SALIM**, through her learned Counsel **Mr. OMAR SAID SHAABAN**, have filed an application by Chamber Summons under Section 70 (1) ©, order XVIII rule 3, Section 129 of the Civil Procedure Decree Cap. 8 together with any enabling provisions of the law. According to the Chamber Summons the application seeks the following orders:-

- (i) That the Honourable court be pleased to grant an interim order restraining the respondents of power that be, their officers, servants, agents, assignees and successors in title or otherwise however from pressing for any execution of the so called mortgage deed signed on 8<sup>th</sup> June, 2009 between JUMA AMOUR MOHAMED, Managing Director of the 1<sup>st</sup> Respondent Bank and NASRA JABIR SALIM, the Applicant until the final determination of this suit.
- (ii). That, the Respondent or Powers that be, their officers servants, agent, assignees and successors in title or otherwise be ordered and restrained not to issue or give any orders unto the Applicant's house situated at Mombasa within the District of West in the Municipality of Zanzibar having the title deed No. 2043/90 of 25<sup>th</sup> January, 1990 or any other Applicant's property in relation to the dealings of the same under any circumstances until the determination of the main suit.

- (iii). That, this Honourable court be pleased to issue an order of Temporary Injunction restraining the Respondents and/or their officers, servants, agents, assignees and successors in title or otherwise from selling or disposing the Applicant Property mentioned above situate as Mombasa until the determination of the suit.
  
- (iv). Generally the Honourable court should refrain the Respondents or powers that be, their officers, servants, agents, assignees and successors in title or otherwise to do anything whatsoever in relation of the alleged mortgage deed until the final determination of the suit.
  
- (v). That the Applicant has its costs of this application.
  
- (vi). Any further orders this Honourable court deems fit.

The Application is supported by the Affidavit of **NASRA JABIR SALIM**, the Applicant herein.

Learned Counsel **SAADIYE H. SULEIMAN**, for the 1<sup>st</sup> Respondent, **MANAGING DIRECTOR PEOPLE'S BANK OF ZANZIBAR LTD.**, filed a Counter Affidavit of Me. JUMA ALI MOHAMMED, who is the 1<sup>st</sup> Respondent herein. 2<sup>nd</sup> Respondent is **MAJEMBE AUCTION MART LTD.**, who was represented by their Zanzibar Branch Manager.

This application was filed under a Certificate of Urgency, on 3<sup>rd</sup> December, 2012 the application was heard ex-parte whereby an Interim Injunction Order was issued pending the hearing of the application Inter-Parte. When I summoned the parties for hearing of the application Inter-Parte on 28<sup>th</sup> December, 2012, it was only the Respondents/Defendants who appeared to the Court, Prior to that counsel for the Applicant Mr. OMAR SAID SHAABAN, wrote a letter to the Registrar dated 27<sup>th</sup> December, 2012 with reference No. Misc./Vol.I/2012/109 informing the Court that he is sick with an ED of seven days starting from 25<sup>th</sup> December, 2012. The prescription certificate from Al-Rahma Hospital was attached to this letter showing that he was suffering from typhoid, malaria and cellulites. In the letter the counsel for the applicant was praying for the hearing of the application to be stayed and adjourned for mention to 2<sup>nd</sup> January, 2013 to fix a hearing date.

Learned Counsel SAADIYE for the 1<sup>st</sup> Respondent objected the prayer for adjournment by telling the court that on their side they felt that the hearing of

the application Inter-Parte was a proper avenue for the Applicant to show the court that she has a serious and arguable case and that she is suffering. She continued submitting that the counsel for the Applicant has failed to show sufficient cause of his absence to the court. She termed the act of the counsel of the Applicant of sending a letter to the court seeking adjournment as an abuse of court process because what the counsel for the Applicant is doing is playing delay tactics so that the ex-parte order of 3<sup>rd</sup> December, continue to be in place. She believed based on the information from her reliable source that the counsel for the applicant is not ill of typhoid, malaria and cellulites, although no supporting evidence was brought to my attention to prove that the advocate is faking his illness.

Learned counsel SAADIYE for the 1<sup>st</sup> Respondent has also referred this court to the proceedings of 17<sup>th</sup> December, 2012 where the Coram of the court read that the Applicant was represented by three advocates namely OMAR MMADI who was the leading advocate, advocate SULEIMAN SHAABAN FADHIL and advocate OMAR SAID SHAABAN. This means if the learned counsel OMAR SAID SHAABAN is sick any one of the remaining advocates could have appeared to the court to continue with the hearing.

Learned Counsel SAADIYE, also referred this court to Order XI rule 1 (1) of the Civil Procedure Decree Cap. 8 which requires the appearance of the parties

before the court to be in person or through an advocate, which means if the advocate is ill then the Applicant could appear in person. She also referred the court to Sakar at page 1448, 11<sup>th</sup> Edition whereby in the case of **SUDERSHAN MITTAL V JUDGE SMALL CAUSE COURT 2001 AIHC 433** where it was held that:

*"The court should not adjourn the case merely on asking by a party to whom such adjournment gives undue advantage"*

She also referred this court to page 99 of Sakar, which discussed the case of **Jai Ambe Ice Factory V Recovery Officer VPC Bank Ltd, Ali IR 2004** where it was held that:

*"Mere sending a telegram by a party to the court informing about its illness seeking adjournment is not sufficient. The Lawyer for the party should appear before the court on the date fixed and file proper adjournment application".*

The counsel for the 1<sup>st</sup> Respondent has lastly told the court that in a situation like this Order XI rule 9 (1) of the Civil Procedure Decree Cap. 8 require a suit to be dismissed. She therefore prayed for the suit to be dismissed with costs and

the counsel for the Applicant Mr. OMAR SAID SHAABAN to be warned for his unprofessional act and misleading the court.

The Zanzibar Branch Manager of the 2<sup>nd</sup> Respondent has told the court that he was the one who conducted the sale of the applicant house at Mombasa Mbuyu Mnene whereby the payment was completed on 30<sup>th</sup> December, 2012. On 3<sup>rd</sup> December, 2012 he received a restraining order from this court stopping him from selling the house in question. On 17<sup>th</sup> December, 2012 he appeared to the court to show Cause why he did not comply with the order of the court. On this material day three advocates represented the Applicant and because all of them as well as the Applicant have not appeared for the hearing he prayed for the suit to be dismissed and the advocate for the Applicant to be warned.

Order XI rule 1 (1) of the Civil Procedure Decree as correctly pointed out by the learned counsel for the 1<sup>st</sup> Respondent requires the attendance of parties to be in person or through advocates. The appearance of parties according to this Order is mandatory. The Order reads:-

*"1 – (1) on the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the court-house in person or by their respective advocates, and the suit shall then be called*

*on and if the summons is for the disposal of the suit it shall be heard unless the hearing is adjourned to a future day fixed by the court”.*

In the case at hand there is no doubt that the counsel for the Applicant, Mr. OMAR SAID SHAABAN, was summoned to appear to the court to proceed with the hearing of the application he filed under a Certificate of Urgency. Instead the said advocate chose to adjourn the case himself believing that the court will have no option than to concur with him in making the adjournment. The position has been discussed in the case of ***Amratlal Damodar Maltaser and Another T/A Zanzibar Silk Stores V. A H Jariwalla T/A Zanzibar Hotel [1980] TLR 31*** where the court had this to say:-

*"A court has the duty not only to follow the rules of procedure but also to exercise some firm control over proceedings before it and, if need be, to impose and enforce a timetable for litigation;".*

As was clearly pointed out by the counsel for the 1<sup>st</sup> Respondent, as well the 2<sup>nd</sup> Respondents the records of the case shows that on 17<sup>th</sup> December, 2012 Applicant was represented by three advocates whom one of them has sent a letter to this court seeking the adjournment.

According to Order XX Cap. 8 adjournment is the discretion of the court and is allowed when sufficient cause is shown. This Order reads:-

*"1 – (1) The court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit.*

*2. Where, on any day to which the hearing of the suit is adjourned the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by Order XI or make such order as it thinks fit".*

In the case at hand the two remaining advocates representing the Applicant as well as the applicant herself had the duty of addressing the court on whether to ask for adjournment or to proceed with the hearing. This position was discussed in the case of ***Shabani Mbega and Another V. Karadha Company Limited*** [1975] LTR N. 113 where Onyiuke J had this to say:-

*"An adjournment cannot be granted as of right but can only be granted for a sufficient cause. It involves therefore an exercise of discretion by court and this must be exercised judicially".*

I do concur with the counsel for the 1<sup>st</sup> Respondent in the principles laid in the Mittal's case and that of Ice Factory.

That being the case I am convinced that the counsel for the Applicant Mr. OMAR SAID SHAABAN has failed to show sufficient cause for this court to adjourn the case. Sending letter to the court seeking adjournment and not bothering to appear before the Judge is not acceptable. Since it is the requirement of Order XI rule 9 of Cap. 8 to dismiss the case in a situation where the Defendant appears and the Plaintiff does not appear when the suit is called for hearing. Here I do differ with the counsel for the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent who prayed for this court to dismiss the suit with costs. The matter before me was the hearing of the application inter-parte not the hearing of the main suit.

For the said reasons the application for Temporary Injunction is hereby dismissed with costs.

Sgd: Rabia H. Mohamed

Judge

30/12/2012.

Delivered in Chamber this 31<sup>st</sup> day of December, 2012, before SAADIYE HAMID SULEIMAN, Advocate for the First Respondent and Mr. HAMAD JUMA PONDEZA, a Managing Director of the second Respondent but in the absence of the Applicant.

Sgd: Yesaya Kayange.

DR

31/12/2012.

**I hereby certify that this is a true copy of the Original.**

Sgd. **GEORGE J. KAZI**

REGISTRAR

HIGH COURT

**ZANZIBAR.**

