

TANZANIA / JUDGMENT

Charles Swale Sayida

COURT
TANZLII

DECIDED
31 May 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (SHINYANGA SUB-REGISTRY)
AT SHINYANGA CIVIL APPEAL NO. 2024070081000016131 (Arising from the decision of Resident
Magistrate Court of Shinyanga in Misc. Civil Application No. 03 of 2023 and Originated from
Execution No. 01 of 2023 for the Decree of the Civil Case No. 04 of 2022) CHARLES SWALE
SAYIDA.....APPELLANT VERSUS KIMOTCO INTERTRADE
CO.LTD.....1ST RESPONDENT KIMOTCO GROUP OF
COMPANY.....2ND RESPONDENT ABDUL MUSSA
MUKASIWA..... 3RD RESPONDENT (T/A MKASIWA AUCTION MART&
COURT BROKERS) (Originating from the decision of the Resident Magistrates Court of Shinyanga
at Shinyanga) (Hon. Glory G. Mwakihaba - PRM) Dated the 31st May 2024 in Misc. Civil
Application No. 03 of 2023

RULING ON PRELIMINARY OBJECTION 26th November 2024 & 31st January 2025 F.H.
MAHIMBALI, J: The appellant herein, is aggrieved by the decision of the executing court
(Shinyanga Rm’s Court through Hon. Mwakihaba – PRM) in which lifted up the attachment order
of the said Court while attempting to execute the decree in Civil Case No. 04 of 2022. 1 The brief
facts behind this ruling can be summarized this way. The appellant had been involved in a motor
vehicle accident owned by the second respondent – Kimotco Group of Company. He successfully
sued a for a claim of tortious liability and awarded TZS: 10,000,000/= as general compensation for
the injuries sustained. In efforts of executing the court’s decree awarding him 10,000,000/=, he
filed execution proceedings at the trial court (Executing Court- Rm’s Court) in which he attached
one vehicle T822 CBE owned by the first respondent – Kimotco Intertrade Co. Ltd instead of
Kimotco Group Company. This led to the filing of an application by the 1st respondent (Kimotco
Intertrade Co. Ltd), challenging the said attachment claiming that the attached property belongs
to her and has nothing in connection with the current case. Upon a thorough digest of the
objection proceedings, the trial court allowed the application, lifted up the attachment, ruling
that the two companies are not established to have been interconnected in any way, thus the two
being distinct companies, the former cannot replace the latter in a form of liability. The appellant
has been aggrieved by that decision claiming that it was erroneous to hold that way, exonerating
the first respondent from 2 the attachment made, insisting that the two companies are one and
the same thing. On the other hand, the first respondent objects the said appeal reasoning that it is

barred from the law. The only legal recourse is to file a suit establishing the said claims. This ruling is in respect of the fact whether the preliminary objection is meritorious. During the hearing of the Preliminary Objection, the first respondent was represented by Mr. Mfinanga whereas the appellant was represented by Mr. Chrisantus Chengula, both learned advocates. The hearing of the said Preliminary Objection was done by way of written submissions. In digest to the parties' submissions, for the 1st respondent it has been argued that under Order XX1, Rule 62 of the CPC, a ruling emanating from such a Preliminary Objection is not appealable. Instead, the aggrieved party has the cause of action of filing a suit establishing his interests over the property subject of attachment. On his part, Mr. Chengula for the appellant, argues that the remedy available as envisaged under Order XX1, Rule 62 of the CPC is when the ruling is against the third party. If it is against the decree holder as per 3 current case, the law is silent. Thus, an appeal as done in the current matter is permissible to the decree holder but barred to the objector. In a clear digest to the facts of the current case leading to this appeal, it is undisputed that the appellant was involved in a car accident involving Motor vehicle with Reg. No.T. 326 DFV owned by Kimotco Company Group and not Kimotco Intertrade Co. Ltd (first respondent), and that it was the second respondent who was sued at the trial court by the appellant. It is also undisputed that the attached vehicle for execution of the said decree is Motor Vehicle with Reg. No. T822 CBE owned by Kimotco Intertrade Co. LTD which is owned by the second respondent. The simplest question is, can the properties of one company discharge liability of another Company in the law suit in the absence of express agreement of doing so? In this matter, Mr. Chengula is submitting that, in the circumstances of this matter, that can be done, merely because, when the second respondent was sued in the main case, Mr. Benedicto Mberesero appeared for her as DW1. In his testimony, is recorded to have said being the owner and the managing Director of Kimotco Intertrade Company Ltd and that the Motor vehicle – bus T. 326 DFV is owned by Kitmotco Intertrade Company Ltd. 4 Assuming this fact is true, that the said DW1- Mr. Benedicto Mberesero is the owner and Managing Director of Kimotco Intertrade Co. LTD (1st Respondent); the vital question to ask is one: why did the appellant sue second respondent in her claim? In that situation, can one then justify to execute a decree against a person who was not a party to the suit? Unless the fact of Mr. Benedicto Mberesero becoming the owner of Kitmotco Co. Ltd is the post fact; so long as the appellant had sued the 2nd Respondent by the name of Kitmotco Group Company, the execution of the decree is only done against the judgment debtor of the case. In the current matter, there has not been established that Kitmotco Group Company who is the judgment Debtor in Civil Case No. 4 of 2022 took over from the 1st respondent or is the same as the first respondent. Otherwise, each company being a separate legal entity is distinct from its shareholders or directors, there is no way another company can take responsibility of another company unless there is an express agreement to that effect. That notwithstanding, the law is, an execution is only carried out against the judgement debtor and not others. My old law Professor - one Gamaliel Mgongofimbo, (UDSM) when teaching me land law, I recall he once said and kept on insisting that: 5 “A lawyer wins or loses a case just at his desk”. I need not say much other than this; it does not need an advocate to have LLM or doctorate law degree for one to know that in Civil Case No. 4 of 2022 at Shinyanga Rm's Court where the parties were Charles Swale Sayid Vs Kimotco Group Company, that its decree could not be extended in execution against another

party - a stranger to the case - Kimotco Intertrade Co. Ltd unless there was express agreement of the two companies to that effect. Otherwise, we have a long way to go for the interests of the parties. On the legal question posed by Mr. Chengula as what is the legal remedy of the decree holder where the application for lifting up the attachment is granted and he is aggrieved by it, the answer as per facts of the current case is simple: you don't need to be aggrieved, but look for the appropriate properties owned by the judgment debtor for the attachment. Otherwise, he could also file a suit to establish such claim. My insistence is, it is not just a decree holder's wish to attach any property but guided by the law on the property suitable for attachment. I guess, in the absence of the law, there could be chaos in administration of justice as everyone would do anything that pleases him/her without regard to the legality or justification of doing it but just his/her pleasure. 6 Therefore, strictly, it is true that a ruling under order XXI, Rule 62 is not appealable as it is expressly provided that where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive. However, as per law an appeal avenue to High Court is only provided from the original decree of the district court, Resident Magistrate Court or Tribunal as per section 70, 74 and Order XL, Rule 1 of the CPC. See also Chacha Ikongoro v. Ndege Kibekke Misc. land appeal No. 145 of 2020, HC at Musoma where it was held, when interpreting section 38(1) and section 74 of the CPC, that execution proceedings as a matter of law is not appealable. The above notwithstanding, in certain situations (not the present one) what is determined by a court in execution proceedings amounts to suit and thus its decree is subject of appeal pursuant to section 38 (1) of the CPC, see Nkwabi Shing'oma Lume V. Secretary General, Chama Cha Mapinduzi, Civil Appeal No. 234 of 2017 CAT, Paul Solomon Mwaipya V. NBC Holding Corporation (2004) TLR 2004, Tanzania Breweries Ltd V. Dotto Chagula, Misc. Civil Appeal No. 25 of 1999, Mwanza HC and Agricultural Inputs Fund V. Stephano Simon Mwampashi, Civil Appeal No. 09 of 2018, HC Mbeya. 7 All this said and done, the preliminary objection raised is merited as reasoned above, and is accordingly upheld. The appeal filed is hereby dismissed with costs for being erroneously preferred. DATED at SHINYANGA this 31st January 2025. F.H. Mahimbali Judge 8

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Prepared on 14 October 2026 · Esheria