

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO.636 OF 2017

(Originated from Civil Case No. 11 of 2011)

OLGA WILLIAM MWAMYALLA(As an Administratrix of the Estate of the late Richard Nehemia Gwau)-----**APPLICANT**

VERSUS

MGS INTERNATIONAL (T) LTD -----**1STRESPONDENT**

MAMBA AUCTION MART & COURT BROKER ----- **2ND RESPONDENT**

RULING

Date of last order: 28.11.2019

Date of Ruling: 06.03.2020

EBRAHIM, J.:

The applicant through the services of Future Mark Attorneys has lodged the present application seeking for the order of this court to postpone the sale of a residential house to wit Plot No. 2159 with CT No. 90317 located at Block E Kunduchi Kinondoni Municipality registered in the name of Richard Nehemia Gwau pending the objection proceedings. The applicant claims that the property has been wrongly attached. The application has been preferred under **Order XX1 Rule 57(2) and Section 95 of the Civil Procedure Code,**

Cap 33 RE 2002 and it is supported by the affidavit of Olga William Mwamyalla, and the supplementary affidavit of 23rd April 2019.

Briefly, the genesis of the matter is traced way back in 26th January 2011 when the Applicant's late husband filed Civil Case No. 11 of 2011 alleging breach of contract. The 1st respondent herein raised a counter claim which necessitated the parties to settle the matter out of court. The consent decree was registered and adopted by the court in favour of the 1st respondent on 6th September 2011. The decreed amount was Tshs. 150,000,000/-. The applicant's husband, namely Richard Nehemia Gwau passed away leaving behind a consent decree of which the 1st respondent chose to execute by attachment and sale of the disputed property. This court had on 27th December 2017 confirmed the sale of the said house and the same was advertised for sale through Mwananchi Newspaper of 29th September 2017.

This application was argued by way of written submission and both parties adhered to the set schedule by the court.

In this application, Counsel for the 1st respondent in replying to the submissions by the Counsel for the Applicant raised legal issues that I find apt to address them first in view of the application. I would

therefore refer to submissions of both parties in the main application in the cause of addressing the legal issues and thereafter the substantive issues if the need be.

The applicant was represented by advocate Bakari Juma. He adopted the affidavit and supplementary affidavit in support of the application to form part of the submission. His main line of argument is that a proof of existence of marriage qualifies a certain house to be treated as a matrimonial home. He referred to the Case of **Samwel Olung'algogo and 2 Others Vs Social Action Trust Fund and Others** [2005] TLR 349. He also cited the Proviso of **Section 48(e) of the Civil Procedure Code Cap 33 RE 2002** which restricts attachment and sale of a matrimonial house. He made further reference to the case of **Ms. Sykes Insurance Consultants Co. Ltd Vs. Sam Construction Co. Ltd**, Civil Revision No. 08 of 2010 (CAT) which interpreted the provisions of **section 48 of the Civil Procedure Code**.

Lastly, he submitted at length on what he termed as the bad practice of disputing the contents of the affidavit by putting the other party into a strict proof only which has a result of rendering the contents of the affidavit uncontroverted. He cited the case of **East African Cables (T) Limited Vs Spencon Services Limited**, Miscellaneous

Application No. 61 of 2016 (HC- Commercial Division), to buttress his assertion. He finally prayed for the application to be allowed.

The respondent in this matter was represented by advocate Robert Reuben.

In reply to the submission by the Counsel for the applicant, Counsel for the 1st respondent firstly adopted the two counter affidavits to form part of the submission.

He firstly drew the attention of the court into four legal issues that the matter is res-judicata, time barred, frivolous, vexatious and abuse of court process; and whether an administratrix of the Estate can competently prosecute the matter.

Beginning with the issue of res-judicata, Counsel for the 1st respondent reminded the court of the dismissal of Miscellaneous Civil Application No. 407 of 2014 by this court for want of prosecution where the applicant was seeking the same prayers that she is seeking now. Again, the same kind of application, Misc. Civil Application No. 190 of 2017 was struck out after the Counsel for the Applicant conceded to the point of preliminary objection (Annexure D). He concluded that this case lacks jurisdiction to entertain the matter again. To cement his argument he referred to the case of **TRA V**

Tango Transport Company Ltd, Civil Appeal No. 84 of 2009, CAT; and **Zanzibar Insurance Corporation Limited V Rudolf Temba**, Commercial Case No. 1 of 2006 on the principle that the issue of jurisdiction can be raised at any stage of the matter. He also referred to **Section 9 of the Civil Procedure Code, Cap 33** on res judicata and the case of **The Soisambu Village Council Vs Tanzania Breweries Limited and Tanzania Conservation Limited**, Civil Appeal No. 105 of 2011; and **Peniel Lotta Vs Gabriel and Others** [2003] TLR 312.

On the issue that the application is time barred, Counsel for the 1st respondent explained from the proclamation of sale of the disputed property in execution of decree dated 4th October 2013 that since 2014, the 1st respondent through the 2nd respondent has been advertising in Newspapers particularly the Daily News of 1st August 2014 and again in on 29th September 2017 for the second time. He concluded therefore that the applicant was aware since 2014 and the contention by the applicant that she saw the advertisement in March 2017 at para 3 of her affidavit is a lie as she had by then filed Misc. Application No. 190 of 2017 to restrain the respondents from selling the house. He surmised on the point that

since the applicant was aware since 2014, the matter is time barred and the court has no jurisdiction to entertain it.

Submitting on the abuse of court process, Counsel for the 1st respondent referred to the dismissed Miscellaneous Civil Application No. 407 of 2014 for want of prosecution and there after the struck out Miscellaneous Application No. 190/2017 where the applicant went back to court praying for stay of execution of the disputed property pending investigation of the claim. To cement his argument he cited the cases of **Jebra Kambole V The Attorney General**, Miscellaneous Civil Application No. 27 of 2017 which quoted with approval the English Case of **Attorney General Vs. Barker** [2000] EWHC 453 and **Wangai V Mugambi and Another** [2013] 2 EA 474 which defined the terms frivolous and vexatious.

On whether the administratrix of Estate can competently prosecute objection proceedings, Counsel for the respondent argued that in the matter at hand the applicant stands in the shoes of the deceased. Therefore for the purpose of objection proceedings, she is neither a third party nor the judgement debtor. He contended further that since the deceased was a party to the deed of settlement filed in August 2011 and did not object to the said

attachment, the applicant cannot claim the issue of matrimonial asset in this matter as she is standing in as an administrator and not a wife.

In rejoinder, counsel for the Applicant opted not to respond to the legal issues and condemned the practice of raising the objection during submission stage. He stressed on the requirement of objection to be raised at an earlier stage so as to give the other party enough time to prepare a reply thereto. He referred to the Court of Appeal case of **James Buchard Rugemalira Vs. The Republic and Harbinder Singh Set**, Criminal Application No. 5919 of 2017. He then proceeded to respond on the issues pertaining to the main application.

I must point out at the outset that both Counsels for and against have made extensive submissions and I commend them as I have been highly enlightened by the researches, suggestions, views, observations, legal practices and procedures and opinions. However, I observed that parties mainly concentrated in addressing the issues to be raised and determined at the hearing of the objection proceedings and investigation of the claim. At page 5 of the Applicant's rejoinder submission, Counsel for the Applicant even stated that *this is an application for objection proceeding in which*

the applicant prays this honourable court to investigate on the facts alleges... Clearly in this application the court is not asked to conduct objection proceedings in terms of **Order XXI Rule 57(1)**. This is an application made under **Order XXI Rule 57(2) of the Civil Procedure Code, Cap 33 RE 2002** seeking for the order of the court to postpone the sale of the disputed property pending the investigation of the claim. For the purpose of clarity **Order XXI Rule 57(2) of Cap 33** reads:

"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"

The lengthy submissions pertaining to whether the house is a matrimonial home or property and whether the proof of marriage qualifies a house to be termed as matrimonial property/home as well as the proof of the same, however enriching and extensive they are, should await its appropriate stage.

In addressing the legal issues raised by the Counsel for the 1st respondent, out-rightly I do not agree with the Counsel for the applicant that a stage at which the legal issues have been raised have not enabled him with opportunity to respond to the same.

Much as it is highly preferred that points of objection should be raised at an earliest stage, depending on the circumstances and the quest to meet ends of justice, the legal issues in this application were raised at a stage where would have been responded to if Counsel for the Applicant had so wished during rejoinder. This is the obvious circumstance considering the fact that the issues raised concerned jurisdiction which the Applicant's Counsel admitted that it could be raised at any stage of the matter and the applicant's locus to file objection on the subject matter. The referred case of **James Buchard Rugemalila (supra)** which I entirely subscribe to, is distinguishable with the facts and circumstances of this case because in the cited case the Republic raised a point of objection that the application is incurably defective for none complying with the law without clarifying the said laws ought to have been cited instead stated them during hearing of the preliminary objection. In the instant case, Counsel for the 1st respondent raised the issues at the time of responding to the applicant's arguments and the applicant had been availed opportunity to rejoin of which he used but decided not to respond on the legal issue! I would therefore proceed to consider the raised points of objection.

In so doing, I would start with the issue of whether the administratrix of the Estate can prosecute objection proceedings in this case?

Verily, the parties in this application are **Olga William Mwamyalla (as an Administratrix of the Estate of the late Richard Nehemia Gwau) and MGS International (T) Ltd and Another**. In her averment at para 1 of the affidavit and supplementary affidavit she has stated that she is the applicant. She went on stating that in their married life with the deceased they acquired a matrimonial residential house which seems though the name is not correct is about to be wrongly attached. She continued in the supplementary affidavit that she has never given consent on the sale of their matrimonial home to her late husband.

From her averments in the affidavits it is obviously that while she is standing as an administratrix of the deceased, she is making a claim of spousal consent as the wife of the deceased. I am at one with the Counsel for the 1st respondent here that an administrator of the estate stands in the shoes of the deceased. In that case the Applicant in this application stands in the capacity of Administratrix of the Estate she cannot be a third party but a judgement debtor. Thus

cannot steer the objection proceedings. The law i.e. **Section 99 of the Probate and Administration of the Estates Act, Cap 352RE 2002** provides that the executor or administrator of a deceased person is his legal representatives and all the properties are vested in him. It follows that when a party stands as an administrator he/she cannot play double roles at the same time. I associate myself with the holding of the case of **Hassan Twaibu Ngonyani Vs Tanzania Pipelines Ltd**, Civil Appeal No. 147 of 2008 (HC – Unreported) that *“in objection proceedings a person objecting must not be a party to the case”*.

In this case, the applicant has filed this application as an administratrix of her husband which means she is representing his interest. The late husband happened to be a party in **Civil Case No 11 of 2011 which culminated the instant application**. Therefore she cannot play double roles as an administratrix and an objector (the wife). In my view she is supposed to institute an objection proceeding as a 3rd party i.e. an objector(wife). That being the position therefore this point of objection is meritorious and the applicant has no locus to institute the instant application.

The above position brings me to point that I find apt to address on the multiplicity of proceedings and abuse of court process.

Indisputably, is the fact that Olga William Mwamyalla filed Miscellaneous Civil Application No. 407 of 2014 against the 1st and 2nd respondents and Richard Nehemia Gwau t/a Hari General Supplies Limited & Parsley General Supplies as the 3rd respondent. In its ruling this court noted that the application emanates from Civil Case No. 11 of 2011. In that application, Olga William Mwamyalla was seeking the same orders as she is seeking in the instant application. Civil Application No.407 of 2014 was dismissed by this court for want of prosecution. The applicant then in 2017 filed Miscellaneous Civil Application No. 190 of 2017 as an administratrix of the deceased praying for stay of execution. The same was struck out with costs after her legal Counsel conceded to the defect on maintainability of the application. I would straight say that this application has no nexus with the objection on res judicata as in this application the applicant prayed for stay of execution as a legal representative of the deceased.

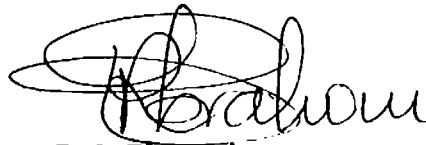
However, it is obvious that Olga William Mwayalla after the dismissal of the Application No. 407 of 2014 for want of prosecution; instead of seeking for restoration order, she has now come with another application as an administratrix seeking the same orders.

Indeed this is an abuse of court process leave alone the fact that in the instant application she has no locus to pursue the matter.

The above observations are enough to dispose of the matter; I would therefore not embark on discussing the maintainability of the present application on the time limitation as the applicant has no locus to institute such kind of proceedings.

That being said, I sustain the point of objection and struck out the application with costs.

Accordingly ordered.

A handwritten signature in black ink, appearing to read 'R.A. Ebrahim', written in a cursive style.

R.A.Ebrahim
Judge

Dar Es Salaam
06.03.2020