

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA DISTRICT REGISTRY
AT ARUSHA

MISC CIVIL APPLICATION NO. 144 OF 2022

(C/F Misc. Civil Application No. 10 of 2016 and Execution No. 7 of 2021)

PRISCILLA CHEDIEL MCHOMVU APPLICANT

VERSUS

MICHAEL KILION BUREMO 1ST RESPONDENT

ALFRD FADHIL SAKIETE 2ND RESPONDENT

MICHAEL KILION BUREMO 3RD RESPONDENT

RULING

26th July & 08th September, 2021

TIGANGA, J.

This is the ruling in respect of the objection proceeding filed under Certificate of Urgency under Order XXI, Rule 57 (1) (2), 68 (1), and Section 95 of the **Civil Procedure Code**, Cap. 33 R.E 2019 (CPC).

In the Chamber Summons supported by the affidavit of Priscilla Chediel Mchomvu, the applicant, the following prayers were advanced;

1. That, this Court be pleased to investigate, object and suspend the attachment and sale of the matrimonial property situated on Plot. No. 218, Block H, Njiro Area, which is not liable for attachment.
2. Any other relief (s) the Court may deem fit and just to grant.

According to the applicant's affidavit, the reason advanced for this application is that the above property is not liable to attachment and sale having been legally obtained as a matrimonial property by the applicant and the 2nd respondent. She deponed that, she was married to the 2nd respondent in 2003 and is blessed with three issues. The suit property attached for executing the decree was obtained through joint efforts with her husband on 28th May 2007.

She further denied being a party to Land Case No. 10 of 2016 hence, the orders issued to sell the suit property should be vacated. She further deponed that, she solely depends upon the said house as she currently lives with her family thus, evicting them will cause irreparable loss.

Opposing the application, the 1st respondent filed his counter affidavit in which he disputed the applicant's claims on the ground that, the impugned property shows sole ownership by the 2nd respondent hence, eligible for attachment and sell. He also deponed that, he had passed through the property and there was no sign of life as the house was closed and empty thus, no one would suffer irreparable loss. On the other hand, the 2nd respondent conceded to the application whereas the 3rd respondent did not file his counter affidavit.

Brief the history leading to this application is to the effect that; the 1st respondent sued the 2nd respondent and one Dominion Works Limited vide Land Case No. 10 of 2016 for double sale of a surveyed land property in Plot No. 164, Block "C" LO. No. 313201, located at Njiro in Arusha City (suit land). The records show that the 1st respondent and Dominion Works Limited bought the suit property from the 2nd respondent on different occasions. The 1st respondent bought it on 2nd September 2014 for consideration of Tshs. 70,000,000/= while the said Dominion Works Limited bought it on 3rd October 2014 for consideration of Tshs. 85,000,000/=.

The main contention was therefore double allocation of the suit land and after the full trial, the Court declared the 1st respondent as the *bona fide* purchaser and Dominion Works Limited as the lawful owner of the suit land as he had already obtained Title Deed of the suit land. The Court ordered the 2nd respondent herein to compensate the 1st respondent his money back Tshs. 70,000,000/= with interest on the decretal sum at the rate of 15% per annum from the date of filing to the date of delivery of judgment. The Court also ordered interest on the decretal sum at the court rate of 7% per annum from the date of judgment to the date of the satisfaction of the Decree in full.

To act on the above orders, the 1st respondent filed Execution No. 7 of 2021 praying for a sum of Tsh. 112,000,000/= being the actual sum and the accrued interest be paid from selling Plot No. 218 Block "H" with Certificate of Title No. 21738 and Plot No. 618 Block "J" all located at Njiro area Arusha. The attachment of the former property is what triggered the applicant to file this application objecting to its attachment on the ground that the same is a matrimonial property.

During the hearing the applicant and the 2nd respondent were represented by Mr. G. Mrosso whereas the 1st respondent was represented by Mr. Gwakisa Sambo, all learned Advocates. The 3rd respondent defaulted appearance hence the application was heard in his absence.

Supporting the application. Mr. Mrosso prayed for the applicant's and 2nd respondent's affidavit to be adopted to form part of this submission and submitted further that, Plot No. 218 Block "H" with Certificate of Title No. 21738 located at Njiro area in Arusha City is a property jointly owned by the applicant and the 2nd respondent herein. since the applicant was not a party to Land Case No. 10 of 2016, the said property should not be attached for execution because it is matrimonial property.

Learned counsel referred the Court to the case of **Bi Hawa Mhamed vs. Ally Seif** [1983] TLR 32 and section 114 of the **Law of Marriage Act**, Cap 29, R.E. 2019 which defined a matrimonial assets as any asset that was acquired by one or both parties with the intention of continuous provision for them and their children during their joint lives and used for their benefit of a family as a whole. He also cited the case of this High Court at Bukoba in Misc. Land Application No. 96 of 2021 between Odilia Makurugasha vs. Selemani Kalimbe and 3 Others where it was observed that a matrimonial property should not be subject to attachment if the judgment debtor's wife and children reside.

On the same note learned counsel conceded to the attachment and sale of Plot No. 618 Block "J" located at Njiro area in Arusha as the same is not a matrimonial property. He prayed that this application be granted and Plot No. 218 Block "H" with Certificate of Title No. 21738 located at Njiro area Arusha be released from attachment and sold in Execution No. 7 of 2021.

Disputing the application, Mr. Sambo prayed the 1st respondent's be adopted to form part of this submission and averred that, section 110 of the **Evidence Act**, Cap 6, R.E. 2019 provides for elementary principle in law that, he who alleges must prove. He argued that the applicant has

not established by evidence that, the property in dispute is a matrimonial property because from the attachments in her affidavit, the certificate of title shows that it was transferred from Godson Tarimo to Fadhili Sekiete, the 2nd respondent, as a sole owner. He cited section 60 (a) of the Law of Marriage Act which provides that, during marriage, a property can be acquired solely by either husband or wife in exclusion of the other. In that regard, the disputed property is not a matrimonial property but rather, it belongs to the 2nd respondent in his capacity. He also argues that had it been a matrimonial property, the applicant's name would have appeared during the transfer. He added, that even in the sale agreement, the applicant does not feature as a witness which cements the fact that, she was and is not the party to the disputed property.

Mr. Sambo addressed the marriage certificate attached to the affidavit as a forged one, because it is not readable hence its authenticity is questionable thus, even the marriage is questionable. Submitting further, learned counsel contended that, the applicant has not filed her registered caveat at the Land Registry to support her claim considering the fact that the disputed property is registered. To buttress this point, he cited the case of **Azza Mohamed Masoud vs. I &M Bank (T) Ltd**, Land Case No. 18 of 2018, High Court at Dsm which observed that, a spouse's

interest must be protected by a registered caveat. He finally submitted that the property in dispute is vacant which is why as deponed in the 1st respondent's affidavit, the 3rd respondent sought a Court Order to break the padlock of the said house. He urged this Court not to entertain the applicant's tactics which intends to deny the 1st respondent from enjoying his decree. He prayed that this application be dismissed for want of merit and that the execution order proceed.

The 2nd respondent's submission shows that he concedes with the applicant's prayers that the property is a matrimonial property jointly owned by him and the applicant. He denied to have offered the property to anyone in any way.

In his rejoinder, Mr. Mrosso briefly reiterated his earlier submission and insisted that the property in dispute is a matrimonial property and should be excluded in Executing No. 7 of 2021. He also challenged the issue of forgery raised by 1st respondent's counsel and put him in liability to prove the same. He further denied the fact that there is a court order for breaking the padlock because the same does not feature anywhere in the 1st respondent's affidavit. The learned counsel further stated that the property subject to attachment is a residential property and therefore

according to the law, it cannot be attached for execution under Section 48 (1) (e) of the CPC.

I have gone through the parties' rival submissions and the only question for determination before this Court is for verification whether Plot No. 218 Block "H" with Certificate of Title No. 21738 located at Njiro in Arusha is matrimonial property.

Although the objection proceedings are covered by Order XXI Rules 57 to 62 of the CPC, this application was brought under Order XXI Rules 57 (1) (2) and 68 (1) of the CPC. For ease of reference, I hereby reproduce them;

"57.-(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 or other respects, 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.

68.-(1) The court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reason for such adjournment:

Provided that, where the sale is made in, or within the precincts of, the court-house, no such adjournment shall be made without the leave of the court.

In light of the above, this Court must investigate and inspect the claims brought by the objector to see if he has proved to have possession or interest in the attached property. The applicant therefore must adduce evidence to prove that she has an interest in the attached property. This was emphasized in the case of **Sosthenes Bruno & Another vs. Flora Shauri**, Civil Appeal No. 249 of 2020, CAT at Dsm where the Court of Appeal had this to say;

*"The rationale for inclusion, in the CPC, of the above rules in Order XXI, in our view, is to provide for a procedure on how to carry out investigation of claims and objections which may be presented to the court by third parties who may be adversely affected by attachments arising from decrees born out of proceedings to which the objectors were not parties. See this Court's decision in **Katibu Mkuu Amani Fresh Sports Club v. Dodo Umbwa Mamboya And Another** [2004] T.L.R. 326.*

From the investigation of facts and evidence in this matter, it is my firm belief that the applicant has failed to prove to have interest in the

attached property as a matrimonial property and the following are my reasons;

One, according to the transfer of right of occupancy and the Certificate of Title as attached to the applicant's affidavit, the property was transferred from one Godson Tarimo to the 2nd respondent herein and is registered in his sole name in exclusion of the applicant. Section 60 (a) of the Law of Marriage Act provides as follows;

***60.** Where during the subsistence of a marriage, any property is acquired-*

(a) in the name of the husband or of the wife, there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse; or

Since the law acknowledges sole ownership of property by a spouse, as provided above, the applicant had to prove that the property in dispute was jointly owned failure of which a rebuttable presumption that the same belongs to the 2nd respondent alone comes in.

Two, according to Order XXI Rule 58 of the CPC, the applicant is supposed to adduce evidence to prove her claims. The section reads;

***58.** The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached*

The law is clear that, for an objection of this nature where the applicant alleges that, the disputed property is a matrimonial property, she has to prove ownership of the same. Section 56 of the Law of Marriage Act provides for equal rights in acquiring and owning properties for husband and wife while section 58 of the same law empowers the said spouses to acquire those properties in their separate names. However, to protect the interests of the said spouses in the properties registered in the name of one party, section 59 of the same Act provides for a requirement of consent in the disposition, lease, and mortgage of such properties. This was gleaned in the case of **Habiba Ahmadi Nangulukuta & 2 Others vs. Hassani Ausi Mchopa (The Administrator of the Estate of the late HASSAN NALINO) & Another**, Civil Appeal No. 10 of 2022, CAT at Mtwara where the Court of Appeal had this to say concerning the above provisions;

*"In terms of the above provisions, it is clear that there are two categories of matrimonial properties, those which are jointly acquired by the spouses prior or during the subsistence of their marriage and/or those which are individually/separately acquired by one spouse in his/her own name. For an asset to be termed a matrimonial property or otherwise, is a question of law and facts to be established by evidence. **That, a party who is challenging a property owned separately by one spouse in a marriage, has a burden to establish that the property***

in question is a matrimonial property.” (emphasis added)

Applying the principles enshrined in these authorities, in the application at hand, the applicant claims that the property in dispute is a matrimonial property and the only proof that she had is the fact that she was married in 2003 and the property was acquired in 2007 which was during the subsistence of their marriage. According to the above provisions, section 114 of the Law of Marriage Act and the case of **Bi Hawa Mohamed** (supra) which defines what constitutes a matrimonial property, the extent of contribution of each spouse on how such property was obtained has to be realized.

The applicant herein has not established ownership of the disputed property at all. There is no evidence of how the applicant contributed to its purchase or how she assisted in making it a joint property. The only fact that she was married when the same was obtained does not make her a joint owner of the same.

Three, the applicant also claimed that, together with the 2nd respondent, they are blessed with three issues who are residing in the said property. However, she did not attach any of the birth certificates as proof of the said three issues. If she could attach a marriage certificate as

proof of her marriage with the 2nd respondent, she would have easily proved their children's existence too through the attachment of their birth certificates so that section 48 (1) (e) of the CPC which bars attachment of residential property used by the judgment debtor's wife and children to be applied.

Lastly, as the famous legal adage goes, "he who comes to equity must come with clean hands" I honestly do not find the applicant's claim and the 2nd respondent's conceding to them are genuine. Looking at the history, the 2nd respondent sold the initial suit land to two different people on two different occasions and pocketed a total of Tshs. 155,000,000/=. He was found with liability and hence ordered to pay back one of the purchase money. However, even though he has not paid back, he is avoiding the liability which led to the attachment of the properties to realize the decree. I think justice has to go both ways, he who has a decree has the right to benefit from it too considering the nature of this case.

The applicant is trying to make this Court believe that she was not aware of Land Case No. 10 of 2016, but somehow she became aware of the Execution No. 7 of 2021, however, without proof of any conflict between her and the 2nd respondent, it is a rebuttable presumption that

they enjoyed the double allocation purchase money together, they now have to face the liability together.

Consequently, the application is dismissed for want of merit. I hereby declare that the landed property on Plot No. 218 Block "H" with Certificate of Title No. 21738 located at Njiro in Arusha is not a matrimonial property hence liable for attachment. Each party is to bear their own costs.

It is so ordered.

DATED and Delivered at **ARUSHA** this 8th day of September 2023.




J.C. TIGANGA
JUDGE