

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MWANZA DISTRICT REGISTRY)**

AT MWANZA

LAND APPEAL NO.50 OF 2020

S.L. ISANGI AUCTION MART & COURT BROKER APPELLANT

VERSUS

SAMWEL KIMARO RESPONDENT

JUDGMENT

29th April, & 14th July, 2021

ISMAIL, J.

This is an appeal against the decision of the District Land and Housing Tribunal (DLHT) for Mwanza, in respect of Misc. Civil Application No. 12C of 2019. The said application was instituted at the instance of the respondent who prayed for a couple of orders, one of which was for a declaration that the properties attached in execution of the decree in Land Application No. 12B of 2005, were not liable to attachment. The order related to properties which were attached on 5th December, 2007. The view taken by the DLHT is that the attachment was unjustified since there was an order of the Court rescinding or stopping the execution. It is this decision that has outraged the

appellant, hence the decision to institute the instant appeal. Four grounds have been raised in the memorandum of appeal. These are: ***One***, that the trial chairman erred in law and fact by opening and entertaining the matter while the DLHT was functus officio, and the application had been overtaken by events. ***Two***, that the DLHT misdirected itself by basing its decision on an annexure that had neither been tendered and tested nor was it exhibited; ***three***, that the DLHT erred in law and fact by determining the matter while the respondent had no locus standi; and ***four***, that the DLHT stripped into an error by purporting to correct the alleged irregularities allegedly committed by his peer.

On the parties' consensual basis, the matter was disposed of by way of written submissions, preferred consistent with the schedule of filing which was conformed to by the parties.

As I was leafing through the voluminous record, something sprung into my mind, requesting an explanation from the counsel for the parties. This was in relation to the proceedings in Land Application No. 12C of 2019 from which the instant appeal emanated. The counsel were, therefore, called upon to address me on the propriety or otherwise of preference of the objection proceedings by the then judgment debtor, the current respondent, who was a party to the same proceedings.

In his brief submission, Mr. Deocles Rutahindurwa, learned counsel for the appellant, argued that it was not proper for the respondent, a party to the proceedings, to emerge and bring the objection proceedings at the stage of the execution. The learned counsel contended that Order XXI Rule 57 of the CPC envisions third parties with interest in the attached property, as the appropriate persons to take action through objection proceedings.

Submitting in reply, Ms. Rose Ndege, learned advocate whose services were enlisted by the respondent, was convinced that the application preferred by the respondent was quite in order, and the procedure adopted was unblemished. The learned counsel further argued that the intention by the respondent was not to object to the attachment. Rather, it was intended that the DLHT should investigate and ascertain if the attachment was proper. She argued that the respondent's action was predicated on the reasoning in ***Omoke Oloo v. Werema Magila*** [1983] TLR 144, which provides for an option for that course of action, instead of instituting a fresh suit. When probed on the avenue provided under section 38 of the CPC, the learned counsel chose to leave that to the Court.

In a brief rejoinder, Mr. Rutahindurwa agreed that section 38 of the CPC was the appropriate provision in the circumstances. On the cited case,

the counsel argued that this touches on the course of action after refusal of the objection proceedings.

Glancing through the proceedings and, as Mr. Rutahindurwa submitted, the proceedings that bred the instant appeal were preferred under a number of provisions. With regards to lifting of the attachment, the enabling provisions are Order XXI Rules 57 (1) and 59 of the Civil Procedure Code, Cap. 33 R.E. 2019 (CPC). These are the provisions which call on the courts to investigate the objector's claim of interest in the property that has been lined up for attachment in execution of a decree. In the process of doing so, the objector is called upon to adduce evidence that proves that, at the time of the intended execution, the objector was possessed of the property subjected to the opposed attachment. These provisions provide in verbatim as follows:

"(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 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.

59. Where upon the said investigation the court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment."

In the proceedings in Land Application No. 12C of 2019, the applicant was the respondent who was involved in Land Application No. 12B of 2005, and emerged a loser against whom the execution proceedings were initiated. This involvement is what attracted the question that required the counsel to address me. Was this a regular indulgence? The view held by the appellant's

counsel is that this was utterly irregular. The respondent's counsel argues that that was quite in order. With utmost respect to Ms. Ndege, her contention is flawed. The whole essence of mounting an investigation and admitting evidence is to arrive at what is provided for under Rule 58 of Order XXI of the CPC, which is to establish if the objector holds interest or is possessed of the property in question. For ease of reference, the said provisions states as hereunder:

"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."

Since ownership or possession of the attached property is not a contentious matter, the objection proceedings would do little, if not nothing, in establishing if the same is in the possession or ownership of the respondent.

It follows, therefore, that Rules 57 through to 62 of the CPC provide for a speedy and summary remedy to third parties to assert their title, or possessory rights to the properties which are subjected to attachment in execution of a decree. Thus, where, as is the case in the proceedings that bred the instant appeal, the party to the proceedings against whom the decree was passed, or his legal representative, is challenging execution of

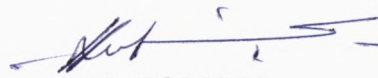
the decree passed against him, the recourse is to invoke section 38 of the CPC. This provision settles questions relating to the execution, discharge or satisfaction of the decree between the parties. This is the route that the respondent ought to have taken when he chose to institute Land Application No. 12C of 2019.

It is my considered view that the application for objection proceedings was erroneously admitted and handled by the DLHT, and it follows that the proceedings and the ensuing decision were in non-conformity with the law and, therefore, a nullity. Consequently, I order that the same be quashed and set aside. I make no order as to costs.

Order accordingly.

DATED at **MWANZA** this 14th of July, 2021.




M.K. ISMAIL
JUDGE

Date: 14/07/2021

Coram: Hon. C. Tengwa, DR

Appellant: Mr. Rutahindurwa, Advocate

Respondent: Ms. Rose Ndege, Advocate

B/C: J. Mhina

Court:

Judgment delivered in the presence of both Counsels of both sides.

C. Tengwa

DR

At Mwanza

14th July, 2021

