IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

MISC. APPLICATION NO. 114 OF 2020

GODFREY KILOTA WANGAI ..... 1ST APPLICANT

AISHA B. KALYOMBA ..... 2ND APPLICANT

GARUZE HARON ..... 3RD APPLICANT

ISAACK KWILASA ..... 4TH APPLICANT

PENDO MABLUCK ..... 5TH APPLICANT

MALEMI ROBAT ..... 6TH APPLICANT

JUMANNE SAID ..... 7TH APPLICANT

VERSUS

THE REGISTERED TRUSTEES OF)

PENTECOST EVANGEL MISSION) ..... RESPONDENT

RULING

3rd March & 1st July, 2021

ISMAIL, J.

The Court is called upon to lift attachment of the properties which were allegedly erroneously attach in execution of the decree. The contention by the applicants is that the attached properties are not the property of the

judgment debtor. The application is preferred under the provisions of Order XXI Rules 57 (1) and 59 of the Civil Procedure Code, Cap. 33 R.E. 2019. The application is supported by a joint affidavit sworn and affirmed by the respondents. The averment by the applicants is that the piece of land in which they hold interest and from which eviction has been ordered does not belong to any or all of the judgment debtors against whom the respondent got declaratory orders. They stated that nothing supersedes their rights which were created by a contract for sale of the suit land.

In a counter-affidavit sworn in rebuttal of the application, the applicant's averment has been disputed. The respondent's contention is that the applicants allegedly bought the suit land from 27 of the judgment debtors, and that they did so when the case on ownership of the said land was ongoing. While imputing that the contract on which the applicants base their claims was forged, the respondent averred that, when a survey on the disputed land was conducted in 1996, none of the applicants was in possession or ownership of the disputed land. The respondent stated that allocation of suit land, known as Plot No. 452 Block "D" Igoma Mwanza was regularly allocated to it by Mwanza City Council.

Hearing of the application was ordered to proceed by way of written submissions the filing of which duly conformed to the schedule of filing. In his brief submission, Mr. Demetrius Mtete, learned counsel for the applicant, argued that Land Case No. 2 of 2014, instituted by the respondent, culminated in a declaration of ownership of the suit land from which an order for vacant possession emanated. The counsel argued that the respondent had indulged in an illegal act by surveying a piece of land that belongs to the applicants. The illegality, the counsel argued, resided in the respondent's failure to notify the street chairman who is well versed with the area. Mr. Mtete argued that the suit land remains a squatter area that legally belongs to the applicants. He shrugged off the contention that the applicant's ownership document is forged. The applicants' counsel further argued that the suit land was, since 1972, in the hands of Igoma village and that any plans to carry out a survey ought to have involved the village council. He noted that, since the land had been developed, any survey ought to have been participatory.

Still on the survey, the learned counsel contended that the applicants' efforts to have the land surveyed had been met with serious resistance from the Mwanza City Council, an act which is interpreted to be a violation of their

constitutional rights, guaranteed under Article 24 of the Constitution of the United Republic of Tanzania. It was the counsel's submission that a notice of intention to sue the Government was issued in 2020, as a prelude to the institution of the proceedings. The learned counsel further contended that the proceedings in respect of which the disputed execution was ordered did not involve Mwanza City Council as a necessary party, an irregular conduct that has led to endless disputes. The learned counsel contended that part of land in dispute, Igoma Magharibi has buildings erected thereon, including a school which was built in 1972. The applicants prayed that the application be granted as prayed.

The respondent's submission was fiercely opposed to the application. Revisiting the background to the matter, Mr. Dutu Chebwa, the respondent's counsel, submitted that survey of the disputed land was done in 1996, culminating in the issuance of the Letter of Offer (annexure B). He argued that when the survey was done, none of the applicants was in occupation of the land in dispute. The learned counsel further contended that on several occasions, Mwanza City Council had the applicants' structures demolished, only for a Mr. Yusuph Sikanyika to dispose of part of land to the 1st applicant. It is then, that the 1st applicant mobilized other trespassers to develop the

land forcibly. Mr. Chebwa held the view that the sale agreement produced was nothing but sheer fabrication which is intended to deflect the cause of justice. On Igoma Magharibi, Mr. Chebwa denied that such locality was in existence in 1989, thereby ruling out the possibility of having a street leader to witness the purported sale. The learned counsel maintained that the applicants bought the suit land from the judgment debtors.

With respect to joinder of Mwanza City Council, the argument by the respondent's counsel is that this fact has not been pleaded in the affidavit. As such, the same is not evidence that can be relied upon.

The respondent's counsel urged the Court to dismiss the application with costs.

From the parties' contending submissions, the grand issue for determination is whether the application is meritorious enough to warrant its grant. But before I delve into the thick and thin of this grand issue, it behooves me to settle one disquieting issue that has featured in the course of the parties' submissions. This relates to the applicant's contention that the decision against which execution is challenged in the instant application did not implead Mwanza City Council as a party. The contention by Mr. Chebwa

is that this issue ought not to be considered because if features no where in the supporting affidavit.

As Mr. Chebwa rightly submitted, the flaws which arise from the respondent's alleged failure to implead the necessary party have not been raised or brought up anywhere in the joint supporting affidavit. Thus, whereasthe question of legitimacy of the applicants to raise it while they were not parties to the proceedings is a subject for another day, failure to plead it in the affidavit is of some significance. The trite position is that submissions made from the bar cannot be the basis for a decision in an application. It is what is deponed in the affidavit that should be relied upon. This position takes into account the fact that depositions in the affidavit are evidence, unlike submissions which are *generally meant to reflect the general features of a party's case and are elaborations or explanations on evidence already tendered.* (See: ***The Registered Trustees of Archdiocese of Dar es Salaam v. Chairman Bunju Village Government and Others,*** CAT-Civil Application No. 147 of 2006 (unreported)). Inspired by this astute position, I agree with what Mr. Chebwa has submitted on this point, and I find Mr. Mtete's argument untenable.

Reverting to the substance of the application, it is clear that the instant application is basically an objection proceeding which is governed by the provisions cited in the application. These are read together with rule 58 of the CPC. They (the provisions) cumulatively require that the Court must investigate the objectors' claim and, in so doing, it must admit evidence. The evidence is intended to satisfy the Court that the subject matter of the attachment was, at the time of the execution, in the possession of the objectors, the applicants herein.

For ease of reference it is apposite that the said provisions be reproduced as hereunder:

> *"(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:*
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> > *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.

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.

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."

The statutory powers of the Court, as conferred upon by the cited provision, were restated by the Court of Appeal of Tanzania in ***Amani Fresh***

Sports Club v. Dodo Ubwa Mamboya & Another [2004] TLR 326, wherein it was held thus:

> *"As a matter of law, it is necessary for the court to investigate claims and objections raised. Under the provisions of rule 50 (1) of Order XXIV of the Civil Procedure Decree, where a claim is preferred or an objection made to the attachment of any property, the court shall proceed to investigate the claim or objection. On the other hand, Rule 51 provides to the effect that the claimant or objector must adduce evidence to show that at the time of the attachment he was in possession of or had an interest in the property."*

The Court's investigation powers, bestowed on it by the cited provisions are not without conditions. The calling into action of the investigation powers is subject to a condition precedent. The said condition precedent is reflected in the existence of three key conditions, splendidly laid down by this Court (Hon. Opiyo, J.), in ***Abdallah Salum Lukemo & 18 Others v. Sifuni A. Mbwambo & 208 Others***, HC-Misc. Land Case Application No. 507 of 2019 (DSM-unreported). These conditions are:

> *(i) Presence of an attachment order of the property in question, made by the decree holder, and that such*

attachment has not touched the property in question;

(ii) That such attachment is done in the execution proceedings; and

(iii) The objection proceedings should be preferred by a person who was not a party to the suit.

The question to be answered, at this point, is whether such conditions have been met for the applicant to trigger the Court's powers. From the application and documents attached thereto, it is clear that these three conditions have been met. The attachment which is being fought by the applicants was preferred by the decree holder, the respondent herein. It is evident, as well, that the eviction (akin to an attachment) that is under the cosh was done in the execution of the decree; and, that the application challenging the execution has been preferred by persons who were not parties to the proceedings from which the decree sought to be attached emanated. This, then, qualifies the application as having passed the eligibility criteria.

With respect to compliance with Rule 58, which requires adduction of evidence to prove possession or interest in the suit property, I gather that the evidence that is available is the applicants' joint affidavit together with attachments which accompany the application. These are the Court's ruling

and drawn order that ordered the judgment debtors to vacate the suit property; and sale agreements of parcels of land allegedly from previous owners to the applicants. Sale of the said pieces of land range between 1989 and 2016. These are the documents on which the applicants' claims hang.

As we leaf through these documents, the question that requires an immediate resolution is whether these assorted documents bear the required sufficiency that may justify the applicants' objection. In other words, the question is whether possession or interest in the disputed land is proven in this case. The view held by the respondent is that documents purporting to convey title or possession of the suit land to the applicants is nothing better than a forged bunch of documents. The respondent picked the case of the 1st applicant who is alleged to have acquired his piece of land from a Mr. Yusuph Sikanyika, one of the judgment debtors, in a matter from which the decree sought to be executed arose. This contention touches on an agreement which was allegedly executed in 2012, before the proceedings between the respondent and the judgment debtors were instituted. This leaves the contention that the sale was done in the subsistence of the court proceedings or after conclusion thereof a mere allegation that is yet to be proved.

Yet to be substantiated, as well, is the contention that the documents which convey right of possession to the applicants were forged. No sworn deposition, either, was adduced to prove that Igoma Magharibi street was not in existence in 1972. While the contention by the respondent may contain the grain of truth that may justify its assertion, belief can only be attached to it if the assertion is verified and evidenced. As it is, not a semblance of evidence has been adduced to back up the respondent's contention. As held by this Court in ***Malago General Enterprises v. Salama Ambari*** *(Administrator of the estate of the late* ***HUSSEIN SALUM MALAGO),*** HC-Mis. Land Application No. 206 of 2019 (MZA-unreported), an allegation levelled in a case must be proved "consistent with the requirements of the rules of evidence as enshrined in sections 110, 112 and 115 of Cap. 6."

This position is consistent with the Court of Appeal of Tanzania's decision in ***Paulina Samson Ndawavya v. Theresia Thomas Madaha***, CAT-Civil Appeal No. 45 of 2017 (Mwanza-unreported). In this decision, the upper Bench quoted the commentaries by Sarkar on Sarkar's Laws of Evidence, 18th Edn., ***M.C. Sarkar, S.C. Sarkar and P.C. Sarkar***, published by *Lexis Nexis,* at page 1896, in which it was opined thus:

> ***"... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof****. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason .... Until such burden is discharged the other party is not required to be called upon to prove his case.* ***The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..."*** [Emphasis added].

The respondent's allegation of forgery or that of disposition of the land in the subsistence of the proceedings has not grown bigger and more authentic than a casual contention whose veracity has not been vouched. This renders the respondent's contention unproven and unable to be acted upon. It also leaves the applicants' contentions unscathed, and I take the view that the applicants have sufficiently presented a credible case that meets the requisite threshold and convince me that they (the applicants) hold possessory and/or ownership interest in the suit land. The available evidence is potent enough to warrant exclusion or release from judgment debtors, the property in respect which an eviction was ordered. The

respondent has not satisfied the Court that the land sought to be recovered through execution against the applicants is the same piece of land that the applicants allegedly bought from the judgment debtors.

In view thereof, I grant the application and order that the applicants' pieces of land be released and excluded from the execution proceedings held by the Court. The applicants have to have their costs.

It is so ordered.

DATED at **MWANZA** this 1st day of July, 2021.

THE HIGH COURT OF TANZANIA
MWANZA

M.K. ISMAIL

JUDGE

Date: 01/07/2021

Coram: Hon. M. K. Ismail, J

Applicant: Mr. Demetus Mtete, Advocate

Respondent: Mr. Mtete for Mr. Dutu Chebwa, Advocate

B/C: J. Mhina

Court:

Ruling delivered in chamber through audio-teleconference in the presence of Mr. Demetus Mtete, Counsel for the applicants and holding brief of Mr. Dutu Chebwa, Advocate for the respondent, this 01st day of July, 2021.

M. K. Ismail

JUDGE

At Mwanza

01.07.2021