

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

**MISCELLANEOUS LAND APPLICATION NO. 202 OF 2019**

*(Arising from Execution No. 31 of 2019 originating from the judgement and decree dated 31/08/2017 by Hon. De-mello, J. in Land Case No. 44 of 2013 of the High Court of the United Republic of Tanzania in the District Registry at Mwanza).*

**GASPAR VITALIS LUANDA .....APPLICANT**

**VERSUS**

**ISACK MAHALU..... 1<sup>ST</sup> RESPONDENT**

**MINISTRY OF LAND HOUSING**

**AND HUMAN SETTLEMENT .....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**MWANZA CITY COUNCIL..... 4<sup>TH</sup> RESPONDENT**

**NYAKATO ENTERPRISES..... 5<sup>TH</sup> RESPONDENT**

**DEODORY JOHN..... 6<sup>TH</sup> RESPONDENT**

**KULWA FIDEL WABANHU..... 7<sup>TH</sup> RESPONDENT**

**RULING**

Date of last Order: 01/07/2021

Date of Ruling: 16 /07/2021

**F. K. MANYANDA, J.**

This application concern objection proceedings filed by the Applicant Gaspar Vitalis Luanda against the seven Respondents in respect of Execution No. 15 of 2018 of this Court.

It is a request by the Applicant that this Court investigate evaluation conducted by the Mwanza City Council in respect of a building with 8 shop rooms valued at Tshs 94,295,200/= which is intended to be paid to the 1<sup>st</sup> Respondent.

The Applicant contends that among the 8 room, 5 of them belongs to him and the other 3 belong to one Philipo Shadrack Komela. On the other hand, the 1<sup>st</sup> Respondent contends that the alleged building does not exist as no such building was evaluated. Further, there is no any ownership or interest demonstrated by the Applicant.

Hearing of the application was conducted by way of written submissions. The schedule for filing the written submissions directed that the Applicant should file his written submissions on or before 24/03/2021, the Respondent on 08/04/2021 and rejoinder, if any, on 15/04/2021.

It turned out that the Applicant filed his written submissions on 25/03/2021 instead of the scheduled date, 24/1/2021, he was late by one day. He did not obtain leave of this Court. The 1<sup>st</sup> Respondent prays the said submissions to be expunged. He cited the provisions of Order IX Rule



8 which provides consequences of none appearance of the plaintiff while the defendant is in Court as been dismissal of the matter. He cited the case of **Ms. Olympia Kowero vs Editor of the Express and others**, Civil Case No. 176 of 2005 (unreported), where this Court said:-

*"where or party fails to file written submission in compliance with scheduling order, the consequence are similar to those of failure to appear and prosecute or defend, as the case may be."*

Similarly, the 1<sup>st</sup> Respondent attacked a certificate of urgency contending that the same was drawn and filed by an unqualified person pretending as an advocate namely Gasper Vitalis Luanda. He prayed the certificate of urgency to be discounted.

It is trite law that a person who fails to file written submissions in accordance with a schedule of the Court is deemed to have absented himself from the hearing and the purported written submissions cannot be acted upon unless he obtains leave of the Court prior. The authority in the case of **Ms. Olympia Kowero vs Editor of the Express and others (supra)**, is good law.

In this matter however the Applicant made the application by a chamber summons supported with an affidavit. Therefore, I will not act on the written submissions but since he presented his evidence by way of an affidavit, I will consider that evidence together with the written submissions by the Respondent and the counter affidavit.

As regard to the unqualified person who signed the certificate of urgency, I think this should not detain me. A certificate of urgency is not evidence, it is opinion of a person filing it that the matter be urgently heard. This matter was filed way back on 29/11/2019 as such by now the alleged certificate of urgency expired long time. I find this argument an academic exercise.

Having disposed the two legal issues, now let me turn to the gist of the application.

The law in objection proceeding is provided Under Order XXI Rule 57, 58 and 59 of the Civil Procedure Code, [Cap. 33 R.E 2019.

Rules 57 reads:-

**" 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 other respects, as if he was a party to the suit. Provided that, to the suit. Provided that, no such investigation shall be made where the Court considers that the claim or objection was designely or unnecessary delayed."**

**(2) NA**

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

**59 where upon the said investigation the Court is satisfied that for some reasons stated the claim or objection such property was not when attached, in possession of the judgment debtor .....it was so in his possession not on account or as his own property but on account of or in trust for some other person or party 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.”*  
(Emphasis added).

As it can be gleaned the provisions provides powers to this Court, after investigating and satisfying itself, to order release from attachment of properties wrongly attached or included in execution of decree(s).

In this matter the complaint by the Applicant is about compensation which is intended to be paid to the 1<sup>st</sup> Respondent by the 4<sup>th</sup> Respondent per evaluation made by the 4<sup>th</sup> Respondent. It is a claim by the Applicant that out of the 8 shop rooms, 5 of them belong to him. Further that the remaining three (3) shop rooms belong to a person known as Philipo Shadrack Komela. This means, the property does not belong to the 1<sup>st</sup> Respondent.

The 1<sup>st</sup> Respondent contend that the alleged building does not exist as no such building was evaluated. Further, there is no any ownership or interest demonstrated by the Applicant.



This Court has asked itself whether the Applicant has managed to establish existence of the property in issue. If the first question is answered in affirmative, then whether he has proved that the same was in possession thereof at the time of execution.

It is trite law that a person who seeks remedy by objection proceedings against execution of a decree is duty bound to prove the grounds thereof. The authority in the case of **Kwiga Masa vs Samweli Mubatwa**, [1989] TLR 103 makes it clear where it was held *inter alia* that: -

*"who seeks a remedy must prove the grounds thereof in which case it is the duty of objector to adduce evidence to show that the date of attachment he had some interest in the property attached."*

In the applicant's affidavit, it is averred in paragraph 3 that said building comprise 8 rooms out of which 5 belong to the Applicant while 3 are property of Philipo Shadrack Komala. The said Komela is not a party to this application. It is further averred in paragraph 5 and 6 that the shop rooms were leased to John Marwa Mgory and Anastazia Kizito who were to

pay rent through the said Komela but they refused to do so, hence, Komela filed Land Application No. 168 of 2019 which is still pending in court.

In paragraph 8 and 9 it is averred that the plot on which the building was located got surveyed and evaluated for compensation purposes by the 4<sup>th</sup> Respondent. It is during this evaluation exercise as averred in paragraph 10 that the 1<sup>st</sup> Respondent misrepresented as owner of the property in issue hence, he claimed to be entitled to the whole evaluated value of Tshs 94,295,200/=. In his counter affidavit, the 1<sup>st</sup> Respondent refutes all the allegations by the Applicant contending that it is himself who owns the property in issue.

As it can be seen the Applicant does not dispute the evaluation of the property in issue as done in Execution of Decree of this Court for purposes of compensation payment to the occupiers of the area including where the property in issue is situated. His dispute is against the 1<sup>st</sup> Respondent whom he alleges that he fraudulently represented to be the owner while in fact is not.



I have gone through the affidavit of the Applicant and counter affidavit and the record generally, there is no anywhere it has been shown that there is a building containing 8 shop rooms and that the same belong to the Applicant. What is attached to the affidavit is an evaluation report of a locality where the Decree of this Court directed to be carried out. As stated above the Respondent is not disputing the said evaluation report but he is claiming that he is entitled to the compensation intended to be paid the 1<sup>st</sup> respondent because the property in issue belongs to him. He was supposed to prove existence of the said property, that the same belongs to him and that it has been attached.

It is my firm views that the Applicant claims for payment of compensation from the evaluated property in issue against the 1<sup>st</sup> Respondent is rather contentious between them needing proof with evidence by the claimant. Moreover, objection proceedings are intended to exclude a property from attachment upon proof of possession by the objector, not claims of payment of compensation as sought by the Applicant.



It is on these reasons that I find the Applicant has failed to establish this objection against the parties in as far as Execution of the Decree of this Court is concerned. The Applicant is advised to resort to the provisions of Order XXI Rule 62 of the Civil Procedure Code, [Cap. 33 R. E. 2019], if he so wishes.

In the result I do hereby dismiss their application with costs. Order accordingly.

