

IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

(LABOUR DIVISION)

AT MWANZA

MISC. APPLICATION NO. 23 OF 2021

(Arising from Labour Execution No. 20 of 2021)

DR. ANTHONY MWANDU DIALLO.....APPLICANT

VERSUS

BIDYA JOHN DAVID & 9 OTHERS1ST RESPONDENT

SAHARA MEDIA GROUP LIMITED.....2ND RESPONDENT

RULING

Last Order date: 12/11/2021

Ruling Date: 19/11/2021

M. MNYUKWA, J.

The Applicant brought his application by way of chamber summons under Order XXI Rule 57(1)(2), Rule 58, Section 68(e) and 95 of the Civil Procedure Code [Cap 33 Re 2019] seeking the following orders:

1. *That this Honourable Court be pleased to investigate on plot No. 6 and 7 Block "C" Ilemela service Industrial area, Ilemela District in Mwanza Region aimed by the 1st Respondent for attachment and*



sale for execution in order to satisfy itself as to the ownership of the said land before allowing the Application for Labour Execution No. 20 of 2021 to proceed.

- 2. That, this Honourable Court be pleased to halt any other subsequent execution proceedings relating to the attachment and sale of the applicant's pieces of land described as plot No. 6 and 7 Block "C" Ilemela Service Industrial area pending the hearing of this application.*
- 3. That, this Honourable Court be pleased to declare the applicant as the lawful owner of plot No. 6 and 7 Block "C" Ilemela Service Industrial Area, in Ilemela District Mwanza region earmarked for attachment and sale for execution of the Labour Dispute No. CMA/MZ/ILEM/588-597- 634/2017/113/2019 and Labour Revision No. 2 of 2020.*
- 4. Any other relief(s) this honourable court may deem fit and just to grant.*

The application was supported by the affidavit and supplementary affidavit sworn by Dr. Anthony Mwandu Diallo, the applicant. During the hearing of this application the applicant was represented by Ms. Francisca Ntemi learned counsel, the first respondent enjoyed the services of Mr. Mathew Nkanda learned counsel and the second respondent was represented by Mr. Boniphace Sariro learned counsel. The application was ordered to be argued by way of written submission, whereas the court scheduled the submission in chief by the applicant to be filed on 21/10/2021, reply by the first respondent to be filed on 29/10/2021, reply



by the second respondent to be filed on 4/11/2021, rejoinder by the applicant if any to be filed on 11/11/202

The applicant filled his submission on time, the same applies to the second respondent who also filed his reply to the written submission on time. However, the first respondent failed to file their reply to the submission in chief as ordered by this court. It is the court's observation that, the first respondent appeared before this court when scheduling for the filing was done on 30/09/2021 and so he was fully aware of the scheduling and court order.

It is a settled law that, failure to adhere to the court's order on filing written submission it is as good as non-appearance of the party when the matter is fixed for hearing and therefore a party failed to prosecute or defend his case. The Court of Appeal of Tanzania in the case of **Godfrey Kimbe v Peter Ngonyani**, Civil Appeal No 41 of 2014 held that:

"We are taking this course because failure to lodge written submission after being so ordered by the court is tantamount to failure to prosecute or defend one's case."

In the present application the available record shows that the first respondent was present when scheduling of the hearing by way of written submissions was done and there is neither justifiable reason nor explanation as to his failure to file reply to the submission in chief. This court considered it as non-appearance to the first respondent. This stand was also taken in Misc. Civil Application No. 41 of 2018, **Famari Investment (T) Limited Vs Abdallah Selemani Komba (Adminstrator of the Estate of the Late Sharifa Abdallah Salama)** HC. Mbeya (Unreported).



Thus, failure by the first respondent to file reply to the submission in chief as scheduled by this court amounts to respondent's failure to defend his case. This means that the court will reach its decision without first respondent defence.

On parties' submissions, the applicant's counsel invited this court to draw attention to her submission in supporting the grounds raised in the affidavit and supplementary affidavit in support her application. The applicant submitted that this application is made under Order XXI Rule 57(1) (2), Rule 58, Section 68(e) and 95 of the Civil Procedure Code [Cap 33 RE 2019] in which this court is vested with powers to investigate the claim or objection concerning attachment of the property in execution process which is not liable for attachment. She added that this court is given power in regards to the examination of the claimant or objector claim in all aspects, as if he was a party to the case.

The applicant counsel went on to submit that Rule 58 provides that, the objector must adduce evidence to show that at the date of attachment he had some interest in, or was possessed of, the property attached. That the applicant learnt of the Execution Application No. 20 of 2021 before Hon. Deputy Registrar in which the decree holder applied for the attachment of plot Na. 2. 4, 6 and 7 Block C located at Ilemela Industrial area in Mwanza City among others.

The counsel of the applicant went on to state that, the above mentioned attached properties belongs to the applicant and he was not party to the main case which was between and against the first and second respondents herein. Thus, the mentioned properties are wrongly attached in the execution process.



Submitting further, the counsel of the applicant stated that, in regards to the aforesaid submission the applicant supported the affidavit annexed in the chamber application with the title deeds of plot No. 6 and No. 7 Block "C" marked as annexure "AD-4" reading together with supplementary affidavit filed on 30th day of August, 2021 of which he brought to the attention of this court the title deeds of plot No. 2 and 4 Block "C" as annexure "DMA-2" to prove ownership of that properties which was subjected to attachment.

The applicant's counsel in totality call upon the attention of this court to investigate plot No. 2, 4, 6 and 7 of Block "C" located at Ilemela Service Industrial area Ilemela District in Mwanza Region aimed by the first respondent for attachment and sale for execution in order to satisfy itself as to the ownership of the said land before allowing the application for Labour Execution No. 20 of 2021 to proceed as well as to halt any other proceeding relating to the attachment and sale of the applicant pieces of land described above. She further pleaded this court to declare that the applicant as the legal owner of plot No. 2, 4, 6 and 7 Block "C" Ilemela service Industrial Area, Ilemela District which was wrongly subjected for attachment in the Labour Execution Case No. 20 of 2021.

She concluded her submission by reiterates what she had submitted earlier and pleaded this court to grant prayers sought by the applicant in his Chamber Summons supported by affidavit and supplementary affidavit.

Responding to the applicant's submission, the second respondent adopted his counter affidavit and supplementary affidavit filed in this court to form part of his submission. The second respondent conceded with



applicant's submission as a whole and pleaded this court to exercise its powers under the laws cited in the application to do justice.

Having gone through and considered both submissions, now this court remains with one issue which is whether the applicant has proved to have interest in the property attached.

Objection proceeding is provided under Order XXI Rule 57, Rule 58 and 59 of the Civil Procedure Code [Cap 33 RE 2019]. In Rule 57 the court is given the power to investigate the claim or objection as submitted by applicant's counsel and as it is provided hereunder that: -

"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 a suit:

The wording of this provision can also be seen in the case of **Katibu Mkuu Amani Fresh Sports Club V Dodo Umbwa Mamboya and Another** (2004) TLR 326, where it was held that:

" Where a claim is preferred or objection made to attachment of any property, the court is duty bound to investigate the claim or objection"

The duty of the court was also discussed in the case of **Dorice Keneth Rwakatare V Nurdin Abdallah Mushi & 5 Others**, Miscellaneous Application No. 300 of 2019 HC. Land Division at Dar – es-



salaam (unreported) where it was also held that, the court has an obligation to investigate the claim to see if the objector has proved to have possession or interest in the attached property.

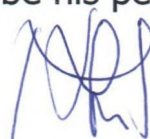
On the other side Rule 58, provides for the burden of adducing evidence to the claimant to show that at the date of the attachment he had some interest in, or was possessed of, the property attached. This burden was discussed in the case of **Kwiga Masa v Samwel Mtubatwa** (1989) TLR 103 where it was held that:

"He who seeks a remedy must prove the grounds therefore, in which case it is the duty of objector to adduce evidence to show that at the date of attachment he had some interests in the property attached."

In this Application, the Applicant in his affidavit and supplementary affidavit averred that, the first respondent has attached his personal property described as Plot No. 6 and 7 Industrial Area Ilemela District Mwanza Region together with Plot No. 2 and 4 which belongs to other people and entities as subject in Labour Execution No. 20 of 2021. The applicant has attached copies of certificates of Titles of Plot No. 6 and 7 Block "C" Ilemela Service Industrial Area bearing the names of Anthony Diallo Mwandu and Anthony Diallo respectively.

In his submission the applicant has stated that Plots Na. 2, 4, 6 and 7 are his properties and are wrongly attached in the execution process and the counsel implored this court to investigate if the applicant had some interest in the said properties.

The court finds that the applicant contradict himself as he firstly mentions two plots No. 6 and 7 Block "B" to be his personal properties as



it is seen in his affidavit, then he goes on to mention Plot No. 2 and 4 to be other people's properties in his supplementary affidavit and lastly, he mentioned all of them to be his personal properties in his submission. As it is the duty of this court to see if the applicant has adduced evidence of his interest on the attached property, I have gone through the annexures mentioned by the applicant and found that the only annexure are copies of Title deeds of Plots No. 6 and 7 Block "C" which bears the names of Anthony Diallo Mwandu and Anthony Diallo respectively.

The copies of certificate of titles shows that the applicant has ownership of the properties for the term of 33 years and there is no differing evidence that the properties does not belong to the applicant. Besides, both respondents did not present any conflicting evidence to the applicant's ownership or possession of the said two plots (Plot No. 6 and 7 Block "C"). This means that the applicant has shown and proved that he had some interest in plots Na. 6 and 7 Block C.

On the other side, despite the applicant's averment that he owns the other two plots No. 2 and 4, based on the above elaborated contradiction, this court finds difficult to believe as there is no any evidence adduced by the applicant to show that he has any interest in the latter property and so he has failed in any way to show interest in Plots Na. 2 and 4 Block "C" Ilemela Industrial Area in Mwanza City. The applicant failed to show that he had actual or sufficient interest over those plots. The applicant also failed to show that the said plots were registered on his name. Thus, I am settled that the applicant ought to have sufficiently established that he is the lawful owner of Plot No 2 and 4 Block C Ilemela Industrial Area in Mwanza City. (See the case of **Leopard Mutembei v Principal Assistant of Titles, Ministry of Lands, Housing & Urban**



Development and the Attorney General, Civil Appeal No 57 of 2017
(unreported)

From that finding, this court have to order the release of Plots No. 6 and 7 Block "C" Ilemela Industrial area in Mwanza City free from attachment as the applicant has established and proved to have interest on the properties and therefore this court declared him as a lawful owner.

In the upshot, I hereby order the release of Plots No. 6 and 7 Block "C" Ilemela Industrial area in Mwanza City from attachment in Execution No. 20 of 2021. Thus, application is partly granted as discussed herein. Each party should bear its own costs.



M.MNYUKWA
JUDGE
19/11/2021

Ruling delivered on 19/11/2021 through Audio Teleconference in the presence of the applicant and the second respondent and in the absence of the first respondent.



M.MNYUKWA
JUDGE
19/11/2021