

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY**

**IN THE HIGH COURT OF TANZANIA
(IRINGA DISTRICT REGISTRY)**

AT IRINGA

MISC. APPLICATION No. 07 of 2021

(Originating from Execution Land Case No. 03 of 2018)

BETWEEN

JULIAS KISAKWANI KAVEVA AND 2 OTHERS -- APPLICANTS

VERSUS

THOMAS MSIGWA AND 2 OTHERS ----- RESPONDENTS

10/03 & 19/04/2022

RULING

MATOGOLO, J.

The applicants namely Julius Kisakwani Kaveva, Yuditha Edward Chengula and Regarn Lucas Sanga through their advocate Mr. Edrick Mwinuka has filed to this court an application in which they are praying for the following orders:-

1. That this court be pleased to investigate an application for attachment and sale of 40 acres of Land at Sawala village within Mufindi District to be attached and sold in order to secure the claimed money of Tshs. 4, 215,000/= in execution of a decree issued against the 1st respondent and that, immediately after investigation order that the Applicants land is not liable for attachment.

2. This court be pleased to order for status quo of the attached land.
3. Costs of this application be provided for.
4. Any other relief(s) this honourable court may deem fit and just to grant.

The application is by chamber summons made under Section 48(1)(e) and 95, Order XXI Rule 57(1) and (2) of the Civil Procedure Code Cap. 33 R.E. 2019.

The application is accompanied with affidavits sworn by applicants.

The application was orally argued. At the hearing, the applicants were represented by Mr. Edrick Mwinuka learned advocate. The respondents namely Thomas Msigwa, Joseph Stephan Kalinga (The Administrator of Estate of the Late Steven Kalinga) and Majembe Auction Marts, were represented by Mr. Leonard Sweke learned advocate. Hearing proceeded on 10/03/2022 but the same proceeded ex-parte against the 1st respondent who did not enter – appearance despite of being served through publication in the Mwananchi Newspaper dated 15/09/2021.

In his submission in support of the application, Mr. Edrick Mwinuka learned advocate adopted the affidavits by the applicants. He said this is an objection proceedings in an execution of decree following the order of this court in execution of decree in Land Case No. 03 of 2018 between Stephen Kalinga and Thomas Msigwa. Mr. Edrick Mwinuka submitted that among other things, applicants are praying for this court to investigate on the attachment of 40 acres of land located at Sawala village in compensation of money, Tshs. 4, 215,000/- emanated from taxation Case No. 08 of 2015 between Stephen Kalinga and Thomas Msigwa.

The learned counsel submitted further that there was execution in land Case No. 03 of 2018 between Stephen Kalinga and Thomas Msigwa which was pending before this court for execution of a decree in taxation No. 08 of 2015 between the same parties. The second respondent who is the administrator of the deceased estates of Stephen Kalinga praying for attachment and sale of the named 40 acres of land located at Sawala village. He submitted further that on 01/07/2019 this court issued an attachment warrant and appointed Laizer Setty Motto of Majembe Auction Mart Ltd to effect the attachment and sale of the said property for purpose of compensation of Tshs. 4,215,000/= which Thoams Msigwa was adjudged to pay Stephen Kalinga.

In the execution of that court order, the 2nd respondent, the third respondent together with the village council and the police made advertisement against 1st, 2nd and 3rd respondents in that application, instead of attaching and selling 40 acres of Land, they decided to chase away 1st, 2nd and 3rd applicants prohibiting them not to use the said land of 40 acres. They also chased and prohibited them from the pieces of land they were using and which were their properties which they owned customarily and they had Customary Right of Occupancy deeds. The 2nd respondent by aid of the 3rd respondent decided to grab the land and owned it contrary to the order of the court.

He said there are pieces of land (farms) measuring 40 acres, also there are pieces of land which are owned by customarily and had customary title deeds which the respondents have trespassed and wrongly possess them. He described the 40 acres which are owned by the

applicants with title deeds, there is a piece of land in between property of Mawazo Kyando. The pieces of land property of the 1st applicant which was wrongly attached by the 2nd and 3rd respondent in execution of the decree has size of 7.46 acres and has title deed of customary Right of occupancy No. 5MFD 67 issued by Sawala Village Council on 07/09/2012. Mr. Edrick Mwinuka tendered in court the said title deed which was admitted as exhibit A1. The piece of land of the 2nd applicant which was also wrongly attached in the execution of decree has size of 8.55 acres with title deed of customary Right of occupancy No. 5 MFD 01 issued by Sawala village council on 07/09/2012. The same was tendered in court and admitted as exhibit A2.

The piece of land of the 3rd applicant is measured 6.6 acres with title deed of customary Right of occupancy No. 5MFD 03 issued by Sawala Village Council on 17/09/2012. The same was also wrongly attached in the execution of decree. Mr. Edrick Mwinuka tendered it in court. The same was admitted as exhibit A3.

The learned counsel submitted that in his application for execution of the decree 2nd respondent prayed for attachment of 40 acres of land located at Sawala Village, Mufindi District. But in his application he was not specific as to which land/farm to be attached. Even the court order was not so specific. Mr. Mwinuka argued that the order for attachment of 40 acres did not consider the area and value of the farm compare to the adjudged amount of Tshs. 4, 215,000/= which 2nd respondent was awarded. He submitted further that in the cause of attaching the said land 2nd and 3rd respondents have caused damages by demolishing houses cutting down

trees and tea plants which were cultivated by the applicants. The 2nd and 3rd respondents went further by even preventing the applicants from getting their rights to earn money through tea harvesting in their farms which were wrongly attached, the act which caused immense economic loss to the applicants, they were also affected psychologically. He said in filing this application, the applicants have complied with the conditions as prescribed by law. To support his argument he cited the case of ***Abdallah Salum Lukeno and 18 Others vs. Sifuni A. Mbwambo and 208 Others***, Misc. Land Case Application No. 507 of 2019 in which at page 6-7 the Court set three conditions to be fulfilled before the court can make investigation to the claim or objection proceedings. He mentioned the conditions to include:

- (i) There should be an attachment of property which is not likely to such attachment;
- (ii) The attachment should be made in the execution proceedings.
- (iii) The objection proceedings must be made by a person who was not a party to the suit.

He said the applicants were not parties to either cases mentioned above be it taxation No 08 of 2015 or execution in land case No. 03 of 2018.

The application was brought following court order for attachment of property in execution of decree. The attached properties were legally owned by the applicants and had title deeds for their properties. The properties were not part of the 40 acres located at Sawala Village. The 2nd.

and 3rd respondents wrongly attached the property of the applicants and went against the order of the court.

Mr. Edrick Mwinuka prayed for this court to make investigations on such attachment of the properties which were wrongly attached by 2nd and 3rd respondents. He also prayed for this court to issue an order of restoration of the said farms/pieces of land to the applicants in the condition they were before wrongful attachment and for an order for the respondents to pay compensation to the applicants for the damaged caused and costs of the case and any other relief(s) the court may deem fit to grant.

In reply, Mr. Leonard Sweke learned advocate for the respondents first prayed for the joint affidavit of the 2nd and 3rd respondent to be adopted to form part of his submission. He said after read the affidavits by the applicants and what was submitted by Mr. Edrick Mwinuka learned advocate he found them to be baseless and prayed to this court to dismiss the application with costs.

He submitted that the 1st and 2nd applicants are claiming that the area which was in dispute between Thomas Msigwa (1st respondent) as administrator of the Estates of Kisakwani Kaveva and Steven Kalinga who is also deceased that area was already handed over to the late Steven Kalinga by the third respondent Majembe Auction Mart on 18/12/2020 through the order of the District Land and Housing Tribunal for Iringa in Misc. Application No. 34 of 2018. He said the 1st and 3rd applicants are relatives. The 3rd applicant is the grandson of the 1st applicant. The reason for the area to be handed over to Steven Kalinga is through Land

Application No. 30 of 2013 which was filed by the respondent Thomas Msigwa against Steven Kalinga. The area which now the 2nd and 3rd applicants are claiming was in dispute from 2008 up to 2018.

He said the dispute was adjudicated through different forums such as the Ward Tribunal and Courts of Law. Mr. Leonard Sweke submitted that even the title deeds of customary Right of occupancy of the applicants which was tendered before this court are doubtful.

He questioned as to how were issued over the area in dispute. But also the title deeds, for example the title deed for 1st applicant has two names Julias Kisakwani Kaveva and Happy Kisakwani Kaveva. For the title deed issued to 3rd applicant has also two names, Reagan Lucas Sanga and Fainess Amos Mfilinge. He said the two title deeds are in two names. But those who filed this application are only two, one in each title deed. For the 2nd applicant has different names in the title deed. There is the name of Yudita Edward Chengula. But in the application there is the name of Yuditha Edward Chengula. The second applicant has two title deeds, one has two names Yuditha Edward Chengula and Mastula Charles Kaveva. He said there is doubt if the said customary Right of occupancy deeds were legally obtained through recognized authorities. He argued that the village council can only allocate land which is not occupied by other person. To that he cited the case of ***Mtongoli Nyamagani vs. Rich*** found in a book by Dr. Tenga W. R. and Dr. Mramba S. J. ***Theoretical Foundations in Land Law in Tanzania.***

He argued that the village council of Sawala could not allocate land and issue title deed on the land still under dispute.

He further submitted that the area this court ordered to be attached is the area 2nd respondent know it properly, it belongs to the late Kisakwani Kaveva and the administrator of the estates of Thomas Msigwa who sued Steven Kalinga claiming for the properties of his father, that is Land Application No. 30 of 2013 in the District Land and Housing Tribunal for Iringa on that area. Kisakwani Kaveva was given that land by his relatives, the respondent Amri Mpya Mtavangu way back from 1930-1939 Mr. Sweke argued that this is in the court record, and that he was given that area while he was coming from Mbeya as he came to work with Brooke Bond Company Ltd. For that case, the land was not the property of the present applicants. But also the applicants are relatives, that were allocated the land is doubles. But that area is not surveyed. If measured it would be only that one family whose land was measured and title deed allocated to them.

On the complaint about destroyed crops, he said were not their properties as have been used by the late Kisakwani Kaveva since he was given by the late Amri Mpya Mtavangu until when the dispute cropped up. On the other side claiming the area which was formerly owned by the late Steven Kalinga for them to own it.

Mr. Sweke said, as the applicants are asking this court to make investigations he prayed to the court also to read the previous court records as the family of the applicants have been filing different suits against the late Steven Kalinga since 2008, they have been doing so exchangeably. The last one to sue is Thomas Msigwa who was appointed as administrator who filed Land Application No. 30 of 2013 claiming the area, property of the late Kisakwani Kaveva. The applicants have no reason

not to recognize Thomas Msigwa as they are the ones who appointed him as administrator of the estates of Kisakwani Kaveva. Steven Kalinga won the case which was followed with execution of a decree. The administrator of the estate of Steven Kalinga was given the area 2nd and 3rd applicants are now claiming but there was no any objection. The 40 acres now in dispute was handled to the 2nd respondent legally as it is known is the property of Kisakwani Kaveva. They had no reason to claim that 1st and 3rd respondents wrongly attached the farm with 40 acres. The said 40 acres were already sold and 3rd respondent was in a process of filing a report to this court on how he implemented the execution. But he was verbally told by the Deputy Registrar to wait pending determination of this application. Mr. Leonard Sweke submitted that the applicants are claiming to have no dispute with the respondent, this is not true because the applicants have a dispute by one of the respondents. He argued that, for that reason the applicants did not comply with the conditions for them to file objection proceedings as it was held in the case of ***Kwiga Mose vs. Samwel Mtubwata (1989) TLR 103***, and ***Katibu Mkuu Aman Sports Club vs. Dodo Umbwa Mamboya and Another (2004) TLR 326***.

In rejoinder on the complaint that the customary Right of occupancy title deeds could not be issued in respect of the land still under dispute, Mr. Edrick Mwinuka was of the view that the issue of title deeds and the way were obtained, the respondents have never complained about them. He said the same were issued in transparency. At the time the title deeds were issued and later thereafter there has been no complaint from the

respondents about those title deeds. There was no any objection to the title deeds was raised by the respondents among any other persons.

As to the case mentioned by the Respondents' advocate land case No. 30 of 2013 between Thomas Msigwa and Steven Kalinga which was before the District Land and Housing Tribunal for Iringa on the dispute over 40 acres. The learned counsel posed a question whether the 40 acres which were involved in that case and the 40 acres which were attached in execution of the decree in execution, Land Case No. 03 of 2018 between Steven Kalinga and Thomas Msigwa which was before the High Court Iringa is the same area or two different areas. He said the circumstances of the case and up to the moment as the dispute appears to be over 40 acres, it is his view that if the 40 acres under consideration is one area, how did the 2nd respondent managed to attach 40 acres which were already their property and which was already handed to them. He said this creates doubts. On the title deeds with two names but only one person filed the application, he said this by itself cannot bar the applicants to file this application in court because each had interest in the said land.

As to 2nd applicant title deed, the learned advocate for the respondents said his names in the title deed and in the present application are different. The learned counsel submitted that in the title deed No. 5 MFD 01 (exhibit A2). The name of second applicant is Yuditha Edward Chengula the name which appears in the application. He said the 2nd applicant has direct interest on the area under complaint.

He submitted that the application was properly filed in court. He said the argument that the applicants were parties indirectly is not correct, what

the applicants are complaining about is on the area which they own and was registered in their own names.

Although the respondents counsel claimed that the 3rd respondent has filed to this court a report which was supposed to be filed on 30/07/2019 following the order in the execution in land case of 2018. But this application was filed on 03/05/2021, thus the application could not bar the 3rd respondent to file a report on the attachment and sale on the area if he actually sold it.

Having carefully read the rival submissions by the learned advocates from both sides, the crucial issue for determination by this court is whether the property now in dispute belonged to the decree debtor to be liable for attachment in execution of the decree by the respondents. The basis of this application is on the fact that in the cause of execution of the decree in Land Case No. 03 of 2018 between Steven Kalinga and Thomas Msigwa. That execution was a result of Taxation No. 08 of 2015 between the same parties. In such execution an order was issued by the taxing officer for attachment and sale of 40 acres of land/farms located at Sawala Village. The attachment was carried out by one Laizer Setty Motto of Majembe Auction Mart Limited, third respondent who was appointed by the court to perform that duty. In the process, and after advertisement, 40 acres of land were attached. The 1st, 2nd and 3rd applicants were chased from their pieces of Land and prohibited from using that land.

They claimed to have owned customarily and possess customary Right of Occupancy title deeds No. 05 MFD 67 which they tendered in court and admitted as exhibit A1, title deed No. 5MFD 01 exhibit A2, title deed

No. 5 MFD 03 exhibit A3, in respect of the 1st, 2nd and 3rd applicants respectively. It is the argument by Mr. Edrick Mwinuka learned advocate on behalf of the applicants that the pieces of land were wrongly attached as they were not parties to the case in which the respondents (1st and 3rd) obtained a decree.

Mr. Leonard Sweke learned advocate for the respondent said the piece of land which applicants claim to own was already handed over to the late Steven Kalinga by the third respondent Majembe Auction Mart Ltd on 18/12/2020 through the order of the District Land and Housing Tribunal for Iringa in Misc. Application No. 34 of 2018. He argued that, 1st and 3rd applicants are relatives, and the reason for the area to be handed over to Steven Kalinga is through Land Application No. 30 of 2013 which was filed by 1st respondent Thomas Msigwa against Steve Kalinga. He said the area now 2nd and 3rd applicants are claiming has been in dispute since 2008 up to 2018 and was adjudicated through different forums the ward Tribunals and Courts of Laws.

However the learned counsel did not tender in court evidence to show in which forum the dispute was adjudicate as he alleged.

Mr. Leonard Sweke also appears to doubts on the authentic of the customary Right of occupancy title deeds which were tendered in court by the applicants as to how were they issued while the pieces of land in question were still under dispute. He also questioned as to why only a single person preferred the present application while on the title deeds two names appear. This is in respect of title deed for 1st applicant which has name of Julius Kisakwani Kaveva and Happy Kisakwani Kaveva and title

deed for 3rd applicant which bears names of Reagan Lucas Sanga and Fainess Amos Mfillinge.

For 2nd applicant there is the name of Yudita Edward Chengula in the title deed but in the application there is the name of Yuditha Edward Chengula impliedly Mr. Sweke argument is centered on the premise that the village council can allocate land to a person which is not occupied as it was held in the case of ***Mtongoli Nyamagani vs. Rich*** (supra).

It is trite law that where a property of a person, who was not a party to the dispute/proceedings is attached in the execution of the decree has a right to prefer a claim or commence objection proceedings to that attachment of property and the court is bound to investigate the claim or objection. In the case of ***Katibu Mkuu Amani Fresh Sports Club vs. Dodo Umbwa Mamboya and Another (2004) TLR 326*** the Court of Appeal of Tanzania held:-

"(i) Under the provision of rule 50(1) of Order XXIV of the Civil Procedure Decree where a claim is preferred on an objection o made to the attachment of any property, the court is bound to investigate the claim or objection.

(ii) The fact that the appellant was not a party to the suit is all the more reasons for the objection proceedings in which it is open for any claimant or objector to prefer a claim or make

objection to the attachment of property”.

This is also provided for under order XXI Rule 57(1) and (2) and Rule 59 of the Civil Procedure Code Cap. 33 R.E. 2019. It provides:-

“57(1) where any claim is preferred to or any objection 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 powers as regards the examination of the claimant or objector and in all other respects as if he was a party to the suit”.

(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 if the claim or objection.

59 where upon the said investigation the court is satisfied that for 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 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 in his own account and partly on account of some other person, the court shall make an order releasing the property, wholly or to some extent as it think fit from attachment".

From the above reproduced provisions, it is apparent that before the investigation for the claim or objection is made three conditions must be complied with, that is:-

- 1. There must be an attachment of the property which is not likely to such attachment.*
- 2. The attachment should be made in an execution proceedings and*
- 3. The objection proceedings must be made by a person who was not the party to the suit.*

Now looking at the facts of the case at hand, there is no doubt that the three conditions enumerated above were fully complied with by the applicants. There was attachment of property which the applicants are objecting. The same was made in execution proceedings and that the applicants were not parties to that case.

Having so hold, the issue for investigation now is whether the attached properties belonged to the judgment debtors.

I have gone through the submission by Mr. Edrick Mwinuka learned advocate for the applicants as well as the reply submission by Mr. Leonard Sweke advocate for the respondent as well as the supporting affidavit and counter affidavit. I have also examined the applicants' customary Right of Occupancy title deeds, exhibits A1, A2 and A3.

Firstly, the applicants have denied to have a dispute with Steven Kalinga. Mr. Leonard Sweke contended in his submission that the said Steven Kalinga had a dispute with the father of Julias Kisakwani Kaveva.

Also in his affidavit at paragraph 3 the learned advocate averred that the 1st and 3rd Applicants claim pieces of land within the land which has a dispute between Thomas Msigwa the administrator of the estate of the late Kisakwani Kaveva 1st Respondent and Steven Kalinga 2nd Respondent's late father. Despite the dispute between the persons named by the learned counsel, he did not go further to explain if the attached pieces of land are the same adjudicated in the mentioned cases which declared Steven Kalinga lawful owner. It should be noted that the objection is centered on the fact that the 1st respondent pointed out a different area to 3rd respondent who effected attachment in fulfillment of the decree between Thomas Msigwa and Steven Kalinga. They are saying it is a different area as they have never been involved in the dispute over the said area and have never been parties to the named case in respect of which the attachment was carried out.

I have gone through the submission by Mr. Mwinuka advocate for the applicants and the customary right of occupancy title deeds, exhibit A1, A2 and A3. The same were issued on 07th September, 2012 for exhibit A1, on

17th September, 2012 for exhibit A2, the same day for exhibit A3. The title deeds were issued to the applicants before even the dispute between Steven Kalinga and Thomas Msigwa was filed before the District Land and Housing Tribunal for Iringa in Application No. 30 of 2013 which was filed on 16th July, 2013.

The decision by the District Land and Housing Tribunal was delivered on 10/04/2015 and its appeal to this court was decided on 20/02/2017, if there was a dispute then the same accrued after the present applicants were granted with title deeds of customary Right of occupancy. It means therefore that had the pieces of land now in dispute were involved in the dispute, the applicants would have been involved in the cases which Mr. Sweke has alleged existed from 2008 up to 2018. It is that is why he did not tender any evidence to back up that allegation.

It was correctly submitted by Mr. Sweke learned advocate that the village council can only allocate a land which is not occupied by another person. The dispute between Thomas Msigwa and Steven Kalinga was in respect of the piece of land located in Sawala village. I have gone through the Tribunal record, the same reveals that Steven Kalinga trespassed on that land/farm in February, 2008 and planted trees on a portion measuring about 40 acres. There is on record that in that 40 acres which were in dispute between Thomas Msigwa and Stephen Kalinga there were trees, fruits, bamboo trees and other species of trees. But the record reveals further that in 2008 one Augustine Kaveva the uncle of Thomas Msigwa claimed that suit land. They went to the village land council and then to the Ward Tribunal. It is disclosed in the Tribunal record that the

respondent Steven Kalinga inherited the suit land (in Application No. 30 of 2013) from his mother's father. ***He is bordering the shamba of the late Kisakwani Kaveva.***

As said before the properties mentioned in the land dispute between Thomas Msigwa and Steven Kalinga are different to those mentioned in the land/farms now in dispute. In the farm which was in dispute between Thomas Msigwa and Steven Kalinga they did not mention tree plants and two houses which are in the farms now in dispute. But as pointed out above the Respondent's witnesses clearly said the land/farm which was in dispute bordered the land/farm of Kisakwani Kaveva which means the farm of Kisakwani Kaveva was not part of the dispute. That is why at the time Thomas Msigwa suing Steven Kalinga already the applicants had title deeds to the farms now they are claiming. The law is clear that he who possesses title deed has superior title, the court could not order for attachment of the property in dispute without first ascertaining the real owner of that property. The Court of Appeal of Tanzania in the case of ***Hamis Bushiri Pazi and 4 Others vs. Saul Henry Amon and 3 Others***, Civil Appeal No. 166 of 2019 at page 27 has this to say:-

"Where a landed property is held under a certificate of title or letter of offer, the executing court cannot make any order for sale of the same in execution

of a decree in execution of a decree without having a prima facie evidence of the title of the judgment debtor on the property”.

Since the applicants had title deeds to the attached properties, the executing court could not order attachment of the said farms without being satisfied that it belongs to the judgment debtor. As the attachment was made against property not belonging to the judgment debtor the same is illegal, the argument that the certificates of Right of occupancy, exhibits A1, A2 and a3 are questionable and the way were issued is doubtful has no legs to stand, the same were issued by Sawala village council which is a proper authority to issue customary right of occupancy for land located within that village. As pointed out earlier, there is no evidence to prove that the pieces of land or farms which were attached were properties of the judgment debtor. Those properties were not therefore liable for attachment. It is hereby ordered that the same be released so that the applicants should continue in occupation of their land as before. This application is therefore granted with costs. It is so ordered.



F. N. MATOGOLO

JUDGE

19/04/2022

Date: 19/04/2022
Coram: Hon. F. N. Matogolo – Judge
L/A: B. Mwenda
1st Applicant: Absent
2nd Applicant: Present
3rd Applicant: Absent
For the Applicant: Mr. Edrick Mwinuka Advocate
1st Respondent:
2nd Respondent: Absent
3rd Respondent:
For the Respondent: Mr. Leonard Sweke Advocate
C/C: Grace

Mr. Edrick Mwinuka - Advocate:

My Lord I am appearing for the applicants.

Mr. Leonard Sweke - Advocate:

My Lord I am appearing for 2nd and 3rd Respondents.

Mr. Mwinuka - Advocate:

My Lord the matter is for ruling. We are ready.

Mr. Sweke - Advocate:

My Lord we are also ready.

COURT:

Ruling delivered.



A handwritten signature in blue ink, appearing to read "F. N. Matogolo", is positioned above the printed name.

F. N. MATOGOLO

JUDGE

19/04/2022.