

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**BUKOBA DISTRICT REGISTRY**

**AT BUKOBA**

**MISC. CIVIL APPLICATION NO. 15 OF 2022**

*(Arising from Taxation Cause No. 13 of 2018 and Misc. Land Appeal No. 23 of 2014 of High Court of Tanzania, Land Appeal No.73 of 2012 of DLHT for Kagera; Original Civil Case No.13 of 2011 of Kikuku ward Tribunal)*

**FELESIANA TRAZIAS.....APPLICANT**

**VERSUS**

**1. PRINCE DEVERIAN..... 1<sup>ST</sup> RESPONDENT**

**2. MAJEMAJE AUCTION MART & BROKERS**

**LTD.....2<sup>ND</sup> RESPONDENT**

**3. TRASIAS KAGOMBORA..... 3<sup>RD</sup> RESPONDENT**

**RULING**

01/08/2022 & 07/09/2022  
**E. L. NGIGWANA, J.**

This is an objection proceeding brought by the applicant under certificate of urgency resisting the attachment and sale of the matrimonial property to wit; a piece of land used for agricultural purposes.

The application was preferred by way of chamber summons made under Order XXI rules 57 (1), 59 and section 95 of the Civil Procedure Code Cap. 33 R.E 2019 and section 59 (1) of the Law of Marriage Act Cap 29 R:E 2019) The same is supported by an affidavit sworn by the Applicant.

The available records and the affidavit filed in support of the application gave a historical background of the matter and the reasons for the

application as follows; on 13<sup>th</sup> day July 2018, the 1<sup>st</sup> respondent through Mr. Joseph Bitakwate, learned advocate, filed Taxation Cause No.13 of 2018 claiming a total sum of Tshs. **2, 251,000/=** as costs for prosecuting Land Appeal No. 23 of 2014 finalized by this court (Kairo, J as she then was) on 18<sup>th</sup> day of May, 2018 and Land Appeal No. 73 of 2012 of the District Land and Housing Tribunal for Kagera at Bukoba.

The Taxing Officer (Deputy Registrar) taxed the amount at a tune of Tshs. **1,651,000=**. The rest of the amount was taxed off. The 1<sup>st</sup> respondent Prince Deverian effected no payment, and as a result, the 3<sup>rd</sup> respondent Trasier Kagomora filed an execution application requesting assistance of this court to enforce its decision by attachment and sale of the 1<sup>st</sup> respondent's five (5) acres of banana and coffee farm located in Bigaga Village within Muleba District. The 1<sup>st</sup> respondent (Judgment Debtor) was issued with a notice to show cause as to why execution should not proceed but he entered no appearance, as a result, the matter preceded exparte. The ruling was delivered on 31/03/2021; where the court (The Deputy Registrar) issued an order for attachment of the three acres farm vide Majemaje Auction Mart & Court Brokers Ltd to attach to execute the order.

On 17/05/2012, the 2<sup>nd</sup> respondent, Majemaje Auction Mart & Court Brokers Ltd issued a notice selling the said farm whereas after seeing the said notice, the applicant filed the present application advancing two reasons; **one**, the property is not subject attachable and sale for being a matrimonial property. **Two**, the livelihood of the whole family depends on the said farm.

When the matter was called on for the hearing the applicant had the services of Mr. Zephurine, the 1<sup>st</sup> respondent had the services of Mr. Joseph Bitakwate, learned advocate, Abud Musa who is Operational Officer of the 2<sup>nd</sup> respondent appeared for the 2<sup>nd</sup> respondent while the 3<sup>rd</sup> respondent appeared in person, unrepresented.

Submitting in support of the application, Mr. Zephurine adopted the applicant's affidavit and stated that the applicant and the 3<sup>rd</sup> respondents were married in 1984 and were blessed with ten issues. He added that the property in question is not subject to attachment and sale because it is a matrimonial property and the family depends on it for livelihood. The learned counsel referred this court to the case of Gabriel **Nimrod Kurwijila versus Theresia Hassan Malongo**, Civil Appeal No. 102 of 2018 where the term family assets were defined that they refer to those properties acquired by one or other spouse before or during their marriage, with the intention that there should be continuing provisions for them and their children during their joint lives. The learned counsel referred this court to section 48 (1) (d) of the Civil Procedure Code Cap. 33 R.E 2019 to show that an agricultural land is not subject to attachment.

On his side, Mr. Bitakwate submitted that there is no law prohibiting attachment of the matrimonial property in execution of the court decree. He argued that the case of **Nimrod Kurwijila versus Theresia Hassan Malongo (Supra)** is distinguishable because in that case what the Court of Appeal defined, was discussing what amount to matrimonial properties for purposes of division of matrimonial properties and not execution. He added the 3<sup>rd</sup> respondent was ordered to pay costs, thus ought to have

obeyed the court order. Bitakwate referred me to the case of the **Director of Public Prosecutions versus Esha Abdallah Kombo and Another**, Criminal Appeal No. 32 of 2021 HC (Unreported) where it was emphasized that court orders are made in order to be implemented; they must be obeyed. If orders made by courts are disregarded or if they are ignored, the system of justice will grind to a halt or it will be so chaotic that everyone will decide to do only that which is convenient to them.

He added that the 1<sup>st</sup> respondent prayed to attach 5 acres of banana and coffee farm out of 8 acres, but the court was very considerate when ordered attachment and sale of three acres only. The learned counsel further stated that, the applicant and her husband (3<sup>rd</sup> respondent) have colluded to circumvent the court process, thus this application should not be granted. The learned counsel added that section 48 (1) (d) of the CPC is very clear but since the whole land has not been attached, the part attached is attachable.

On his side, Mr. Abdul Musa, Operational Officer of the 2<sup>nd</sup> respondent stated that they managed to attach 3 acres farm as per court order, and announced the auction of the same, but the process stopped pending final determination of this matter.

On his side, the 3<sup>rd</sup> respondent admitted that he is indebted to the 1<sup>st</sup> respondent following costs incurred by the 1<sup>st</sup> respondent to prosecute Land Appeal No. 23 of 2014, but the attached land is the family land in which the family depends on for survival.

In brief rejoinder, Mr. Zephurine stated that the farm is not attachable the applicant and her ten (10) children depends on it. He added that the

applicant had the right to file the present application because she was not a party to Land Appeal No. 23 of 2014.

Having heard the rival submission, for and against the application the issue to decide is whether the farm is matrimonial property and if yes, whether the applicant and her family wholly dependent upon use of the attached farm for agricultural purposes.

The marriage between the applicant and the 3<sup>rd</sup> respondent is still subsisting. There is no doubt that the attached farm is a matrimonial property, as clearly stated in the applicant's affidavit, the fact which was not objected by the respondents. The same fall within the meaning given in the case of Gabriel **Nimrod Kurwijila versus Theresia Hassan Malongo**, Civil Appeal No. 102 of 2018 where a matrimonial property was defined as a property acquired by one or other spouse before or during their marriage, with the intention that there should be continuing provisions for them and their children during their joint lives.

It is always crucial for the executing court to establish that the property subject of attachment is attachable property. To ascertain whether the property is attachable or not, in our case, the court has to consider section 48 of the Civil Procedure Code Cap 33 R.E 2019 which provides properties of the judgment debtor which are subject to attachment and those which are not subject to attachment. Section 48 (1) of the Civil Procedure Code Cap 33 R: E 2019 Provides;

*The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, banknotes, cheque, bills of exchange, promissory notes, Government*

*securities, bonds or other securities for money debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, movable or immovable, belonging to the judgment debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment debtor or by another person in trust for him or on his behalf:*

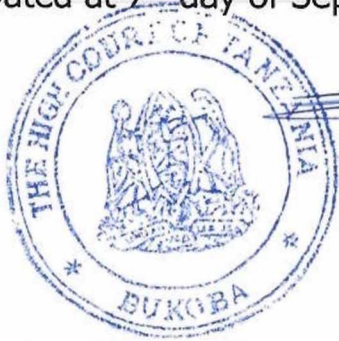
*Provided that, the following shall not be liable to such attachment or sale, namely-*

***(d) any land used for agricultural purposes by a village, an Ujamaa village, a co-operative society, or an individual whose livelihood is wholly dependent upon the use of such land.***

In this application, the objector has discharged her burden by establishing her right to have the attached piece of land released from attachment. The situation would have been different if the said family property would have been mortgaged to secure a loan because a mortgaged property is subject to attachment and sale. See **James G. Nokwe versus Finca Microfinance Bunda Branch**, Land Appeal No.84 of 2020. The attached 3 acres of banana and coffee farm, apart from being a matrimonial property, the livelihood of the applicant and her ten children depends entirely on it. For that reason, the application is hereby granted. The attached 3 acres of banana and coffee farm located in Bigaga Village within Muleba District is hereby released from attachment. The 1<sup>st</sup> respondent is advised to identify attachable properties of the Judgment debtor so that he can recover the taxed amount.

It is so ordered.

Dated at 7<sup>th</sup> day of September, 2022



E L. NGIGWANA

JUDGE

07/9/2022

Ruling delivered this 7<sup>th</sup> day of September, 2022 in the presence of the applicant and her advocate Mr. Derrick Zephurine, 1<sup>st</sup> and 3<sup>rd</sup> respondents in person, Hon. E. M. Kamaleki, Judges' Law Assistant and Ms. Tumaini Hamidu, B/C



E L. NGIGWANA

JUDGE

07/09/2022