

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB REGISTRY OF MUSOMA

AT MUSOMA

MISC. CIVIL APPLICATION FOR REFERENCE NO. 06 OF 2022

(Originating from Land Application No 165 of 2021 ad District Land and Housing
Tribuna of Musoma at Musoma)

UPENDO CCT VICOBA MASINKI1ST APPLICANT

MAGAMBO MWITA 2ND RESPONDENT

VERSUS

ROMA MARICHA MAKORI 1ST RESPONDENT

ELIAS MANKA 2ND RESPONDENT

RULIING

19TH Oct & 21ST Nov, 2022

F. H. Mahimbali, J.:

This ruling is in respect of the reference application filed by the applicants under section 77 and Order XLI, Rule 1 of the CPC, Cap 33, R.E 2022 challenging the ruling of the DLHT of Mara at Musoma in which the applicants are irritated with.

The applicants to this reference application are trying to challenge whether it is proper after the primary court had dismissed the first respondent's objection proceedings against the execution application, for the DLHT to entertain land case filed by the 1st respondent thereafter.

It appears that the 2nd respondent Elias Manka had obtained a financial loan of 2,592,000/= on 2nd July, 2015 from the first applicant. As security for the said loan, he mortgaged his property after obtaining spouse consent from Christina Manka .

He defaulted repayment of it. In efforts to recover the said loaned money, the applicants first successfully sued the 2nd respondent before Kenyana Primary Court where it was ordered that the said money be repaid or the mortgaged house (property) be sold in discharge of the loaned money. The said house was ultimately sold in public auction by the Primary Court - cum executing court.

In the midst emerged the 1st respondent with the objection proceedings before the trial court - cum executing court against the attachment and sale of the said house as per public auction. In determining the said objection proceedings, the primary court dismissed it and allowed the auction to take place. The public auction was successfully

done and one PETER MWITA MARO purchased the said house after he had emerged the successful bidder.

That instead of appealing against the said decision of the executing court in its objection proceedings, the objector filed land Application No. 165 of 2021 before the DLHT against the applicants.

In turn, the applicants who are then first and second respondents in the said Land Application No 165 of 2021 at the DLHT filed three legal objections:

- i) That the DLHT has no jurisdiction to adjudicate the matter.
- ii) The first respondent (applicant before DLHT) has erred for non-joinder of the buyer.
- iii) That the first applicant is wrongly sued for want of proper name.

Upon hearing of the preliminary objections, the DLHT dismissed all objections save the second objection that the purchaser of the said house be joined as necessary party to the case.

It is through this impugned ruling of the trial tribunal that the applicants have knocked the doors of this court by way reference:

- i) Whether the judgment of the primary court on the objection proceedings is unappealable.
- ii) Whether the attachment of the land in dispute through civil matter by the trial primary court amounts to land dispute.
- iii) Whether the trial Tribunal has no jurisdiction to determine the land application between the parties.

During the hearing of the said reference application, Mr. Gervas Emmanuel learned advocate appeared for the applicants. While adopting the applicants' affidavit, he submitted that as per facts in the affidavit, he has invited this court to borrow the wisdom of the case of **Pili Mugabi vs Juma Menge Kiuno and 2 others**, Misc. Land Application NO 38 of 2014, High Court Mwanza in considering this application. In essence, he is of the firm view that a party aggrieved by the decision of the Primary court-cum executing court has the remedy to appeal against it to the District Court.

On his part, the first respondent just insisted that the said house is his, thus wrongly sold for the satisfaction (execution) of the court's decree.

The second respondent on his part submitted that since there is a case dully filed after the dismissal of the objection proceedings, he thinks

the best legal approach is to file the suit as done. He prayed that let the matter proceed with the hearing as filed.

Having summarized the case as per available material in the court record and the parties' submission, the three main issues for consideration by this court are:

1. Whether the decision of the primary court on objection proceedings is appealable to a dissatisfied party.
2. Whether the attachment of the land (property) in dispute through civil matter by the trial primary court amounts to land dispute.
3. Whether the trial tribunal has jurisdiction to determine the land application between the parties.

According to the enabling provision of the law (Order XLI, Rule 1 of the CPC), provides that:

Where, before or on the hearing of a suit in which the decree is not subject to appeal or where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the court may, either of its own motion or on the application

of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained and refer such statement with its own opinion on the point for the decision of the High Court.

With this enabling provision of the law, I think the Court is properly moved to give the proper directives as far as this called reference application is concerned.

It should be noted first that the objective of objection proceedings is to protect the interests of those who were not party to the proceedings from which the decree has been obtained (see **Katibu Mkuu Amani Fresh Sports Club C: Dod Umbwa Mamboya and Another** (2004) TLR 326). Relevant to this reference application, the primary court's proceedings arose out of the objection proceedings preferred by the 1st respondent. The relevant law governing the steps taken by the objector is the Magistrate's Courts (Civil Procedure in Primary Courts) rules (MCA Rules). Rule 70 thereof provides:

- 1) **Any person, other than the judgment debtor,** who claims to be the owner of or to have some interest in property which has been attached by the court may apply to the court to release the property*

from the attachment, stating the grounds on which he bases his objection.

- 2) On receipt of an application under subrule (1), **the court shall fix a day and time for hearing the objection** and shall cause notices thereof to be served upon the objector, the judgment-creditor and the judgment debtor.*
- 3) No order for the sale of such property shall be made until the **application has been determined** and if any such order has been made, it shall be postponed.*
- 4) On the day fixed for the hearing, **the court shall investigate the objection and shall receive such evidence** as the objector, the judgment-creditor and the judgment debtor may adduce.*
- 5) If the court is **satisfied that the property or any part of it does not belong to the judgment debtor, it shall make an order releasing it, or such part of it, from the attachment.** [emphasis added].*

Reading the excerpt above, in the case of **Rahel Chossa V. Gabaseki Kuboja Mgewa and James Muhoja Bunzali**, PC Civil Appeal No. 68 of 2021, HC Mwanza, made the emphasis, which I entirely agree and adopt it that: One, the objector should not knock on the doors of another judicial forum for trial before the executing court has received such objection for investigation. It is good and settled practice (**Kangaulu**

Mussa v Mpunghati Mchodo [1984] TLR 348). Two, the hearing envisaged under the above provision is by way of investigation of the objector's interest in the property being attached. Three, investigation covered here is not the substitute of adjudication or trial. Four, investigation is a process that is less intensive than the hearing of the main suit. Five, its aim is to establish a prima-facie interest of the objector in the property so attached. Six, the outcome of the investigation about the lodged objection, particularly if it is not sustained, does not bar the interested party to go for litigation afresh. Seven, the investigation does not render the subsequent matter between parties as *resjudicata* (**Omoke Oloo v Werema Magira** [1983] TLR 144). Eight, the court which was involved in the investigation does not become functus officio for the newly filed suit (assuming the fresh matter is determinable in the hierarchy to which such court belongs).

That said, my findings and ruling as far as this reference application is concerned are as follows:


1. The Primary Court being the trial court -cum executing court, did what it found to be right.

2. Having ruled on the objection proceedings, the Primary Court (Executing Court) had finally discharged its duty. That finding is not appealable as per law.
3. The Dissatisfied party had the legal remedy of filing a suit in a proper judicial forum. That move is neither res judicata nor barred from law.
4. A mere attachment of landed property in execution of the court's decree does not make the matter land dispute. It is land dispute only if there arises a dispute involving interest over the said landed property by another person (stranger to the case) and whose objection is dismissed by the executing court.
5. The first respondent in this case rightly exercised his legal right as legally guaranteed.
6. The DLHT in this matter has a full mandate to adjudicate the matter as per law, it being a land case and therefore made a proper finding on its jurisdiction.
7. The preliminary objections by the DLHT were rightly ruled.

Now under after hearing the parties and made the above findings, under Order XLI, Rule 3 of the CPC, Cap33 R.E 2022, I hereby order that the Deputy Registrar of this Court to transmit this Court's ruling and the records thereof for the DLHT to proceed disposing of the case as per law as the case before it, is rightly filed. Costs to follow the event.

DATED at MUSOMA this 21st day of November, 2022.




F.H. Mahimbali
Judge

Court: Ruling delivered this 21st day of November, 2022 in the presence of the applicant, Respondent, Mr. Gervas Emmanuel, advocate for the applicant and Gidion Mugo, RMA.



F. H. Mahimbali
Judge