

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(ARUSHA SUB-REGISTRY)
AT ARUSHA**

MISC. CIVIL APPLICATION NO. 69 OF 2021

(C/f the High Court of Tanzania at Arusha, PC Civil Appeal No. 38 of 2005,
emanating from Arusha District Court, Civil Appeal No. 24 of 2005, Originating from
Arusha Urban Primary Court, Civil Case No. 45 of 2003)

AMEDEUS R. MALEO 1ST APPLICANT
HAMAD JOSHUA SHOMARI 2ND APPLICANT
WOISY SHIFAYA MBOYA 3RD APPLICANT
YOLANDA JOSEPH 4TH APPLICANT
GLORY CHRISTOPHER MOSHI 5TH APPLICANT
DEVOTHA ALPHONCE PETER 6TH APPLICANT
ONESMO FAUSTIN KIMARO 7TH APPLICANT
JOHN YUDA MSURI 8TH APPLICANT
SAMWEL WILSON 9TH APPLICANT
VICTOR B. KILEO 10TH APPLICANT
SEVERINI T. MICHAEL 11TH APPLICANT
ZULY SAID 12TH APPLICANT
GENES HUGHO SHIRIMA 13TH APPLICANT
FRAZIER KAZIKODI 14TH APPLICANT
MESHACK PETER MADANGI 15TH APPLICANT
ESHIWAKWE R. NKYA 16TH APPLICANT
AMINA IDDY JUMA 17TH APPLICANT

VERSUS

DEOGRATIUS MISANA 1ST RESPONDENT
SELINA MISANA 2ND RESPONDENT
KELVIN LOIVOT KISIRI 3RD RESPONDENT
ADVANCED CREDIT RECOVERY CO. LTD 4TH RESPONDENT
JUDITH ISAYA GUNDA 5TH RESPONDENT

RULING

06/12/2022 & 07/03/2023

KAMUZORA, J.

The application has been preferred under the auspices of Order XXI Rule 57(1) of the Civil Procedure Code, Cap. 33 [R.E 2019] (henceforth the CPC), moving the Court to postpone execution order for evicting the Applicants from the suit property which is in the Applicants' occupation pending investigation by this Court whether the land is liable for attachment and eviction of the Applicants herein to satisfy the decree in PC Civil Appeal No. 38 of 2005 between the 1st, 2nd and 3rd Respondents. The application is supported by affidavit deposed by Mr. John S. Mjema, learned advocate for the Applicants. The application is contested by counter affidavits of the 1st, 2nd, 4th and 5th Respondents, deposed by each Respondent. The 3rd Respondent in his counter affidavit supported the application.

Facts of the case giving rise to this application appear intricate but easy to comprehend. They can be discerned from the record as follows: The 3rd Respondent herein sued the 1st and 2nd Respondents in Arusha Urban Primary Court (henceforth the trial court), vide Civil Case No. 45 of 2003. In that case, the 3rd Respondent sought and obtained an order to evict the 1st and 2nd Respondents from a piece of land measuring two

acres which also had a six roomed house built thereon (henceforth the suit property). According to the evidence adduced in the trial court, the 3rd Respondent also sought to be declared lawful owner of the suit property as the same was given to him by his late father Loivot Veino Kisiri way back 1980 prior to his death in 1990. In their written statement of defence, the 1st and 2nd Respondents maintained that they were tenants in the suit property. After full trial, the trial court ruled in favour of the 3rd Respondent, ordered eviction of the 1st and 2nd Respondents from the suit property. The 3rd Respondent was declared the lawful owner of the same. In execution of the trial court's decree, the 1st and 2nd Respondents were evicted from the suit property on 25/11/2005.

The 1st and 2nd Respondents were aggrieved by the trial court's decision. They unsuccessfully appealed to the District Court of Arusha (henceforth the district court), vide Civil Appeal No. 24 of 2005. In its decision delivered on 06/09/2005, the district court dismissed the appeal with costs upholding the decision of the trial court.

Still unamused, the 1st and 2nd Respondents appealed to this Court vide PC Civil Appeal No. 38 of 2005. In its decision handed down on 21/05/2009, this Court (Sheikh, J, as she then was), allowed the appeal quashing the decisions of the two lower courts. The basis of the learned Judge's decision was that the trial court had no jurisdiction to entertain

the suit since it was based on landlord/tenant relationship. Further, the 3rd Respondent had no *locus standi* to institute the case since he was not duly appointed as legal representative of the late Loivot Veino Kisiri, whose property or estate was the subject matter of the dispute.

Having noted that their appeal was allowed and that the decisions of both lower courts were nullified, the 1st and 2nd Respondents appeared before the District Registrar, seeking to execute that decree. By then, the 3rd Respondent had already sold the suit land to the Applicants. They sought to execute the decree against the 3rd Respondent by evicting the Applicants who were occupying the suit property, whose right of ownership was derived from the 3rd Respondent. On 31/08/2021, the Deputy Registrar who was presiding over the execution application, ordered the 3rd Respondent to voluntarily give vacant possession of the suit property and in case he defaulted, the 4th Respondent was appointed to evict the 3rd Respondent, his agents, workmen or any other persons in occupation of the suit property. The 4th Respondent issued 14 days' notice to the 3rd Respondent and the Applicants to give vacant possession of the suit property, the notice which would expire on 20/09/2021.

Being made aware that they were to vacate the suit property while they claimed to be in lawfully occupation of the same, on 14/09/2021 the Applicants preferred the instant application in the form of objection

proceeding claiming to establish their rights in the suit property. In the affidavit in support of the application, the Applicants stated at paragraphs 4 to 20 that they purchased their respective plots from either the 3rd Respondent or from other third parties who derived ownership from the 3rd Respondent. They alluded further that they developed their plots by building modern houses.

On their part, the 1st, 2nd and 5th Respondents in their counter affidavits separately filed, contended that the suit property which was surveyed as Farm No. 1634 Ilkiloriti Village, Arumeru District under Certificate of Title No. 19800 measuring 8430 square metres, belongs to the 5th Respondent as the same was given to her by the late Mesiakini Loivoti Kisiri who passed away on 28/06/2009. According to paragraph 3 of the 5th Respondent's counter affidavit, she was entrusted ownership of the suit land for herself and on behalf her four sisters, Doris Clement Mafinga, Naomi Deodatus Peter, Selina Deogratus Misana (2nd Respondent) and Angela Loivoti Kisiri.

Elucidating on how the suit property evolved to her possession, the 5th Respondent averred that her mother was married to the late Loivot Veino Kisiri (the 3rd Respondent's father) as a second wife. Upon his death, the late Loivot Veino Kisiri left a will bequeathing the suit land to his second wife, the late Mesiakini Loivoti Kisiri (the 5th Respondent's mother).

She processed certificate of occupancy effectively from 2003. She was issued with offer letter dated 05/01/2006, and certificate of title No. 19800 was issued in her mother's name on 25/01/2006 for a term of 66 years. According to paragraph 4(d) of the 5th Respondent's counter affidavit, on 19/01/2007, ownership of the suit property was transferred to the 5th Respondent by her mother in consideration of love and affection, for her own behalf and on behalf of her four sisters. Registration to that effect was effected on 15/05/2007. It was therefore argument by the 1st, 2nd and 5th Respondents that the suit property is lawfully owned by the 5th Respondent, hence the Applicants herein are trespassers.

On his part, the 4th Respondent did neither contest the application nor supported it as he was only ordered to execute the decree. In her affidavit, the 5th Respondent averred that she was not made a party in the suits which gave rise to PC Civil Appeal No. 38 of 2005, whose decree is subject of this application.

Following the above historical background, which brought about the instant application, after scanning the affidavits and careful revisiting the submissions by counsel for the parties, I noted that prayers sought in the chamber application do not support the depositions in the affidavit. I also noted that this application was preferred against an order for execution of this Court's decree which nullified the lower courts' proceedings and

judgment thereto. Perpetrated by the above, following pertinent issues became apparent:

- i) Whether the application is based on the prayer for postponement of the execution or prayer for investigation;*
- ii) Competency of the application;*
- iii) Whether there is executable decree; and*
- iv) If there is executable decree, whether the High Court being the last Appellate Court, is the proper court to execute the decree.*

The Applicants were represented by Messrs John Mjema and Ombeni Kimaro, learned advocates while the 1st, 2nd and 5th Respondents were represented by Mr. Ezra Mwaluko, learned advocate. Earlier on, it was resolved that the application be disposed of by way of written submissions, which both counsel for the parties complied to the filing schedule.

In the course of composing this ruling, following the issues that arose as above pinpointed, this Court found it prudent to resummon counsel for the parties to address me on some crucial issues for proper deliberation of the matter.

On the first and second issues above, this Court inquired clarification from counsel for the parties after it was discovered that the prayers sought in the chamber application were inconsistent with the depositions in the affidavit in support of the application. While the chamber application

revealed that the Applicants were seeking for postponement of the execution, the provision under which the application was preferred together with the affidavit in support of application denoted that it was objection proceeding, calling for investigation of the matter.

In their submissions in response to these issues, both counsel for the parties were at one that this application be treated as objection proceeding. The reason put forward by counsel for the Applicants was that the provision referred in the chamber application which is Order XXI Rule 57(1) of the CPC, is applicable in objection proceedings. He added that even the affidavit in support of the application made reference to objection proceeding. The learned counsel for the Applicants reversed his gear praying that if the words used in the chamber application had any defect, this Court be pleased to invoke the overriding objective principle under section 3A and 3B of the CPC to circumvent technicalities that may delay or deny substantive justice.

According to the reasoning by counsel for the Respondents, this Court in Misc. Civil Application No. 86 of 2021 noted that Application No. 69 of 2021 was an objection proceeding. However, the learned minds lock horns on the words implicated in the chamber application as noted by this Court. In that accord, counsel for the Respondents posed a question as to whether the Court can grant relief not sought, stating that the relief

sought in the chamber application is postponement of the execution and not investigation.

I am alive that investigation of the matter like the present one in one way or another entail calling for evidence to prove if the property in question is subject to attachment or not. This is pursuant to Order XXI Rule 58 which reads:

*"The claimant or objector **must adduce evidence** to show that at the date of the attachment he had some interest in, or was possessed of, the property attached."*(Emphasis added)

In the application at hand, despite the fact that both parties agree that it is an objection proceeding, no evidence was adduced in Court so as the Court to be in a position to investigate the claim by the Applicants. On the face of it, the submissions in respect of this matter were ordered in contemplation that the prayer sought in the chamber application was postponement of the execution pending investigation. But upon going through the provision under which the application was preferred and the affidavit in support of application, I agree with both counsel for the parties that the application is an objection proceeding calling upon this Court to conduct investigation and satisfy itself whether the suit property is liable for attachment considering the rights of third parties, the Applicants herein. Justification in this regard, is discernible in the provision upon

which the application is pegged. Order XXI Rule 57(1) of the CPC provides in clear terms 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 the suit.**"*
(Emphasis added)

The above provision is preceded by sub-heading "*Investigation of Claims and Objections*". This entails investigation of ownership of the property subject of attachment where a third party who was not a party in the decree subject of execution claims interest in that property. It therefore intends to investigate on whether the attached property belongs to the judgment debtor and rights of third parties in respect of the attached property.

However, in the application under consideration the prayer sought does not fall under the investigation of the claim above stated rather postponement of the execution. The chamber summons is predicated on the following relief:

"That this Honourable court be pleased to postpone an execution order for eviction from the suit land which is in occupation of the applicants herein pending the investigation by this Honourable court

to see if this land is liable for attachment and eviction of the applicants herein to satisfy the decree in Civil Appeal No. 38 of 2005 between the 1st, 2nd and 3^d respondents herein."

In the affidavit in support of application, from paragraphs 4 to 28, the facts deponed therein were solely based on investigation of the attached property save paragraph 29 which as things stand, calls for both postponement of the execution and investigation of the matter. In view of the above, I am of the considered view that the affidavit does not support the chamber application, that is to say, prayers sought in the chamber application.

Now the question is whether the incompatibility in the prayers sought in the chamber application and the facts deponed in the affidavit is curable by overriding objective principle as suggested by counsel for the Applicants. To respond to this argument the question comes, should the Court allow the application, which order should be issued; whether postponement of the execution or that the property is not subject to attachment?

In my considered view, despite the fact that the provision relied upon in the chamber application and the facts deponed in the affidavit support investigation of the claim, the prayers sought in the chamber application are incompatible with the two. Bearing that reason in mind, it

is crystal clear that this Court was not properly moved to grant the prayers sought. Similarly, the defect in my view, is not one curable by the overruling objective principle. Circumstances obtaining in the application at hand is that prayers sought in this application were not featured in the chamber application. I thus agree with Mr. Mwaluko that the Court cannot grant relief not prayed for. This classical principle of the law finds its legitimacy in the authoritative decision of the Court of Appeal in the case of **Melchiades John Mwenda Vs. Gizelle Mbaga (Administratrix of the Estate of John Japhet Mbaga - deceased) & 2 Others**, Civil Appeal No. 57 of 2018 (unreported) at page 24, where the Court stated:

*"It is elementary law which is settled in our jurisdiction that **the Court will grant only a relief which has been prayed for.** See also: James Funke Gwagilo v. Attorney General [2004] T.L.R. 161 and Hotel Travertine Limited & 2 Others v. National Bank of Commerce [2006] T.L.R. 133."*(Emphasis added)

Deducing from the above, as the Court was not properly moved on the prayers sought, it attracts an order striking out the application. Having found that the Court was not properly moved, I find no compelling reasons to address the other two issues relating to the execution application. This application is therefore struck out for being incompetent. Considering the

fact that the ailment was raised by the Court *suo motu*, each party shall bear their own costs.

DATED at **ARUSHA** this 7th March, 2023.



A handwritten signature in black ink, appearing to read "D. C. Kamuzora", is written over a circular stamp.

D. C. KAMUZORA

JUDGE

