

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY**

AT DAR ES SALAAM

MISC CIVIL APPLICATION NO. 16 OF 2022

(Arising from the Judgement and Decree of Land case no 88 of 2017(Hon Ngwala J, dated 4th December 2019 and Execution No 29/ 2020 dated 19th March, Kisongo Deputy Registrar.)

WINFRIDA MAGURE & 122 OTHER.....APPELLANT

VERSUS

1. MARTIN NASSON OGWARI..... RESPONDENT

2. LOICE ERASTO NASSON..... RESPONDENT

3. YONO AUCTION MART & CO LIMITED.....RESPONDENT

RULING

27th March & 28th April 2023

MKWIZU, J.

This court is by a chamber summons supported by an affidavit made under Order XXI Rule 57 (1) and section 95 of the Civil Procedure Code Cap 33 RE 2019 tasked to investigate the ownership of the land located at Mbondole Area near Njia nne Msongola Ward- Ilala District in Dar es salaam region, measuring approximately 100,000 square meters to establish the real owner between the applicants and the 1st and 2nd respondents -the decree holders in respect to the decision of this court in Land Case. No. 88 of 2017.

The application is opposed through a counter affidavit by the respondents and a notice of preliminary objections, on 25th August 2022, questioning the suitability of the application on the following points.

- 1. In as far as the order for eviction in execution No. 29 of 2020 was issued by the court on 19th March 2021(Hon Kisongo Deputy Registrant) this application is hopelessly time-barred.*
- 2. The Application is defective for lack of proper affidavit.*
- 3. The application is defective for containing the affidavit sworn in by counsel instead of the Applicants.*
- 4. The affidavit accompanying the application is defective for containing defective verification.*

The preliminary objections were on 16/2/2023 in the presence of Mr. Ludovick Nickson, Mr. Silvester Mayenga, and Ms. Kapwani Mbegalo all learned advocates for the applicants, 1st and 2nd respondents, and 3rd respondents respectively ordered to proceed by way of written submissions. I thank the 1st and 2nd respondents and the applicant counsel for their timely filed written submissions. It is also noted that the 3rd respondent has opted not to respond to the preliminary objections raised.

Mr. Mayenga's submissions for the 1st and 2nd respondents were prefaced by two prayers. An invitation to the court to decide along with the raised preliminary objections a question whether the Applicants needed to apply to a representative suit under Order 1 Rule 8 of the Civil Procedure Code Cap. 33 R.E 2019 before the application is lodged and whether taking into account that the execution in the present matter has already been carried out, the application is capable of being granted under Order XXI Rule 57(1) which requires investigation to be done on the attached property.

Submitting the preliminary objection formally filed in court Mr. Mayenga said, this application is time-barred. The Judgment of this Court was pronounced in favor of the 1st and 2nd Respondents on 4th December 2019, the execution process was carried out and an order commanding the eviction of all persons in the suit property was issued on 19th March 2021 followed by a notice to vacate issued by 3rd Respondent to all trespassers and affixed to their respective illegally built buildings on 20th March 2021. Mr Mayenga held the position that going arithmetically from 19th March 2021 to 17th July 2022 when the application for objection proceedings was lodged, a period of one year and 4 months have elapsed. Citing to the court the 1st Schedule, Part III item 21 of the Law of Limitation Act Cap. 89 R.E. 2019, Mr. Mayenga said, in any application for which no period of limitation is provided, the 60 days rule applies contending that this application was filed beyond 60 days prescribed by the law and liable to be dismissed under section 3 of the same Act. He cited to the court the decision in **Christian Ntumigwa Mwakifualefule v/s Equity Bank Tanzania Limited**, Misc. Civil Applications No. 558 OF 2021 and **China Mrabu v/s Errasy Manyori Njenje**, Misc. Land Application No. 18 of 2020(All unreported) to bolster his submissions.

On the second and third objections, Mr. Mayenga attacked the Application for lacking proper supporting affidavits. He on this point submitted that Mr. Ludovick has no authority to swear an affidavit on behalf of his clients on a contentious matter like the one at hand because it is nowhere within the affidavit the applicants issued their mandate for the said Counsel to swear and act on their behalf. And in any case, that mandate would only be limited to facts that came into the advocate's knowledge by his acting in such a capacity for his client and not to substantive evidence for

establishing a right or denying liability for his client in any court proceedings.

He contended that according to paragraphs 3 and 6 of the accompanying affidavits, the Applicants in this matter are 123 in total, who on diverse dates bought the disputed land. And they have been in occupation of the suit land for different years ranging from 2,4 and 12 years and therefore these variances cannot be proved by a single affidavit of their Counsel which unfortunately does not display the mandate of the Applicants. He referred the court to **CATS Tanzania Limited and 4 others v/s International Commercial Bank Limited**, Misc. Commercial Application NO. 116 of 2022 and **Vietel Tanzania Limited v/s Assa General Supplies and Construction Limited**, Civil Application No. 12/2008 of 2021 (unreported).

Referring the court to the case of **Ruhel Kifyogo vs Kanjinga Mwashilindi**, HC Civil Appeal No. 56 of 1997, **Ramesh Raiput vs Sunanda Raiput [1988]** TLR_and Rule 36(e) and 37(b) of the Rules of the Professional Conduct and Etiquette of the Tanganyika Law Society, Mr. Mayenga said, that the import of Order XXI Rule 58 of the Civil Procedure Code, requires this court to take evidence from the parties, and therefore the affidavit of the Counsel cannot meet the threshold of the law. He maintained that since individual Advocates are officers of the court, they are accountable to the court for the instruments they draw and file in court. A court could censure an Advocate for a shoddy instrument or one which disregards ethical norms and can equally complement an Advocate for a job well done. He insisted that the purpose of the law would be defeated if the drawer of the instrument will be allowed to shield behind the pseudonym by wearing two caps, the

Applicant in one part and the Advocate in the other. He urged the court to find the affidavit sworn by one Ludovick unmaintainable.

Submitting on the fourth ground that the application is defective for containing defective verification, Mr. Mayenga stated that Order VI Rule 15 of the CPC requires pleadings to be verified at the foot by the party or by one of the parties pleading or by some other person proving to the satisfaction of the court to be acquainted with the facts of the case. He said a person verifying the pleading is required to specify by reference to the numbered paragraphs of the pleading, what he verifies of his knowledge and what he verifies upon information received and believed to be truth. To cement his submissions, he reproduced a passage in the book titled **The Law of Pleadings in India 14th Edition (Revised), 1987**, on pages 54 to 55 by **PC Mogha** where the rationale for the verification clause in the pleadings was said to be :

".... the object of verification is only to fix the responsibility for the statements made therein on someone before the courts proceed to adjudicate upon them... the responsibility of verifications is very great and should always be released" (Emphasis supplied)

He elaborated that, the interest of the Applicants on suit property is at variance in terms of size and duration of occupation. According to the verification clause, Mr. Ludovick has verified all paragraphs in his knowledge and understanding, meaning that Mr. Ludovick has first-hand knowledge of what is contained in the stated paragraphs, while Order XIX Rule 3 (1) of the Civil Procedure Code requires the deponents to swear on matters which he can prove out of his knowledge while the facts stated are solely in the knowledge of the Applicants. He lastly invited the Court

to find that the affidavit in support of the application was defective, uphold all preliminary objections, and dismiss the application with costs.

Opposing the objections, the applicant's counsel submitted that the raised preliminary objections do not fit preliminary objections on the point of law and all authorities cited for that matter are misplaced and irrelevant as far as the case at hand is concerned. The cases of **Mohamed Enterprise (T) Vs Masoud Mohamed Nasser, Civil** Case No. 127 Of 2009, and **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributor Ltd** (1969) 1 E. A 696 **were** cited in support of his arguments stating that the P/O raised contains more than a point of law that need evidence to be successfully argued.

He said the point on the Representative suit argued by the respondent's counsel is a new fact not in the objection it cannot be argued at this stage. He was firm that an application for objection proceedings is not a suit, it is an application for the court to investigate whether the applicants have the right on the suit's land or not.

Regarding time limitation, the applicant's counsel contended that the applicants became aware of the judgment in Land Case No. 88 of 2017 (Honorable Ngwala J,) dated 4th December 2019 and execution No. 29 of 2020 dated 19th March 2021, C. Kisongo Deputy Registrar on 3rd June 2022 as per Paragraph 7 of the Affidavit and on 14th July 2022, they filed the present case just after 44 days from the time they were made aware of the decision in question. Amplifying more, the applicant's counsel said, the applicant's claims are over ownership of land based on a judgment whose time limitation is 12 years, under section 9(2) and items 16 and 22

of the Law of limitation act cap 89 R.E 2019 and therefore it was wrong to categorize the applicants claim at a 60-day limitation.

He also opposed the respondent's prayer for the dismissal of the application in case that is found to be time-barred. He argued that this is a wrong position of the law for a time-barred matter is usually struck out, so a party is not denied the right to apply for an extension of time and fight for his right. He on this relied on the cases of **Chama cha Walimu Tanzania V. The Attorney General**, Civil Application No. 151 Of 2008 At Dare Es Salaam (Unreported) and **Sixbert M. Haule and Another Vs Raymond Haule And Another**; Civil Application No. 204 Of 2014 (Unreported).

Speaking on the points impeaching the affidavit for being sworn by the advocate, he said no single line in the cited cases prevented the applicant's advocate to swear an affidavit on behalf of his client. In an application asking the court to investigate the claim, the advocate is not prevented from swearing such an affidavit because he may have also opted to move the court even by a letter just to ask the court to satisfy itself on ownership of the land given to the Respondents. What the deponent was required to do is to declare facts that are within his knowledge and the information he got from the Applicants the information that was stated in the verification clause of the affidavit in dispute.

In rejoinder, the respondent counsel maintained that all the raised points are matters of law and there is no need for evidence and the cases cited on each subject are the clear testimony that all points bear a court decision in which the Court has lucidly set a foundation on each objection.

On the completion of execution, he refereed the court to annexure Martin –Loyce-8 attached to the Counter affidavit -a handing over certificate by the 3rd Respondent giving a clear indication that the eviction has been fully effected and the decree fully satisfied. And on the issue of time limitation 1st and 2nd respondent submitted that time is not calculated from the time when the Applicants became aware but from when the cause of action arose, that is since 20th March 2021 when the notice of eviction was issued to all trespassers. Reliance was made to section 5 of the law of Limitation Act Cap 89 R.E 2019.

He as well submitted that the 12 years period does not apply to land claims based on judgment. Section 9(2) of the law of Limitation Act, does not give a leeway to the land claimed through judgment to be demanded beyond 60 days period since the nature of reliefs sought by the Applicants are found under a specific provision which is Order 21 of the Civil Procedure Code Cap 33 R.E 2019. The rest of his submissions were a reiteration of his submissions in chief.

Having examined the application, affidavits for and against the application points of objection, and the party's submissions, I noted that there is clear information from the affidavits suggesting that the execution was complete before the institution of this application in court, raising a question whether objection proceedings can be maintained after the conclusion of the execution processes. And since this matter was not formally presented to the parties for their discourse, the legitimate option was to recall the parties to address the court on this pertinent issue.

Addressing the court on the raised issue, Mr. Ludovick's advocate said (i) execution is still incomplete because no report by the court broker to that

effect was brought to the court records (ii) that the applicant's claims are on an area of 100,000 square meters of coverage while the execution had only covered an area of 91690 square meters suggesting that there are applicants who are not touched by the execution proceedings and (iii) that the issue raised by the court needs evidence that cannot be given at this stage of the proceedings. He relied on the decision of **Mukisa Biscuit Manufacturing Co Limited V West End Distributors Limited**, 1969, EA 696.

Mr Mayenga's advocate on the other hand stated that there is already in the court records a filed report exhibiting the completion of the execution process. He referred the court to annexure Martin Loys 8, a certificate by the Court Broker brought through paragraph 8:18 of the 1st and 2nd respondents' joint counter-affidavit showing the process of execution and the handing over report after the completion of the execution.

Responding to the arguments that the execution was effected on 91960 square meters and not 100,000 square meters, Mr. Mayenga said, the applicant's counsel is in a way admitting that the execution has been done, the issue of the measurement is another thing altogether because the 1st and 2nd respondents joint counter-affidavit shows that the area in question is measured by the area covered by the certificate of title in question. He also characterized the applicant's arguments that there are applicants who are not touched by the execution as a statement from the bar for failure by the applicant's counsel to name the said applicants in court.

He firmly argued that the issue of completion of the execution is a judicial process that can be looked at through the affidavits by the parties and

that the objections proceedings are rendered redundancy after the execution proceedings.

Ms Kapwani advocate for the 3rd respondent was in support of the point raised by the court. She submitted that there is no pending attachment of the property in dispute as they on 15/7/2022 filed a handing over certificate between Stanley J Kevela, Court Broker Trading as Yono Auction Mart and Co Limited, and the 1st Decree Holder Martin Nashon Ogware together with the 2nd Decree Holder Loyce Erasto Nashon which is attached to the 3rd respondent's counter affidavit.

Answering the issue of the area covered by the execution, Ms. Kpwani said, the execution was carried out on Plot 15 and 16 Block D Majohe area Ilala Municipal only as stipulated by the eviction order in which the 3rd respondent was required to evict and demolish all the structures developed on the area and handover the plot to the Decree Holders. She insisted that the point raised does not need evidence.

I have considered the submissions by the parties. Order XXI Rule 57 of the Civil Procedure Code is relevant to the point. The provisions read:

"Order XXI Rule 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:

Provided that, no such investigation shall be made where the court considers that the claim or objection was designedly or unnecessarily delayed.

(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 of the claim or objection.

The purpose of objection proceedings was also pronounced by the Court in **St. Marys International Academy Limited v. Asile Ally Saedy & 6 Others**, Misc. Land Application No. 703 of 2009 (unreported) to be :

"... Objection proceedings, as correctly submitted by the first respondent counsel aim at challenging the attachment of a property in execution of a court order. The main relief is the release of the attached property and not a declaration of payment."

A similar position was expressed in Abdallah **Salum Lukemo & 18 Others v. Sifuni A. Mbwambo & 208 Others**, HC-Misc. Land Case Application No. 507 of 2019 (unreported) where three conditions for valid objections proceedings were mentioned to include the presence of an attachment order of the property in question, made by the decree-holder in the execution proceedings;

Both the provisions of the law and cited case laws prescribe "attachment of the suit property" as a key element to an application for Objection Proceedings. It is evident from the counter affidavit by the 1st and 2nd respondent that the eviction order issued by this court was fulfilled and

the land was by 17/5/20202 handled to the decree holders by the 1st and 2nd respondent herein. Paragraph 8: 18 of the counter affidavits reads:

"8:18 Following the striking out of the application lodged by the Applicants, the 3^d Respondent being unaware of any case lodged in any court of competent jurisdiction proceeded to effect the order earlier on issued by this court. After the eviction exercise, the third respondent duly handed over the disputed property to the 1st and 2nd respondents. A copy of the handing over certificate issued by the 3^d Respondent to the 1st and 2nd Respondents dated 15th July 2022 is attached and marked Martin Loice-8 to form part of this Affidavit".

The above averment is supported by paragraph 4 of the 3rd respondent counter affidavit which is phrased thus:

"4. That the contents of paragraph 7 are denied, and the applicant is put into strict proof thereof, the 3^d respondent has already evicted and demolished all the structures of plot No. 15 and 16 Block 'D' Majohe area and handing over the same to the 1st and 2nd respondent. Attached herewith marked as YN is the copy of the handing over document leave of this court is sought to be part of this counter affidavit".

No reply to the counter affidavit was filed to contest the contents of the two paragraphs above and therefore the arguments by Mr. Ludocvick that the completion of execution is not supported by a validly filed report is baseless.

I There is no doubt that the point at issue is a point of law covered by the detailed information brought by the parties in their pleadings. It is an

elementary law that a preliminary objection is a point of law that is argued on the assumption that all the facts pleaded by the other side are correct as decided in **MUKISA BISCUIT MANUFACTURING COMPANY LTD. Vs. WEST END DISTRIBUTORS LTD** (1969) EA 696. Mr. Ludocvick's argument that this point is not fitting to be argued as a preliminary point is out of context because the pleadings by the parties afford all essential information for the determination of the point without requiring any additional information from the parties.

There is another suggestion by Mr. Ludovick that the execution was only done in respect of a square meter of 91,690 and not the area of 100,000 square claimed by the applicants. I think this point should not detain me further. It is common knowledge that, the foundation of the execution proceedings is the judgment/decreed or orders of the court. Execution being the final process of the enforcement of a decree & order to enable the decree-holder to realize the fruits of the decree becomes complete when the decree-holder gets the property awarded to him by the judgment, decree, or order. **See East African Development Bank Vs. Blue Line Enterprises**, in Civil Application No. 57 of 2004 (Unreported).

It is not in dispute that the execution under scrutiny finds its origin from the decree of this court in Land case No 88 of 2017 in which the 1st and 2nd respondents were declared owners of the suit plot designated as Plots No 15 and 16 Block D Majiohe areas, Ilala Municipality within Dar es Salaam. There is no doubt that these are the same plots appearing in the eviction order issued by the court on 19th March 2021 and are the same plots that the 3rd respondent has confirmed to have handled to the 1st and

2nd respondent through a handing over certificate dated 15th July 2022 which in law marked the end of the execution proceedings.

There is no gainsaying therefore that, an objection proceeding preferred by the applicants under the provisions of Order XXI Rule 57 of the CPC has been visibly overtaken by events. The investigation powers of this court cannot by any standard gain entry in such a situation. This point alone suffices to dispose of the application.

In the upshot, the application is dismissed with no order as to costs. It is so ordered.

Dated at Dar es Salaam, this 28th April 2023



E. Y Mkwizu
Judge
28/4/2023