

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

MISC. CIVIL APPLICATION NO. 124 OF 2022

(Originating from the High Court of Tanzania at Arusha, Execution Application No. 8 of 2019)

**THE REGISTERED TRUSTEES OF THE
MOUNT MERU UNIVERSITY APPLICANT**

Versus

**BOARD OF TRUSTEES OF THE PUBLIC
SERVICE SOCIAL SECURITY FUND 1ST RESPONDENT
MOUNT MERU UNIVERSITY 2ND RESPONDENT
VICE CHANCELLOR, MOUNT MERU UNIVERSITY 3RD RESPONDENT**

RULING

27/03/2023 & 27/05/2023

GWAE, J.

The application has been preferred under Order XXI Rules 57(1) and 59 of the Civil Procedure Code, Chapter 33 Revised Edition, 2019 (CPC). The applicant herein is after moving the court to order Plots No. 192/2, 192/4, 192/5, 192/6 and 192/9 with Certificates of Title No. 30538, 30537, 30536 and 30534 respectively located at Engare-Olmotony, within Arumeru District are properties of the applicant therefore not subject to any attachment and sale. The applicant also prays for costs and any other reliefs this Honourable Court deems fit and just to grant. The application

is supported by affidavit deposed by Rev. Isaack Rajabu Sui, Principal Officer of the applicant. The 1st respondent contested the application through a counter affidavit deposed by Mr. Steven Thomas Biko, Principal Legal Officer of the 1st respondent.

Facts of the case giving rise to this application as can be discerned from the applicant's affidavit and annexures can be summarised as follows. That, the 1st respondent preferred summary suit against the 2nd and 3rd respondents vide Civil Case No. 8 of 2019, claiming to be paid a total of TZS 2, 915, 378, 289.17/= being the unremitted contributions of their employees. The 2nd and 3rd respondents sought and were granted leave to defend, but failed to fulfil the conditions implicated in the leave. The case was heard ex-parte, as the 2nd and 3rd respondents waived their right to defend the suit. The court (**Kamuzora, J**) entered judgment in favour of the 1st respondent against the 2nd respondent at the sum of TZS 2,915,378,289.17. The court also granted interest at the rate of 3% of the decretal sum from the date of institution of the suit to the date of judgment and interest at the same rate from the date of judgment to the date it is paid in full. The 2nd respondent was further condemned to pay the costs of the suit.

The 2nd respondent for did not honour the decree of the Court. On 2nd August, 2020, the 1st respondent filed application in this Court seeking

an execution of the decree of the court. In the execution application, the 1st respondent sought to attach and sell the 2nd respondent's landed properties, which included Plots No. 192/2, 192/4, 192/5, 192/6 and 192/9 with Certificates of Title No. 30538, 30537, 30536 and 30534 respectively, Farm No. 192 Engare-Olmotony Arumeru District, within Arusha Region. Alternatively, the 1st respondent sought to detain and arrest the 3rd respondent as a civil prisoner.

Noting that, the landed properties subject of attachment and sale, the applicant preferred this objection proceeding urging the court to investigate its interests on the said properties and an order that, they are not the 2nd respondent's properties, hence release them from attachment and sale.

At the hearing of the application, the applicant was represented by Mr. Sheck Mfinanga, learned advocate while Mr. Steven Thomas Biko, the learned principal state attorney, represented the 1st respondent. The 2nd and 3rd respondents neither supported nor contested the application. Hearing of the application was done through filing written submissions. Both learned counsel for the parties prayed to adopt affidavits in support of their positions forming part of their respective submissions.

Submitting in support of the application, Mr. Mfinanga contended that, in terms of Order XXI Rule 57(1) of the CPC, this Court has mandate

to investigate the applicant's interest in the properties subject of attachment and sale and order their release. He further alluded that, the applicant was not a party (defendant) in Civil Case No. 8 of 2019. Hence, granting the execution against him is tantamount to condemning the applicant unheard contrary to the rules of natural justice. That, the applicant was registered on 15th July 2005 vide certificate of incorporation, annexure RT-1. He added that, the applicant acquired and owned the properties subject of the intended attachment and sale since 2007. That, the applicant was subsequently issued with certificate of titles, while the 2nd respondent was registered on 31st October 2012 and issued with charter of incorporation. It was counsel's further submission that, at the time the 2nd respondent was registered, the applicant was already registered as the owner of the landed properties subject of attachment and sale. He further accounted that the 2nd respondent was mere licensee and such licence seized when the university was deregistered by the Tanzania Commission for Universities (TCU). That, upon registration, the 2nd respondent acquired legal personality, reliance being section 26 of the Universities Act, 2005.

Mr. Mfinanga insisted that the applicant and the 2nd respondent are two distinct legal persons hence their liabilities vary from one another. To reinforce his contention, he referred the famous case of **Solomon vs**

Solomon & Co. Ltd (1987) A.C 22. He accounted that the landed properties sought to be attached are properties of the applicant from 2007 when they were registered to date. There being patent applicant's interest in the landed properties subject of attachment, this court is justified to order release of the said properties from attachment and sale. To buttress his argument, Mr. Mfinanga relied on the Court of Appeal's decision in **Sosthenes Bruno and Another vs. Flora Shauri**, Civil Appeal No. 249 of 2020 (unreported). He was of the view that mere usage of land as education building does not in itself connote change of ownership as counsel for the 2nd respondent purports, referring paragraphs 5, 6 and 7 of the counter affidavit. It was his further assertion that, the owner of a parcel of land refers to a person in whose name the estate/interest is registered. He made a reference to section 2(1) of the Land Registration Act, Cap 334, Revised Edition, 2019. He concluded by urging the court to grant the applicant an order releasing the immovable properties subject of attachment and sale.

In his rebuttal submission, Mr. Biko stated that, in the certificate of incorporation of the applicant dated 15th July 2005, there is a condition precedent that, acquisition of land and permit to use the same in fulfilment of the purpose of its formation, has first to obtain consent from the Administrator General. In compliance to the above condition, the plots

allocated to the applicant were to be used for educational purposes only. He further relied on the clauses 3 (3) and 25 (1) of the Charter of incorporation stating that the 2nd respondent who was formed as a result of the applicant's compliance to the above prescribed conditions, is as well owned by the applicant. Therefore, according to him any claim by a third party can be levelled against the 2nd respondent who is owned by the applicant. Counsel for the 1st respondent argued **firstly**, that, the applicant was established with condition to acquire land for educational purposes. **Secondly**, the applicant is the owner of the 1st respondent and **thirdly**, the 2nd respondent is owned and managed by the applicant by providing among others, reports on operations and progress of the University as per clause 25 (2) (f) of the charter. He added that since the 2nd respondent failed to remit the statutory contributions of its employees to the 1st respondent. Her blameable acts are the acts of the applicant. He amplified his contention to the reported case of **Machame Kaskazini Corporation Limited (Lambo Estate) vs Aikaeli Mbowe** [1984] TLR 70.

Mr. Biko maintained that, the documents submitted for investigation in respect of the landed properties do not support the submission made by the applicant that, the applicant and the 2nd respondent are two distinct juristic persons. It was his view that, the applicant and the 2nd respondent

are one and the same. Hence, acts of the 2nd respondent cover the applicant including the decree entered against the 2nd respondent. The 1st respondent's counsel further argued that the landed properties are liable for attachment and sale in order to satisfy the decree of the Court. He then urged the court to dismiss the application and proceed upholding the attachment and sale order of the landed properties and order Application for Execution No. 32 of 2022 to proceed.

I have scanned the affidavits for and against the application and the competing written submissions by the parties' counsel in support of their respective positions. The main issue for determination is whether the applicant has managed to prove her interest on Plots No. 192/2, 192/4, 192/5, 192/6 and 192/9 with Certificates of Title No. 30538, 30537, 30536 and 30534 respectively, Farm No. 192 Engare-Olmotony Arumeru District, within Arusha Region, to warrant this court issue release order from attachment and sale.

I am animated that, investigation of the matter like the present one entails calling for evidence to prove if the property/properties in question are liable for attachment and sale or not. This is pursuant to Order XXI Rule 58 of the CPC 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 his profounding submission, the counsel for the applicant argued that the applicant was allocated the plots subject of attachment and sale in 2007 when they were duly registered in its name to date, prior to establishment of the 2nd respondent.

On his part, counsel for the 1st respondent asserted that existence of the 2nd respondent wholly depends on the applicant because the 2nd respondent is owned by the applicant, therefore, any order issued against the 2nd respondent equally covers the applicant as its owner.

According to the evidence through the applicant's affidavit, the applicant was established on 25th July 2005, through the certificate of incorporation, annexure RT-1. It sought and was allocated plots of land subject of attachment and sale as reflected in annexure RT-2 collectively. The 2nd applicant was established through its charter of incorporation on 31st October, 2012 as per annexure RT-3. It is therefore undoubted that the applicant was established prior to establishment of the 2nd respondent. One may add that, it is certainly correct to conclude that, the applicant was allocated the said plots of land prior to establishment of the 2nd respondent.

In both the counter affidavit and the reply submission, the 1st respondent's counsel does not dispute the fact that the plots subject of attachment and sale are registered in the applicant's name. Both counsel for the parties lock horns on the relationship between the applicant and the 2nd respondent. From the annexures in support of the application, it is undisputed that the 2nd respondent was established and incorporated as a Higher Learning Institution on 31st October, 2012. Going by the respective laws established both the applicant and the 2nd respondent, it is trite to note that the two are two distinct entities, capable of owning properties, suing or be sued in their names. The Universities Act 2005, the law governing universities in Tanzania, provides the following under section 26(a):

"26. The university to which the charter is granted in terms of section 25 shall:-

*(a) Be a body corporate with **perpetual succession and common seal and may sue or be sued in its corporate name** and may for and in connection with its objects and functions*

*(i) **Purchase, hold, mortgage and dispose of any property whether movable or immovable;***

(ii) Enter into any contract or transaction as may be expedient; and do any other act or thing as bodies corporate may lawfully do; and

(iii) subject to the provisions of section 6, be registered by the Commission as a fully accredited institution;”
(Emphasis added)

On the other hand, upon being incorporated, the applicant acquired powers to own properties. Section 8 of the Trustees Incorporation Act, Cap 318 [R.E 2002] provides in clear terms that;

8. (1) Upon the grant of a certificate under subsection (1) of section 5 the trustee or trustees shall become a body corporate by the name described in the certificate, and shall have:-

(a) Perpetual succession and a common seal;

(b) Power to sue and be sued in such corporate name;

*(c) subject to the conditions and directions contained in the said certificate to **hold and acquire, and, by instrument under such common seal, to transfer, convey, assign and demise, any land or any interest therein in such and the like manner**, and subject to the like restrictions and provisions, as such trustee or trustees might, without such incorporation, hold or acquire, transfer, convey therein, assign or demise any land or any interest.*

(2) ...”(Emphasis added)

The above position of the law was reaffirmed by the Court of Appeal in **The Registered Trustees of Chama cha Mapinduzi vs. Mohamed**

Ibrahim Versi and Sons & Another, Civil Appeal No. 16 of 2008

(unreported), where it was held:

"The effect of incorporation of the Board of Trustees of C.C.M. under the Trustees Incorporation Act, renders it a body corporate by that name with the power to sue and be sued in that corporate name (See sections 8 (1) and (6)). Therefore, in law, the Registered Trustees of C.C.M. is a separate person with its own legal identity distinct from Naibu Katibu Mkuu C.C.M."

From the above positions of the law, I agree with Mr. Mfinanga that both the applicant and the 2nd respondent are distinct entities capable of owning properties, transfer the same, sue or be sued in their corporate names, as pleaded under paragraph 8 of the affidavit in support of the application. The 2nd respondent was established in 2012, after the said plots of land were allocated and registered in the applicant's name way back in 2007. There is no controverting evidence on whether the applicant had transferred such properties to the 2nd respondent. Since the said plots of land were registered in the applicant's name, the applicant reserves an indefeasible interest on the said plots. Upon registration of a piece of land in the name of a party, such party holds interest in that piece of land free from any other encumbrance. Section 33(1) of the Land Registration Act, Cap. 334 [R.E 2019] provides:

"33 (1) The owner of any estate shall, except in case of fraud hold the same free from all estates and interests whatsoever, other than-

(a)...(g)

In a book titled **Conveyancing and Disposition of Land in Tanzania; Law and Practice**; authored by W. R. Tenga and S. J. Mramba (2017), Law Africa, Dar es Salaam at page 330, the learned authors described indefeasibility principle, and made the following remark;

"The registered owner enjoys an indefeasible title against the whole world. The principle of indefeasibility infers that the government guarantees title of a registered owner. This in turn, imposes some obligation on the part of the government to satisfy itself as to the true state of things before registering a title".

The Court of Appeal cemented that position in the case of **Leopold Mutembei vs. Principal Assistant Registrar of Titles, Ministry of Land, Housing And Urban Development and Another**, Civil Appeal No. 57 of 2017 (unreported).

Mr. Biko rightly made reference to clause 25 of the Charter that established the 2nd respondent vesting powers to the applicant to take care of the immovable and movable properties of the 2nd respondent. The applicant is also conferred with powers to receive reports on the operation

and progress of the university. However, I am of the considered view that, alone, do not entitle attachment and sale of properties registered in the applicant's name taking into that, such properties were owned by the applicant before establishment of the 2nd respondent. In case the 1st respondent thought and found that, the applicant is the custodian of the 2nd respondent's properties, they ought to have sued the applicant or at least joined her in the suit.

Consistent with the above position of the law, I am of the firm view that that, a liability imposed on the 2nd respondent does extend to the applicant since they are two distinct entities, with powers to own, dispose, transfer and sue or be sued in their corporate names.

Having found that, the plots subject of attachment and sale are registered in the applicant's name, it follows therefore, allowing attachment of the said plots to proceed on the order issued against 2nd respondent, will be like condemning the applicant unheard. As such, it amounts to breach of the rules of natural justice enshrined in the Constitution of the United Republic of Tanzania. As pointed out correctly by the applicant's counsel, the mere fact that the applicant acquired the said plots for educational purposes does not in itself confer ownership of the landed properties to the 2nd respondent.

Fortified by the above deliberations and position of the law, it is my firm believe that the applicant has managed to establish her interest on Plots No. 192/2, 192/4, 192/5, 192/6 and 192/9 with Certificates of Title No. 30538, 30537, 30536 and 30534 respectively, Farm No. 192 Engare-Olmotony Arumeru District, within Arusha Region. Having established her interest on the above properties, such properties cannot therefore be liable for attachment and sale in order to satisfy the decree of this Court in Civil Case No. 8 of 2019 against the 2nd respondent, since the applicant was not a party in that case.

In the light of the above deliberations, the application is merited. It is hereby granted. The above-named plots are released from the intended attachment and sale. Taking into account the relationship of the parties especially, the applicant and 2nd respondent that, the attachment was sought in compliance of the court decree against the 2nd respondent, I make no order as to costs of this application.

Order accordingly,

DATED at ARUSHA this 27th May 2023.




MOHAMED. R. Gwae

JUDGE