

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SU-REGISTRY OF MWANZA
AT MWANZA**

MISC. APPLICATION NO. 26696 OF 2023

(Arising from Execution No. 35 of 2023 which arose from the Bill of Costs No. 42 of 2022 which arose from Civil Cause No. 17 of 2022)

MAGRETH MUKAGIRAGE MUCHURUZA.....APPLICANT

VERSUS

JUSTINE RUTTA KAIGI.....1st RESPONDENT

MKOMBOZI COMMERCIAL BANK PLC.....2nd RESPONDENT

RULING

19th March & 12th April, 2024

ITEMBA, J.

This application originates from Execution proceedings No. 35 of 2023 and Bill of Costs no. 42 of 2022. It is made under Order XXI rule 57(1) and section 48 (1) (e) of the Civil Procedure Code (CPC), where the applicant prays for the following orders:

- i. The Court to investigate the ownership of Plot No. 896 Block "F" Nyegezi, in Mwanza City, bearing Certificate No. 64257 and find it is Matrimonial dwelling House, depended by the wife and children of the judgment debtor hence not attachable for execution.*
- ii. The Court to investigate the ownership of Plot No. 896 Block "F" Nyegezi, in Mwanza City, bearing Certificate No. 64257 and*

find it is Matrimonial House not belongs to the first Respondent as personal property.

iii. Costs against the Respondents.

iv. Any further relief(s) deems just to be granted.

At the hearing, the applicant was absent but she was represented by Arsein Molland learned counsel while the 1st respondent fended for himself. The 2nd respondent had the services of Dr. Mwaisondola learned counsel. In her affidavit, which is somehow indistinct, the applicant has explained that she is the wife of the 1st respondent under a presumption of marriage and they have been living together since 1985. That, in the said marriage, they were blessed with issues without disclosing the number and they acquired a property at Plot no.896 Block F Nyegezi, Mwanza with certificate no. 64257 herein the disputed property. To support her aversion, she attached as annexure 'A', a copy of the correspondences towards their marriage which is neither in court's language nor translated. There is also a sale agreement dated 27/8/1985 between the author of the said agreement whose name is not pleaded in one side and the applicant and the 1st respondent in the other side. The applicant avers further that, on 10th May 2023 she lodged a complaint at the Mwanza District and Land and Housing Tribunal which was struck out on grounds that the disputed property was

already attached by the High Court in Execution no 35/2023. That, she made this application because she has interest with the property in dispute and she has never been a party in any suit subject to Execution no. 35/2023 and therefore not bound by the Execution order. That, the property is matrimonial and a dwelling house of the applicant, the 1st respondent and their children hence not attachable; and, if disposed, those other people will be affected. The applicant's counsel submitted in support of these averments.

The 1st respondent for apparent reasons, supported the application while the 2nd respondent lodged a counter affidavit deposed by Dr. George Mwaiondola opposing the application.

The 2nd respondent, heatedly opposed the application. Submitting in support of the counter affidavit, Dr. Mwaiondola told the court that for objection proceedings to succeed under Order XXI rule 57(1) of CPC, the objector should prove valid claim on the property subject to execution. He expounded that, the disputed property is a house located in a surveyed area and it has a title deed no.64257, (annexure MCB-2). That, the said title bears the name of the first respondent only meaning that the house is owned only by him and there is no other person holding interest thereof. He

submitted that under those circumstances, the applicant does not show to have interest in the property. He stressed that, through the law of precedent, a spouse can prove interest in the landed property by first proving that she is lawfully married an aspect which is not proved. He went on that according to the contents of the copy of application no. 275/2023 before the DLHT Mwanza (annexure MCB1), the applicant, under paragraph 6 (a) (iv) states that she separated from the 1st respondent before 1990 and one Joyce Ruta Nshambya, was traditionally married thereafter. He maintained that, the marriage between the applicant and 1st respondent is not established. He added that, even if the marriage was established the applicant still had to establish her linkage to the property because marriage does not convert property owned by one spouse to be matrimonial as per section 58 of the Law of marriage Act. He relied on **Hadija Issa Arerary v Tanzania Postal Bank** Civil Appeal no.135 of 2017. The Court held that under section 59 of the Law of marriage Act, if the Tittle is under the name of one person the other spouse is supposed to file a caveat to register her interest in the property. That, as the disputed property is under the name of the 1st respondent only and there is neither caveat nor caution registered, the disputed property can still be attached.

The respondent's counsel also referred to the enabling provisions and stated that under O.XXI rule 57(1) has a proviso which states that no investigation should be done if the objection is designed to cause delay. That, the application should be dismissed with costs because it does not conform with O. XXI rule 57(1) and s. 48(1) of CPC.

Mr. Molland did not succumb, he rejoined that, under section 161 of the Law of Marriage Act, the applicant and 1st respondent are considered husband and wife under presumption of marriage. On the issue of the Title deed having only the 1st respondent's name, he stated that section 161(2) of the Land Act is clear that a spouse can be owner of the property even if it is registered under only one name. he referred the case of **Hadija Issa Arerary** (supra) arguing that, if there is a conflict between case law and statutory law, the statutory prevail. To him, section 161(2) of Land Act prevails and there was no need for the applicant's name to feature in the Tittle deed to make her the lawful owner. He referred the court to Annexure A2 '*barua ya manunuzi*' a sale agreement, which bears both names the applicant and 1st respondent. That, not all interests are registered through caveat it all depend with the nature of circumstances.

As for the cases before the land Tribunal he prays for the court to take judicial notice of annexure A4 that application no. 192 was withdrawn after noticing that the property was attached by the High court. That, the applicant was in a different forum seeking for his rights and not delaying execution as claimed by the counsel.

Based on the rather rival submissions, the issue is whether the application has merit. Should the disputed property be attached in execution no. 35/2023?

Order XXI rule 57(1) of the CPC provides 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:

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

While section 48(1) (e) of the CPC provides that:

48.-(1) 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-***

(e) any residential house or building, or part of a house or building occupied by the judgment debtor, his wife and dependant children for residential purposes;
(emphasis supplied)

The main ground for objection by the respondent has 2 limbs. That, the applicant is not the owner of the disputed property because her name does not feature in the Tittle deed and; that the applicant is not the wife of the 1st respondent. Starting with the validity of marriage between the applicant and the 1st respondent. I have pointed out that there is an attachment, annexure 'A', the alleged to be matrimonial proceedings, titled '*Emiruka yo kusiga omwanawange Margareht Mukagilage*' which is neither in court's language nor translated. The applicant who relies on such documents had a duty to ensure the reliability of his evidence through

translation or interpretation or any other means for the court and the respondent (s) to understand and act accordingly. Courts are not expected to understand all the languages of the world, that is why the law has defined a proper language of the court in terms of section 84(1) of the Interpretation of Laws Act, Cap 1 R.E 2020 read together with Rule 3 of the Interpretation of Laws (Use of English Language in Courts) (Circumstance and Conditions) Rules, GN. No. 66 of 2022, that it is either Kiswahili or English. For these reasons, this court cannot accord any weight to annexure A.

However, as the applicant is telling the court that the 1st respondent is her husband, they live together since 1985 and they were blessed with one issue. There is also evidence that the disputed property is a dwelling house of the applicant, 1st respondent and their child. To me, this explanation translates that the two are married and them being the best person to explain about the status of their marriage, I believe them unless there are reasonable grounds not to.

As to the claims raised by the 2nd respondent, I have gone through the cited paragraph 6 (a) (iv) of the affidavit made by the applicant in application no. 192/2023 before the DLHT Mwanza, and I will quote:

'That, during the Applicant and the 1st Respondent's marriage cohabitation (sic), they managed to produce one child Neema Justin Rutta, on 15-08-1988.'

In the wording of this paragraph, I see nothing suggesting that the parties separated. Perhaps the respondent intended to refer to paragraph v of the same counter affidavit which states that the 1st respondent customarily, married a second wife in 1990. Yet, marrying a second wife does not automatically dissolve the former marriage between the applicant and the 1st respondent. the respondent ought to have shown that the applicant is not living in the disputed property. As mentioned above, the proviso of section 48(1) of the CPC excludes the residential house occupied by the wife and children of the judgment debtor from attachment or sale. See also **MS. SKYES Insurance Consultant Co. Ltd. V MS. SAM Construction Co. LTD** Civil Revision no. 8/2010 CAT Dar es salaam.

Moving to the issue of ownership, I have gone through the attached Certificate of occupancy annexed as MCB 2 and indeed, it has only one name of the 1st respondent. However, as rightly stated by the applicant's counsel under section 161(2) of the Land Act if the land is held under the name of one spouse and the other spouse has shown contribution towards

the land, both spouses shall be deemed to have acquired that land. Evidence towards contribution is shown by a sale agreement (Annexure A2) named '*Makubaliano ya kuuziana shamba*' where both applicants and the 1st respondent features as buyers of the land which is the disputed property.

Besides, section 48 (1) (e) of the CPC does not require the applicant to be the actual owner. The section provides that properties which

*'shall not be liable to such attachment or sale includes any residential house or building, or part of a house or building **occupied by the judgment debtor, his wife and dependant children** for residential purposes;'*

The word used is occupied and not ownership. The rationale here is execution process should not lead to lack of residence to innocent people who are related to the judgment debtor. Therefore, the applicant only needed to prove that she is occupying the house in dispute and she depend on it for residential purposes, and she has discharged that duty.

That being said, the application succeeds and it is hereby granted. The disputed property is released from attachment and it is excluded from execution proceedings no. 35 of 2023 before this court.

It is so ordered. I make no orders for costs.

Dated at Mwanza this 12th of April 2024.



L.K. J. ITEMBA
JUDGE
12/4/2024

Judgment delivered under my hand and seal this 12th Day of April 2024, in the absence of the applicant and 1st respondent and in the presence of Dr. George Mwaiondola and Ms. G. Mnjari, RMA.

L. K. J. ITEMBA
JUDGE