

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA SUB-REGISTRY)

AT ARUSHA

MISCELLANEOUS CIVIL APPLICATION NO.104 OF 2023

**(C/F Execution No. 5 of 2023. Originating from PC Civil Appeal No. 19
of 2021)**

FRANK WILBARD URIO.....APPLICANT

VERSUS

GRACE STEPHEN CHACHA.....1ST RESPONDENT

ALLAN REUBEN MOLLEL t/a FIRST WORLD INVESTMENT,

COURT BROKER.....2ND RESPONDENT

RULING

10 & 22/05/2024

KIWONDE, J.:

The applicant Frank Wilbard Urio, filed an application by way of chamber summons supported by an affidavit of his counsel Ngereka Eliamini Miraji, praying for the following court orders:

- (a) That, this court be pleased to uplift an order for warrant of attachment issued on 4th October 2023 before Kamala, Deputy Registrar of the High Court of Tanzania at Arusha in Execution



No. 5 of 2023 pending the final determination of the application for stay of execution.

(b) Any other relief (s) this court may deem fit and just to grant.

The respondents were served, however, only the 1st respondent filed counter affidavit refuting some facts deponed by the applicant; the 2nd respondent did not file counter affidavit nor appear in court when the matter was called on for hearing on 10th May 2024; and so, the matter proceeded *ex parte* against him.

In his submissions in-chief, the counsel for the applicant argued that the court uplift the order of warrant of attachment of the house No. 59 located at Osunyai Ward, Sombetini area, issued by the Deputy Registrar on three reasons. **One**, that the High Court, has no jurisdiction to entertain the application for execution, rather, the trial primary court of Enaboishu. The High Court determined an appeal from Arumeru District Court but it did not give any executable orders. He cited section 33 of the Civil Procedure Code, Cap 33 (R. E 2019) to the effect that execution is done by the court which passed the decree; **two**, that the applicant was condemned unheard since he was not served with summons to show cause why execution should not proceed and finally, **three**, that the house is not subject to attachment for it is a family house and the family is living there.

As to whether this application is properly before me, the counsel for the applicant said he raised such concern before Honourable Gwae, J. but he was told that the application can be heard by the Judge.

In reply, the 1st respondent resisted the application on reason that the applicant never appeared in primary court and the matter was heard *ex parte*, and in the application for execution, he threw down the summons he was served.

As to the property ordered to be attached, the 1st respondent argued that it belongs to her husband (the applicant) and it is for lease and the tenants are therein. She said the applicant is willing it to be attached and sold to pay her the money awarded by the trial court at the tune of TZS 11, 000, 000/=.

On the issue of the executing court, the 1st respondent said she was advised to file the application for execution in the High Court. She asked this court to dismiss this application.

In rejoinder submissions, the counsel for the applicant said the issue of summons is not deponed in the counter affidavit, thus, it should not be entertained since parties are bound by their pleadings.



From the pleadings and oral submissions, the main issue for determination is whether the application has been merited or otherwise.

Before I expound on the merits or otherwise of the application, I find it necessary to determine the competency of the application before this court. It is clearly stated that the application for execution was heard and determined by the Deputy Registrar and at the end, she allowed execution process to proceed. She issued an order or warrant of attachment of the house in question. This is what the counsel for the applicant is challenging.

In my view, if there were any objections to the attachment, the counsel for the applicant had to file objection proceedings before the same court and officer who ordered attachment who, if satisfied with the reasons given, can grant an order lifting up the warrant of attachment. This is provided under O.XXI. rr. 57 and 58 of the Civil Procedure Code, Cap 33 (R. E 2022).

This is because the execution process is still pending before the Deputy Registrar. The counsel for the applicant is challenging the order of attachment on reasons of lack of jurisdiction of the High Court to entertain application for execution while it was the domain of the trial Enaboishu Primary Court, the property is a residential house in which the family lives and that the applicant was condemned unheard in the application for

execution. But this is not a proper channel to challenge the order of the Deputy Registrar who allowed execution to proceed. In law, once the Deputy Registrar allows execution process to proceed in civil cases, his or her decision cannot be challenged before the High Court Judge. This was a position in **Francisca Kokuganywa Alfred Versus Mussa Saleh and another**, Civil Application No.270/17 of 2022 [2024] TZCA 158 (20th February 2024) TanzLii.

When required to address the court on the manner the application is brought before the High Court Judge, the counsel for the applicant said he has ever raised this concern but he was told that it can proceed. The counsel has to adhere to the law and not to follow mere advice which was not a decision of the court.

For that matter, I find and hold that the application is incompetent before this court and it is hereby struck out with cost.

It is so ordered.

Dated at Arusha this 22nd May 2024.




F. H. KIWONDE

JUDGE

22/05/2024.

Court: Ruling is delivered in the court room in the presence of Mr. Ngereka Miraji counsel for the applicant, the 1st respondent and Maryciana (RMA) but in the absence of the 2nd respondent and the right of appeal is explained.




F. H. KIWONDE
JUDGE
22/05/2024.