

**IN THE UNITED REPUBLIC OF TANZANIA
THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
MISC.CIVIL APPLICATION NO. 448 OF 2023**

FRANSISCA N MUKAJUNA PLAINTIFF/ DECREE HOLDER

VERSUS

FRANCIS M. MAKASSY DEFENDANT/JUDGEMENT DEBTOR

AND

MONICA KASIGWA LAURENT.....OBJECTOR

RULING

MKWIZU, J:-

By way of a suit, the decree-holder sued the judgment debtor for the division of partnership properties acquired jointly during the existence of their partnership. Judgment was on 21st March 2022 awarding each party a 50% share of the partnership properties.

In execution of the resultant decree, several properties were attached in execution No 66 of 2022 including a landed property (a social hall) at Pugu Kinyamwezi, land at Pugu Kinyerezi area, land at Kinyerezi Bonyokwa Ilala Municipality, Plot No 228 Block A situated at Kigilagila are Ilala municipality with CT No 129145 and a Farm at Bagamoyo- Sadan measuring 7 acres bought under the name of Francis Makassy .

Having learned of the attachment, the objector filed this application made under Order XXI Rule 57 and 59 of the Civil Procedure Code Cap 33 RE 2019, for orders that;

- a) This Honourable Court may be pleased to make a staying the execution through attachment and sale of properties owned under the name of the judgment debtor in execution No. 66 of 2022 pending the hearing and final determination of the objections raised herein.*
- b) This Honourable Court may be pleased to set aside the order of the High Court in Execution No. 66 of 2022 attaching and selling properties known as Land at Pugu – Kinyerezi area, Land at Pugu Kinyerezi having social Hall. Land at Kinyerezi Bonyokwa at Ilala District plot No. 228 Block 'A' situated at Kigilagila Area in Ilala Municipality DAR ES SALAAM With CT No. 139145 and Farm at Bagamaoyo – Sadani, measuring 7 area acres bot under the name of the judgment debtor for being matrimonial asserts.*
- c) Costs of this application be costs in the suit*
- d) Any other order(s) that the Honourable Court may deem fit.*

The chamber summons is supported by an affidavit by Monica Kasigwa Laurent claiming to be the legal wife to the judgment debtor and that the properties named above are matrimonial assets acquired jointly during the existence of their marriage.

The application is resisted by the decree-holder on the ground that the properties attached have never been matrimonial assets, they are properties acquired through a business partnership between the decree-holder and the judgment debtor. That the objector was never living with

the judgment debtor and has never contributed to the acquisition of the claimed properties. Copy of a divorce certificate dissolving the marriage between the objector and judgment debtor and marriage certificate between the judgment debtor and Meynard Dallo was annexed to show that the judgment debtor is formally married to another woman and not the objector.

In his counter affidavit, the judgment debtor was in a way supporting the application.

Submitting in support of the application, and having adopted the affidavit in support of the application, Ms. Mary Masumbuko advocate for the objector asserted that the objector was married to the judgment debtor on 27th July 1996, and they together acquired certain properties as listed in paragraph 2 of the affidavit irrespective of the extramarital relationship that her husband had with the decree-holder.

Amplifying the objector's interest in the listed properties, Ms. Mary said, the land at Pugu Kinyamwezi area- was acquired way back in 1999 on 5th January 1999 during the subsistence of the marriage between the objector and judgment debtor. The court was referred to Annexure A6 collectively consisting of a sale agreement dated 5th January 1999, property tax demand notes of the year 2015- 2016, and 2019-2020 in the name of Francis Musemba Makassy who is the judgment debtor dated 29th August 2015, and 30th March of 2020 respectively.

She went further to state that the property at Kinyerezi Bonyokwa is owned by Francis Musemba Makasi (the judgment debtor) as a sole owner as evidenced by a tax demand notice of 19th October 2019 and a

sale agreement dated 6th December 2019 but acquired jointly with the Objector. Plot No 228 Block A situated at the Kigilagila area with CT No 131942 appearing in the name of Fransco Musemba Makassi, the judgment debtor and it is the same house in which the objector is currently residing together with the judgment debtor. And the farm at Bagamoyo Sadani measuring 7 acres is owned by Francis Makasi as per the sale agreement dated 1st May 2009 attached to the affidavit. She maintained that the objector was a civil servant with an income and therefore she contributed to the acquisition of the said properties. She on this referred the court to annexure A 9 collectively with the Pension Identity card, objectors' cheque number, and receipts in maintaining and developing a social Hall at Pugu Kinyamwezi. She generally prayed for the grant of the application with costs.

Mr Ukong'wa the judgement debtor was in support of the application. His main contention was that the properties listed are matrimonial assets the objector had contributed to their acquisition and these properties are in the sole name of the Judgement debtor, the objector's Husband. He also referred the court to the decree of this court by Mruma J, where parties to it were ordered to share properties with documents in their joint names stating that since the properties listed here are not in the joint names of the parties to the decree, they are not attachable. He lastly adopted the reasons and the points of law submitted for and on behalf of the objector and urged the court to find the application meritorious.

The application was strenuously opposed by Ms Genofeva Kato advocate for the decree-holder on the ground that the basis of the objection by the objector is a lawful marriage with the judgment debtor the fact which is

not true because the two had divorced on 20/4/2011 in matrimonial cause No 31 of 2011 at Kinondoni and the named asserts have never been the matrimonial properties between the objector and the judgment debtor and they have never so mentioned in any matrimonial proceedings.

Ms. Genofevour was of the sense that the judgment debtor and the objector have colluded to defraud the decree-holder right because the judgment debtor has never denied divorcing the objector, that he is now married to Hossain Mairand Dallo, and that he just brought his ex-wife to claim ownership of the properties at issue without any legal bases.

To her, this application is a revelation of women abuse by the judgment debtor bringing to court three women the objector, to whom he was married before he got into an extramarital prelateship with the Decree Holder with whom a partnership was made that worked for 8 years to find a working permit and subsequent citizenship to Tanzania guaranteed by the decree-holder and her relatives. And that all the properties named above were acquired when the judgment debtor had not acquired the Tanzanian citizenship and therefore could not have acquired properties on his own. She attacked the objector for failure to provide evidence on how she acquired the said properties with a prayer for the dismissal of the application.

Rejoining, Ms Masumbuko said, the objector was never a party to the divorce proceedings and Civil Case No. 15 of 2017 and she only came to court to seek her rights. She is in court to show that she has contributed to the properties she has listed in the application.

I have considered the records and the arguments by the parties. Order XXI Rule 57 of the Civil Procedure Code on which this application is premised provides: -

*"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." (bold is mine)

At least it is not disputed that in the year 1997, the judgment debtor entered a business partnership with the decree-holder by the name of DUO FM General Enterprises and DUO FM Music Consultants Promotions. This fact is established by a certificate of Registration and Business name registration certificate attached to the counter affidavit by the decree-holder. This was just a year after the marriage between the objector and the judgment debtor contracted at St Joseph Cathedral Dar es Salaam on 27th July 1996 and which subsisted to April 2011.

The itemized properties in this matter are branded matrimonial assets based on the legal marriage between the objector and the judgment debtor. The objector contends that she holds a share of all matrimonial properties acquired during the subsistence of her marriage with the judgment debtor to which she contributed to their acquisitions, development, and maintenance.

I have investigated the matter. A close examination of the records reveals that, *firstly*, the itemized properties in this objection proceedings were acquired during the existence of the marriage between the objector and the judgment debtor. As indicated, the couple's marriage subsisted between 1996 to 2011 and according to the uncontroverted sale agreement attached in the supporting affidavit, (annexture A6) the landed property at Pugu Kinyamwezi was acquired on 5/1/1999. A seven-acre farm in Bagamoyo was acquired on 1/5/2009; the landed property in Bonyokwa Kinyerezi in 1999. Being married couples during all this time, the possibility of a joint acquisition by the couples either directly or indirectly cannot be ruled out easily by a divorce certificate without more. It would need cogent evidence to separate what was acquired by the husband, the judgment debtor in person, and what was acquired by the couple's joint effort.

In addition to that, the objector's pension card and some receipts exhibiting the purchase of some building materials were brought to the court's attention to drive home her interest in the claimed properties insisting that she was capable of purchasing them as she was a waged employee.

The decree holders counsel contention that since the marriage between the two was dissolved, nothing existed between them as matrimonial assets is without merit. In this matter, apart from evidence of the divorce, nothing was brought to establish the division of the matrimonial properties between the divorcees. This evidence is crucial because not every divorce proceeding under the law of the Marriage Act is packaged with the division of matrimonial assets. The latter could be done at any later stage, at the option of the parties. This is also the position in **Julie A Mmasi V Augustini Mmasi**, Civil Appeal No 84 of 2009 (H/C Unreported) by Juma J (as he then was when interpreting section 114 of the law of Marriage Act, at page 7 said:

*"The words **"when granting or subsequent to the grant of a decree of separation or divorce"** in section 114-(1) of the Law of Marriage Act imply that courts are vested with power depending on evidence to order the division of matrimonial assets at the same time courts grant decrees for separation or divorce or **may leave open the question on division of assets till later.**"* (Emphasis added)

And since it is the decree-holder who introduced the issue, she was in law required to establish not only divorce but also that the division of the matrimonial assets between the parties had left the named properties to the judgment debtor under section 112 of the Evidence Act Cap 6 RE 2022.

Secondly, it is not in dispute that the objector is currently residing in a house located on Plot No 228 Block A situated in the Kigilagila area with CT No 131942. This alone suffices to establish interest in the said landed

property. I am supported by the decision in **CRDB Bank Ltd vs Mwamba Enterprises Ltd and Charles Mtokozi**, Commercial case No. 50/2000 where it was stated that actual possession is enough to prove that a person has interest over the property which is subject to objection proceeding.

Thirdly, the judgment and decree had awarded parties an equal share (50% each) of the landed properties appearing in their joint names. The first item to the decree reads:

“That the plaintiff and the defendant are each entitled to 50% share in all landed properties that have documents in their joint names in terms of sale agreements and /or title deeds”

In other words, execution was to confine itself to the landed properties in the joint names of the defendant, Francis M Makassy, and the plaintiff Francisca N. Mukajuna, but contrary to that all the listed properties in this application appear by the name of the judgment debtor.

I have also paid particular attention to the collusion between the objector and the judgment debtor propagated by the decree holders and find it without any legal significance in this matter. This is because in terms of Rule 58 of Order XXI of the CPC, the objector only must establish her interest in the attached properties at the time of attachment **See: Kwiga Masa V samwel Mtumbatwa**(1989) TLR 103 and the standard of proof in such a matter is in the balance of probabilities.


In sum, the objector has proved her case to the required standard. The weighting scale on the evidence adduced in this matter tilts in favour of the objector than on the decree-holder. She has been able to establish

that the properties listed are s not related to the main suit and that she has legal interest in them.

The application is thus granted. The attached properties namely, land at Pugu Kinyamwezi with a Social Hall, land at Kinyerezi Bonyokwa, Plot No 228 Block A, situated at Kigilagila area in Ilala District Dar es salaam with CT No.139145 in the name Francois Munsemba Makassy and a Farm at Bagamoyo – Sadani, measuring 7 acres in the name of judgment debtor are hereby released from attachment. The Decree Holder to identify other attachable properties in lieu thereof. Costs to follow the events. Order accordingly.

DATED at ES SALAAM this 17th Day of May 2024.




E.Y. MKWIZU
JUDGE
17/ 5/2024