

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI SUB-REGISTRY

AT MOSHI

LAND CASE NO. 18 OF 2023

PAULO SHAO.....PLAINTIFF

VERSUS

MAGRETH PAUL SHAO.....1ST DEFENDANT

MATHIAS LAURENT CHUWA T/A

KILI CRAALS ADVENTURE.....2ND DEFENDANT

DEFAULT JUDGEMENT

Date of Last Order: 22.05.2024

Date of Judgment: 29.05.2024

MONGELLA, J.

On 04.09.2023, the plaintiff herein filed this suit against the defendants over a house located at Plot No. 93 Block AAA within Moshi Municipality in Kilimanjaro region (hereinafter, the suit property). He is seeking for the following reliefs:

- i. A declaration that the suit land i.e. a house on plot No. 93, Block AAA, Moshi Municipality is the lawful property of the plaintiff and the defendants are trespassers.
- ii. A declaration that the act of attaching the suit land by the defendants while it was not among the properties

ordered by the court to be attached was trespassing on that land.

- iii. The order that the defendants should hand over the suit house to the plaintiff forthwith.
- iv. The order that, defendants should pay Tsh. 1,200,000/= per month from the date when they trespassed the suit house up to the date when it will be handed over to the plaintiff for loss of income caused by wrong attachment of that house as per paragraph 14 and 15 herein.
- v. The defendants be ordered to pay Tsh. 8, 400,000/- being the damage for the building material destroyed or stolen due to their trespass to the suit property as per paragraph 16 herein.
- vi. Costs be provided for.

The facts of the case are to the effect that: in 2006, the 1st defendant filed Matrimonial Cause No. 13 of 2006 in the district court of Kinondoni at Kinondoni seeking for divorce and division of matrimonial properties. The petition proceeded *ex parte* and the court ordered the 1st defendant to be given a guest house at Moshi, a house at Uru-Kitandu and a farm at Mwika Mrimbo Uuwo village. The district court of Kinondoni sent a certificate of execution of decree to Resident Magistrates' court of Moshi for execution

(hereinafter, executing court). The same detailed properties subject to execution.

In 2015, the 1st defendant successfully sought attachment of a house located at Plot No 73 block 9 Section iii Market Street within Moshi Municipality; a house at KCMC-Longuo B, Kitandu and a farm at Mwika Mrimbo Uuwo village vide Miscellaneous Civil Application No. 19 of 2015 filed in the executing court. On 31.10.2022, the same court issued a warrant of attachment with a schedule indicating that the mentioned properties were subject to execution. On receipt of the warrant of attachment, the 2nd defendant issued a notice stating that the suit property was not among the listed properties.

The defendants filed Miscellaneous Civil Application No. 19 of 2021 in the executing court seeking for the court to interchange house located at Plot No 73 block 9 Section iii Market Street within Moshi Municipality with the suit property, the court denied the prayer. However, surprisingly, the defendants trespassed the suit property and forcefully attached the same as one of the properties liable for execution.

The plaintiff was represented by Mr. Innocent Msacky, learned advocate. It appears that the defendants were represented by Mr. Martin Kilasara. This is reflected on their Written Statement of Defence (WSD) and proceedings of 30.04.2024 whereby Mr. Msacky held a brief on behalf of the said counsel.

Upon being served with summons requiring them to appear and file their WSD, the defendants filed their WSD on 17.10.2023. The record reflects that neither Mr. Kilasara nor the defendants ever entered appearance in person. On 21.04.2024 the court fixed the matter to come for first pre-trial conference (1st PTC) on 30.04.2024. On the material day of 30.04.2024, neither the defendants nor their counsel appeared in court, Mr. Msacky informed the court that he had communicated with the defendant's counsel about the matter. The matter was again adjourned to 22.05.2024 for 1st PTC whereby again, neither the defendants nor their counsel entered appearance.

Under the circumstances, Mr. Msacky moved this court to invoke the requirement under **Order VIII Rule 20(1), (b) and (c) of the Civil Procedure Code** [Cap 33 R.E 2019]. The provision states:

“Where at the time appointed for the pre-trial conference, one or more of the parties fails to attend, the court may

- (a) N/A
- (b) strikeout the defence or counter-claim if a defaulting party is a defendant;
- (c) enter judgment; or
- (d) make such other order as it considers fit.”

Pursuant to the requirements under the above quoted provisions, I struck out the defendant's Written Statement of Defence and thereby proceeded to enter Judgment for the plaintiff as reflected hereinbelow.

Upon observing the Plaintiff, I find the plaintiff to have sufficiently established his claim in relation to the suit property being unlawfully involved in execution while the same had not been included in the list of properties the district court of Kindondoni declared should pass to the 1st defendant. Proof of ownership of the suit property is seen through: Annexure P1, the plaintiff's certificate of occupancy; Annexure P2 showing the *ex parte* Judgement in Matrimonial Cause No. 13 of 2006 in which a guest house at Moshi, a house at Uru-Kitandu and a farm at Mwika Mrimbo Uuwo village were awarded to the 1st defendant.

The suit property was indeed not in the list of properties listed for execution. This is further proved by annexure P5, a warrant of attachment in Misc. Civil Application No. 19 of 2015 and; annexure P4, a Ruling in Miscellaneous Civil Application No. 19 of 2021 in which an order for execution was issued. The executing court in Moshi denied altering the property title as reflected in annexure P7, its Ruling of 19.12.2022 in Misc. Civil Application No. 19 of 2021. However, surprisingly, on 23.12.2022, the 2nd defendant issued a report confirming executing the decree which involved the suit house.

The plaintiff filed objection proceedings in the executing court under **Order XXI Rules 57(1) and 59 of the Civil Procedure Code** vide Misc. Civil Application Case No. 02 of 2023. In the Ruling issued on 04.05.2023, the executing court dismissed the objection proceedings since execution was already completed.

In the circumstances, I am satisfied that the plaintiff has established being the owner of the suit property. I therefore declare him the rightful owner of the suit property. The defendants' act of attaching the suit property and executing a decree involving the suit property is hereby declared an act of trespass. In that respect, the defendants are hereby as well, ordered to hand over the suit premises to the plaintiff with immediate effect.

With respect to the relief of payment of T.shs. 1,200,000/= per month from the date of trespass to when it would be handed to the plaintiff, I find the claim not substantiated in the Plaint. Nothing is reflected therein showing the suit property being leased or even the amount of rent collected from the alleged lease. Paragraph 14 and 15 contains mere assertions not sufficiently supporting the alleged claim.

Considering the claim of specific damages resulting from damage of building materials worth 8,400,000/=, I find it to be mere claims. There is nothing presented in the Plaint to substantiate presence of the alleged materials in the suit property or even purchase of the same. Being specific damages, they require strict proof thereof. See, **Eligius Kazimbaya vs. Pili Prisca Mutani @ Pili Prisca Yangwe Mutani & Another** (Civil Appeal No. 163 of 2019) [2020] TZCA 1886 (4th December 2020. Even though this is a default judgement, the reliefs pleaded in the Plaint need to be substantiated in the same Plaint through facts averred and annexures attached on it.

The plaintiff has therefore won this case in default and to the extent stated hereinabove. The defendants shall as well bear costs of this suit.

It is so ordered.

Dated and delivered at Moshi on this 29th day of May, 2024.



X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA