

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR-ES-SALAAM SUB-REGISTRY)
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION NO. 26699 OF 2023

ISSA HAMISI BAKARI *alias* ISSA MRIRI 1ST APPLICANT
ZAWAD IBRAHIM SINGA 2ND APPLICANT
YUSUPH R. SHEDURA 3RD APPLICANT
FATUMA MUSSA MSUYA 4TH APPLICANT
ALLY HUSSEIN NINGA 5TH APPLICANT
SULEIMAN ALLY SULEIMAN 6TH APPLICANT
BEATRICE ELISA SENGUJI 7TH APPLICANT
CELESTINE STUART MITANDE 8TH APPLICANT
ABDUL MRISHO MSUYA 9TH APPLICANT
MWANAHARUSI SHOMVI 10TH APPLICANT
ZAINABU MWINYIMVUA 11TH APPLICANT
FLORIAN JOTHAM SANGA 12TH APPLICANT
KHADIJA ABDALLAH IBRAHIM 13TH APPLICANT
ABDUL FATAH ALLY 14TH APPLICANT
KITUKU MWIDADI MFINANGA 15TH APPLICANT
HAWA SALEHE MGALA 16TH APPLICANT
MOHAMED NYERI 17TH APPLICANT
ANNA MUSHI 18TH APPLICANT
FATUMA MUSA 19TH APPLICANT
ENOS LUVANDA 20TH APPLICANT
LIBERATHA MUSHI 21ST APPLICANT

MWANAISHA MGOWELA 22ND APPLICANT
YUSTIN CYPRIAN 23RD APPLICANT
TUMPE MWAMAKULA 24TH APPLICANT
ANNA SEIF 25TH APPLICANT
SOPHIA JACKSON 26TH APPLICANT
BILIHUDA SALUM 27TH APPLICANT
FILBERT KATO 28TH APPLICANT
ABUDL MSUYA 29TH APPLICANT
IKABODI LIKOLO 30TH APPLICANT
YASIN M. MFINANGA 31ST APPLICANT
OMARI KASSIM 32ND APPLICANT
SHAKUR KASSIM 33RD APPLICANT
MURSAL ATHUMAN YUSUFU 34TH APPLICANT
IBRAM MPOMBO YOHANA 35TH APPLICANT
OMAR SULEĪMAN 36TH APPLICANT

VERSUS

**THE REGISTERED TRUSTEES OF
 MASJID KIBLATAIN RUFJ 1ST RESPONDENT**

**THE REGISTERED TRUSTEES OF
 KAWA ISLAMIC CENTER 2ND RESPONDENT**

CROWN AUCTIONEERS LTD 3RD RESPONDENT

RULING

S.M. MAGHIMBI, J:

The applicants herein have moved this Court under the provisions of Order XXI Rule 57 (1), (2), 58 and 59 of the Civil Procedure Code [Cap. 33

R. E. 2019]. In the Chamber Summons, the applicants have moved the court for the following:-

1. This Honourable Court be pleased to investigate the claim that different parcels of unsurveyed land, located at Ukwamani Street, Kawe, Kinondoni District, Dar es salaam, owned by the applicants; are not subject to attachment/eviction/demolition in execution of Land Case No. 15.2012, between, The registered Trustees of Masjid Kiblatain Rufiji vs The Registered Trustees of Kawe Islamic Centre.
2. That this Honourable Court be pleased to release the property from attachment.
3. Costs of this application be provided.

The application at hand has been supported by an affidavit sworn by Beatrice Elisa Senguji. Before this Court, the 2nd, 3rd, 7th, 8th, 9th and 19th applicants were represented by Mr. Pongolela Daudi, learned Advocate and the remaining applicants appeared in person and unrepresented. The 1st respondents was represented by Mr. Kyaruzi learned advocate. Hearing of this application was by way of written submission.

Before I go into the determination of the application, I find it apposite to narrate a brief background to this matter. There was lodged in this court a Land Case No. 15/2012, between The Registered Trustee of Masjid Kiblatain Rufiji (1st respondent herein) and The Registered Trustee of Kawe Islamic

Centre (the 2nd respondent herein) who were the plaintiff and defendant respectively. In the said suit, the 1st respondent sought against the Second Respondent for, amongst other things, a declaratory order that the Second Respondent is a trespasser in Plot No. 695, Title No. 53153, Kawe Area, Dar es Salaam City. In the middle of the proceedings, the First and Second Respondent decided to amicably settle the matter and registered their settlement in court. The case ended up by a settlement agreement between the parties and subsequently a decree of the court was issued by the High Court on 11th June, 2015 on the terms of the said agreement. In the said decree the First Respondent was decreed to be the lawful owner of Plot No. 695 Kawe Area, Title No. 53153 Dar es Salaam city (the disputed premises). In 2022, the First Respondent filed Execution No. 351/2022, seeking to execute his decree. The executing Court granted the execution order mode of which was by eviction of all people in the disputed premises. The court further appointed the Third Respondent to carry out the execution.

It would appear that the disputed piece of land has been occupied by the applicants herein for a period of time. Owing to that, the applicants were then served with a notice of eviction on 18th August, 2023. After such notice they have been in a serious discussion with the First Respondent (Decree Holder) with regards to their interest over the disputed premises, a conversation which has been facilitated by the District Commissioner of

Kinondoni and other government leaders. However, the discussion didn't bear any fruit and currently the Decree Holder is at the verge of demolishing their property and evict them from the premises hence this application seeking for the aforementioned reliefs.

Submitting in support of the application, Mr. Pongolela submitted that they are seeking the intervention of this court to investigate the claim that, different parcels of un-survey lands, located at Ukwamani Street, Kawe, Kinondoni District, Dar es Salaam are owned by the decree holder. They are claiming that the piece of land should not be a subject to attachment/eviction/demolition in execution of Land Case No. 15/2012, as they are private properties of the Applicants. They also seek the indulgence of this court to release the said properties from attachment.

Mr. Pongolela then submitted that on 18th & 19th August, 2023, without prior knowledge of any dispute touching their respective lands; the applicants were surprised to see the agents of First Respondent affixing on their houses fifteen days' notice requiring them to vacate from their houses in execution of a decree in Land Case No. 15/2012. It was in the applicant's submission that, the fact that the applicant's possess documents of ownership (this includes sale agreement and Residence License and secondly, the fact that the Applicants have been residing in the disputed premises with their families for diverse periods; not only establishes interests

of the Applicants right over the disputed premises, but they also prove possession of the disputed premises on their own behalf. In no way are the Applicants' possession of the disputed premises has any connection with the judgment debtor, therefore, the Applicants' respective pieces of lands are beyond the purview of the decree sought to be executed and they therefore ought to be released from attachment order.

He then cited the provisions of Order XXI Rule 57(1) provides thus;

"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".

That while interpreting Order XXI Rule 57, 58, and 59 (supra) the Court of Appeal in **Katibu Mkuu Amani Fresh Sports Club vs. Dodo Umbwa Mamboya and Another** [2004] T.L.R 326, held that;

"As a matter of law, it is necessary for the court to investigate claims and objections raised..... where a claim is preferred or

an objection made to the attachment of any property, the court shall proceed to investigate the claim or objection.....the claimant or objector must adduce evidence to show that at the time of the attachment he was in possession or had an interest in the property."

From the above, in strengthening their argument the applicant's Counsel also cited the case of **CRDB Bank Limited Versus Mwamba Enterprises and Charles Mulokoz**, Commercial Case No. 50/2000, where the court held that: -

".....when the court is dealing with an objection under Order XXI rules 57, 58, 59 and 60 of the CPC, the court should concentrate on the question of possession of the property the subject of attachment and then decide whether the judgment-debtor is in possession of the property on his own behalf or on account of or in trust for some other person. If the property is in the actual possession of some person other than the judgment-debtor, then the court has to decide whether that possession is in trust for or on behalf of the judgment debtor: The court should not be concerned with the question of title unless necessary for its decision on the question of possession."

Mr. Pongolela submitted further that the First Respondent is alleging that the Applicants are trespassers in the disputed premises, an assertion which is misplaced and misconceived. He argued that in objection proceedings the court is not invited to decide on who is the trespasser or not, rather the court is invited to investigate whether the objector had interest or in actual possession of the property at the time of execution. He went on submitting that it would have looked different if the 1st Respondent's assertion proves Applicant's possession of the lands in question. He emphasized that the test in objection proceeding is below the normal standard of civil case and therefore, the objector is only supposed to establish a prima facie case that he/she has interest or is in actual possession of the disputed premises. That although the 1st Respondent is aware of the existence of the Applicants within the premises she was litigating on, the 1st Respondent never joined the applicants in that case neither institute a fresh case against them. Instead she surprised them with the eviction notice.

On whether the objector has interest or in actual possession of the property, he submitted that an application for objection proceedings meet three prerequisite as stated in the case of **Abdallah Salum Lukemo & 18 Others Versus Sifuni A. Mbwambo & 208 Others**, Misc. Land Case Application No. 507 of 2019 where the Court provided that;

- i. There should be an attachment of the property which is not likely to such attachment, made by the decree holder.
- ii. The attachment should be made in execution proceedings.
- iii. The objection proceedings are made by a person who was not the party to the suit.

He also averred that on the first condition; there should be an attachment of the property which is not likely to such attachment, made by the decree holder. He pointed to what was averred under paragraphs 6, 7, & 8 of the Applicants' affidavit, on 18th & 19th August, 2023, the applicants were served with fifteen days' notice of eviction requiring them to vacate the premises in execution No. 351/2022. Paragraph 12 of the 1st Respondent's affidavit (Omar Awadh Khamis), admits that, indeed, there is a notice issued at their instance and eviction and attachment of the disputed premises is at stake. On the second condition that the attachment should be made in execution proceedings. He pointed to paragraph 6 of the Applicants' affidavit, on 18th & 19th August, 2023, the Applicants were served with fifteen days' notice requiring them to vacate from their lawful premises in Execution No. 351/2022. He argued that the fact was also admitted by the First Respondent/Decree Holder. Lastly; he submitted that the objection proceedings are made by a person who was not the party to the suit. That the proceedings in Land Case No. 15/2012, and Execution No. 351/2022,

(annexure KW1 – to the Applicants’ affidavit) shows that parties to the disputes were First Respondent against the Second Respondent. The Applicants were not party to Land Case No. 15/2012, sought to be executed. That the Applicants being third parties in the decree sought to be executed, are justified to approach this temple of justice through these proceedings in order to rescue their properties sought to be attached in execution of a decree. He cited the case of **Katibu Mkuu Amani Fresh Sport Club vs Dodo Umbwa Mamboya**, Civil Appeal No. 88 of 2002, (Zanzibar) at page 10, the Court of Appeal’s directives are;

"The fact that the appellant was not a party to the suit is all the more reason for the objection proceedings in which it is open for any claimant or objector as is the case with the appellant, to prefer a claim or make objection to the attachment of the property."

Concluding their submission, the applicants stated that they have not only proved that they have interests on the disputed premise but also in actual possession of their respective pieces of lands, which the 1st Respondent seeks to attach in execution of a decree. That the entire three prerequisite required in objections proceeding are fully met. He therefore prayed for the Court to grant the application and release the disputed premises from attachment in Execution No. 351/2022.

In reply, the 1st Respondent submitted that all the said residential licenses

attached and relied upon by the applicants are not valid as all of them indicate that they had expired in 2008, 2009, 2010 and 2011. That it is a trite law that one cannot claim right in the court of law without having valid title on that land hence the court cannot grant their claim by relying on invalid documents.

The 1st Respondent submitted further that the decree holder/1st respondent continues to suffer loss by the presence of trespassers in the suit plot whilst she has to extend buildings of classrooms for students and offices and the area is too limited as it is invaded and occupied by trespassers. The 1st respondent then argued that for objection proceedings to succeed, all the three conditions stipulated under Order XXI of the Civil Procedure Code [Cap. 33 R. E, 2019] must be met in accumulative. In the case, at hand he argued, the applicants have failed to meet first condition under **Rule 57(1)** supra, that there should be an attachment of the property which is not likely to such attachment. They also relied on the case of **Abdallah Salum Lukem & 208 Others** (supra), to support their submission. That the property so attached is plot No. 695 with title deed No. 53153 L. O No. 22318 Kawe Area Dar es Salaam measured 3, 667 hectares which needs to be handed over to the decree holder and nothing else.

It was the 1st respondent's observation that, the case would be different if the attachment was going beyond and outside the measurements

and boundaries of Plot No. 659. The 1st respondent argued that the applicants have failed to prove whether the execution is taking place to their properties which are outside the demarcations of the suit Plot No. 695 while the eviction order dated 31.07.2023 is very clear, it directed the court broker to only evict any occupant in Plot No. 695 Title No. 53153 Kawe Dar Es Salaam City and the court broker (3rd respondent) has not acted outside that plot. In view of the above submissions the prayer was that the objections be dismissed with costs as they are designed to delay execution.

On her part, the 2nd respondent's submissions substantively elaborated how the ownership of the disputed land came about. It was their submission that they are a body corporate incorporated under the Trustees incorporation Act, [Cap. 318 R. E. 2002], with registration No. 2975 of 2005. That the dispute begun on 20.7.199 after the Muslims of Kawe requested, by writing a letter to the manager of the Tanganyika Packers Factory, the area of Plot number 695, Kawe area Dar es salaam, for the purpose of using it for the Islamic worship activities. That the reason for request arose, after other denominations were given Plots for carrying out their worship activities according to their beliefs. On 7.6.1996, the Muslims wrote another letter to reminding of their request to be given this said Plot number 695, Kawe area, Dar es Salaam and that after a long silence again on 21.01.2001, the 2nd respondent they wrote another letter to the Chairman of the Population

Studies Research Centre (PSRC) reminding them again of their request for the plot mentioned above. After these requests by letter, the Muslims decided to start the construction of the Mosque in this dispute Plot number 695 Kawe area Dar es salaam.

The 2nd respondent further averred that on 22.3.2002, the Ex - District Commissioner of Kinondoni Municipality, Honorable Hawa Ngulume, having received the information about the construction of a mosque in the disputed Plot, called the Muslims of Kawe and gave them the an advice that first, she blessed the Muslims of Kawe to use the disputed Plot for Islamic religious matters and to do all religious activities on this dispute Plot. And that she also advised that in order for quick achievement and according to the intended goals in time, it is better for the Muslims of Kawe to find an Islamic religious institution registered in accordance with the law. That after agreement with that institution the Plot will be divided into two equal parts. The 2nd Respondent called and selected the 1st Respondent as a Partner in this disputed Plot because until 2002 the Muslims of Kawe did not have an institution registered according to the law. After the agreement the 1st Respondent succeeded in obtaining the Certificate of Occupancy with number 53153 dated 24th June 2005 of this dispute Plot.

It was added by the 2nd respondent that the High Court Decree ordered the Muslims of Kawe to leave the dispute Plot that they have requested for

the first time on 20.7.1992. They then warned the leaders to start looking for an alternative way to save their area in various administrative authorities, and on 24.6.2022, the 1st Respondent and the 2nd Respondent agreed to share this disputed Plot, with the agreement that the 2nd Respondent gets a gift for the 1st Respondent and the agreement is free and no party will violate the agreement reached in the office of the Region Commissioner of Dar es Salaam. After the agreement, the 1st and 2nd Respondents have ended their conflict in a peaceful way and that no one is claiming from the other. Concluding their submission, the second respondent requested this Court not to involve them in any costs to pay any of the parties in this case.

Having gone through the submission of the applicants and the respondents for and against the application, it is undisputed that the applicants herein were not party to the Suit from which the execution effected herein affects them. Looking at the records before me, I find there was Land Case No. 15 of 2012 between the 1st and 2nd Respondents who in the cause of hearing the suit the two reached a settlement and a settlement Agreement was entered. The applicants are firm that the attachment of the parcels of their land is unlawful since they have never had knowledge of any ongoing suit that concerned their parcels of land. It is their claim that they have been in possession of the said pieces of land for more than 40 years and that the applicants each have proof of ownership of the land but also

some other applicants inherited their pieces of land through customary inheritance.

The 1st and 2nd respondents however, claim their right from a court decree in the suit that was allegedly granted to them in 23/10/2003 for 33 years which makes the applicants trespassers. It's the 1st respondent's claim that the applicants are trespassers and were warned from the time they cropped into the said piece of land but ignored the warning and kept trespassing, none of them has stayed at the premises for more than 40 years.

It is trite law that when an applicant seeks for this investigation, she r has the duty to prove to the Court through evidence that at the time the attachment was made the applicant had an interest in the said parcel of land. The court, if satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment debtor, shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment. This above is the position of law that has been clearly stated under Order XXI Rule 58 and 59 of the Civil Procedure Code.

Looking in the records, although the respondents do not dispute occupation of the applicants in the disputed land, the applicants had a duty to porve interest over the piece of land. Occupation alone is not the mere

factor to grant an application for objection under Order XXI Rule 58 and 59. Interest over a piece has to be proved. However, in their whole evidence, there is no valid documentary evidence to prove ownership. The residential licence artel aimed to have expired a fact not denied by the applicants. I must point out that it would appear from the records that when the suit was lodged, the 1st and 2nd respondents were aware of the occupation of the applicants in the suitland but they did not implead them in the suit. However, that is not my determination at this point since the suit had already been decreed by this same court. I am also aware that the applicants have a pending Revision Application before the Court of Appeal, a fact which was narrated in due course of the pendency of this application and undisputed by either party

That being the case, I cannot, at this stage of objection proceedings determine the ownership of the suitland as it would demand calling of witnesses and adduce of evidence. That being the case, the objection proceedings before me cannot be granted by lifting the order of the executing court. In the alternative, the remedy available to the applicants is to prove their ownership of the suitland through a civil suit before a court/tribunal with competent jurisdiction. It is therein where their interest to the suit property may be determined.

As for this application, it is hereby dismissed. Given the nature of the case and what is claimed herein, I make no order as to costs.

Dated at Dar es Salaam this 27th Day of May, 2024.



A handwritten signature in black ink, appearing to be "S. M. Magimbi", is written over a horizontal dotted line.

S. M. MAGIMBI

JUDGE