

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA SUB-REGISTRY
AT MBEYA
MISC. LAND APPLICATION NO. 27 OF 2023

(Originating from Application for Execution in Bill of Costs No. 26 of 2018)

EDSON ABEL KAJIGILI..... OBJETOR/APPLICANT

VERSUS

TEHILAH FOUNDATION.....1ST RESPONDENT

SHUKRAN GIDION2ND RESPONDENT

MR. FULCO MLELWA T/a HIGHLAND AUCTION MART LTD....3RD RESPONDENT

RULING

Date of last Order: 22nd April, 2024

Date of Ruling: 30th May, 2024

KAWISHE, J.:

This is a ruling in the application filed by the applicant Edison Abel Kajigili. The applicant moved this court through chamber summons under Order XXI Rule 57(1), (2), 58 and 59, and section 48(1) of the Civil Procedure Code Cap 33 R.E 2019. The chamber summons is supported by an affidavit sworn by the applicant. The applicant is challenging attachment

of alleged residential house as a result of execution in Bill of Costs No. 26 of 2018. The applicant sought the following orders:

- 1. That, this Honourable Court be pleased to suspend execution proceedings preferred by Tehila Foundation and Shukran Gideon (the Decree Holders) against the respondent over landed property described as House No. RA 997 situated at Rwanda Ward within Mbeya City.*
- 2. That, this Honourable Court be pleased to investigate the applicants' claim and/or the objection made by the applicant/objector and make an order that the residential plot/house with identification No. 331/5915/12 with Residential Licence No. MBYCCRL/11964 is situated at SOWETO Street, Ruanda Ward in Mbeya District is not liable for attachment.*
- 3. Cost of application.*
- 4. Any other relief(s) this Honourable court shall deem fit to grant in favour of the applicant.*

The application was contested to by the respondents jointly via their joint counter affidavit.

When the application was called for hearing the applicant was represented by Mr. Baraka Mbwilo, learned counsel whereas the respondents enjoyed the services of Mr. Ibrahim Athman, learned counsel.

Mr. Mbwilo, Advocate for applicant in getting started, prayed to the court to adopt the affidavit of the applicant to form part of his submission thus, he could only add clarification. He submitted that the application is

against the attachment of a residential house or plot, specified under paragraph 2 of the applicant's affidavit together with the elaboration under paragraph 3 of the affidavit. That the plot which the respondents have applied for execution to satisfy a decretal sum of a Bill of Costs of 2018 as per paragraph 5 of the applicant's affidavit, the respondents want to attach a residential house. Mr. Mbwilo argued that the law prohibits attachment of a residential property/house/building which is occupied by the judgment debtor, his wife and children for residential purposes, that the same is provided for under section 48 (1) (e) of the Civil Procedure Code Cap 33 R.E 2019 (the CPC). To cement his argument, he referred this court to the case of **Odilia Mkarugasha vs. Selemani Kalimbe and 3 others** Misc. Civil App. No 96 of 2021 H.C at Bukoba page 4 to 6 and **Shaban Janson vs. Sangulo Gardian and 2 others PC. Civil App. No 07 of 2022 H.C** at Bukoba, page 3. That being a Civil case, the affidavit of the applicant has established his case on the balance of probability to prove that the property which is about to be attached is a residential house.

Mr. Mbwilo added that the property stated under paragraph 2 and 5 is not the one specified in the warrant of attachment. That in the warrant of attachment is House No. RA 997 situated at Rwanda Ward, Mbeya City.

However, the title of ownership specified in the residential licence is a Residential House with Licence **No. MBYCCRL.11964** which is at Soweto Street in Ruanda, within Mbeya District, the identification number is **331/5915/12** specifically for residential purposes. The attachment in the affidavit shows that it is a residential licence. The application for residential licence, was applied for by the applicant and his deceased wife, for residential purposes. Mr. Mbwilo prayed to this court to declare that the house which the respondents are about to attach is not subject to attachment on the submitted grounds. He finally prayed that the application be granted with costs.

Mr. Ibrahim, learned counsel for the respondents in his reply prayed to adopt the respondents' joint counter affidavit to form part of his reply submission. He submitted that they strongly contest the application on the ground that the applicant has failed to prove that the said house which is ordered to be attached so as to satisfy the decree in the Bill of Costs No. 26 of 2018 is a residential house. That mere words which the applicant stated in his affidavit cannot be taken into consideration because there are no affidavits of the children and grandchildren who the applicant alleged that he resides with in the said property. Mr. Ibrahim argued that there is

no report from the local government's official to satisfy this court that the said house is being resided by the applicant and his family.

Mr. Ibrahim responded to the argument that the said property attached is not specified in the warrant of attachment which was granted in application for execution in Bill of Costs No. 26 of 2018, by arguing that it is a mere misconception because, licence number and house number are two different terms. That the argument from the applicant's counsel requires proof. He added that it is a technique to delay justice on the part of the 1st and 2nd respondents to be paid the decretal sum which was awarded in the Bill of Costs No. 26 of 2018.

Mr. Ibrahim referred to what is stated under paragraph 7 and 8 of the joint counter-affidavit and prayed to this court to reject the applicant's application for being short of merit. He attacked the cases cited by the learned counsel for the applicant. He referred to the case of **Odilia Mkarugusha** (supra) and held that it is distinguishable from this application. In that case the issue was an attachment of matrimonial home while in the present case, the applicant has not proved it to be matrimonial property. In the case of **Shalon and 2 others** (supra) he considered it to be distinguishable too. That the case concerned a wrong attachment of

property of a party who was not a part in the main case. He concluded by praying to this court to disregard the authorities and dismiss the application for want of merit.

In his rejoinder Mr. Mbwilo, argued that there is no requirement that the children and grandchildren who resides in the residential house have to swear affidavit too. He contended that the respondents in their affidavit failed to state that the house subject to attachment is resided by whom apart from those mentioned by the applicant. That they have failed to state the use of that house, whether its use is other than the one specified on the residential licence. It was his opinion that the affidavit of the applicant and the attachments are enough to proof the allegation.

Mr. Mbwilo continued to state that there is no requirement of the local government's report to prove that the house subject to attachment is residential or not. The annextures to the affidavit including the residential licence is enough proof to show that it is a residential house. He further argued that it is the duty of the party applying for execution to prove the property is subject to attachment. That since the applicant has stated the fact, the burden has shifted to the respondent to prove that the house is not resided by the applicant and his dependants. He added that, the

respondents' leaned counsel stated that the house number and the residential licence number refers to the same. That the submission by the counsel on this aspect is stated by paragraph 7 where the House Number **R 997** is shown to be different property from the residential house with Residential Licence **No. MBYCCRL/11964**. He further argued that in their affidavit they could have reflected that the number of the house in the warrant of attachment in the affidavit by the applicant is **No. RA 997** to enable them to attach as the same house.

On the cited cases Mr. Mbwilo submitted that they are relevant to this application. In his view, a matrimonial home falls within a residential house under section 48 (1) (e) of the CPC. That a residential house can be a matrimonial home. He alleged that the cases he has cited are relevant as they are interpreting section 48 (1) (e) of the CPC which is the position of the law on attachment of a residential house in execution of decree. He reiterated his submission and rested his case.

I have fervently followed the submissions aired by the counsel for both parties and have perused the records available. From their submissions this court has to answer one question, whether the application has merit.

In order to respond to the question, I will first analyse the submissions made by the parties. Mr. Baraka Mbwilo, leaned counsel for the applicant averred that, the law prohibits attachment of a residential property, house, building which is occupied by the judgment debtor, his wife and children for residential purposes. He cited section 48(1)(e) of the CPC and case laws which interpreted the same to wit, **Odilia Mkarugasha vs. Selemani Kalimbe and 3 others** (supra) and **Shaban Janson vs. Sangulo Gardian and 2 others** (supra). On his side Mr. Ibrahim, learned counsel for the respondent challenged the authorities cited as they are distinguishable from the case at hand. He added that the applicant did not attach affidavit of the dependants to prove that they reside in the house and a report from local government to show that it is a residential house. In his rejoinder Mbwilo, defaulted the submission by the counsel for not being able to prove who resides in the said house and what is it used for. Also, the dependants are not required to swear an affidavit. Even the local government is not required to prepare a report as the affidavit of the applicant suffices. Also, the Residential Licence **No. MBYCCRL.11964**, the Identification No. **331/5915/12** specifically for residential purposes. The main contestation in their argument is whether the house subject to

attachment is a residential house. The applicant relied on the provisions of section 48(1)(e) of the CPC. The proviso to section 48(1) provides that 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; [...]*. This section excludes the residential house occupied by the wife and children of the judgment debtor from attachment or sale. See the case of **Ms. Sykes Insurance Consultants Ltd vs. Ms. Sam Construction Co. Ltd** (Civil Revision 8 of 2010) [2010] TZCA 2 (5 November 2010) which interpreted the provisions of section 48(1) of the CPC by stating that:

*"All the same, it is categorically provided that **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** shall not be liable to attachment or sale." [emphasis is mine].*

From the interpretation and position of the Court of Appeal, the case at hand falls in the same line. The applicant claimed that a residential house is subject to attachment. Although the respondent insisted that the court should allow the execution to proceed, I am of the view that, residential

houses are not subject to attachment. The intention of the law is very clear that, people should not become homeless as a result of attachment.

The respondent argued that the applicant has not brought affidavit of the dependants mentioned in his affidavit with its attachments. Also, averred that there was not report from the local government to prove that the house is a residential house. The applicant's counsel refuted by stating that the law does not require dependants to swear an affidavit neither a report from the local government showing that the house subject to attachment is a residential house.

As per the records available and as submitted by the applicant's counsel, the house subject to attachment is a residential house. The residential licence attached to the affidavit proves the same. The copy of the Residential Licence (Leseni ya Makazi) annex EAK-01, was issued to Edison Abel Kajigili and Christina Kagunda Kajigili for a period of five years from 1st of July, 2022 up to 30th June, 2027. The conditions for the issuance of the licence specifically at paragraph (iii) states that the purpose is "residential". The respondent has not disputed the licence and the use of the piece of land as per the conditions stated on the licence. According to the applicant's counsel and the annex EAK-01 the subject of attachment is

a residential house. To that extent, I am inclined to the submission of the applicant's counsel that there was no requirement to have the local government's report as the licence is self-explanatory.

The counsel for the parties argued about the House Number **R. 997** versus Residential Licence **No. MBYCCRL/11964** to be different properties. The respondents' learned counsel contended that it is not a residential house. The applicant's affidavit under paragraph 6 stated that the warrant of attachment is House No. R 997 but the 3rd respondent is about to attach residential house with Residential Licence No. MBYCCRL/11964. That the plot with Residential Licence No. MBYCCRL/11964 is not subject to attachment. The respondents' joint counter affidavit under paragraph 7 stated that, the 3rd respondent states that the house attached is House No. RA-997 situated within Rwanda Ward Mbeya City and not residential house with licence MBYCCRL/11964.

The rival arguments by the counsel for both parties in my view are on the same property. The name Rwanda versus Ruanda is just a usage and articulation. The respondents just strongly disputed the contents of paragraph 2 of the applicant's affidavit. This means they even disputed the location of the house. The applicant's counsel expounded on the same

enough. In addition, the Residential Licence together with the application form the licence (Fomu ya Maombi ya Leseni ya Makazi) explain that the residential house is situated at Ruanda Ward, Soweto Street, Mbeya City. Relying on the submission of the respondents' counsel that House No. RA-997 situated within Rwanda Ward, Mbeya City and not residential house with licence MBYCCRL/11964, then he has entangled his own neck. There is no document to show the House No. RA 997 but the counsel has linked it to the house with Residential Licence No. MBYCCRL/11964 which as per the residential licence and the application form for the same show that it is for residential purposes. Since there is no evidence to dispute that, and given the position of the law and the case law on the same, I am convinced that, the house subject to attachment is a residential house. In that the issue raised is in affirmative.

Having said so, I find that the application has merit. In the upshot, the application is granted hence, the residential house subject to attachment with Residential Licence No. MBYCCRL/11964 be released from the Execution Proceedings No. 26 of 2018 before this court.

I make no order as to costs.

It is so ordered.



E. L. KAWISHE

JUDGE

30/5/2024

Dated and Delivered at **MBEYA** this 30th day of May, 2024 in the presence of Ms. Jalia Hussein learned advocate for the respondents, Mr. Ipyana Mwantoto learned advocate for the applicant and in the presence of the 1st respondent.



E.L. KAWISHE

JUDGE