

**IN THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION
AT DAR ES SALAAM**

COMMERCIAL CASE NO.45 OF 2006

LEONIDA HARTSUIKER.....PLAINTIFF/RESPONDENT

VERSUS

JACKSON MWASANGA.....1ST DEFENDANT/RESPONDENT

MRS. IRENE JACKSON

MWASANGA.....2ND DEFENDANT/RESPONDENT

UNYANGALA AUCTION MART&

COURT BROKER.....3rd RESPONDENT

AND

GODWIN R. BUBELWA.....APPLICANT/OBJECTOR

Date of the last order: 19/05/2011

Date of oral hearing: 19/05/2011

Date of ruling: 29/06/2011

RULING

MAKARAMBA, J.:

This is a ruling on objection the Applicant/Objector, Godwin Bubelwa, raised against the execution proceedings. The applicant/objector contends that the farm Plot No.814 CT No. 39908 at Mkuza Village, Kibaha District,

Coast region, the subject of attachment in these proceedings, does not belong to the Judgment Debtors, hence it is not liable for attachment.

The objection has been preferred under Order XXI Rules 57(1), 59, section 68(e) and 95 of the Civil Procedure Code Act, [Cap. 33 R. E. 2002]. The Application was made by way of Chamber Summons under a Certificate of Urgency, and was filed in this Court on 20th February 2009 before Hon. K.K. Oriyo (as she then was). The Chamber Summons has been taken at the instance of Mushumba and Co. (Advocates, Lida House, Nkurumah Street and is supported by the affidavit of Godwin R. Buberwa, the Applicant/Objector and other reason(s) and argument adduced at the hearing.

In the application the Applicant/Objector sought the following orders, that:

1. *This Honourable Court be pleased to investigate and order stay of execution of the decree of this Court dated 12/09/2008 pending hearing and determination of the objection proceedings by the Applicant/Objector herein.*
2. *Attachment and sale of the farm on Plot No.814 CT No. 39908 at Mkuza Village, Kibaha District, Coast Region be permanently stayed as it does not belong to the Judgment Debtors hence not liable to the attachment.*
3. *Costs of this Application.*
4. *Any or further relief(s) this Honourable Court shall deem fit and equitable to grant.*

The order of stay of execution of the decree dated 12th September, 2008 was duly granted by Hon. K.K. Oriyo J, (as she then was) on 20th March 2009.

The Application was disposed of orally, the Objector being represented by MUSHUMBA, learned Counsel. Mr. Mwakasege, learned Counsel appeared for the 1st and 2nd Respondents and Msemwa, J, learned Counsel represented the Plaintiff/Respondent.

The present application has been preferred under among other provisions, Order 57(1) of the Civil Procedure Code, [Cap.33 R.E 2002] which provides as follows:

*"(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." (the emphasis is of this Court).

Essentially the present application enjoins this Court to carry out an investigation of claims to, and objections to attachment of property. In carrying out investigation as per Order 57(1) of the Civil Procedure Code, [Cap.33 R.E 2002], the court is to proceed as if the claimant or objector was a party to the suit which gave rise to the decree leading to the attached property, the subject of the objection. In his affidavit in support

of the application, the Applicant/Objector, Mr. Godwin Bubelwa avers that sometimes in early February 2009 he was served with a prohibitory order dated 22nd day of January 2009 and letter ref. No.GM/UAMKM/02/09 dated 27/01/2009 from Unyangala Auction Mart Limited and Court Brokers, the 3rd Respondent referring to a decree issued on 12/09/2008 against the Defendant requiring payment of US \$ 27,000.00. The Applicant/Objector avers further that in that Order his farm on Plot.No.814 at Mkuza Villlage Kibaha District Coast Region is being mentioned as property being prohibited and restrained from any form of disposition or charge until further order of this Court and that execution by attachment and sale of the same will follow after 14 days unless the said US\$ 27,000.00 are paid. It is the further averment of the Applicant/Objector that as the said prohibitory order and letter are addressed to the Defendants and he was not a party to this suit but served as a person in physical and actual possession of the property. This is what prompted the Applicant/Objector into action and thus come to this Court to object to the attachment.

The general principle as regards investigation is clearly stipulated under Order 59 of the Civil Procedure Code, Cap.33 R.E 2002 which provides as follows:

*"Where upon the said investigation the court is satisfied that for the reason stated in the claim or objection **such property was not, when attached, in the possession of the judgment debtor** or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment debtor at such time, it was so in his possession, **not on his own account or as his own property**, but on account of*

or in trust for some other person, or partly on his own account and partly on account of some other person, the court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment.”(The emphasis is of this Court).

In carrying out investigation, in terms of Order 59 of the Civil Procedure Code, [Cap.33 R.E 2002], the Court has to be satisfied among other things that such property was not, when attached, in the possession of the judgment debtor or that, being in the possession of the judgment debtor at such time, it was so in his possession, not on his own account or as his own property. Upon the Court being so satisfied it will make an order releasing the property wholly or to such extent as it thinks fit, from attachment. The provisions of Order 59 of the Civil Procedure Code [Capp.33 R.E. 2002] has received judicial consideration in a number of decisions but suffice to mention only two decisions of this Court, **ULANGA KILOMBERO CO-OPERATIVE UNION V. PANGOLIN TRADERS LIMITED**, Commercial Case No. 37 of 2000 (unreported) by Hon. Kalegeya, J. (as then he was) and **ALLY ISSA MUSSA V. MWIDADI ALLY MAWILA & 2 OTHERS**, Commercial Case No. 91 of 2009 (unreported) by Hon. Makaramba, J, where it was stated that *the property to be attached should belong to the Judgment Debtor*. The issue before this Court therefore is *whether the property the subject of attachment, namely, the farm on Plot.No.814 at Mkuza Villlage Kibaha District, Coast Region, when attached was not the proprerty of the judgment debtor*.

In his affidavit, the Applicant/Objector avers that he bought the said Plot No. 814 CT No. 39908 at Mkuza Village Kibaha District, Coast on the

15th day of September 2004 from one IRENE JACKSON MWASANGA, the 2nd Defendant/Respondent, and signed the transfer of right of occupancy on 19/05/2005, hence the said plot does not belong to the Judgment Debtor. The Applicant/Objector avers further that he has been in physical and actual possession of the said property, and has paid the Tanzania Revenue Authority (TRA) dues for the transfer and has been paying Local Government Taxes as the owner of the said farm. The Applicant/Objector avers further that he has erected a residential house, and established poultry farm and cattle rearing on the said farm. Further, that he had used the same farm to secure a loan from CRDB Bank at Holland Branch which was extended to PMM Estate (2001) Limited Company in which he is the Director and that the Title Deed has been attached to the Bank.

In his counter affidavit, JACKSON MWASANGA, the 1st Respondent herein, deponed that, they had received the prohibitory order prohibiting and restraining them from any form of disposition or charge while the said farm having already been sold to GODWIN R. BUBELWA, the Applicant/Objector herein.

Mr. Yussuf Sheik, an advocate representing the Plaintiff in the case which gave rise to the execution process in favour of the Plaintiff, testified that before execution and attachment orders had been sought and granted by this Court, a diligent search was conducted over the ownership status of the property with the Registrar of Titles, which did not reveal that the property in question was owned by the Objector.

In line with the requirement under Order 57(1) of the Civil Procedure Code, Cap.33 R.E 2002, this Court proceeded 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 and scheduled the 28 September 2009, as the date for proceeding with the matter by hearing.

On that date the only person who appeared for the hearing was the Applicant/Objector, Mr. GODWIN RWEGALULILA BUBELWA who testified as PW1. In his testimony, PW1 stated that he lives at Kibaha kwa Matias and that he is engaged in farming activities and keeping poultry. PW1 testified further that he knows JACKSON MWASANGA, the 1st Respondent and IRENE MWASANGA, the 2nd Respondent herein, but he does not know LEONIDA HERTSUIKER, the Plaintiff. PW1 testified further that on 10/09/2004, he purchased the farm from the 1st and 2nd Respondents for TZS 60,000,000/- (Sixty Million Shillings) and that he paid TZS 29,000,000/- (Twenty Nine Million Shillings) as an advance through CRDB Bank, Azikiwe Branch, and promised to pay the balance later on. PW1 testified further that the said sale was witnessed by the Village Chairman and neighbours and tendered the Sale Agreement showing the amount paid and witnesses which was admitted and marked as **Exhibit P1**. It was the further testimony of PW1 that the date of the sale was 15/9/04, but the Sale Agreement was signed in the Advocate's office after completing payment of the outstanding amount on the 9th November 2005 and that he paid tax for the purchase at Tanzania Revenue Authority (TRA). PW1 tendered TRA Receipt, the Sale Agreement, and Transfer Deed which were admitted and marked as **Exhibit P2** collectively.

PW1 testified further that the Title Deed for the said Plot was handed to him by the Seller and the same was deposited with the Bank as guarantee to his partner Dr. JUDITH MHINA who had processed the loan from the Bank. PW1 testified further that since the Title Deed was not changed, still it is deemed to contain the name of the Seller. PW1 testified further that he (PW1) and Dr. JUDITH MHINA decided to draft a Memorandum of Understanding between them to keep PW1's title in the safe custody of the bank so that the Bank could service the loan of Dr. JUDITH MHINA effectively and that in event of default, the Bank to put the house on sale. PW1 tendered in this Court the Memorandum of Understanding concluded between Dr. JUDITH MHINA and PW1 (GODWIN R. BUBERWA) dated 10th day of July 2006, which this Court admitted and marked as **Exhibit P3**. PW1 testified further that as the Title Deed is now with CRDB Bank, the he (the objector) could not process transfer until the loan has been paid in full. PW1 testified further that he also has the declaration by Mrs. IRENE MWASANGA that PW1 has not changed the name because the Title Deed is with the Bank and that she (IRENE MWASANGA) has already sold the property to GODWIN BUBERWA. PW1 tendered the declaration regarding the said Plot No. 814 CT No. 39908 Mkuza Village, Kibaha dated and signed on 10/07/2006 which this Court admitted and marked as **Exhibit P4**.

PW1 testified further that, he had receipts from the Kibaha Town Council as evidence showing payment of property tax since he purchased for the years 2005, 2006, 2007 and 2008, which this Court admitted and marked as **Exhibit P5**.

Upon the Applicant/Objector closing its case, the matter was scheduled for defence hearing on 19/05/2011. However, on that date, Mr. Msemwa, learned Counsel for the Respondent told this Court that he had not been in communication with his client for a long time now and that there was no indication when he will appear before this Court and therefore prayed that this Court proceed with the ruling based on the evidence available on record. Mr. Mushumba, learned Counsel for the Applicant/Objector and Mr. Mwakasege, learned Counsel for the 1st and 2nd Respondents were of the same view. Following that, this Court proceeded with preparing this ruling with the benefit of only the testimony of the Applicant/Objector and the documents tendered in the course of the hearing.

On the evidence on record, particularly **Exhibit P2** collectively, clearly the prohibitory order was issued after the disputed Plot No. 814 CT No. 39908 Mkuza Village, Kibaha had already being sold to Mr. GODWIN R. BUBELWA, the Applicant/Objector. The fact of the disputed property having been sold is supported by the affidavit of JACKSON MWASANGA, the 1st Defendant/Respondent who stated that he sold to GODWIN R. BUBERWA a piece or parcel of land situated on Plot No.814, comprised under Certificate of Title No.39908 at Mkuza Village, Kibaha within the Coast Region as evidenced by Sale Agreement which was signed by IRENE JACKSON MWASANGA, the 2nd Defendant/Respondent. In his sworn affidavit, the Applicant/Objector, GODWIN R. BUBERWA deponed that he is in physical and actual possession of the disputed property, and that he has paid TRA dues for the transfer and that he has been paying Local Government Taxes

as the owner of the disputed property. In his testimony, the Applicant/Objector testifying as PW1, further stated he has erected a residential house on the disputed property and that in addition he is keeping poultry and cattle therein. The further testimony of the Applicant/Objector (PW1) was that the Title Deed for the disputed property is now with CRDB Bank, having been deposited there as security for a loan guaranteed by his partner one Dr. JUDITH MHINA. Mr. Yussuf Sheikh, learned Counsel, who was the former Advocate for the Plaintiff, and who is conversant with the facts of this case, in his Counter Affidavit he deponed that it was the Applicant/Objector himself who to a large extent contributed to misleading the Plaintiff to know the ownership status of the farm before applying for execution in this Court, therefore the Applicant/Objector ought to bear the costs for this application. Mr. Yussuf Sheikh in his affidavit averred that before the execution and attachment order was sought and granted a diligent search was conducted over the ownership status of the property with the Registrar of Titles which did not reveal that the property in question is owned by the Applicant/Objector. However, in the course of his testimony, PW1 testified that as per the declaration by Mrs. IRENE MWASANGA, PW1 has not changed the name because the Title Deed is with the Bank and that she (IRENE MWASANGA) has already sold the property to GODWIN BUBERWA. If this is the case therefore definitely no diligent search as Mr. Yussuf Sheikh claims would have revealed that the disputed property was owned by the Applicant/Objector since the Title Deed, which is evidence of ownership, was not in the name of the Applicant/Objector.

In wish to state here that in terms of the provision of Order XX1 Rule 59 of the Civil Procedure Code, Cap.33 R.E 2002 what the Court is enjoined to investigate is whether "***such property was not, when attached, in the possession of the judgment debtor or that, being in the possession of the judgment debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person.***"

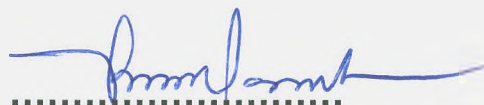
On the evidence on record, at the time of attachment order, the disputed property was neither in the ownership nor in the possession of the Judgment Debtor. The general principle as regards attachment of property as could be gathered from two decisions of this Court, **ULANGA KILOMBERO CO-OPERATIVE UNION V. PANGOLIN TRADERS LIMITED, Commercial Case No. 37 of 2000** (unreported) by Hon. Kalegeya, J. (as then he was) and **ALLY ISSA MUSSA V. MWIDADI ALLY MAWILA & 2 OTHERS, Commercial Case No. 91 of 2009** (unreported) by Hon. Makaramba, J, is that *the property to be attached should belong to the Judgment Debtor.*

In my view, and on the basis of the evidence on record, at the time of the attachment, the disputed property, farm on Plot No. 814 evidenced by CT No. 39908 situated at Mkuza Village, Kibaha District, Coast Region, was not the property of the Judgment Debtor. It was therefore wrongly attached. At the time of the attachment order, the said property had already been sold to the Applicant/Objector. It did not therefore belong to

the judgment debtor and thus it could not be amenable to an attachment order.

It is also my considered view that the delay by the Applicant/Objector to change the name in the Title Deed of the disputed property most probably led the Decree Holder to believe that the disputed property, farm at Plot No. 814 evidenced by CT No. 39908 situated at Mkuza Village, Kibaha District, Coast Region, was still in the ownership of JACKSON MWASANGA. In the circumstances however, there is no cause for this Court to make any order as to costs. Each party shall therefore bear own costs in this application.

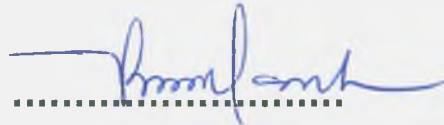
In fine and for the foregoing reasons, the application succeeds. The warrant of attachment is hereby raised and/or lifted. The disputed property, the farm on Plot No. 814 evidenced by CT No. 39908 situated at Mkuza Village, Kibaha District, Coast Region, is hereby ordered to be released forthwith from attachment. The prohibitory order dated 22/01/2009 which was issued by this Court is hereby extinguished. It is accordingly ordered.



.....
R.V. MAKARAMBA
JUDGE

29/06/2011

Ruling delivered in Chambers this 29th day of June, 2011 in the presence of the Applicant/Objector in person, the Plaintiff/Respondent, in person, Mr. Mwakasege, Advocate for the 1st & 2nd Defendant/Respondents and in the absence of the Court Broker/Respondent.



.....
R.V. MAKARAMBA

JUDGE

29/06/2011

Words count: 3,062