

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO.91 OF 2009.

**FATUMA ISSA ALLY MUSSA (Administratrix of the
Estate of the late ALLY ISSA MUSSA.....APPLICANT**

VERSUS

MWINDADI ALLY MAWILA.....1ST RESPONDENT

ISSA ALLY SHUNDA.....2ND RESPONDENT

SHAI COMPANY.....3RD RESPONDENT

RULING.

BUKUKU, J.

This is an ex parte ruling on the application the applicant lodged in this court on 23rd September 2011. The application has been made under Order XXI Rules 57 (1) and (2), 58 and 59, Section 68 (e) and Section 95 of the Civil Procedure Code, Cap 33 R.E 2002 to the effect that;

- 1. The Honourable Court be pleased to lift/raise a warrant of attachment of property registered as Plot Nos. 706 and 707 Block B*

- 2. Msasani Village, Dar Es salaam, as the same does not belong to or create interest on any of the litigants in a case pending in court.*
- 2. That this Honorable court be pleased to order whoever possesses a decree(if any) in respect of the case subject hereof, to proceed against personal property of the judgment debtor.*
- 3. Costs be provided for.*
- 4. Any other order (s) as the Honorable Court shall deem proper to issue.*

The application came for hearing on 24th October 2011 whereas the counsel for the Respondent did not appear and it was ordered by this court that the matter should proceed ex parte. On 13th March 2012 the application was heard exparte and Mr. Taisamo, Advocate appeared for the Applicant.

In brief the submissions of the learned counsel for the Applicant in support of the application are as enumerated hereunder;

That, this Court is moved to raise a warrant of attachment of property on Plots No 706 and 707 Block "B" Msasani Village Dar Es salaam as the same do not belong to or create interest on any of the litigants in the case pending in this court. Mr. Taisamo, prayed to this court to adopt the affidavit of one Fatuma Ally Issa being the administratrix of the estate of the late Ally Issa Musa being so appointed by Magomeni Primary Court

in probate cause No. 305/201, annexed to the application and marked FM 2 to form part of the proceedings.

Submitting, Mr. Taisamo narrated that the deceased Ali Issa Musa was the legal owner of the portion of land registered as Plots No 706 and 707 Block B Msasani Village Dar Es Salaam as per title deed document attached to the affidavit as Annexure FM2 and he prayed that it forms part of the proceedings. He went on to submit that the plot in question has been a subject of regular visits by the 1st Respondent and his unknown agents, and that it was upon an inquiry conducted, that, the Applicant came to know that the plot is about to be auctioned following this Court's order in execution of a decree in respect of the matter that was pending in this Court between the 1st Respondent as a Plaintiff and 2nd and 3rd Respondents as co-defendants.

Mr. Taisamo made it clear that the purpose of this application is to object the attachment of the said plots for the sole reason that the same do not belong to the 2nd and 3rd Respondents hereof or create any interest on the litigants in the case pending in this court. Insisting his point, Mr. Taisamo made it known to this Court that annexure FM2 to the affidavit shows the plots are registered in the name of Ali Issa Mussa and not Issa Ally Shunda who was amongst the Defendants in the preceding case, and that being the case, the plots forms part of the estates of the late Ally Issa Mussa now under the administration of the Applicant.

Concluding his submissions, Mr. Taisamo averred that whoever wants to execute this Court's decree should proceed against the personal properties of the Defendants, as there is no evidence that the property attached belongs to the Judgment Debtors and much that the land has no relationship with whoever is the Judgment Debtor. To add weight why the prayers sought in the application should be granted, Mr. Taisamo submitted that, constant threats of auctioning the plots have been causing unspeakable disturbances not only to the family of the deceased but also to the tenants of the place who have threatened to take action against Applicant for disturbing peaceful enjoyment of their tenancy. He thus surmised that justice will be granted in that, a warrant of attachment will be raised and that the Decree Holder be directed to proceed against personal properties of the Defendants.

Having considered the submissions by the learned counsel, let me now turn to consider the application before this court. This application has been preferred under *Order XXI Rules 57 (1) and (2), 58 and 59, Section 68(e) and Section 95 of the Civil Procedure Code, Cap 33 R.E 2002*. For purpose of reference in the course of determining this application I will reproduce Order XXI Rules 57 (1) and (2), 58 and 59 hereunder;

Rule 57 reads;

"(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.*

Rule 58 provides;

The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.

Rule 59 reads;

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.

In essence this court has been called upon by the Applicant to investigate the attachment of the property of the Applicant with a prayer to lift/raise a warrant of attachment in order to release the purported attached Plots No 706 and 707 Block B Msasani Village Dar Es salaam. I wish to start by noting that although this application was heard ex-parte, it is a fundamental principle of law that, even where a party is called upon to prove his or her case exparte, he or she must strike the standard of proof in civil cases, which is on the balance of probabilities.

Going through the submissions of the learned counsel for the applicant and the annexures on record, the following are my observations towards reaching the decision of this Court. Mr. Taisamo for the Applicant has convincingly argued that the plots in question for which this application is made, belonged to the late Ally Issa Musa whose estates are now under the administration of one Fatuma Ally Issa, the administratrix appointed by Magomeni Primary Court as evidenced by annexure FM2 attached to the applicant's affidavit. He went further to submit that since the attached property do not belong to the 2nd or 3rd Respondents or create any

interests, the Applicant objects the attachment and that as much as the said land has no relationship with the Judgment Debtor, then justice will be done if the application sought is granted.

It is my considered opinion that, Mr. Taisamo has labored much in submitting on the ownership of the attached property, something which is fine with me, but what he did not tell this Court is which order of this court led to an attachment of the property which the Applicant is objecting its attachment. He could even have attached a copy of that order. That also he has not done. The omission by the Counsel to disclose to this Court the decree he is referring to, has led me to go through the court records and see what really happened. In my investigation in the court records, I came across a decree of my Learned brother Mruma, J. dated 30th June 2010 which was a result of the Consent Settlement Order reached by the parties in Commercial Case No.91 of 2009 in which the parties were Mwindadi Ally Mawila V. Issa Ally Shunda. I am convinced that it was after the failure to honour the Consent Agreement that the decree holder proceeded to apply for execution of the decree and during that process, some properties belonging to the Judgment Debtor were attached to fulfill the decree. Among the attached properties was Plot No 200 Block B Msasani Village, Kinondoni District Dar es salaam. Checking further I found different proclamations of sale which were issued by this court at different dates. One is dated 14th December 2010 which discloses the property to be attached as *Plot No 200 Block B Msasani Village Dar Es salaam*, and

another dated 12th August 2011 describing the plot to be attached as "*a building with an office and showroom situated at an un surveyed Plot at Msasani Mwisho along Kimweri and Uganda Avenue Adjacent to Plot No. 199, 200 Block B Msasani village*".

Now what I am failing to comprehend is how did Plots No 706 and 707 Block B Msasani Village Dar Es Salaam end up being the subject of frequent visits by people for the purposes of inspecting the same for auction. There is no mention of these plots anywhere in the records of this court, in the form of warrant of attachment or in the proclamations for sale issued. I beg to quote Paragraph 5 of the applicant's affidavit which discloses a fact that;

"there was a time the same area was almost sold by auction following the said case, but the exercise failed following what I came to know as wrong citation of plot number".

The quoted paragraph reveals that indeed the mentioned plot in the warrant of attachment and proclamation of sale was not the applicant's plots, instead it was another plot with a different plot number No. 200 Block B Msasani Village Kinondoni District Dar Es salaam or "*a building with an office and showroom situated at an un surveyed Plot at Msasani Mwisho along Kimweri and Uganda Avenue Adjacent to Plot No. 199/200 Block B Msasani village*". It is clear that, the property in question is Adjacent to Plot No. 199/200, and not Plot No. 199/200. The plot in dispute

is un surveyed plot.

Coming back to the prayers of the Applicant which are, this Court be pleased to lift/raise the warrant of attachment of property registered as Plots Nos. 706 and 707, and another prayer is, this Court be pleased to order whoever possesses a decree to proceed against personal property of the Judgment Debtor. It is pertinent to note that there are things which the Court looks at when investigating the attachment of property, things like, whether at the time of attachment the objector or claimant (Applicant) was in possession of the property at the time of attachment or had interest, this is as per Rule 58 of Order XXI of the Civil Procedure Code. It is upon the Court being satisfied that the property was not in the possession of the Judgment Debtor, or some person in trust for him, or in occupancy of a tenant, then, according to Rule 59 of O.XXI of the CPC, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment.

Having gone through the submissions of the Counsel for the Applicant and the affidavit in support of the application, I must admit that it becomes difficult for me to grant the sought orders due to the following: first and foremost, the plots which the Applicant alleges that they belong to her are not subject of attachment, as far as this court is concerned unless there is something which is not clear for this Court to see. The Applicant is seeking a relief from this Court to have the warrant of attachment concerning her property evidenced by the annexed title to the affidavit

marked **FM2**, lifted by this Court for the sole reason that the same does not have any relationship with whoever the Judgment Debtor is.

Looking at the proclamation of sale, warrant of attachment and the certificate of sale in Commercial Case No. 91 of 2009, what is being mentioned is a building with an office and showroom situated at an un-surveyed Plot at Msasani Mwisho along Kimweri and Uganda Avenue, adjacent to Plot No. 199,200 Block B Msasani village, in the name of Issa Ally Shunda. Now, can this Court be led to believe that Plots Nos. 706 and 707 of the Applicant are the same plots as mentioned plots in the proclamation, the sale warrant and the certificate? I think no, unless the Applicant has evidence to suggest otherwise, that it is the same plot, something which the Applicant has failed to do so. That being the case, this Court's hands become tied to lift the warrant of attachment over the property which is not the subject of attachment in any orders of this court. Under such circumstances, I consider the application for lifting/raising the attachment warrant of attachment of property registered as Plots Nos. 706 and 707 block B Msasani Village Dar Es Salaam, being a misplacement, for reasons advanced herein.

Secondly, it is not disputed that, the Judgment Debtor in **Commercial Case No. 91 of 2009** is one Mr. Issa Ally Shunda. According to the records, the plot attached is unsurveyed and therefore

It is assumed that, it does not have Plot numbers yet. Whereas, the applicant herein claims to be in possession of the two surveyed plots which were in the name of the late Ally Issa Musa. According to the available records in this court, there is a letter from the Kinondoni Municipal Council, with reference No. KMC/LD/25164/PMR dated 05 April, 2011 which clearly establishes that, the plot adjacent to Plots 706 and 707, which is the disputed plot in this matter is unsurveyed. It is unfortunate that, the Applicant's Counsel has failed/neglected to assist this court in determining if at all there is a connection between the name Ally Issa Musa (deceased) who was the owner of Plots 706 and 707, and the name of Issa Ally Shunda the Judgment Debtor in **Commercial Case No.91 of 2009**.

I fail to comprehend as to why the property of the Applicant could end up being confused with that of the Judgment Debtor, if at all there is no relationship/connection between the two as submitted by the Counsel for the Applicant! All along coincidentally, it seems the Decree Holder and the auctioneers were also mistakenly paying visits to the plots which do not belong to the Judgment Debtor. Although generally, the auctioneer is not a decree holders' representative, it must be conceded that, a decree holder or his agent would normally know or would identify the property expected to be attached, and the decree holder always identifies property for purposes of satisfying the executing court that, at the time he applied for execution, the property to be attached and *cold prima facie* belonged to the judgment debtor.

Thirdly, considering that the property in question has been sold on 27th day of November, 2011, pursuant to this court's order dated 7th November, 2011, and considering that the purchase price has been paid in full and thereafter a certificate of sale having been issued pursuant to the provisions of O.XX1 Rule 92 of the Civil Procedure Code, is there anything left to be lifted/raised? It is my considered opinion that this application has already been taken over by events.

From the above findings and reasoning, this Court finds that the Applicant has failed to convince this Court to grant the prayers sought bearing in mind the difference in plot numbers and having perused the warrants of attachment in question, together with the proclamation of sale issues by this court, I am satisfied that, there is no order issued by this court attaching Plots Nos. 706 and 707 block B Msasani Village Dar Es Salaam. The orders of this court relate to a plot adjacent to Plots Nos. 706 and 707 block B Msasani Village Dar Es Salaam. Under such circumstances, this court cannot raise/lift something which is not the subject of an order of this court.

In fine and for the foregoing reasons the Application by the Applicant lacks merits and is hereby dismissed. No order as to costs.

It is accordingly ordered.


A.E. BUKUKU

JUDGE

27th JUNE, 2012

For the Applicant: Mr. Msemo, holding brief for Mr. Taisamo, Learned Advocate.

For the Respondent: Mr. Mwindadi Ally Mawila (in person).



A.E. BUKUKU

JUDGE

27th JUNE, 2012