

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 22 OF 2022

(Arising from Commercial Case No. 12 of 2021)

BETWEEN

GALLA KAYA SAMJELA..... APPLICANT

VERSUS

REMY MUTAMBA NGOIE.....1st RESPONDENT

CHRISTIAN LUSAMESO VINDU.....2nd RESPONDENT

TIMOTHY FRANCIS MWANDIKO.....3rd RESPONDENT

APPOLINARY KAJUNA MASILINGI.....4th RESPONDENT

GO PROPERTY CONSULTANTS AND

AUCTIONEERS CO LTD.....5th RESPONDENT

Date of Last Order: 20th September 2022

Date of Ruling: 18th November 2022

RULING

MKEHA, J.

The objector in these objection proceedings is inviting the court to investigate the correctness of attachment of the Applicant's household utensils and a

house located on Plot No. 14 Block 22 Buyuni, Ilala, Dar es salaam, that was attached on 8th February 2022. The application is preferred under Order XXI Rule 57 (1) (2) and 59 as well as section 95 of the Civil Procedure Code. The application is supported by an affidavit sworn by the applicant. The said application is resisted through counter affidavits of the 1st, 2nd, 3rd and 4th Respondents. Whereas Ms. Kivea learned advocate represented the applicant, Mr. Philemon Msegu represented the 1st 2nd and 5th respondents, Mr. Kikwasi learned advocate represented the 4th Respondent. The 3rd Respondent did not file counter affidavit. Neither did he file written submissions to address any of the legal issues.

According to the applicant's affidavit and submissions by Ms. Kivea learned advocate for the applicant, Commercial Case No. 12 of 2021 involved the 1st and 2nd Respondents as the plaintiffs and the 3rd Respondent as the defendant. The said commercial case ended in favour of the 1st and 2nd Respondents who are now the decree holders. The decree condemned the 3rd Respondent to pay the decree holders (1st and 2nd Respondents) TZS 40,321,000, USD 91,186. 68, general damages to the tune of TZS 20,000,000/=, interest at a commercial rate of 17% per annum, interest at a court rate of 12% per annum, costs of the suit and returning the semi refined Gold with gross weight of 12.40 Kgs or its equivalent value in USD to the plaintiffs/1st and 2nd respondents.

According to the applicant's affidavit and the submissions by the learned advocate for the applicant, the applicant was not a party to Commercial Case No. 12 of 2021 hence it was wrong for the executing court to attach her property. In terms of paragraph 9 of the Applicant's affidavit, the applicant bought the said Plot No. 14 Block 32 at Buyuni, Chanika on 9th February 2018 from the 4th Respondent, Mr Appolinary Kajuna Masilingi. Sale agreement between the Applicant and the 4th Respondent and title deed in the name of the 4th Respondent was annexed as Annexure BR-3.

Mr. Phelemon Msegu learned advocate for the 1st 2nd and 5th Respondents, relying on the affidavit sworn by the 2nd Respondent on behalf of the 1st and 5th Respondents and for his own behalf, submitted that, the applicant has never owned Plot No. 14 Block 32 Buyuni, Chanika. It was submitted on behalf of the three Respondents that the said plot and property over the said plot belonged to the 3rd Respondent/Judgement Debtor who bought it on 30th January 2018 from the 4th Respondent. The learned advocate submitted that, the applicant was a biological mother of the 3rd Respondent who was living at Vingunguti.

The 4th respondent's counter affidavit indicates that, he sold his property to the applicant on 9th February 2018. That notwithstanding, he annexed to his

counter affidavit a search report that indicates that he (the 4th Respondent) was still the owner of the disputed property up to 7th June 2022.

The only issue for determination is **whether the Applicant has satisfied the court that at the time of attachment she had interest in the attached property or was possessed of the property.** In paragraph 11 of the 1st 2nd and 5th respondents' counter affidavit it was deponed that, the applicant was a biological mother of the judgement debtor who was living at Vingunguti. In paragraph 4 of the 1st 2nd and 5th Respondents' counter affidavit it was deponed that, the Applicant had never owned Plot No. 14 Block 32 Buyuni Chanika that, the plot was being owned by the 3rd Respondent/Judgement debtor who bought it on 30th January 2018 from the 4th Respondent. The Applicant did not file an affidavit in reply to the 1st 2nd and 5th Respondents' counter affidavit. As such, the facts that the applicant was not in possession of the attached property at the time of attachment as she was living at Vingunguti and that the attached properties belong to the judgement debtor, are uncontroverted. As well as the fact that the applicant is the biological mother of the judgement debtor who by design entered no appearance in these execution proceedings.

The duty to prove interest in the attached property lies to the objector. In the circumstances of this case, a mere sale agreement does not suffice to prove

that the Applicant had interest in the attached property at the time of attachment. In cases of registered land, interest vests in the purchaser when the Commissioner for Lands approves the disposition of land after receiving the application for transfer which apart from the sale agreement should be accompanied by Land Form No. 29 (Notification of Disposition), Land Form No. 30 (Application for approval) and Land Form No. 35 (Deed of Transfer).

Although the purported sale to the applicant is alleged to have been made on 9th February 2018, more than four (4) years ago, nothing suggesting vesting interest in the purchaser appears to have been done. In cases of this nature, a mere sale agreement is not sufficient but at least evidence sufficing to indicate that steps have been taken aiming at vesting interest in the Applicant if at all she was the purchaser as alleged. That is not all. The purported sale agreement relied upon by the applicant does not indicate at all, when actually did the Commissioner for Oaths witness the purported sale. I choose to attach no weight to the said annexure to the Applicant's affidavit.

For the foregoing reasons, I hold that the applicant has failed proving that at the time of attachment, she had interest in the attached property or that, she was in possession of the same. The application is dismissed with costs.

DATED at DAR ES SALAAM this 18th day of November 2022




C.P MKEHA

JUDGE

18/11/2022

Delivered this 18th day of November, 2022 in absence of both parties and their counsels.




J.M. MINDE

DEPUTY REGISTRAR

18/11/2022