

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 111 OF 2023

(Arising from Commercial Case No. 28 of 2017)

BETWEEN

EMMANUEL E. MWAKASEGE..... APPLICANT

VERSUS

FELIX ANDREW SAMILAN.....1ST RESPONDENT

CLAUS KILONGOMTWA.....2ND RESPONDENT

HAMISI NGOMA.....3RD RESPONDENT

MARTINI MATIKU.....4TH RESPONDENT

YUSUPH S. MOHAMED.....5TH RESPONDENT

PHILEMON KADA.....6TH RESPONDENT

ADAM ISSA ZULU.....7TH RESPONDENT

MOHSIN PANYA.....8TH RESPONDENT

SIMON.....9TH RESPONDENT

Date of last order: 07/11/2023

Date of judgment: 05/12/2023

RULING

MKEHA, J.

The applicant is moving the court for an order putting him into possession of a piece of land described as Plot No. 295/1, Block 6 with CT. No. 57006 located at Keko Area in Temeke Municipality within Dar es Salaam City. He is also praying for costs of the application.

The application is made under Order XXI Rules 95 (1), (2) and 96 of the Civil Procedure Code [CAP. 33 R.E. 2019]. The application is made by way of Chamber Summons supported with an affidavit sworn by the applicant.

Only the 1st Respondent disputed the application through his counter affidavit. Despite service, the 2nd to 9th Respondents did not contest the application in any way; hence, the application proceeded ex-parte against them.

The application was heard orally. Whereas the applicant was represented by Messrs Ashiru Rugwisa and Faraj Ahmed learned advocates, the 1st Respondent was under representation of Mr. Ramadhan Karume learned advocate.

Mr. Rugwisa learned advocate for the applicant submitted that, the application was moving the court to put his client into possession of a property located at Keko Area, Temeke, Dar es Salaam. The reason behind

the application according to the advocate was that, there was resistance from the respondents denying the applicant to gain possession of the said property. He also adopted the applicant's affidavit as part of his submissions. He went on to state that, the applicant had bought the property in execution of a decree in respect of Commercial Case No. 28 of 2017 and a Certificate of Sale had been issued to that effect. That, the property had already been registered in the applicant's name. Finally, the learned advocate revealed that, the respondents were in physical possession of the said property.

In reply, Mr. Karume learned advocate commenced his submissions by adopting the contents of the counter affidavit sworn by the 1st respondent as part of his submissions. He continued to submit that, the applicant's affidavit did not indicate how the 1st respondent resisted the applicant to obtain possession of the property. That, the 1st respondent was put into possession of the said property by one Mr. Mohamed Panjuan. As to why the said Mohamed Panjuan would be legally justified to put the 1st respondent into possession of the disputed property, this remained unanswered.

When he rose to rejoin, Mr. Rugwisa learned advocate submitted that, the property in dispute was Plot No. 295/1 Block 6 with CT. No.57006 located at Keko Area, Temeke, Dar es Salaam. The learned advocate added that, Mr. Mohamed Panjuan was not in physical possession of the applicant's property to be able to welcome the 1st respondent to the said property.

As highlighted hereinabove, the application is brought under the provisions of Order XXI Rules 95 (1), (2) and 96, both of the Civil Procedure Code. Rule 95 (1) and (2) of the said Order reads as hereunder:

'95. (1).....Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the court complaining of such resistance or obstruction.'

'(2).....The court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.'

Rule 96 reads:

' 96.....Where the court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment debtor or by some other person at his instigation, it shall direct that the applicant be put into possession of the

property, and where the applicant is still resisted or obstructed in obtaining possession, the court may also, at the instance of the applicant, order the judgment debtor, or any person acting at his instigation, to be detained as a civil prisoner for a term which may extend to thirty days.'

Basing on the above quoted provisions, the following conditions are to be met before an application of this nature succeeds.

- i. There must be either the decree holder for the possession of immovable property or the purchaser of the said immovable property in execution of a decree.
- ii. The said decree holder for possession of immovable property or the purchaser of the said immovable property, has to be resisted or obstructed by either the judgment debtor or any other person to obtain possession of the same.
- iii. The resistance should be without any just cause.

Therefore, after considering the applicant's affidavit, the 1st respondent's counter affidavit and oral submissions of the learned counsel for the parties, the following issues are paramount for determination.

- (a) Whether the applicant is the decree holder for possession of an immovable property or the purchaser of an immovable property in execution of a decree.
- (b) If the 1st issue is answered in the affirmative, whether the respondents have resisted or obstructed the applicant to obtain possession of the said immovable property.
- (c) If the 2nd issue is answered in the affirmative, whether the resistance or obstruction by the respondents is without any just cause.

In terms of the 1st issue, I have considered the applicant's affidavit particularly paragraphs 2 and 3. Therein, the applicant clearly stated that he was the purchaser of a land on Plot No. 295/1 with CT No. 57006 located at Keko Area, Temeke Municipality, Dar es Salaam. According to the applicant, he purchased the said piece of land at a public auction resulting from execution of a decree in Commercial Case No. 28 of 2017. A Certificate of Sale was issued to him in that regard. This fact was not disputed by the respondents. Not even by the 1st respondent who attempted to resist the application.

Therefore, since this fact is uncontested by the respondents, the 1st issue is answered in the affirmative to the extent that the applicant is a bona fide purchaser of an immovable property in execution of a decree, which is a piece of land on Plot No. 295/1 Block 6 located at Keko Area, Temeke, Dar es Salaam.

The 2nd issue is whether the respondents have resisted or obstructed the applicant to obtain possession of the said immovable property. In his affidavit, the applicant stated under paragraph 4 that, in the course of taking possession of the piece of land in dispute, the respondents gave him hardship through different modes. The applicant complained that, one of such hardship was that, some cases had been filed with the aim of obstructing him to gain possession of his piece of land. He mentioned the actual cases to that effect. The cases included Land Application No. 283 of 2022 and Land Application No. 90 of 2023 filed at the District Land and Housing Tribunal for Temeke. Also Miscellaneous Commercial Applications No. 25 and 70 of 2023 filed before this court.

Through his counter affidavit, the 1st respondent denied his involvement in obstructing the applicant from gaining access to his purchased property. I have considered the depositions in the affidavits filed in this case. The

central complaint of the applicant was that, there was resistance and obstruction by all the respondents denying him opportunity to take possession of the land in dispute. This fact was not disputed by the respondents save for the unsuccessful attempt made by the 1st respondent. The applicant submitted that, the respondents were in physical possession of the property in dispute. This fact was not contested by any of the respondents. In the submissions made by Mr. Karume learned advocate on behalf of the 1st respondent, it was clearly stated that, his client (1st respondent) was really in possession of the property in dispute, having been put in the said possession by one Mr. Mohamed Panjuan. The 1st respondent did not establish the basis of his stay on the said property. Neither was the learned advocate able to explain, why the said Mr. Mohamed Panjuan would invite the 1st respondent at the applicant's property. Basically, the 1st respondent did not see the need of inviting the said Mr. Mohamed Panjuan who brought him to the disputed land, to these proceedings. In fact, the 1st respondent did not claim any ownership of the disputed property.

It is trite law that, the one who alleges must prove and the standard of proof in civil cases is on balance of probability. See: **PAULINA SAMSON**

NDAWAVYA VS. THERESIA THOMASI MADAHA, CIVIL APPEAL NO.

53 OF 2017, CAT, (UNREPORTED). Basing on the principle of the law stated in the cited case hereinabove, it is obvious that the applicant was under the duty to prove that, he was resisted or obstructed to take possession of his piece of land by the respondents. It is my holding that, the applicant has sufficiently discharged the said duty against all the respondents including the 1st respondent who admitted the fact that he was in possession of the property without being owner of the same. For the foregoing reasoning, the 2nd issue is answered in the affirmative.

The 3rd issue is if the 2nd issue is answered in the affirmative, whether the resistance or obstruction by the respondents is without any just cause. All the respondents including the 1st respondents have not only failed to advance the cause for their resistance, but also, they have failed to justify it. On part of the 1st respondent, apart from admitting the fact that he was in possession of the land in dispute, he did not advance any tangible reason for being in possession of a property that did not belong to him. That leads me into answering the 3rd issue in the affirmative.

According to Order XXI Rule 96 (supra), the court is empowered to direct that the applicant be put into possession of the property when it is satisfied

that the resistance or obstruction is without any just cause. Thus, in the instant application I am satisfied that the respondents' resistance is without any just cause. The respondents have failed to demonstrate the cause for their resistance against the applicant's efforts to gain possession of the land in dispute. In the premises, the application is granted and I order that, the applicant be put into possession of a piece of land on Plot No. 295/1, Block 6, located at Keko Area, Temeke, Dar es Salaam. All the respondents be immediately evicted from the suit premises. Should the respondents continue resisting/obstructing the applicant from taking possession of the purchased land, the penal sanction stipulated under Rule 96 of Order XXI will visit them without further proceedings but subject to the applicant's notification to this court of the continued resistance/obstruction.

DATED at DAR ES SALAAM this 05th day of December 2023.




C. P. MKEHA

JUDGE

05/12/2023

Court: Ruling is delivered in the presence of Mr. Faraj Ahmed learned advocate for the applicant and Ms. Ifigenia Gervas for 1st respondent.




C. P. MKEHA

JUDGE

05/12/2023