IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)
AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 617 OF 2020

(Arising from Execution No. 79/2016. Originating from Land case No. 65 of 2009)

MISHED CHUNILAL KOTAK ..... APPLICANT/OBJECTOR

VERSUS

OMARY SHABANI ..... 1ST RESPONDENT
SELEMANI MWANJEKA ..... 2ND RESPONDENT
GETRUDE RWAKATALE..... 3RD RESPONDENT

RULING.

S.M. MAGHIMBI, J:

The application beforehand was filed by way of Chamber Summons under the provisions of Order XXI Rule 57 (1) & (2), 58, 59 and Section 95 of the Civil Procedure Code, Cap 33 R.E 2019 ("The CPC") and any other enabling provision of the law. Supported by an affidavit of Applicant dated 27/10/2020; the applicant's Chamber Summons sought to move the court for the following orders:

1. That the Court be pleased to investigate the objector's claim respecting the intended immediate eviction of the applicant and his tenants from house No. 108 on Plot No. 13 Block 75 Aggrey street, Kariakoo area, in Dar es salaam (the Suit house).

2. That after investigation the court be pleased to allow the applicant claim by not evicting the applicant and his tenants from the suit house.
3. Costs of the application be provided for by the respondents.
4. Any other relief(s) the court may deem gift and just to grant.

In this application, Mr.F.A.M Mgare, learned Advocate represented the applicant while Mr. Adnan Abdallah Chitale, Advocate represented the 1st respondent. As per the court records dated 30th April, 2021, the 2nd and 3rd respondents were not objecting the applicant's prayer sought in the Chamber Summons. The application was disposed by way of Written Submissions.

In his submissions to support the application, Mr. Mgare began his submission by alerting the court that he was not served with the counter affidavit if at all it was filed in this court, so he prayed for order that the 1st respondent did not file his counter affidavit and thus he is not objecting the application. He then submitted that it is on record that on 23/11/2016 the applicant was served by the then 3rd Respondent counsel with an application for Execution No. 79 of 2016 which was later dropped and in lieu thereof Execution No. 72 of 2019 was filed. That in the later application the 1st respondent is intending to carry out an immediate eviction of the judgment debtors (i.e., 2nd and 3rd respondents), their families, agents and relatives from the disputed house (annexure "B" to the affidavit).

He submitted further that though the execution application by the 1st respondent was not annexed with the decree or order sought to be executed, it is clearly showing that it is intending to evict the 2nd and 3rd

respondents, their families, agents and relatives, but in actual fact it is the applicant not his tenants who are in occupation of the property.

Secondly, he submitted, that in his execution application the 1st respondent is misleading the court as he wants to execute what is different from what was granted to him by this court. He added that as per his own plaint, the disputed plot mentioned under paragraph 4, 5 and 15 of the plaints was plot No. 108 Block 75, Aggrey street, Kariakoo and not plot No. 13 Block 75, House No. 108, Aggrey street, Kariakoo. He added that his effort to remedy the situation vide Misc. Land Application No. 181 of 2015 proved failure because correction of the purported clerical mistakes of the plot and house numbers was dismissed by this court on 7/3/2016.

He submitted further that the applicant bought the suit house from the 3rd Respondent on 4/4/2014 at Tshs 450,000,000/= and now it is registered in the name of the applicant. He added that the applicant conducted official search which clearly shows that the 3rd respondent was the legal owner of the same. He thus added that he is the Bonafide purchaser and therefore the applicant cannot lose title to the said disputed house. He supported his arguments by citing the case of **Omary Yusuf v Rahma Ahmed Abdulkadir (1987) TLR 168.**

Mr. Mgare went on submitting that the applicant has never been a party to any suit between the respondents, as such, evicting him and his tenants from the disputed house without hearing him amounts to condemning him unheard, which is against the principles of natural justice as per the case of **DPP v Sabinis Inyasi Tesha and another (1996) TLR 156.**

In reply, Mr. Chitale submitted that the 2nd and 3rd Respondents have nothing to lose in this case and they are one thing with the applicant and

they are all fighting against 1st respondent. He added that the two respondents were both sued by the 1st respondent in Land case No. 65 of 2009 in which the first respondent won the case through the default judgment. That the 2nd respondent sold the suit house to the 3rd Respondent in 2001, then the 3rd respondent sold the same property to the applicant.

Replying on the issue that the decree holder intends to execute the decree or order fraudulently, Mr. Chitale submitted that the house No. 108 located at Aggrey street in Kariakoo area was part and parcel of the plaint. That this house is on the Plot No. 13 Block 75 Aggrey Kariakoo area and it was referred in paragraph 8 of the plaint. He added that the court in Land case No. 65 of 2009 entered default judgment against the 2nd and 3rd Respondent, this means all prayers including declaratory order that the sale of the suit property from the 1st Defendant to the 2nd Defendant (in the plaint) is illegal was issued. That the decision has not been appealed against until today.

Mr. Chitale submitted further that so long as the default judgment of 11th day of March 2014 that declared the sale of the suit house to the third respondent by the 2nd respondent is illegal stands, it follows therefore the 3rd respondent had no better title in the property capable of transferring to the applicant. He added that in other words the disposition dated 4th April 2014 was illegal. He submitted further that the applicant did not do efforts to discover patent defects underlying the title of Getrude Rwakatare to the property including on-site inspection, ask neighbors of the house on how she owned the suit house. Further that the applicant did not ask her whether the property has any dispute pending in court.

He went submitting that since the applicant had not carried out due diligence search, its then true that the applicant was not heard because at the time the judgment was pronounced on 11th March 2014 the applicant had not purchased the suit house. That he illegally purchased it on 04th April, 2014 while the case was already decided. He concluded that the applicant can recover his money is from the administrator of the estates of late Gertrude Rwakatare. His prayer was that the application be dismissed with costs.

I have considered the records of this application including the parties' submissions thereto; the issue for determination is whether the applicant has any lawful interest over the property to be entitled to the orders sought.

Before I began my determination, I have noted that Mr. Mgare complained that the 1st Respondent did not file his counter affidavit and thus invited the court to proceed to allow the application for being not contested. On my part, the records reveal that the counter affidavit was filed on 30, March 2021, and on 30th April I ordered this application be conducted by way of written submission in the presence of all parties to this suit. The applicant was represented by the counsel who had an audience of addressing the court but did not inform the court that he was not served with the counter affidavit. Therefore, his argument has no merits.

Going into the merits of the application, Mr. Mgare's basis of argument is that the applicant was not a party to the Land Case No. 65 of 2009, and that the 2nd and 3rd respondents do not reside in the suit house. That is the applicant who is occupying his own house. He tendered evidence to prove that he bought the suit house from the 3rd Respondent (Annexure "A" to

the affidavit). On the other hand, Mr. Chitale disputed the allegation and prayed for the dismissal of the application with costs.

I have gone through the record of this application and I must point out on the onset that in an application of this kind (Objection Proceedings) the duty of the applicant under Order XXI Rule 58 of the CPC was to adduce evidence to show that at the date of attachment he had interest in the suit house. It is now for this court to see whether the applicant hadlawful interest at the time of attachment. I also had to call the records of the Land Case No. 65/2009 in due course of investigating this claim.

Going through the records of this application and the Land Case records, I have noted that the 1st respondent filed the Land Case against the 2nd and 3rd Respondent herein on the 18th March, 2009. On the 11th March 2014 this court entered the default judgment against them by granting the plaintiff's prayers following the then defendants' failure to file their written statement of defense. The plaintiff's prayers which were granted by the default judgment were for a declaration that the sale of the suit property by the 1st defendant to the 2nd defendant was illegal and ineffectual. By granting the prayers, it means that the sale of the suit property by the then 1st defendant (2nd respondent herein) to the 2nd defendant (3rd respondent herein) was illegal and ineffectual. This means that the 3rd respondent lost all interest in the suit property. That judgment has never been appealed against, therefore as of today, the sale of the property by the 2nd to the 3rd defendant is a nullity.

The applicant seems to claim his interest in the suit property from the 3rd respondent. He alleges to have purchased the suit property from the 3rd respondent and his evidence was contained in the Collective Annexure A to

the affidavit which includes the title deed and the documents of transfer of right of occupancy from the 3rd respondent to the applicant. The most important question is on the validity of both the sale and the subsequent transfers.

As per the records, the purported sale of the suit property by the 3rd defendant to the applicant took place on the 04th day of April, 2014. As per the records, the Judgment of this Court was delivered on 11th day of March, 2014 which means that by the time the sale took place, the 3rd respondent had no interest in the property because the sale of the property to her by the 2nd respondent which she claims title from, had been nullified since 11th day of March, 2014, a month earlier. At this juncture I am in agreement with the Mr. Chitale that during the sale of the suit house to the applicant herein, the 3rd Respondent had no better title to pass to the applicant. The situation is a pure case of the principle of sale of good in the famous latin Maxim *Nemo dat quod non habet* or no one can give better title than he himself has. This common law rule means that the first person to acquire title to the property is entitled to that property notwithstanding any subsequent sale of the same. Therefore even though there was a sale agreement between the applicant and the 3rd respondent, the party in whose favor the judgment in the Land Case over the same property was, remains the lawful owner of the property despite the alleged subsequent sale. To be more precise the 3rd respondent had no title to pass to the applicant and thus the applicant never acquired any lawful title to the property.

From the above findings of my investigation, the conlusion is that since the 3rd respondent had no better title to pass, the applicant also had not received any title from the 3rd respondent. He cannot therefore succeed in this objection.

On those findings, it is conclusive that there have not been adduced any convincing grounds for this court to alter the order of eviction issued in Execution No. 72 of 2017 arising from Land Case No. 65 of 2009. The application before me lacks merits and it is hereby dismissed with costs awarded to the 1st respondent.

Dated at Dar-es-salaam this 12th day of July, 2021

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S.M. MAGHIMBI.

JUDGE