

**IN THE HIGH COURT OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM**

**MISC. LAND CASE APPLICATION NO. 356 OF 2021**

<b>EQUITY BANK (T) LIMITED</b> .....		<b>APPLICANT</b>
<b>VERSUS</b>		
<b>PROSPER RWEYENDERA</b> .....		<b>1<sup>ST</sup> RESPONDENT</b>
<b>GODFREY MALASSY</b> .....		<b>2<sup>ND</sup> RESPONDENT</b>
<b>CITY CHRISTIAN FELLOWSHIP</b> .....		<b>3<sup>RD</sup> RESPONDENT</b>

(Arising from Execution No. 79 of 2020 and originated from  
Land Case No. 237 of 2004)

**RULING**

**Date of Last Order: 30/11/2021 &  
Date of Ruling: 10/12/2021**

**A.MSAFIRI, J.**

This is the ruling in respect of the objection proceeding filed under Order XXI, Rule 57 (1)(2) and Section 95 of the Civil Procedure Code Cap. 33 R.E 2019. In the Chamber Summons supported by the affidavit of Heri Saburi the Principal Officer for the applicant, the following prayers were advanced;

- 1. That, this Court be pleased to investigate the correctness of the attachment of the landed property on Plot. No. 230, Block D, registered under Certificate of Occupancy on Title No. 171054, located at Sinza Area, in Kinondoni Municipal, Dar es Salaam, in execution of judgment and decree in Land Case No. 237 of 2004 made by 1<sup>st</sup> Respondent.*

*Alu*

2. *That, this Honourable Court may be pleased to order and declare that, the attachment of landed property on Plot No. 230, Block D, Registered under Certificate of Occupancy on Title No. 171054, located at Sinza, Area, in Kinondoni Municipal Dar Es Salaam is void.*
3. *That, this Honourable Court be pleased to postpone the sale pending investigation and issue permanent injunction order against the 1<sup>st</sup> Respondent, and/ or, their agents from attaching for sale the Land in dispute until the mortgage filed under File Document No. 197670 in favor of Equity Bank (Tanzania) Limited, the applicant above is discharged.*

The reason advanced is that the said property is not liable to attachment and sale having been legally mortgaged by the judgment debtor Godfrey Malassy to the objector the Equity Bank (Tanzania) Limited, for the loan to the tune of Tshs. 200,000,000/= which has not yet been discharged. The applicant also prays for an order for the declaration that the attachment and sale of the said mortgaged property is void.

Historically one Prosper Rweyendera, 1<sup>st</sup> respondent sued the 2<sup>nd</sup> and 3<sup>rd</sup> respondents vide Land Case No. 237 of 2004 for vacant possession of Plot No. 932 Block "C" Sinza under Certificate of Title No. 32759 within Kinondoni Municipality. It appeared that the 1<sup>st</sup> respondent leased that premises to the 3<sup>rd</sup> respondent through 2<sup>nd</sup> respondent who is the senior pastor so that to conduct church business. However, relationship between Land Lord and tenants went sour and the matter reaches to the Court and the Court approve the 1<sup>st</sup> respondent prayers by ordering 2<sup>nd</sup> and 3<sup>rd</sup> *Alls.*

respondents to pay him mesne profits, payment of outstanding bills for the utilities consumed and costs of the suit. To act on that the 1<sup>st</sup> respondent filed Execution No. 79 of 2020 praying that a sum of Tsh. 139,000,000/= and costs of execution be realized from the judgment debtors and in default thereof Plot No. 230 Block "D" located at Sinza Area Wami Street which is in the name of Godfrey Malassy being the judgment debtor and senior Pastor of the 3<sup>rd</sup> respondent be attached accordingly to secure the decretal amount. The attachment of the said property is what triggered the applicant to file this application objecting to the attachment of the said property as it is still mortgaged and yet to be discharged.

The only question before this Court is for verification whether the applicant has established to have interest in the subject matter. The affidavit sworn by Heri Saburi, a Principal Officer of the applicant gives the grounds of the application that on 28<sup>th</sup> March 2018, the applicant advanced a loan of Tshs 200,000,000/= to the 3<sup>rd</sup> respondent and it was agreed that the loan shall be secured by the Certificate of Occupancy No. 171054 in the name of Godfrey Emmanuel Malassy and the Mortgage Deed was signed on 6<sup>th</sup> June 2018 and it was registered on 6<sup>th</sup> July 2018 in favour of the applicant. The said loan has never been discharged to date.

The Application was disposed of by way of written submissions, the applicant was represented by Advocate Godfrey Mapunda, 1<sup>st</sup> respondent was represented by Advocate Erick Simon and Advocate Joseph Rutabingwa represented the 2<sup>nd</sup> respondent.

It is a concern by the applicant's counsel Mr. Mapunda that, in case the property, in which she has vested interest as a security for loan to the 3<sup>rd</sup>


*Alb.*

respondent, is attached and sold, the bank will not be able to recover her money, hence, will suffer irreparable loss because she has no any other property from which to recover her money as the mortgage of the Right of occupancy is yet to be discharged.

On the other hand Mr. Erick counsel for 1<sup>st</sup> respondent contested that the applicant has failed to prove that the judgment debtors are not in possession of the attached property as required by the law. The only reason adduced by the applicant is that the attached property is securing a loan granted to the 3<sup>rd</sup> respondent. He is in opinion that the applicant can still recover loan from other properties which were pledged as securities of the loan as mentioned under the letter of offer Annexure TFC-1. He therefore prayed the objection proceedings be dismissed.

Advocate Rutabingwa for the 2<sup>nd</sup> respondent was of opinion that, the legality of the 3<sup>rd</sup> respondent to enter into contract is challengeable as it does not exist as a legal entity and therefore there is a plan to file review against the judgment and decree of the Land Case No. 237 of 2004. The learned counsel further stated that, the property subject to attachment is a residential property and therefore according to the law it cannot be attached for purpose of execution under Section 48 (1) (e ) of the Civil Procedure Code.

The law in objection proceeding is provided under Order XXI Rules 57, 58 and 59 of the Civil Procedure Code, [Cap. 33 R. E. 2019]. For ease of reference, I hereby reproduce;

*"57.-(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 or 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.*

*58. 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.*

*59. 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*

*Atty.*

*order releasing the property, wholly or to such extent as it thinks fit, from attachment."*

In the case of **Dorice Keneth Rwakatare vs. Nurdin Abdallah Mushi and 5 Others**, Miscellaneous Application No. 300 of 2019 (unreported) the High Court held:

*"In an objection proceedings the executing court has an obligation of investigating the claims to see the objector has proved to have possession or interest in the attached property."*

From the thread of authorities above, clearly it is the duty of the applicant to adduce evidence to prove that she has interest in the attached property. Also, it is a duty of the Court to investigate such a claim. From the investigation of facts and evidence in this matter it is my firm belief that the applicant has proved to have interest on the attached property as the security for loan to the tune amount of Tsh. 200,000,000/= upon which the Plot. No. 230, Block D, registered under Certificate of Occupancy on title No. 171054, located at Sinza Area, in Kinondoni Municipal, Dar es Salaam in the name of 2<sup>nd</sup> respondent was set as loan security and registered as a mortgaged property and it is yet to be discharged. I disagree with the counsel for 1<sup>st</sup> respondent Mr. Erick, that the Bank can recover its money from other securities under the Loan Agreement.

In my opinion, this is the weak argument in the sense that, as long as the attached property is mortgaged property which secure money landed to the 3<sup>rd</sup> respondent and giving the fact that bank money is public money, the 1<sup>st</sup> respondent has no option but to look for other property to attach

*Alb.*



so as to secure the decretal amount in Land Case No. 237 of 2004. As for the moment the said mortgaged property not available for attachment until it is fully discharged.

Consequently, the Application is granted. I hereby declare that the landed property on Plot. No. 230, Block D, registered under Certificate of Occupancy on title No. 171054, located at Sinza Area, in Kinondoni Municipal, Dar es Salaam is wholly released from the attachment. It is ordered that the same be released and excluded from attachment in Execution No. 79 of 2020. Each party to bear their own costs.

**It is so ordered.**

Dated at Dar es Salaam this 10<sup>th</sup> day of December 2021.



**A.MSAFIRI**

**JUDGE**