

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

**MISC. LAND APPLICATION NO. 194 OF 2020**

(Arising from Land Case No. 256 of 2013 and Execution No.76 of 2015.)

**VENANCE METOSALA MWAMOTO.....1<sup>ST</sup> APPLICANT  
COMMERCE INTERNATIONAL  
(AFRICA) LIMITED.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**IGNAS ISAAC ZUMBA.....1<sup>ST</sup> RESPONDENT  
SETH MWAMOTO.....2<sup>ND</sup> RESPONDENT  
JOSHUA MWAITUKA t/a  
FOSTERS AUCTIONERS &  
GENERAL TRADERS.....3<sup>RD</sup> RESPONDENT**

Date of Last Order: 12.11.2021  
Date of Ruling: 29.11.2021

**RULING**

**V.L. MAKANI, J**

The applicants have moved this court under Order XXI Rule 57 (1), section 68 (e) and section 95 of the Civil Procedure Code, Cap 33 RE 2002 (The **CPC**) and any other enabling provision of the law, seeking for the following orders:

- (1) *That this Honourable court be pleased to investigate claim or objection that the property viz. Plot No.258, Mbezi Beach Area, Kinondoni Municipality within Dar es Salaam City (the **suit property**) is not liable to the intended attachment and sale by auction by the Respondents.*
- (2) *That the attachment of the property be postponed pending the finalization of such investigation.*

- (3) *Order to be given that the suit property is not liable for attachment and sale.*
- (4) *Costs and any other relief the court shall deem fit and just.*

The application is made under Order XXI Rule 57(1), Section 95 and 68 of the Civil Procedure Code CAP 33 RE 2002 (the **CPC**) and is supported by the affidavit sworn by the 1<sup>st</sup> applicant. It should be noted that it was found by this court that no application by the 2<sup>nd</sup> applicant existed since there was no affidavit filed by the 2<sup>nd</sup> applicant in support thereof. In that respect, and for avoidance of doubt, what remains is the application by the 1<sup>st</sup> applicant supported by his affidavit.

With leave of the court, the application was argued by way of written submissions. Submissions on behalf of the 1<sup>st</sup> applicant were drawn gratis by Mr. N. Saidi, Advocate and filed by the 1<sup>st</sup> applicant. Msengezi and Company Advocates drew and filed submissions in reply on behalf of the 1<sup>st</sup> respondent while MTC Advocates drew and filed submissions in reply on behalf of the 2<sup>nd</sup> respondent.

Submitting for the application, Mr. Saidi gave a brief background of the matter and stated that the 1<sup>st</sup> applicant is the lawful owner of Plot

No.258, Block K, at Mbezi, within Kinondoni Municipality (the **suit property**). He said the 1<sup>st</sup> respondent is seeking to attach and sale the suit property while the applicant was not party to Execution No.76 of 2016 between Ignas Isack Zumba (decree holder) and Seth Mwamoto (judgment debtor). That the value of the suit property is TZS 200,000,000/= much higher than the allowable amount and that the 3<sup>rd</sup> respondent did not follow legal procedure accompanying attachment and sale by auction. He insisted that the 14 days' notice issued by the 3<sup>rd</sup> respondent is inexecutable since the suit property does not belong to the 2<sup>nd</sup> respondent. That there is nowhere under Order XXI Rule 65 (1) of the CPC that provides for attachment and sale of the third party's property. Mr. Saidi said that the applicant in his affidavit proved ownership over the suit premises and the same was not seriously disputed. He said he showed the certificate of sale which stipulated that he bought the suit premises in a public auction held on 06/07/2004 by Majembe Auction Mart. That the said certificate is pleaded in paragraph 3 of the applicant's affidavit and marked as annexure **APLCT A**. That the suit property is still in the name of Commerce International (Africa) Limited because the transfer is yet to be affected; and that Rule 21(1) of the Court Brokers and Process Servers (Appointment, Remuneration and Disciplinary)

Rules 2017 (the **Court Brokers Rules**) provides that the Court Broker is required to serve the judgment debtor with a notice of not less than 14 working days to settle the decretal amount. That since the applicant was not party to the case, he is neither a judgment debtor nor a decree holder as such his property (the suit property) is not liable for attachment and sale.

Mr. Saidi further pointed out that Rule 23 (1) and (2) of the Court Brokers Rules requires the executing officer not to attach property with market value which exceed the value of the decree plus the execution expenses permitted under the rules by more than five per centum. That the executing officer had a duty to conduct valuation to determine market value of the suit premises, such requirement was not complied with. That allowing attachment and sale of the suit property amounts to illegality punishable of the executing officer (3<sup>rd</sup> respondent) under Rule 23 (2) of the Court Brokers Rules.

Counsel further argued that apart from attaching the property which does not belong to the judgment debtor, the 14 days' notice issued did not comply with Rule 21 (1) of the Court Brokers Rules which requires the executing officer to serve the judgment debtor with the

notice of not less than 14 working days to settle the decretal amount or comply with the decree or order as prescribed, prior to the format set out in Form 10 of the First Schedule. He said that the notice required the judgment debtor to vacate the suit property the suit subject of auction. He said that the judgment debtor was not given opportunity to settle the decretal amount or to comply with the decree prior to the carrying out of execution and therefore the notice was rendered incompetent and void. That the sale advertisement in the Sunday News of 05/04/2020 did not specify the property subject of sale. Counsel therefore insisted that the suit property is not subject of the intended attachment and sale. He prayed for grant of the application with costs.

In reply Mr. Msengezi for the 1<sup>st</sup> respondent prayed to adopt the contents of the 1<sup>st</sup> respondent's counter affidavit and said that there are two main issues to be considered in determining the matter at hand; that the applicant's application and its annexures were struck out vide the ruling and drawn order of this Court dated 12/04/2021 and that it is settled law that attachments are not allowed to be annexed in the written submissions. Counsel relied on a number of cases among being the case of **Prismo Universal Italia S.R.L. vs.**

**Termocotant (T) Ltd, Commercial Case No.42 Of 2004 (HC Commercial Division-DSM)** (unreported). He said that 1<sup>st</sup> applicant has attached annexures in his submission contrary to the law and that the said annexures should be disregarded. He said that the 1<sup>st</sup> applicant is not lawful owner of the suit premises as alleged. He said the 1<sup>st</sup> applicant filed this application under the instruction of the 2<sup>nd</sup> respondent with the intent to prevent the decree holder from enjoying the fruits of the decree in Land case No.256 of 2013. That the Certificate of Sale has been fabricated by the 1<sup>st</sup> applicant and 2<sup>nd</sup> respondent who are blood related brothers. That even Majembe Auction Mart is under the 2<sup>nd</sup> respondent and the 1<sup>st</sup> applicant, therefore it is easy for them to fabricate the said Certificate of Sale as if it was legally issued. That if the 1<sup>st</sup> applicant had any interest in the suit premises, he could have objected the said sale from initial attempt through Misc. Application No.26 of 2018 which was also objection proceedings preferred by the 2<sup>nd</sup> respondent/judgment debtor but was decided in favour of the 1<sup>st</sup> respondent/decreed holder. That the 2<sup>nd</sup> respondent having failed to rescue his property through Misc. Application No.26 of 2018 he has now decided to bring his brother, the applicant herein by creating fictitious documents like the said Certificate of Sale in order to prevent the decree holder/1<sup>st</sup>

respondent from enjoying the fruits of the decree. That the Certificate of Sale is deemed to have been issued since 30/06/2004, 17 years to date. That if the applicant was real owner of the suit premises, he could have transferred the same in his own name. That the alleged sickness in his affidavit is unfounded and has not been supported with any proof. He insisted that the property belongs to the 2<sup>nd</sup> respondent as per Annexure IIZ-2. That since Commercial International (Africa) has been struck out from the application, even annexure APL A should not be considered in the determination of the matter at hand. That search in BREALA reveals that the company is not in existence. That a non-existing person cannot own property. He insisted that the suit property belongs to the 2<sup>nd</sup> respondent.

On the validity of the auction, Counsel said that in application for objection it is the duty of the objector to adduce evidence to show that at the date of attachment he had interest in the property attached. He relied on the case of **Kwisa Masa vs. Samwel Mtubatwa [1989] TLR 103** and added that the objector is entitled to prove the property to be sold belongs to him and therefore it is not subject to sale. That the act of challenging the sale procedures instead of claiming ownership reveal that the property is liable for

attachment and sale only and according to him the procedure was not followed. He said it also proves that the applicant has been fronted by the 2<sup>nd</sup> respondent, his brother in attempt to rescue the property. That Rule 23(1) of the Court Brokers Rules is to the effect that the executing officer can proceed with attachment and sale notwithstanding the value of the said property provided that there is an order of the court. That there was an order of the court dated 24/03/2020 therefore the applicant's allegation is bound to collapse. He added that there is nothing on record to justify that the suit property is worth TZS 200,000,000/= as alleged by the 1<sup>st</sup> applicant and that the wording of Rule 23(1) of the Court Brokers Rules does not require executing officer to undertake valuation before attachment and sale. He insisted that 21 days' notice was compiled as shown in **Annexure APL C** to the 1<sup>st</sup> applicant's affidavit. That in the said notice the 3<sup>rd</sup> respondent clearly indicated at paragraph 1 that the 2<sup>nd</sup> respondent must settle the amount owed to decree holder prior to conducting the auction. That the applicant has inserted a copy of the newspaper which is the notice of the auction instead of the properly issued notice (**Annexure APL C**). Counsel thus concluded that the suit property is liable to attachment and sale. He thus prayed for the application to be dismissed with costs.



On his side, the 2<sup>nd</sup> respondent said that he is not the owner of the suit property and that he has no objection to the prayers sought by the 1<sup>st</sup> applicant.

In rejoinder Mr. Said reiterated his main submissions and added that in some cases like the one at hand annexures can be attached to the submissions.

The uncontroverted issue by the parties is that the applicant herein was not a party in the application for Execution No.76 of 2016 between the decree holder (1<sup>st</sup> respondent) and judgment debtor (2<sup>nd</sup> respondent). Investigation of claims and objections is governed by Order XXI Rule 57 to 62 but for purposes of this application Rules 57 to 59 are the ones which are applicable. The said Rules provides as follows:

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

*he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.*

Order XXI Rule 58 of the CPC cited above, requires the 1<sup>st</sup> applicant to either establish interest or possession of the suit property at the date of attachment. The 1<sup>st</sup> applicant herein relied on **Annexure APL B** which certifies that he purchased the suit property at a public auction held on 06/07/2004. The said Certificate of Sale is not

conclusive proof of ownership over the suit premises by the applicant, but rather it depicts the 1<sup>st</sup> applicants' interest in the suit property. The respondent has claimed that the same has been the issue of forgery but that was from the bar and has not been substantiated. In any case the duty of the court in this application is only to investigate the claim as to whether the applicant has any interest over the suit property at the time of attachment. The issue of forgery of the Certificate of Sale can be determined in a separate suit between the parties if they wish to pursue the same.

The most important point to note is that the applicant in such applications must not only prove that he was not party to the application for execution proceedings but he must also establish that the property subject of the execution is not subject of attachment. In this present application the 1<sup>st</sup> applicant has posed a serious doubt vide the Certificate of Sale that the suit property cannot be conclusively owned by the 2<sup>nd</sup> respondent meaning that the 1<sup>st</sup> applicant has interest. In such circumstances therefore, attachment cannot be on a property which is not owned by the 2<sup>nd</sup> respondent who is the judgment debtor. It is trite law that a decree holder cannot

attach a property which is not of the judgment debtor, and as said there are doubts if the 2<sup>nd</sup> respondent is owner of the suit property.

As for the application at hand, the requirement under Order XXI, Rule 58 has been met by the 1<sup>st</sup> applicant establishing his interest in the suit property at the time of attachment. Regarding the validity of the notice of the auction and issuance of notices, I agree that the applicant's duty is only to establish that he had some interest in the suit property at the time of attachment, and since he was not party to the application for Execution No. 76 of 2016, he cannot therefore challenge procedures in the said execution.

Mr. Msengesi stated in his submissions that the annexures in the submissions by the 1<sup>st</sup> applicant should not be considered. But looking at the submissions, the 1<sup>st</sup> applicant has relied mostly on the Certificate of Sale to establish interest on the property which is annexed to his affidavit as **APL B**. Further Mr. Msengesi claimed that the suit property belonged to the 2<sup>nd</sup> respondent and relied on Property Rate Demand Note from TRA (**Annexure II2-2** collectively). However, the Property Rate Demand Note is not proof of ownership of property, and in any case, the said Demand Note

though addressed to the 2<sup>nd</sup> respondent it does not reflect the property subject of the demand. The assumption therefore is that the Demand Note from TRA is not in respect of the suit property. Mr. Msengesi also argued that the 2<sup>nd</sup> applicant is no longer registered with BRELA. However, this assertion is from the bar as it is not substantiated with any proof. In other words, it is not founded on the pleadings as such the court cannot rely on mere averments from the bar.

In the result, I am of the considered view that this application is meritorious, and it is granted with costs. The suit property, namely, Plot No.258, Mbezi Beach Area, Kinondoni Municipality within Dar es Salaam City is not liable for the intended attachment and sale by auction by the respondents and it is hereby released.

It is so ordered.

  
**V.L. MAKANI**  
**JUDGE**  
**29/11/2021**

