

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

MISC. LAND APPLICATION NO. 327 OF 2022

*(Arising from Execution of Decree of the High Court of Tanzania at Dar es Salaam
(Land Division in Execution No. 32 of 2020, originated from Land Case No. 171 of
2014 before this Court)*

**ISAYA ALOYCE LIVETI.....1ST APPLICANT
HASSANI MOHAMED NAMGALULA.....2ND APPLICANT
FURAHINI ADAMU MSHANGAMA.....3RD APPLICANT
HAIDARY MOHAMED KAMBWILI.....4TH APPLICANT
ISAYA LAKONDYEKA.....5TH APPLICANT**

VERSUS

**ASHURA MOHAMED SHENG'ONDO.....1ST RESPONDENT
RAPHAEL MROPE2ND RESPONDENT
HASSANI SAID.....3RD RESPONDENT
WEMA ISSA.....4TH RESPONDENT
HAMIS MZEE.....5TH RESPONDENT
SALUM IDD.....6TH RESPONDENT
T/A KISHE AUCTION MART CO LTD.....7TH RESPONDENT**

Date of Last Order: 20/10/2022

Date of Ruling: 17/11/2022

RULING.

I. ARUFANI, J

The application before the court is an objection proceeding filed in this court by the applicants to object execution order issued by this court in Execution No. 32 of 2020 arising from Land Case No. 171 of 2014. The first respondent being a decree holder in the afore mentioned land case, she filed in this court the mentioned execution proceeding to seek for an

order of evicting the rest of the respondents who are judgment debtors in the mentioned suit from the land in dispute which she was declared is the lawful owner.

It was stated the land in dispute is a land comprised on un-surveyed land located at Kigezi Ward within Ilala District in Dar es Salaam Region which is under the occupation of the applicants who were not party in the Land Case No. 171 of 2014 which the first respondent was seeking to execute its decree. The application is made under Order XXI Rule 57 (1) of the Civil Procedure Code Cap 33, R.E 2019 (hereinafter referred as the CPC). The applicant is praying the court to investigate their claims against the decree issued to the 1st respondent which has an effect of dispossessing them the mentioned land which they have stated they acquired the same lawfully.

The application is supported by affidavits deposed by each applicant and opposed by a counter affidavit deposed by the first respondent. The rest of the respondents did neither appear in the court nor filed their counter affidavit in the court as a result the court ordered hearing of the application to proceed ex parte against them. During hearing of the application, the applicants were represented in the matter by Mr. George Mwalali, learned advocate and the first respondent was represented by Mr. Aaron Lesindamu, learned advocate.

In support of the application the counsel for the applicants prayed to adopt the affidavits of the applicants filed in the court to support the chamber summons as part of his submission. He argued that, the applicants have deposed in their affidavits that the land in dispute belongs to them. He stated the eviction order issued in respect of the Land Case No. 171 of 2014 was issued against the second to seventh respondents who were judgment debtors in the mentioned land case. He argued the applicants were not parties in the mentioned land case and prayed the court to rise and vacate the said eviction order.

He argued that the applicants have filed their affidavits in the court to support the application and they have annexed their sale agreements with their affidavits to prove their ownership to the land in dispute. He stated the first respondent has affirmed at paragraph 4 (a) of her counter affidavit that, the sale agreements of all applicants were entered by the applicants and the original owner of the land in dispute and later on were witnessed by the Chairman of the Street Local Government namely Swalehe A. Swalehe.

He went on arguing that, when the land in dispute were attached in execution of the decree of the court issued in Land Case No. 171 of 2014 the Lands were not in possession of the judgment debtors and submitted the applicants are the owners of the lands in dispute. He referred the court to the case of **Sosthenes Bruno & Another V. Flora Shauri**, Civil

Appeal No. 249 of 2020, CAT at DSM (unreported) where it was stated the objector must establish at the time of attachment, he had some interest in the attached property.

He stated that, after the court being satisfied the objector has an interest in the property the court can grant an order to release the property. He submitted that, as the applicants have shown they are the owners of the land in dispute at the time of attachment of the land in dispute they are praying the court to rise the order of attachment issued by the Deputy Registrar of this court and release their lands.

In reply the counsel for the first responded prayed to adopt the counter affidavit of the first respondent as part of his submission. He stated the application filed in the court by the applicants is incompetent as it is supported by affidavits sworn before an advocate namely Richard R. Madaha who did not insert his full name in the jurat of attestation of the affidavit sworn before him.

He argued it is a requirement of the law as provided under section 8 of the Notaries Public and Commissioners for Oaths, Cap 12 R.E 2019 that, the name of the Commissioner for Oaths is required to be inserted in full in the jurat of attestation of an affidavit. He argued that, the name of the advocate attested the affidavits of the applicants is Peter Richard Madaha but the name inserted in the jurat of attestation of the affidavits

supporting the application is Peter R. Madaha which is not in compliance with the above cited provision of the law.

He went on arguing that, the second applicant has not sworn anywhere in his affidavit as the person sworn his affidavit is Isaya Aloyce Liveti. He prays the court to note that the 2nd applicant has not sworn an affidavit to support his claim and that shows he has failed to support his claim or objection.

He argued further that, the counsel for the applicants has argued that the applicants have interest in the land in dispute measuring 17 acres which is the property of the first respondent. He argued that is not true because there is nowhere stated what is the size of the land claimed by the applicants. He argued further that, there is no evidence to show the second, third and fourth respondent purchased the land in dispute. He stated the fourth applicant has not attached any sale agreement with his affidavit as deposed in his affidavit and stated by his advocate.

He stated further that, although it is stated in the application the name of the fourth applicant is Haidary Mohamed Kambwili but the name appearing in the sale agreement is Haidary Mohamed and there is no affidavit filed in the court to show those are the names of the same person. He went on arguing that, although it is deposed in the affidavit of the fifth applicant that he owns land at Kigezi Chini but there is no any evidence adduced to establish he owns a land at the mentioned area. He

submitted that shows the counsel for the applicants lied before the court that there is a sale agreement of the mentioned applicant annexed in his affidavit.

He submitted that, section 110 (1) of the Evidence Act, Cap 6 R.E 2019 requires whoever is alleging existence of a certain fact he has a duty to prove existence of the alleged fact. He submitted that all five applicants have failed to prove in their affidavits that the sellers of the land they are claiming they purchased had good title to the land in dispute. It is not stated how the sellers of the land in dispute acquired the land in dispute.

He stated the third applicant has attached two sale agreement in his affidavit whereby one agreement shows the land was purchased on 23rd December, 2013 and another one shows the land was purchase on 11th of November, 2018. He argued that, existence of two sale agreements on the same plot raises doubt as to how the same land was bought twice.

He argued that, all the applicants deposed they purchased the land after the first respondent had instituted the case in the court. He submitted that, while the first applicant deposed to have bought his land on 25th April, 2017, the second, third, fourth and fifth applicants deposed to have bought their land on 24th February, 2015. He submitted further that, while the applicants argued to have purchased their lands on the mentioned dates but by that date the first respondent had already

instituted a land dispute before Ilala District Land and Housing Tribunal which was registered as Misc. Land Application No. 85 of 2012 seeking for temporary injunction to restrain any kind of development over the land in dispute.

He went on arguing that, after seeing the value of the subject matter was beyond pecuniary jurisdiction of the District Land and Housing Tribunal, they withdrew the application and filed the suit in this court and registered as Land Case No. 171 of 2014. He stated that, on 14th December, 2018 the first respondent was declared lawful owner of the land in dispute and the said decision has never been challenged anywhere. He submitted that the stated judgment is judgment in rem which means is a judgment against the whole world.

He argued that, although some of the applicants deposed to have purchased the land from one Mrope but the judgment delivered in Land Case No. 171 of 2014 was delivered against the said Mrope who was first defendant in the matter. He argued further that, all five applicants stated their sale agreement were witnessed by one Swalehe S. Swalehe who was the Chairman of the Street Local Government. He argued the said Swalehe S. Swalehe received the office from one Seleman Abdallah Kiyumbo who testified as eighth witness in Land Case No. 171 of 2014.

He submitted that, the said witness stated in his testimony he gave before the court that, he knows the first respondent as the owner of the

land in dispute and stated he worked with a new Chairman entered into the office after him namely Hadija Issa Mwenda to evict the persons who had invaded the land of the first respondent. He went on arguing that, Swalehe S. Swalehe who is the third Chairman into the office knew the truth about who is the rightful owner of the land in dispute but he witnessed the sale agreements of the applicants and stamped them with the stamp of their office while known the applicants are not lawful owners of the land in dispute.

He stated further that, for example the second applicant has two sale agreements. One of them is stamped by local Government Leader and the other one is not stamped. He argued the first respondent prayed the land in dispute to be surveyed on 19th January, 2012 and Abdallah Kiyumbo who was the Chairman of the Local Government by that time forwarded the letter of the first respondent which shows the letter was written before the dates the applicants claim they bought the land in dispute. He submitted the above stated reasons shows the applicants have no good titles over the land in dispute. He stated the first respondent bought the land in dispute on 25th December, 1999 from Ally Salum Gulu and the land is measuring 17 acres. At the end he prayed the application be dismissed with costs for want of legs to stand on.

In his rejoinder the counsel for the applicants stated the counsel for the first respondent has submitted on both points of law and points of

facts. He stated points of law are supposed to be raised and determined before hearing of the matter. He stated that, the size of the lands of the applicants are stated in the affidavit of the applicants and the sale agreements are annexed thereto. He submitted that, the argument that the first respondent was declared lawful owner of the land in dispute does not mean that the applicants cannot file objection in the court because that is allowed by Order XXI Rule 57 (1) of the CPC.

He further argued that, any person whose property or interest has been attached in execution of a decree can institute a suit in the court to claim for his right. He insisted that, the whole land in dispute belongs to the applicants before the court. In conclusion, he prays the court to raise the eviction order issued by the court and release the whole land to the ownership of the applicants as they were not parties to the Land Case No. 171 of 2014.

After going through the chamber summons, affidavits and counter affidavit filed in this court by the first respondent the court has carefully considered the submissions made to the court by the counsel for the parties and find that, before going to the merit of the application it is proper to start with points of law raised by the counsel for the first respondent when he was responding to the submission made to the court by the counsel for the applicants. One of the points of law raised by the counsel for the first respondent is that the advocate who attested the

affidavits of the applicants did not insert his full names in the jurat of attestation of the affidavits of the applicants as required by section 8 of the Notaries Public and Commissioners for Oaths Act.

The counsel for the first respondent stated the advocate who attested the affidavits of the applicants indicated his name is Peter R. Madaha while his complete name is Peter Richard Madaha. The court has found as rightly argued by the counsel for the applicant this point was supposed to be raised as a point of preliminary objection before hearing of the application commenced and is not a point which can be raised in the submission of the counsel at the hearing of the merit of the application.

The court has found that, although the first respondent filed in the court a notice of preliminary objection stating the chamber application is bad in law as it is supported by defective affidavits but when the application came for hearing on 14th July, 2022 the counsel for the first respondent prayed to withdraw the stated notice of preliminary objection from the court and his prayer was granted. As the counsel for the first respondent prayed to withdraw the application and his prayer was granted and the preliminary objection marked withdrawn, he cannot be allowed to raise the same again as the preliminary objection was withdrawn with no order to refile.

The court has also found that, even if it will be taken the said point of preliminary objection could have been raised after being withdrawn from the court but the court has failed to see any merit in the said point and is trying to make a mountain out of a mouse mound. The court has arrived to the stated finding after seeing there is nowhere under section 8 of the Notaries Public and Commissioners for Oaths Act stated an advocate attesting an affidavit is required to insert his full name in the jurat of attestation of an affidavit and if his name is not inserted in full in the jurat of attestation it will render an affidavit defective. For clarity purposes the cited provision of the law states as follows: -

*"Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act **shall insert his name** and state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made"*
[Emphasize added).

From the wording of the above quoted provision of the law it is crystal clear that, what the commissioner for oaths attesting an affidavit is required to do is to insert his name in the jurat of attestation and there is nowhere stated he is required to insert his full name so that it can be said if he has not inserted his full name the affidavit will be defective. The court has found that, as the full name of the advocate attested the affidavits of the applicants is Peter Richard Madaha and it has not been stated the name of Peter R. Madaha he inserted in the jurat of attestation

of the affidavits of the applicants is not his name the court has found the point of law raised by the counsel for the first respondent is devoid of merit.

Back to the merit of the application the court has found that, as the application before the court is made under Order XXI Rule 57 (1) of the CPC it is proper to have a look on what is provided under the cited provision of the law. The cited provision of the law states as follows: -

"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."

From the wording of the above quoted provision of the law it is crystal clear that, a person who is not a party to a court proceeding is permitted to access the court to object attachment of a property he thinks he has an interest. After the objection being filed in the court, the court is required to investigate the claim of the objector or claimant as if the objector or claimant was a party to the suit upon which the attachment order was issued. The above view of this court is getting support from the

case of **Sosthenes Bruno & another** (supra) where it was stated as follows: -

*"... Order XXI Rule 57 (1) provides for two different aspects; **one**, an objector, a third party to the court proceedings, is permitted to access the court to object to any attachment of the property in which he has interest, and; **two** the rule vests jurisdiction in the court that passed a decree to hear the objector on his objection as if he was a party to the suit."*

The court has also found that, despite the fact that the court is tasked to investigate a claim or objection filed in the court by a claimant or an objector who was not a party in a suit but Rule 58 of Order XXI of the CPC casted a duty of proving interest to the property to the claimant or objector. When discussing the stated provision of the law, the Court of Appeal stated in the case of **Sosthenes Bruno & Another** (supra) that:-

*"The next rule, which is rule 58 of that Order, provides that after preferring the objection before the court, the applicant has a duty to prove either of the two facts in respect of the property subject of attachment. **One** is his interest in the property or; **two** alternatively, he must prove that at the time of attachment, he was in possession of the property attached."*

While being guided by the position of the law stated hereinabove the court has found the applicants have stated in their chamber summons that they are urging the court to investigate their ownership to the land in dispute. The applicants who filed their affidavits in the court to support

the chamber summons and to prove their ownership to the land in dispute deposes at paragraphs two of their affidavits that they purchased their lands on different dates from different persons mentioned in their affidavits.

Their affidavits are accompanied by sale agreements they stated they used to purchase the land in dispute. After carefully reading the affidavits of the applicants and after considering the submissions from the counsel for the parties the court has found there are some doubts in the claims of ownership of the applicants to the land in dispute. In order to be able to see the said doubts the court has found proper to deal with evidence of each applicant as adduced in the affidavits filed in the court to support the application of the applicants.

Starting with the first applicant namely Isaya Aloyce Liveti the court has found he deposes at paragraph 2 of his affidavit that, he purchased the land is arguing is his property from Kelvin Raphael Juma Mrope on 11th February, 2014. He deposed he purchased the stated land at the price of Tshs. 600,000/= and the sale agreement was witnessed by Selemani Juma who was ten cell leader of the area where the land in dispute situates and on 25th April, 2017 the sale agreement was witnessed by Swalehe S. Swalehe.

The court has found that, although the first applicant deposes in his affidavit that he purchased the land in dispute from the mentioned vendor

but there is no any evidence from either the seller of the land namely Kelvin Raphael Mrope or the ten cell leader namely Selemani Juma or Swalehe S. Swalehe who witnessed the alleged sale agreement annexed to the affidavit of the first applicant to support his claim or objection.

The court has also found that, there is no sale agreement annexed to the affidavit of the first applicant to support his evidence that he purchased the land from the mentioned seller on 11th February, 2014 as he deposed at paragraph 2 of his affidavit. The court has found the sale agreement annexed in his affidavits which he deposed was witnessed by Swalehe S. Swalehe is the copy of the sale agreement he stated was witnessed on 25th April, 2017 which is not even easily readable.

The court has failed to understand why sale of the land to the first applicant was done twice on different dates and before two different witnesses. If it will be said the first sale agreement was entered before the ten cell leader and the second sale agreement was just affirming the previous sale agreement but the court has failed to understand why the date of buying the land in dispute in the alleged two sale agreements are different. To the view of this court the first applicant was supposed to give explanation in relation to the stated discrepancies and to bring to the court evidence of the person sold the land to him or his witnesses to prove the root of the interest is alleging he has on the disputed land.

As the first applicant has not done what is stated hereinabove the court has come to the view that, it cannot be said he has managed to discharge his duty of showing he has some interest or he is in lawful possession of the land in dispute as provided under Rule 58 of Order XXI of the CPC. The stated requirement is also being supported by the requirement provided under section 110 (1) of the Evidence Act which states that, whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

Coming to the second applicant namely Hassan Mohamed Namgalula the court has found that, as rightly argued by the counsel for the first respondent, the second applicant has not adduced any evidence to prove his interest or possession to the land in dispute. The court has come to the stated finding after seeing the affidavit purported to have been made by the second applicant to support his claim or objection was not affirmed by the second applicant who made the stated affidavit but it was affirmed by Isaya Aloyce Liveti who is not the one made the stated affidavit.

That stated situation caused the court to find the affidavit purported to have been made by the second applicant to support his claim or objection is incurably defective for not been properly attested at the jurat of attestation. The court has found the position of the law in relation to an affidavit which its jurat of attestation is not properly attested as stated

in the case of **D. P. Shapriya & Co. Ltd V. Bish International B. V.** [2002] E.A 47 cited in the case of the **Director of Public Prosecution V. Dodoli Kapufi & Another**, Criminal Appeal No. 11 of 2008, CAT at DSM (unreported) is very clear that, it renders an affidavit incurably defective. As the affidavit of the second applicant is incurably defective and as there is no any other evidence to support his claim or objection it cannot be said he has managed to discharge the duty of substantiating his claim or objection provided under the law.

As for the third applicant namely Furahini Adamu Mshangama the court has found he deposes at paragraph two of his affidavit that he purchased his land from one Habibu S. Rashia on 23rd December, 2013 and their sale agreement was witnessed by one Borafia Mzee. He stated on 24th April, 2015 the sale agreement was also witnessed by the Street Chairman namely Swalehe S. Swalehe. The court has found as it is for the first and second applicants, third applicant has not adduced before the court any evidence from either the person sold the land to him or the persons witnessed the land being sold to him. The court has found as rightly argued by the counsel for the first respondent it was incumbent upon the applicants to bring to the court the evidence of the mentioned persons to establish his root of title in the land in dispute.

Going to the fourth applicant namely Haidary Mohamed Kambwili the court has found he deposed at paragraph two of his affidavit that he

purchased his land from Habibu S. Rashia on 23rd December, 2013 in a consideration of Tshs. 1,000,000/= . He stated their sale agreement was witnessed by one Borafia Mzee and on 24th April, 2015 the sale agreement was witnessed by the Street Chairman namely Swalehe S. Swalehe. As it is for the first, second and third applicants neither the vendor nor witnesses of the sale agreements whose evidence was adduced before the court by the fourth applicant to support his claim or objection.

The court has also found there is contradictions from the facts deposed in the affidavit of the fourth applicant and what is written in the copy of the sale agreement annexed in the affidavits of the applicants. The court has found that, while the fourth applicant deposed at Paragraph two of his affidavit that he purchased the land in dispute from Habibu S, Rashia on 23rd December, 2013 at the consideration of Tshs. 1,000,000/= but he also deposed at paragraph three of the same affidavit that he purchased the land in dispute from Seleman Jumanne on 16th August, 2012 and the sale agreement was witnessed by Swalehe S. Swalehe who was the Street Chairman in 2016.

The court has also found that, the copy of the sale agreement annexed in the affidavits of the applicants shows the fourth applicant bought his land from Seleman Jumanne at a consideration of Tshs. 1,800,000/= . The court has found the stated contradictions are very serious and they are raising great doubt in his claim or objection. As there

is no explanation given to clear out the stated contradictions the court has found it cannot be said the fourth applicant has managed to prove his interest or possession to the land in dispute as required by the law.

As for the fifth applicant namely Isaya Lakondyeka the court has found that, he deposes at paragraph two of his affidavit that he purchased the land in dispute on 23rd December, 2013 from one Habibu S. Rashia at the price of Tshs. 1,000,000/=. He deposed the sale agreement was witnessed by one Borafia Mzee and on 24th April, 2015 the sale agreement was witnessed by Swalehe S. Swalehe. However, as rightly argued by the counsel for the first respondent there is no any sale agreement annexed in the affidavits of the fifth applicant as argued by his advocate to support his claim or objection.

Besides, and as it is for the rest of the applicants there is no any evidence from the vendor of the land or persons witnessed his sale agreement brought to the court to support his claim or objection. As there is no such evidence the court has found it cannot be said the fifth applicant has managed to prove the claim or objection, he has filed in this court to object execution of the decree of the court. The court has found the duty of the applicants as objectors to prove their interest in the property against which the eviction order was issued was emphasized in the case of **Kwiga Masa V. Samwel Mtubatwa**, [1989] TLR 103 where it was

held that, the burden of proving interest in objection proceedings is on the objector.

The court has also found the counsel for the first respondent argued in his reply to the submission by the counsel for the applicants that, although the applicants alleged to have purchased the land in dispute from various vendors but the time the applicants states they bought the land in dispute the first respondent had already bought the land in dispute from 1999 and she had instituted Land Application No. 85 of 2012 at the District Land and Housing Tribunal for Ilala District at Ilala seeking for temporary injunction to restrain any development or anything to be done on the land in dispute.

The court has been of the view that, as the said argument was not disputed by the counsel for the applicants and as the applicants deposed in their affidavits that, they purchased their land in dispute from 2013 onwards it cannot be said they have managed to establish they have lawful interest in the land in dispute which is required to be protected by this court.

The court has considered the further argument by the counsel for the first respondent that Mrope who sold the land in dispute to some of the applicants was a party in the matter filed at the tribunal and Swalehe S. Sawelehe was a witness in the Land Application No. 71 of 2014 but find there is no any evidence or record availed to the court to support the

stated argument. In the premises the court has found it will not be safe to rely on the said argument as there is no sufficient material in the record of the application to support the same.

In the light of all what have been stated hereinabove the court has found the applicants have not managed to satisfy the court there is sufficient evidence to prove their interest or ownership over the land in dispute so as to move the court to raise the order of eviction issued by the court in Execution No. 32 of 2020. Consequently, the claim or objection filed in this court by the applicants is hereby dismissed in its entirety for being devoid of merit and the costs to follow the event. It is so ordered.

Dated at Dar es Salaam this 17th day of November, 2022



I. Arufani

JUDGE

17/11/2022

Court:

Judgment delivered today 17th day of November, 2022 in the presence of all applicants save for the second applicant and in the absence of all respondents. Right of appeal to the Court of Appeal is fully explained to the parties.



I. Arufani

JUDGE

17/11/2022