IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 271 OF 2021

(Arising from the ruling and drawn order of the District Land and Housing Tribunal for Ilala at Ilala in Misc. Land Application No. 675 of 2020 Hon. Mgulambwa-Chairperson)

ERASTO BONIFACE ..... APPELLANT

VERSUS

THABITA SANGIWA MAKARANGA.....1ST RESPONDENT

TRESFORY WILLIAM MAGELLA.....2ND RESPONDENT

Date of last order: 18/7/2022

Date of Judgment: 2/8/2022 & 11/8/2022

JUDGMENT

A. MSAFIRI, J.

Before the District Land and Housing Tribunal for Ilala District at Ilala (hereinafter referred to as the trial Tribunal), the above named appellant instituted Land Application No. 54 of 2018 against the respondents herein, claiming for reliefs *inter alia* that the 2nd respondent had breached sale agreement which was executed on 5th November 2012.

It is on record that the appellant and the 2nd respondent entered into an agreement sometimes on 5th November 2012 for sale of a house situated at Tembo Mgweza Tabata Kisukuru-Kimanga area Ilala Municipal (the disputed premises). According to the said agreement, the 2nd respondent was to sale the disputed premises to the appellant at the tune of Tsh 50,000,000/=, whereby a sum of Tsh 40,000,000/= was instantly paid and the remained amount was required to be paid in two installments.

The appellant managed to pay only Tsh 42,500,000/=. It is to be borne in mind that the 2nd respondent was still in occupation of the disputed premises while awaiting for the appellant to pay the full price. It is further discerned from the record that, sometimes later the appellant received a phone call from the area cell leader that the 1st respondent had evicted the 2nd respondent from the disputed premises and she (the 1st respondent) was in occupation of the disputed premises. The appellant therefore visited the suit premises and found the 1st respondent living in the disputed premises.

The appellant reported the matter to the police at Pangani whereby the 2nd respondent was arrested and admitted to sell the disputed premises to the appellant but there were other two people who had also purchased

the disputed premises. It was further revealed that the 2nd respondent was later imprisoned.

Now, following that state of affairs, the appellant instituted the Land Application No. 54 of 2018 against the respondents as stated before. The said application proceeded *ex parte* against the respondents as they did not enter appearance. At the end, the trial Tribunal ordered the 2nd respondent to refund the sum of Tsh 42,500,000/= he had received from the appellant.

The trial Tribunal in its judgment stated that the appellant was not entitled to be declared as a lawful owner of the disputed premises because no title to the property had passed to the appellant because he did not pay in full the purchase price as agreed hence the 2nd respondent was entitled to dispose the disputed premises.

Having a decree on his hand entitling him to Tsh 42,500,000/= from the 2nd respondent, the appellant initiated execution process against the respondents before the trial Tribunal. The mode of execution preferred was to attach the disputed premises and dispose the same so as to satisfy the

decree. Fosters Auctioneers & General Traders were appointed to carry out the attachment and execution process.

The 1st respondent became aware of the intended attachment hence she immediately lodged Application No. 675 of 2020 before the trial Tribunal asking it to release the disputed premises because it is her lawful property and she legally purchased the same from the 2nd respondent hence it was not liable for attachment.

After hearing the parties, the trial Tribunal released the disputed premises from attachment for the reason that the same could have not been attached because it was not the property of the 2nd respondent. The appellant was therefore advised to find another property of the 2nd respondent.

That decision did not amuse the appellant hence he preferred the present appeal to challenge the decision of trial Tribunal in Application No. 675 of 2020 of releasing the disputed premises from attachment. The appellant has raised a total of five grounds of appeal which can be conveniently summarized as follows;

1. *The application was incompetent for being supported by an incurably affidavit, as well as being preferred under wrong provisions of the law.*
2. *The trial tribunal erred in law for deciding the case basing on evidence which was not tendered during the trial.*
3. *The trial tribunal erred in releasing the disputed premises which was under attachment.*
4. *The trial tribunal erred in declaring the 1st respondent as a lawful owner of the disputed premises.*

Hearing of this appeal proceeded by written submissions. Messrs Eliezer Kileo and Bitaho Marco learned advocates appeared for the appellant and the 1st respondent respectively. The 2nd respondent did not enter appearance.

The appellant contended that the application before the trial Tribunal was defective for having an affidavit which contravenes section 8 of the Notary Public Act, Cap 12 which requires the Commissioner for Oaths to insert the name and at what place and on what date the oath was taken. Failure to comply with the law renders the application incompetent. To fortify his point the appellant has referred to me the case of **Joseph**

Thomas Temu & 2 others v Yohana Thomas Tengere and another, Misc. Civil application No. 44 of 2018 (unreported).

The appellant submitted further that the affidavit offended Sections 5 and 10 of the Oaths and Statutory Declarations Act [CAP 34 R.E 2019] which requires that a Commissioner for Oaths to state clearly on the jurat on how he or she came to know the deponent. According to the applicant the affidavit in support of the application subject of the present appeal did not comply with the requirement of the said provisions hence it ought to have been struck out.

Similarly, the appellant faulted the application because it was preferred under wrong and inapplicable provisions of the law. According to the applicant, the Application No. 675 of 2021 was preferred under Order XXXVII Rule 1 (a) and (b) and Section 95 of the Civil Procedure Code [CAP 33 R.E 2019], (the CPC). The said provisions are for temporary injunction and hence were inapplicable to the application before the trial Tribunal.

The appellant submitted further that the application ought to have been preferred under Regulation 22 (c) of the Land Courts Disputes Act Regulations and not Order XXXVII Rule 1 (a) and (b) and Section 95 of the

CPC. The appellant submitted further that the appropriate prayer ought to have been stay of execution and not injunction as it was before the trial Tribunal.

On reply, the 1st respondent stated that the application before the trial Tribunal was proper and it was indicated where the oath was taken. Similarly it was not the duty of the applicant to show where the oath was taken rather it was the duty of the Commissioner for Oath, the 1st respondent contended. The 1st respondent did not say anything whatsoever regarding the provisions of the law which were cited in the application.

On rejoinder the appellant essentially reiterated what he submitted in his submission in chief.

In addressing the first ground of appeal, which essentially touches on the competency of the application preferred by the 1st respondent which resulted in releasing of the disputed premises from attachment, I have keenly gone through the trial Tribunal's record and found that the appellant had raised similar objections but the same were overruled by the trial Tribunal. I will start with the issue of enabling provisions of the law.

As rightly pointed out by the appellant the objection by the 1st respondent ought to have been preferred under Regulation 22 of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, GN 174 of 2003 (the Regulations) and not order XXXVII, Order XXI Rules 57 (1) and (2) and 59 of the CPC.

Order XXI Rules 57 (1) and (2) and 59 of the CPC, deals with objection proceedings arising from the attachment and it is an avenue available to a stranger of the case to challenge the attachment in the process of execution. The decision arising from such objection is not appealable rather a fresh matter has to be instituted to establish a right over the matter.

Regulation 22 of the Regulations gives powers to the Tribunal to determine objection arising from execution. Unlike under Order XXI Rules 57 (1) and (2) and 59 of the CPC which is applicable for stranger to a case, Regulation 22 of the Regulations is available to the judgment debtor who wish to object the execution process and unlike to the former whose decision is not appealable, in the latter the aggrieved party may prefer an appeal against such a decision arising from the execution, (see Regulation 24 of the Regulations).

I am of the settled opinion that the omission in citing the enabling provisions of the law did not prejudice the appellant as he was very much aware of what was before the court. Wrong citation of the enabling provision of the law did not invalidate the matter before the trial Tribunal because still the jurisdiction to entertain the matter existed. The same goes to the complained defectiveness of the jurat of attestation, I hold that the appellant was not in anyhow prejudiced. It is for that the reason I dismiss the first the ground of appeal.

I will determine the rest of the grounds together. They essentially revolve around the propriety of releasing the disputed premises from attachment.

In totality in grounds 2, 3, 4 and 5, the appellant complains on the order of the trial Tribunal in declaring the 1st respondent as the lawful owner of the disputed premises basing on unreliable evidence which was not tendered before it during the main application. The appellant also was discontented in releasing the disputed premises, holding that the same was liable for attachment, also the appellant faults disputed premises that was not legally under the 1st respondent's possession.

The appellant has submitted that the 1st respondent did not challenge the judgment in the original application namely Land Application No. 54 of 2018. According to the appellant the trial Tribunal did not make any order in favour of the 1st respondent. Neither did the 1st respondent made documentation in respect of the disputed premises, hence she could not have legally claimed to own the disputed premises.

On the other hand, the 1st respondent has strongly submitted that parties were given right to be heard and that she was able to establish ownership of the disputed premises. The 1st respondent submitted further that the 2nd respondent is no longer in occupation of the disputed premises and the same passed to the 1st respondent after the appellant had failed to pay the purchase price. Hence the trial Tribunal rightly released the property from attachment, the 1st respondent contended.

Having gone through the submissions of the parties in respect of the 2nd, 3rd, 4th and 5th grounds of appeal, I think the fundamental issue that needs to be determined is whether the disputed premises could have been properly attached for execution purposes.

It is discerned from the record that, before the appellant had lodged Application No. 54 of 2018 he was very much aware that the disputed premises had already been disposed to the 1st respondent by the 2nd respondent herein. This is because the appellant testified to have visited the disputed premises and found the 1st respondent in actual occupation of the disputed premises and that is why he lodged the application before the trial Tribunal against both the respondents and among the reliefs he prayed was declaration that the sale agreement between the 1st and 2nd respondents over the disputed premises was illegal because the disputed premises had already been disposed to the appellant. It follows therefore that, there was no dispute looking at the circumstance of the matter, although the 1st respondent never testified as the matter went *ex parte* against her, she purchased the disputed premises and she was in actual occupation of the same as clearly admitted by the appellant himself.

Now, as stated before, the appellant prayed for nullification of the sale agreement between the respondents but at the end the said sale agreement was not nullified as prayed for by the appellant instead it was ordered by the trial Tribunal that the appellant be refunded by the 2nd

respondent the purchase price he had paid. Nothing was ordered in respect of the 1st respondent.

I am of the settled view that the 1st respondent had nothing to challenge in the said judgment as alluded to by the appellant rather it was the appellant if aggrieved who was required to challenge the same but because he did not challenge the said judgment, the same stands.

The appellant has faulted the trial Tribunal for releasing the disputed premises from attachment. To me after looking at the matter, the trial Tribunal rightly ordered the release of the disputed premises from attachment following an objection from the 1st respondent. This is because first, there was no objection from the 2nd respondent that he sold the disputed premises to the 1st respondent when the latter lodged her objection. Also the fact that the 1st respondent had purchased the disputed premises was not new to the appellant, he was aware even before the main application (Application No.54 of 2018) was lodged before the trial Tribunal.

Similarly the sale agreement between the respondents which the appellant prayed to be nullified was not nullified. The sale agreement

which was produced by the 1st respondent in her objection was just to support the appellant's claim that she indeed purchased the disputed premises.

The trial Tribunal advised the appellant to look for another property for execution, and so rightly in my view the appellant instead of coming to this court he should have complied with that advice or resort to other modes of execution to satisfy the decree of the trial Tribunal against the 2nd respondent.

In the final analysis I find the appeal lacking in merits and it is hereby dismissed in its entirety with costs.

Right of Appeal explained.

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A. MSAFIRI,

JUDGE

11/8/2022