

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 646 OF 2021

(Originated from Execution/Misc. Land Application No. 68 of 2017)

HIZZA ABDUL HOZA.....APPLICANT

VERSUS

**THE REGISTERED TRUSTEES OF TANZANIA SOCIETY FOR THE
PRESERVATION AND CARE OF ANIMALS.....1ST RESPONDENT**

DASSU MOHAMED MUSSA (the Legal personal Representative of the late

AL- HAJJ MOHAMED MUSSA..... 2ND RESPONDENT

Date of last order: 25/7/2022


Date of ruling: 11/8/2022

RULING

A. MSAFIRI, J.

This is the second ruling on preliminary objection raised by the 1st respondent. It is on record that initially the 1st respondent raised an objection that the present application is time barred. I overruled the said objection but on 13th July 2022, the 1st respondent raised another objection to the effect that;

That this application is misconceived to be brought under

Order XXI R. 57 (1) of CPC CAP 33 R.E. 2019 as there is 

no any pending attachment, so should be dismissed with costs.

In the instant application which was lodged in Court by the applicant on the 19th day of November 2021, under Order XXI Rule 57 (1) of the Civil Procedure Code [CAP 33 R.E 2019 (the CPC), for the following orders;

- i. That this Honourable Court may be pleased to restrain the 1st respondent from making execution on Plot No. 47 Block 40 Hananasif, Kinondoni, Dar es Salaam pending investigation of the objector's claim.*
- ii. That this Honourable Court may be pleased to investigate the Applicant/Objector's objection and investigate the legality of the acts of the 1st respondent who in Execution/ Misc. Land Application No. 68 of 2017 is making such execution on Plot No. 47 Block 40 Hananasif Kinondoni and may the Court proceed to release Plot No. 47 Block 40 from the execution and order the 1st respondent to do the said execution on Plot No. 40 Block 40, Hananasif as per the judgment of the Court in Land Case No. 133 of 2013.*
- iii. Costs of this application.*

Atle

- iv. *The applicant may be granted any other incidental reliefs that the Court may deem just to grant.*

The application has been taken at the instance of the applicant and it is supported by an affidavit affirmed by Hizza Abdul Hoza, the applicant herein.

The above preliminary objection was disposed of orally. When the matter was fixed for hearing of the preliminary objection on 25th July 2022, Ms. Catherine Mzava, Messrs Henry Kishaluli and Reginald Shirima learned advocates, appeared for the applicant, 1st and 2nd respondents respectively.

Mr. Kishaluli submitted that the present application is incompetent before the court for being brought under wrong provision, as there is no any attachment before the Court. Mr Kishaluli contended further that as per item (ii) of the chamber summons there is nothing which the Court can release.

It was further contended that, the objection proceedings can only be brought when there is an order for attachment. This is under Order XXI Rule 57 (1) of the CPC, and the remedy is the property attached to be released. Mr. Kishaluli contended further that the most important ingredient is the attachment and this is only when the Court can

Alls.

investigate on the same. In the absence of attachment order makes this application to be incompetent before this Court. To fortify his stance, Mr. Kishaluli referred to me the decision of **TANESCO v IPTL & 2 others** [2000] TLR 324. Hence it was the prayer by the learned advocate that the present application be dismissed with costs.

On reply, Ms. Catherine contended that this application is properly before the Court and it can be filed anytime where it is discovered that the property which was not subject to the decree is subjected to the attachment in future or in any execution proceedings.

Ms. Catherine submitted further that the applicant has decided to bring this application because the execution has gone contrary to the judgment of the Court in Land Case No. 133 of 2013 in which the subject matter of the dispute is on property on Block No. 47 Plot No. 40 and not Plot No. 47 Block No. 40.

Ms. Catherine contended that there is a likelihood of the applicant to be evicted that is why the present application was preferred.

On rejoinder Mr. Kishaluli learned advocate reiterated his submission in chief and contended further that the objection proceedings shall be done only when there is attachment.

Alls.

Having gone through the submissions in support and rival to the preliminary objection raised by the 1st respondent, the point for my determination is whether the said objection has merits.

To appreciate the nature of the application at hand, I have gone through the record and the following are brief facts, the 2nd respondent herein instituted Land Case No. 133 of 2013 against the 1st respondent claiming for the reliefs *inter alia* that the house No. 47B on Plot No. 40 situated at Kinondoni District, Dar es Salaam (the suit premises) forms part of the estate of the late Al Hajj Mohamed Mussa. At the hearing of the matter three issues were formed as to whether the 2nd respondent is the lawful owner of the suit premises.

Having heard the parties, on 31/7/2015 this Court dismissed the suit for lack of merits and the 1st respondent was declared as a lawful owner of the suit premises having purchased the same from the National Housing Corporation (NHC).

It is on record that on 27/9/2017, the 1st respondent instituted an application for execution of the decree in Land Case No. 133 of 2013 the mode of execution being the eviction of the 2nd respondent from the suit premises. It is borne out of the record that the 2nd respondent lodged *Appls.*

notice of intention to appeal to the Court of Appeal of Tanzania as well as an application for stay of execution of the decree which was granted by the Court of Appeal on 21st October 2020 with the condition that the 2nd respondent deposit a sum of Tsh 30,000,000/=.

Back to the present application having seen the prevailing circumstance, the law on which the applicant has brought this application is Order XXI Rule 57(1) of the CPC. The said provision provides;

*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: [Emphasis added].*

From the foregoing provision, an application can be preferred under the said provision where there is a property which has been attached in the execution of a decree and the property so attached is not liable for attachment. Where the Court is satisfied that such property so attached is

Atts.

not liable for attachment, the remedy is to order the release of the said property under Order XXI Rule 59 of the CPC.

The issue now is whether there is any property attached by the Court in the execution of a decree arising from the matter at hand. As of now the application for execution is still pending in Court and the same is yet to be heard. There is no any order issued for the attachment of the disputed property let alone the attachment itself. As rightly submitted by Mr. Kishaluli, the application could have been preferred only if there is an attachment of the disputed property which would have called the Court to investigate.

With respect, I do not agree with Ms. Catherine that an application under Order XXI Rule 57 of the CPC can be made at any time. It can only be made where there is not only an order for attachment but also the property in question is indeed attached. The applicant should have waited for the determination of the application for execution and if any of his property which is not liable for attachment becomes attached he then could have prefer the present application. The present application is premature as there is no any attachment made. *Alls.*

Consequently that said and done, I hold that present application has been pre-maturely filed in this Court. Mr. Kishaluli prayed for dismissal of the same, but as the application has not been determined on merits the same cannot be dismissed rather it can only be struck out as I hereby do with costs.

It is so ordered.



A handwritten signature in blue ink, appearing to read "A. Msafiri". The signature is written in a cursive style and is positioned above a horizontal dotted line.

**A. MSAFIRI,
JUDGE
11/8/2022**