

TANZANIA / JUDGMENT

helen kishiwa vs denisa tebuye others

2018 tzhclandd 38 2 february 2018

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TANZLIIDECIDED
2 February 2018

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM MISCELLANEOUS
LAND CASE APPLICATION NO. 374 OF 2016 (Arising from Land Case No. 137 of 2013) HELENA
KISHIWA.....APPLICANT VERSUS DENISA
TEBUYE..... 1st RESPONDENT GIDION
TEBUYE.....2nd RESPONDENT AGREY
KISHIWA..... 3rd RESPONDENT IGALULA AUCTION MART LTD & COURT
BROKER..... 4TH RESPONDENT

RULING

24/ 11/2017 & 15/2/2018 MZUNA, J.: The applicant has filed this application against the said respondents seeking for the following orders:-

1. That this Honourable court be pleased to issue an interim order staying execution of the decree by attachment and sale of the house No. 376 on Plot No. 701 Block "A" Kijitonyama kwa AH Maua in Kinondoni Municipality. i
2. That this Honourable court be pleased to release the House No. 376 on Plot No. 701 Block "A" Kijitonyama kwa AH Maua in " Kinondoini Municipality from attachment.
3. That this Honourable court be pleased to investigate into the matter.
4. Costs of this application and
5. Any other relief (s) this Honourable court may deem fit and just to grant The application is made under Order XXI Rule 57, 58 and section 95 of the Civil Procedure Code (Cap. 33 R.E. 2002), and any other enabling provisions of the law. At the hearing the applicant was represented by Mr. Mabera, the learned advocate while the 1st and 2nd respondents were represented by Mr. Sekule, the learned advocate. The 3rd respondent appeared in person as for the 4th respondent, the matter proceeded ex parte. The argument raised by the applicant's counsel as per the filed affidavit deposed by Helena Kishiwa is that this court entered judgment in Land Case No. 137 of 2013 in favour of the 1st and 2nd respondent as against the 3rd respondent. The said respondents have filed an application for execution and this application is meant to stay execution of the house on Plot No. 701 Block "A" Kijitonyama

kwa Ali Maua in Kinondoini Municipality which does not belong to the 3rd respondent, the judgment debtor. She says it belongs to the beneficiaries of the late Kishiwa Nyalagi Kishiwa who passed away in 1999 to which the applicant is the appointed administratrix since 2011. That the 3rd respondent despite being among the seven beneficiaries, had already been given his share. That according to the official search the house belongs to Julius M. N. Nkanda who sold it to Mr. Kishiwa Nyalagi Kishiwa and there is proof that the applicant paid the last payment. Both have already passed away. In essence, the argument raised by the applicant's counsel is that the attachment of the property which does not belong to the 3rd applicant should not be allowed to stand. Mr. Sekule the learned counsel has submitted that there is wrong citation because the cited Order XXI Rule 57, 58 and 59 together with S. 95 are irrelevant in an application for stay of execution. That even assuming the application is properly cited, still the court cannot stay the execution of a decree because that is the remedy granted by the Court of Appeal in view of the clear provision of Order XXI Rule 24 of the Civil Procedure Code, Cap 33 RE 2002. That so long as there is already an attachment issued by the District Registrar, there is no application for an interim order which would otherwise be granted under section 68 (e) and section 95 of the CPC. As for the application to investigate on the matter it was his view that there must be proof that she has interest on the matter and that she was not aware on the existence of the suit in court. He is of the opinion that the application is improperly cited because section 57 of the CPC has sub sections (1) and (2). 3 That there is no triable issue as even the name of the deceased differs with the one which appears in the death certificate where it reads Alexander Nyaragi Kishiwa while they allege the name of the deceased is Kishiwa Nyalagi Kishiwa. It is not clear according to the learned counsel that whom did she stand as the administratrix? That there has never been a transfer of the property to be in the name of the beneficiaries in exclusion of the 3rd respondent. He further raised his concern that it is surprising that the same person whom they say had his share still continues to receive rent as the landlord of the 1st and 2nd respondent. That he made eviction which gave rise to the Land case No. 137 of 2013. He is of the view that there is no serious issue and therefore there is nothing to investigate. He further informed court that the house is in the name of Julius Nkanda. He is the one who could have raised the objection proceedings not the present applicant Helena Kishiwa. Further that even if they allege that the 3rd respondent is not the owner, however he posed as the representative of the family leading to the court order on illegal eviction. He sees this application as collusion with the 3rd respondent to defeat justice that is why he never objected. He prayed for the application to be dismissed with costs. The 3rd respondent on his part joined hands with the applicant and said that he has no share in the said house. That the relatives of Nkanda cannot raise objection because the house had already been sold. He denies to have been receiving house rent from the tenants as alleged. The attachment was simply because it belonged to his late father. The issue for determination is whether the facts as they exist have shown that the property liable for attachment is the property of the 3rd respondent, the judgment debtor? There has been raised some points as to whether the deceased is the same person whom the applicant was appointed to stand as the administrator of the estate. In his rejoinder submission, Mr. Mabera, the learned counsel

submitted that reading from paragraph five of the affidavit, the death certificate is written in his Christian name Alexander Nyaragi Kishiwa which is the same person. The learned counsel did not counter that fact though he said that the probate case No. 183 of 2000 to which the applicant was appointed to administer the estate relates to Kishiwa Nyaragi kishiwa. I take it that the contention by the applicant's counsel stands. I rule out that of the 1st and 2nd respondent. Now the question to ask, does the property so attached belong to the 3rd respondent? The basis upon which Mr. Sekule the learned counsel relies is on the fact that it is the 3rd respondent who collect rent as opposed to the contention by the applicant that he was given his share in that house. Further that the house is in the name of Julius Nkanda. This fact should not detain me. The law is clear that he who alleges must prove. It was upon Mr. Sekule the learned counsel to show that the 3rd 5 respondent is the sole owner of that house. That fact has never been established. It is wrong to attach the property which is not in the name of the judgment debtor. The allegation that it amounts to a stay is not true because there is no appeal which has been preferred so far. There was also raised the issue that the application is improper for wrong citation. The learned counsel never filed formal application. It was an ambush on the opposite party. I opted to deal with the main application to do substantial justice. Order XXI Rule 57 (1) and (2) of the Civil procedure Code, Cap 33 RE 2002 deals with 'investigation of claims to, and objections to attachment of, attached property and postponement of sale'. It reads:- "(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.... The present application on objection in respect of the attached property in execution of a decree as per the above provision, is in order. I agree with the applicant, the widow cum the administratrix of the estate of the late Alexander @ Kishiwa Nyaragi Kishiwa that the said house on Plot No. 701 Block "A" Kijitonyama kwa Ali Maua in Kinondoni Municipality does not belong to the 3rd respondent. She has shown in paragraph 10 of her affidavit how the house passed from Julius Nkanda to Kishiwa Nyaragi kishiwa after sale. What the respondents failed to establish is whether Agrey Kishiwa, the 3rd respondent is the same as Julius Nkanda, the name appearing in the title deed or that he had exclusive right over that property. The argument that the 3rd respondent posed as the representative in the main case to my view would apply if the issue concerned ownership which was not the case. The same argument would also apply to answer the argument on the knowledge of the applicant on the existence of the suit in court. The issue of ownership of that house was never discussed there. That said, the application is allowed. I order that the said house be released from attachment. Each party to bear its own costs. It is so ordered. \ M. G. MZUNA

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