

TANZANIA / JUDGMENT

joseph wegesa wangubo vs mjini kati village council 4 others 2024 tzhc 300 19 february 2024

COURT
TZHCDECIDED
19 February 2024

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IN THE HIGH COURT OF TANZANIA MUSOMA SUB-REGISTRY CIVIL APPLICATION NO. 68 OF 2022 (Arising from Civil Application No. 28 of 2021 of Primary Court of Nyamwaga at Tarime Original Civil Case No. 32 of 1996/97 of Primary Court of Nyamwaga at Tarime) BETWEEN JOSEPH WEGESA WANGUBO..... APPLICANT VERSUS MJINI KATI VILLAGE COUNCIL (Formerly was part of Nyangoto Village Council)..... 1st RESPONDENT NYANGOTO VILLAGE COUNCIL..... 2nd RESPONDENT DISTRICT EXECUTIVE DIRECTOR TARIME DISTRICT COUNCIL..... 3rd RESPONDENT FORTUNATUS ROBI WANGUBO (An Administrator of the Estate of Wankyo Wangubo)..... 4th RESPONDENT THE ATTORNEY GENERAL..... 5th RESPONDENT

RULING

13? & IS? February, 2023 M, L, KO MBA, J,: Applicant herein is applying for the following orders;
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1. This court be pleased to investigate the claim or objection with regard to the attachment of 1.5 acres the applicant's property and find out that the said immovable properties are not liable to attachment in execution order of the primary court dated 3Cfh November, 2006 in Civil Case No. 32/1997 of Nyamwaga Primary Court.
2. This court be pleased to issue an order lifting the warrant of attachment in respect of immovable property 1.5 acre of land, belonging to the applicant as the same not subject to the execution order of 5 acre as ordered in ruling dated 3(fh November, 2006 in Civil case No. 32/1997 of Nyamwaga Primary Court.
3. Costs for this application and;
4. Any other and further relief (s) that this court may deem just and equitable to grant. The chamber summons indicates this application is made under Order XXI rule 57(1) and rule 59 and section 95 of the Civil Procedure Code, Cap 33 R.E 2019 supported with applicant's affidavit. As a tradition all respondents filed counter affidavits. The 1st, 2nd, 3rd and 5th

respondents (the four respondents) file preliminary objection which before hearing of the matter they prayed and allowed to withdraw. When the matter was scheduled for hearing, applicant prayed and parties agreed that this application be heard Page 2 of 15 by way of written submission. Parties adhered the filing schedule as fixed by this court. When the matter was fixed for hearing, applicant appeared in person unrepresented and filed his submission. In his submission he informed this court that 2nd respondent was awarded 5 acres in Civil Case No. 32 of 1996 after a dispute between 2nd and the 4th respondent. Execution order was issued by Tarime District Court via Civil case No. 32 of 1997 on 25/07/2014. It was his submission that during execution, the 1st and 2nd respondent took his land measured 1.5 acre which was not subject to execution but to his surprise the 1st and 2nd respondents hide under the fact that Case No. 32 of 1996/97 did not meant 1.5 acre owned by the applicant, but 2nd and 4th respondents. Applicant further submitted that his claim for the piece of land is backed up by the letter with reference No. HWT/J1/7/120 of 26/10/2018 from Tarime Municipal Director While insisting on legality of his application, applicant submitted that this court has to release his land from the disputed land regarding 2nd and the 4th respondents as it was not part to execution. The applicant was of the opinion that so far as the second respondent was in need of a place to build hospital, if at all the land was for social service, it could acquire the Page 3 of 15 same by compensate the owner. He prayed this court to investigate his claim in which he is the third party adversely affected by attachment arising from the decree in Civil Case No. 32 of 1996/97. To boost his submission, he supplied the case of Katibu Mkuu Amani Fresh Sports Club vs Dodo Ubwa Mamboya and Another [2004] T. L. R 326. The 1st, 2nd, 3rd and 5th respondents' (the four respondents) submission were fiercely opposed to the application. On behalf of mentioned respondent, the written submission was filed by Mr. Abdalah Makulo (State Attorney) who after revisiting the back ground of the matter, he started his submission with the preliminary objection that the matter is time barred and this court has no jurisdiction to entertain the same for being filed out of time. Elaborating on his points State Attorney submitted that under, Item 21 part III of the Law of Limitation Act [Cap 89 R. E 2019], that the time limit to file objection proceeding is sixty (60) days. According to applicant's affidavit, the case was decided and concluded in 11/12/1996, execution was made in 1996 through Misc. Application No. 32 of 1996. To him, this application was filed eighteen years (18) later while the applicant was aware of everything as picked from annexure 2 of his affidavit. It was his further submission that even if tracing the same from Page 4 of 15 Misc. Application No. 28 of 2021, the ruling was delivered on 27/07/2022 and the current application was filed on 04/11/2022 which is three (3) Months and 7 days that is beyond sixty (60) days as provided by the law. in that account he supplied the decision of Misc. Land Application No. 558 of 2021 between Christina Ntumigwa Mwakifulefule vs Equity Bank Tanzania Limited and 5 others (unreported) and prayed the matter to be dismissed under section 3 of Cap 89 with costs. On the second irregularity he was of the submission that the matter is instituted in wrong court. That is, objection proceeding has to be instituted in the court issued the execution order as per Order XXI rule 98 (1) of the Civil Procedure Code [Cap 33 R. E 2019]. He was of the submission that the court issued execution decree was the

Primary Court, but the applicant instituted the application to this court which according to the cited provision it is required to be filed in trial court. In alternative, the learned State Attorney prayed their counter affidavit to be adopted and state that the second respondent executed his decree to the District Court of Tarime which was 5 acres. It was misconception of the applicant herein that his land measure of 1.5 acre is among of the land required to be executed as there is no prove that the suit land of 1.5 acre Page 5 of 15 is out of 5 acres; that is so because the second respondent is only dealing with 5 acres and not 6.5 acres as claimed by the applicant. It was the four respondents' submission that the applicant also failed to show specific territory of his land, which differentiate between 5 acres and 1.5 acre, as per order VI rule 4 of the Civil Procedure Code, Cap 33 R.E 2019 and failure of the applicant to state particulars which differentiate between the two land means he don't know what he is claiming. Further, it was their submission that applicant failed to prove his status as form number IV made under rule 10 of GN NO. 49 of 1971 was not attached in his application to show the assets was delt with hence creates doubts if the applicant herein has locus in this suit or the administrator. The four respondents prayed this court to find the applicant has no locus, to dismiss the application and award them costs. In his affidavit, the 4th respondent conceded to facts as narrated by the applicant that executing court, Nyamwaga Primary Court wrongly attached 1.5 acres belongs to applicant and went further to indicate demarcation of land which was in dispute between Wankyo Wangubo and second Page 6 of 15 respondent which was subject to attachment. From record, 4th respondent is administering the estate of Wankyo Wangubo, and the late Wankyo Wangubo is the one who was contesting for the 5 acres of land with second respondent (Nyangoto village) in Civil case No. 32 of 1996 which was decided in favour of Nyangoto village and Wankyo was to be compensated on exhausted improvement. The second respondent herein was awarded the land in dispute between the two. In other words, the second respondent was awarded the land which was occupied by Wankyo Wangubo and currently administered by the 4th respondent. While rejoining, on the first point of objection the applicant submitted that so far as this court was moved by Order XXI Rule 57 (1) of the CPC, the Law of limitation is unapplicable and supported his submission by Doris Martin Minja vs Diamond Trust Bank and 4 Others, Misc. Commercial Application No. 398 of 2017 and Katibu Mkuu Amani Fresh Sports Club vs Dodo Ubwa Mamboya and Another (supra) while insisting that there were multiple applications in courts of law. On the issue of jurisdiction of this court over execution the applicant submitted that it was due to the amendment of Government Proceedings Act, Cap 5 [R. E. 2019] that all suits against the Government shall be Page 7 of 15 instituted in the High Court and the Attorney General ought to be co- defendant. For him it was impracticable to proceed with the application for objection proceedings at the Primary Court. From the parties' contending submissions, the grand issue for determination is whether the application is meritorious enough to warrant its grant. The applicant is claiming to be the lawful owner of the land measure 1.5 acre which was wrongly attached during execution. In their submission, the four respondents raised preliminary objection on time limitation and jurisdiction of this court over the matter although on the heading it was jurisdiction due to time limitation, either way, I shall address both scenarios. Reverting to

the substance of the application, it is clear that the instant application is basically an objection proceeding which is governed by the provisions cited in the application. These are read together with rule 58 of the CPC. They (the provisions) cumulatively require that the Court must investigate the objector's claim and, in so doing, it must admit evidence. The evidence is intended to satisfy the Court that the subject matter of the attachment was, at the time of the execution, belong to the applicant. For Page 8 of 15 ease of reference, it is apposite that the said provisions be reproduced as hereunder: XXI Rule 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 Upending 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. Rule 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 Page 9 of 15 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.' The statutory powers of the Court, as conferred upon by the cited provision, were restated by the Court of Appeal of Tanzania in *Amani Fresh Sports Club vs Dodo Ubwa Mamboya & Another* (supra), wherein it was held thus: 'As a matter of law, it is necessary for the court to investigate claims and objections raised. Under the provisions of rule 50 (1) of Order XXIV of the Civil Procedure Decree, where a claim is preferred or an objection made to the attachment of any property, the court shall proceed to investigate the claim or objection. On the other hand, Pule 51 provides to the effect that the claimant or objector must adduce evidence to show that at the time of the attachment he was in possession of or had an interest in the property'. The Court's investigation powers, bestowed on it by the cited provisions are not without conditions. The calling into action of the investigation powers is subject to a condition precedent. The said condition is reflected Page 10 of 15 in the existence of three key conditions, splendidly laid down by this Court (Hon. Opiyo, J.), in *Abdallah Salum Lukemo & 18 Others vs Sifuni A. Mbwambo & 208 Others*, HC-Misc. Land Case Application No. 507 of 2019 (DSM-unreported). These conditions are:

- (i) Presence of an attachment order of the property in question, made by the decree holder, and that such attachment has not touched the property in question; (ii) That such attachment is done in the execution proceedings; and (iii) The objection proceedings should be preferred by a person who was not a party to the suit. The question to be answered, at this point, is whether such conditions have been met for the applicant to move this court. From the application, submission and documents attached thereto, it is clear that these three conditions have been met. The attachment which is being fought by the applicant was preferred by the decree holder, the 2nd respondent herein. It is noticeable, as well, that the eviction was done in the execution of the decree as the hospital/ dispensary/mortuary is in the disputed land; and, that the application challenging the execution has been preferred by a person who was not party to the proceedings from which the decree Page 11 of 15 sought to be attached emanated. This, then, qualifies the application and vests this court with jurisdiction. Further to that, the issue of jurisdiction was analysed in *Katibu Mkuu Amani Fresh Sports Club vs Dodo Umbwa Mamboya and Another* (supra) thus; '...where a claim is preferred or an objection made to the attachment of any property, the court is bound to investigate the claim or objection.' Reading parties herein, I find the Attorney General and therefore, as submitted by the applicant, it is the position of the law since amendment of Cap 5, that any suit which involve the Government must be filed at the High court. I find the objection as raised by the four respondents has no merit. Turning to the merit of application in line with Rule 58, which requires adduction of evidence to prove possession or interest in the suit property, I gather that the evidence from the applicant's affidavit together with attachments which accompany the application. There is the Court's judgment, ruling and orders that ordered the judgment debtor to vacate the suit property; memorandum of understanding between the 2nd respondent, 3rd respondent and North Mara Gold mine on evaluation, Page 12 of 15 relocation and compensation of villagers at Nyangoto village, clan meeting minutes, 4th respondent's affidavit, Nyangoto village meeting minutes and various communications. These are the documents on which the applicant's claims hang. As I leaf through these documents, the question that requires an immediate resolution is whether these assorted documents bear the required sufficiency that may justify the applicant's objection. In other words, the question is whether possession or interest in the disputed land is proven in this case. The view held by the four respondents is that the applicant has failed to prove his status as there is no form no VI from the GN. No. 49 of 1970 on whether he is beneficiary or administering the estate of the late person. Reading probate cause No. 3 of 2009 and the minutes of the clan meeting, the applicant has both status, administrator and heir. Therefore, the issue of status as argued by the State Attorney is answered in affirmative that he was appointed as administrator and the sole heir is Joseph Wegesa. The 2nd respondent had civil suit with the 4th respondent and he is aware of exactly a portion of land he administered after the death of Wankyo Wangubo and admitted that the attachment order included the land which Page 13 of 15 was owned by the applicant. The only record available regarding attachment and execution is 5 acres to be handled to 2nd respondent and the 4th respondent (then the late Wankyo Wangubo) vacate the said land and was to be paid compensation. The one ordered to vacate the land admits execution included property

of the applicant, that is to say, the 5 acres which was taken by the 2nd respondent includes the 1.5 owned by the applicant. While the contention by the respondent may contain the grain of truth that may justify its assertion, belief can only be attached to it if the assertion is verified and evidenced. The assertion by the 4th respondent is backed up by the evidence which is minutes of the Nyangoto village public meeting held on 14/06/2018 and the rest are technicalities which are discouraged under Article 107 A of the constitution. Complain by State Attorney that applicant failed to prove the ownership and boundaries as the place has mortuary is less weighed as attached document in the affidavit has proof of the said fact. It therefore leaves the applicant's contentions unscathed, and I take the view that the applicant has sufficiently presented a credible case that meets the requisite threshold and convince this court that he holds possessory and/or ownership interest in the suit land. The available Page 14 of 15 evidence is potent enough to warrant compensation by the incoming occupier. The four respondents have not satisfied this court that the 5 acres possessed after execution were surely owned by the 4th respondent only who was said to be ordered to vacate and compensated. In view thereof, I grant the application and order that the applicant's 1.5 acre of land be released and excluded from execution or else the applicant be compensated over his 1.5 acres according to the law as of now. Each party shall bear its own cost. It is accordingly ordered. DATED at MUSOMA this 19th day of February, 2024. Page 15 of 15

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