

TANZANIA / JUDGMENT

PILI MIRAJI 2 1

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31 January 2025

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM MISC. LAND CASE APPLICATION NO.28954 OF 2024 (Arising from Misc. Land Application No. 26113 of 2023 and Land Case No. 10 of 2010) PILI MIRAJI MZURI.....APPLICANT VERSUS JANE DAVID MUSHI(Administratrix of the Estate of the Late DAVID MUSHI).....RESPONDENT

RULING

16th & 31st January, 2025 L.HEMED, J Before this court there is a pending application for execution, that is Execution No.11992 of 2024, presided by Honourable Mwakatobe, the Deputy Registrar. In the said execution proceedings, the Decree Holder one Jane David Mushi, the Respondent herein, is moving the Court to evict the Judgment debtor one Rashid Kitwanga (administrator of the Estate of the late Abdallah Msham Kitwanga) from all that farm constituting ten (10) acres at Madale Area, Kinondoni District, Dar es Salaam and for payment of the decretal sum of TZS 80,000,000/= by attachment and sale of the judgment debtor's immovable property located at Pande Street Zinga Ward, in Bagamoyo District. While the said application for execution is still pending, the Applicant/Objector, one Pili Miraji Mzuri filed the instant application against the Decree Holder, seeking for the following orders: - "EX-PARTE ...1(b) That, this Honorable Court may be pleased to order for maintenance of the status quo of the Applicants'/Objectors' suit property in respect of a residential and matrimonial house located at located at Pande Street, Zinga street Ward, Bagamoyo District, Pwani region (Hereinafter called a Suit property') against the Respondent, her agents, employees, assignees and whomsoever pending hearing of this Application interpartase(sic). INTERPARTASE(sic)

- (a) That, this Honorable Court be pleased to investigate the claim or an objection that, the 2 property (Comprised of one residential and matrimonial house) located at Pande Street, Zinga street Ward, Bagamoyo District, Pwani region (Hereinafter called a Suit property') is not liable to the attachment and sale by the Respondent;
- (b) That, the suit property subject to the outcome of the investigation be released from attachment and sale as it is not liable to execution in satisfaction of the Drawn Order by Honorable Ms. A. MSAFIRI, J dated 17th April, 2024 in Misc. Land Application No.26113 of 2023 in which the Applicant/Objector is not a party to the proceedings;

- (c) That, the attachment of the Suit Property be postponed pending the finalization of such investigation;
- (d) Costs be paid by the Respondent; and
- (e) Any Reliefs this Honorable Tribunal may deem fit to grant.” The application which has been supported by the affidavit of the applicant has been resisted by the Respondent vide the counter affidavit of one Jane David Mushi. Additionally, the Respondent through the legal service 3 of Mr. Willson Ogunde, learned advocate, raised a preliminary objection in limine litis thus: - “...That, the present application for objection proceedings is premature hence incompetent as there is no order of attachment in which has ever been issued in respect of a property located at Pande Street, Zinga Ward, Bagamoyo District, Pwani Region.” Due to time constraint, I directed both the preliminary objection and the application to be argued simultaneously by way of written submissions. As aforesaid, Mr. Ogunde acted for the Respondent while the Applicant enjoyed the legal service of Mr. Alex Balomi, learned senior advocate. Logic requires to begin with the preliminary objection. I have read the submissions filed by Mr. Ogunde, the learned senior advocate who has generally asserted that the application for objection proceedings is premature before this court. The basis of his arguments is that there is no order of attachment and sale of the property in dispute. The learned counsel relied on Order XXI Rule 57 (1), Section 48 (1) (e) and 68 (e) and 95 of the Civil Procedure Code [Cap 33 R.E 2019]. 4 In response thereto, the learned senior counsel for the Applicant, Mr. Balomi, contended that the application is not premature. According to him, this application ought to have been filed in court within 60 days from the date of the impugned drawn order by Honorable Ms. A. MSAFIRI, J dated 17th April, 2024 in Misc. Land Application No. 26113 of 2023 which is due for execution. It was submitted further by the counsel for the Applicant that the law empowers the court to investigate the claim made in respect of attachment of the suit property on the ground that such a property is not liable to attachment. Citing the provision of Order XXI Rule 57 of the Civil Procedure Code (supra), the learned counsel insisted that the court has power to grant the application and release the property under attachment. It has also been submitted that the matter at hand has been brought under section 48 (1) of the Code which strictly prohibits attachment of the matrimonial home. The learned counsel contended that the law does not provides the time under which to lodge the application to challenge attachment of matrimonial home. The learned counsel ended praying for the dismissal of the preliminary objection. 5 I must say at the outset that, the preliminary objection calls the court to address the question of time at which application for objection proceedings can be preferred and determined by the court. The objection also raises a very important question as to whether, in the absence of attachment order, application for objection proceedings remains tenable. In order to properly address the above highlighted questions, I have to go through the cited provision which the Applicant relied upon to move this court to determine her prayer for objection proceedings. To start with sections 69(e) and 95 of the Code, I am quite sure that they are not relevant to the prayer for objection proceedings. The two sections were cited as legal base of the exparte prayer for maintenance of status quo pending determination of the objection

proceedings. I have gone through section 48(1)(e) of the Code and found it envisaging for protection of matrimonial home from attachment and sale in execution of a decree. However, the said section does not provide for the procedure to move the court to uplift the attachment order. The relevant provisions for objection proceedings are Order XXI Rules 57(1) and 59 of the Code which provides thus: - 6 “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: [Emphasis added] Rule 59 proceeds to provide thus:- “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 judgment debtor at such time, it was so in his possession, not on his own account or 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 7 releasing the property, wholly or to such extent as it thinks fit, from attachment.” [Emphasis added] Going through the above provisions, it is quite obvious that in applications for objection proceedings, the court is normally called to uplift an order for attachment or sale of the property of the person who is not the judgment debtor. According to the aforecited provisions, for the court to entertain application for objection proceedings, there must be an order for attachment and or sale of the property of the person other than the judgment debtor. I am holding so because, objection proceedings are a formal process through which a party can challenge an attachment order issued by a court of competent jurisdiction where an objector has interest in the property subject to the attachment order. In the light of the foregoing, an application for objection proceedings cannot be preferred in court if there is no order for attachment or sale of the property of the person who is not the judgment debtor. This is because, the court cannot be moved to uplift or vacate a non-existing order. I have thoroughly gone through the affidavit deposed by one Pili Miraji Mzuri to support the application and found all 25 paragraphs and the 8 respective annexures do not make any reference to attachment order. In the rival submissions, both learned counsel are at one that there is no attachment order which the court has issued so far. This implies that there is no order which this court can uplift or vacate. In other words, the instant application is an afterthought. In his submission to oppose the preliminary objection, Mr. Balomi, learned senior counsel has asserted to have filed this application because the time limitation began to run on 17th April 2024 when the Ruling and drawn order in respect of Misc. Land Application No.26113 of 2023 was delivered. In other words, the learned counsel seems to be saying that the time limitation is what compelled the Applicant/objector to lodge the instant application notwithstanding the absence of the attachment order. I have noted that the Applicant was not a party to the said application and thus the Drawn Order in Misc. Land Application No. 26113 of 2023 did not and in fact does not concern her. This means that the time limitation to challenge the same could not run from the date on which the ruling

and drawn order subject for execution was delivered and extracted. 9 In application for objection proceedings, the time limitation normally starts to run from the date the objector becomes aware of the attachment order. In the present matter, the attachment order has not been issued and thus the Applicant has not yet been served with the same. This being the case, I find that the application at hand is prematurely filed as there is no attachment order this court is called to uplift. The fact that the preliminary objection disposes of the application, I find no need to proceed to determine the merit of the application. Before I pen off, let me address one point that I have discovered in the course of composing this ruling. In Execution No.11992 of 2024 parties are Jane David Mushi (as Administratrix of the Estate of the late David Mushi) vs Rashid Kitwanga (as Administrator of the Estate of the late Abdallah Msham Kitwanga), however, in the instant application for objection proceedings, the Objector/Applicant has opted to bring the matter against the decree holder alone. She never dared to join the judgment debtor one Rashid Kitwanga (Administrator of the Estate of the late Abdallah Msham Kitwanga). My firm view is that, since the instant application is rooted from the said application for execution, both the decree 10 holder and the judgment debtor were necessary parties to the application for objection proceedings. I believe that the judgment debtor who was a party to the execution proceedings has the right to be heard and to know what is going on in the objection proceedings. It should be noted that, the Objector in the instant matter is trying to move this court to uplift the 'attachment order' over the property alleging not to belong to the Judgment debtor. In the circumstance of this matter, I believe that the judgment debtor is an important party to tell the court whether the property alleged to be attached is not his. Failure to join the said judgment debtor would amount to denial of the right to be heard which is a fundamental constitutional right enshrined in Article 13(6)(a) of the Constitution of the United Republic of Tanzania, Cap.2. I am aware that the parties have not been given the opportunity to address on the point of competence of the instant matter for failure to join the judgment debtor. Therefore, I cannot use the same to dispose of the matter at hand. 11 The fact that the matter has been found to be premature, I proceed to strikeout the entire application with costs. It is so ordered. DATED at DAR ES SALAAM this 31st January, 2025. L. HEMED JUDGE 12

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Prepared on 13 October 2026 · Esheria