

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF MWANZA)**

AT MWANZA

MISC. LAND APPLICATION NO. 206 OF 2019

MALAGO GENERAL ENTERPRISES APPLICANT

VERSUS

SALAMA AMBARI (*Administrator of the estate*

of the late HUSSEIN SALUM MALAGO) **1ST RESPONDENT**

ABDALLAH SALUM MALAGO **2ND RESPONDENT**

AMRI SALUM MALAGO **3RD RESPONDENT**

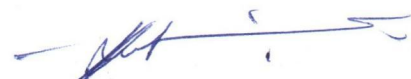
RULING

2nd December, 2020, & 26th January, 2021

ISMAIL, J.

The application from which this ruling emanates has been preferred under the provisions of Order XXI Rule 57(1) and (2) and section 95 of the Civil Procedure Code, Cap. 33 R.E. 2019, and it embodies twin orders, reproduced in verbatim, as follows:

- 1. That this Honourable Court be pleased to investigate the claims and objections of the applicant as the owner of the disputed plot No. 242 Block "C" Igogo Area-in Mwanza City, by stopping the sale*



order over the said land and release it from attachment, declaring the applicant as a lawful owner.

- 2. That this court investigate (sic) and make (sic) findings that the 1st, 2nd and 3rd respondents are not having any interest over the said plot and deceased Hussein Malago is not a lawful owner of the premises, and the applicant is unworthy of being evicted without being given the constitution (sic) right to be heard as was not part (sic) to the Order dated 10th September, 2018 in execution case No. 3 of 2017.*

The application is supported by an affidavit affirmed by Dotto Hussein Malago who has identified himself as the applicant's principal officer. He avers that the suit plot is lawfully owned by the applicant, and that the execution order issued on 10th September, 2018, vide Execution Case No. 3 of 2017, for sale of the property, was in respect of the property that does not belong to the late Hussein Malago, through whom the respondents are claiming interest. The applicant further deponed that the late Hussein Malago was merely a shareholder in the applicant company and not the owner of the suit land. The applicant's further averment is that the execution proceedings from which the sale order emanated did not involve the applicant, meaning that the latter was not afforded the opportunity to be heard.



While the 1st respondent, fielded no opposition to the application, the 2nd and 3rd respondents have ferociously are opposed to the application. Through a counter-affidavit affirmed by Abdallah Salum Malago, the duo disputed the role of the deponent of the supporting affidavit in the applicant company. They contended that, at no point in time, was Dotto Hussein Malago involved in the affairs of the applicant as a director or at all, averring that the said deponent was then a seven year child who would never be involved in the company affairs. They maintained that the property in dispute was the property of the deceased, and that no certificate of title had been issued, arguing that an official search conducted on 3rd September, 2020 did not reveal that the ownership of the said property was in the applicant's hands. On the proposed sale, the respondents aver that this decision was made on a consensual basis.

Hearing of the application pitted Mr. Akram Adam, learned counsel who represented the applicant, against Mr. John Edward, learned advocate who appeared for the respondents. Mr. Adam kicked the first blow by submitting that the prayer is for the investigation of the disputed land, with a prayer that the same should be taken off the list of the assets to be disposed of, pursuant to the order of the Court dated 10th September, 2018.



Mr. Adam further contended that the certificate of occupancy a copy of which is attached to the application, in respect of the suit plot was prepared but the same was not signed. He also contended that there is a letter dated 17th July, 2017 through which the Court was informed that the disputed plot belongs to the applicant. The learned counsel further contended that the applicant has never disposed of or alienated the disputed land, refuting the contention that the said plot had ever been in the personal ownership of Hussein Malago, though he was a shareholder of the applicant company. He prayed that the application be granted.

In a swift response, Mr. Edward contended that there is no evidence that proves that the applicant is the owner of the suit land. While downplaying the significance of the draft certificate of occupancy and letters cited by the applicant, the learned counsel contended that nothing exists in the land registry to prove ownership of the land by the applicant or at all. Mr. Edward contended that, in terms of the records at Mwanza City Council, as stated in the letter dated 13th January 2016, the suit land is in the names of 2nd and 3rd respondents.

Mr. Edward further contended that heirs of the estate of the late Hussein Malago sat and agreed that the plot be sold and proceeds of the sale be shared by all beneficiaries. This is in terms of a letter dated 14th

August, 2017. This, the learned counsel contended, was an acknowledgment of the fact that the property was part of the estate of the deceased, and that the applicant's principal officer, Dotto Malago was there.

The respondents further contended that no ownership documents were tendered in court to prove the applicant's ownership. They held on to their contention that the application is misconceived, deserving nothing short of a dismissal.

In his rejoinder submission, the applicant's counsel argued that it was wrong for the respondents to go the Registrar of Titles where there is nothing on the ownership of the suit land. He contended that proper records would be gotten from the City Council where the letter that confirmed the applicant's ownership originated. On the alleged transfer of land to the respondents, Mr. Adam contended that there is no evidence to that effect. He refuted the contention that there was a consensus on the matter, as none of the applicant's office bearers was present or had an authorization from the company. Mr. Adam further asserted that no consent order had been tendered in court. He reiterated his contention that the applicant is still the owner of the suit land.

A handwritten signature in blue ink, consisting of a stylized name followed by a horizontal line with a small flourish at the end.

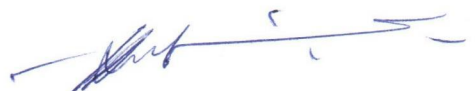
From the parties' contestations, the central question for determination is whether there is merit in these objection proceedings.

As rightly contended by the learned counsel, objection proceedings are primarily governed by the provisions of Order XXI Rules 57(1) (2), read together with section and 58 of the CPC. These provisions require that the Court must investigate the objector's claim and, in so doing, it must admit evidence that proves that, at the time of the intended execution, the objector was possessed of the property attached. For ease of reference it is apposite that the said provisions be reproduced as hereunder:

"(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 it pending 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."

From the parties' rival submissions, the question is whether a case has been made for the grant of the application.

It is incontrovertible that the Court is vested with powers of investigating into the claim or objection with a view to satisfying itself with the legitimacy or otherwise of the claim or objection raised.

The powers of the Court, as conferred upon by the cited provision, were confirmed by the Court of Appeal of Tanzania in ***Amani Fresh Sports Club v. Dodo Ubwa Mamboya & Another*** [2004] TLR 326, 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, Rule 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."

Significantly, such investigation can be launched upon satisfaction, by the applicant, of the existence of three important conditions, as accentuated in the decision of this Court (Hon. Opiyo, J.) in ***Abdallah Salum Lukemo & 18 Others v. 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.

Glancing through the application, it is clear that the applicant has fulfilled all the conditions set out for triggering the objection proceedings. Having settled the question of eligibility of the application, the question that springs to mind is whether, the conditions set out in rule 58 have been fulfilled i.e. whether the claimant or objector has adduced evidence to



show that at the time of the attachment, the objector (the applicant) was in possession of or had an interest in the property.

In this case, the available evidence is the applicants' affirmation done by way of an affidavit through which I have dispassionately glanced. The affidavit is also accompanied by copies of correspondences from Mwanza City Council; an execution order; proclamation of sale; and a copy of an un-issued and un-signed certificate of occupancy. Of the annexures appended to the affidavit, letters from the City Council and the un-signed certificate of title are the only relevant documents on which the applicant's case hangs. The question that begs an answer is whether the same are sufficient to prove the applicant's interest or possession in the suit property. Put it differently, whether these justify the applicant's objection.

It is a well-known fact that interest in a registered land is provable by availing ownership or possessory documents which demonstrate that it is the objector, and none else, who holds such interest. In our case, such demonstration would be done through a certificate of occupancy or a letter of offer which would bear the names of the applicant. The contention by the applicant is that the certificate of occupancy was not issued because of the unresolved boundary issues. While I have no qualms with that, and the letter from the City Council confirms such fact, one would expect that the



letter of offer with Reference No. MCC/L/10121/4/EGK, allegedly issued on 1st October, 1981 in the name of Igogo Engineering, or Reference No. MZM/6228/26/KKI, dated 23rd July, 1991, in the name of Malago General Enterprises, would be produced as part of the applicant's testimony on ownership or possession. Instead, the Court has been treated to correspondences which are contradictory to one another yet they came from the same authority.

Glaringly missing, as well, is a semblance of evidence which would prove the applicant's existence as a company and its current corporate status. This would include the certificate of incorporation, current annual returns, and similar other documents which would validate the applicant's contention that it is legally in existence and that the deponent of the affidavit is one of the office bearers or owners thereof. This would not only quell the fears that the respondents exhibited in their counter-affidavit (see paragraph 2), but also satisfy the Court that a party it is dealing with is properly and legally constituted. There is also a contention that on 25th September, 2015, those who constitute the disputants in this application, including the applicant's principal officer, sat and resolved that the disputed land be disposed of as part of the deceased's estate, and have the proceeds shared on an equal basis. The respondent's contention is

evidenced by a letter of this Court to Mwanza City Council, dated 14th August, 2017, attached to the counter-affidavit. This contention was casually controverted by the counsel for the applicant, and I find the denial too measly to be believed.

It should be noted that adduction of evidence to the Court's satisfaction, constitutes an inescapable burden on the part of the applicant, for the grant of the orders in the application. The applicant, just like any other litigant in a civil matter, has to have his case proved consistent with the requirements of the rules of evidence as enshrined in sections 110, 112 and 115 of Cap. 6 and, as emphasized in numerous court decisions and various commentaries by renowned legal scholars. These include the Court of Appeal of Tanzania's decision in ***Paulina Samson Ndawavya v. Theresia Thomas Madaha***, CAT-Civil Appeal No. 45 of 2017 (Mwanza-unreported), that quoted the commentaries by Sarkar on Sarkar's Laws of Evidence, 18th Edn., ***M.C. Sarkar, S.C. Sarkar and P.C. Sarkar***, published by *Lexis Nexis*, at page 1896, thus:

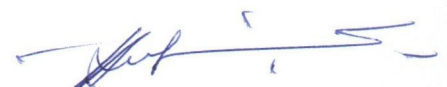
"... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and should

*not be departed from without strong reason Until such burden is discharged the other party is not required to be called upon to prove his case. **The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party...***" [Emphasis added].

In my considered view, the testimony adduced by the applicant does not come anywhere close to having this burden discharged. This, then compels me to borrow an invaluable wisdom ushered by the High Court of Malawi in ***Haji v. New Building Society Bank*** [2008] MWHC 36, wherein it was held thus:

"It is never the duty of the Court to create a case for the parties and, specifically in this case, for the plaintiff by contradicting the defendant's case. Where the plaintiff has no evidence on the matter in issue the Court has to analyse the evidence of the defendant and make a finding one way or the other, and then decide the case on the merit of the evidence available." [Emphasis is supplied].

Applying the principles as enunciated in the cited decisions, I take the view that the applicant has not presented a credible case that meets the



requisite threshold or convince me that the applicant has any interest, possessory or ownership, in the suit land to warrant exclusion or removal of the said property from the estate of the deceased.

Consequently, I hold that the application is barren of any fruits and, accordingly, the same is dismissed. I make no order as to costs.

It is so ordered.

DATED at **MWANZA** this 26th of January, 2021.



M.K. ISMAIL

JUDGE

Date: 26/01/2021

Coram: M. K. Ismail, J

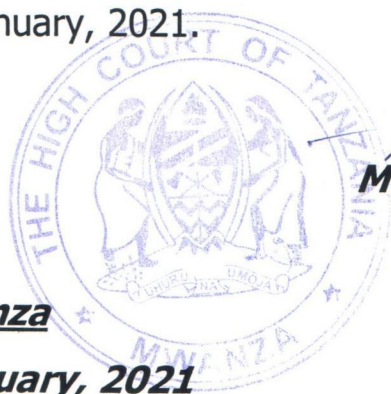
Applicant: Absent

Respondents: Absent

B/C: B. France

Court:

Ruling delivered in chamber, in the absence of the parties, this 26th day of January, 2021.



M. K. Ismail

JUDGE

At Mwanza

26th January, 2021