

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[ARUSHA DISTRICT REGISTRY]
AT ARUSHA

MISC. CIVIL APPLICATION NO. 39 OF 2020

(Originating from Taxation Cause No. 47 of 2017, the High Court of Tanzania, the Arusha District Registry)

JAMES LONGIDAREKI APPLICANT

Versus

ABRAHAM GERALD (Administrator of the Estate of the Late Barisho Ndiki) **1ST RESPONDENT**
ABRAHAM GERALD **2ND RESPONDENT**
JUSTINE GERALD **3RD RESPONDENT**
YUSUPH GERALD **4TH RESPONDENT**
NUTMEG AUCTIONEERS AND
PROPERTY MANAGERS CO. LTD 5TH RESPONDENT

RULING

2nd September & 9th October, 2020

Masara, J.

The Applicant, **James Longidareki**, has brought this application under Order XXI Rule 57(1) and (2) and 58(1) and (2) and 59, and Order XLII Rule 2 of the Civil Procedure Code, Cap. 33 [R.E 2002]. The Applicant is praying for, inter alia, the following orders reproduced verbatim:

- a) That, the Honorable Court be pleased to order setting aside the order to attach the Applicant's/objector's land measuring 35 paces by 35 paces located at Oloiruwa Hamlet, Ikirevi Illage, Olturoto Ward,*

Enaboisghu Division, Arumeru District, Arusha Region with the following demarcations, East Amon Long'idareki, West the land of Nathanael Marko, North bordered the land of Long'idareki Ndiki, and on South it borders the land of Yusuph Gerald and Justine Gerald; and

b) That, the Honorable Court be pleased to release the Applicant properly from attachment.

The Application is supported by affidavit sworn by the Applicant himself. The Respondents contested the application by filing a joint Counter Affidavit attested by the 1st, 2nd, 3rd and 4th Respondents. In the hearing, the Applicant was represented by Mr. Severin Lawena, learned advocate, while all the Respondents engaged the services of Mr. Nelson S. Merinyo, learned advocate. The application was heard *viva voce*.

From the affidavits of the parties, the brief facts leading to this application can be summarised as follows: The Respondents were Decree Holders in Taxation Cause No. 47 of 2017. The judgment debtor was the late Longidareki Ndiki, the Applicant's father. In the aforesaid cause the Respondents were awarded Tshs. 1,842,000/= by the taxing master, being costs of the case. The Respondents applied for an execution order in this Court. The matter was heard and determined by Mr. Nkwabi, Deputy Registrar who granted the prayer by ordering attachment and sale of what was said to be the judgment debtor's piece of land measuring 35 paces length by 35 paces width, located at Oloirowa Hamlet, Ilkirevi Village,

Olturoto Ward, Enaboishu Division, Arumeru District, Arusha Region with boundaries specified above. The fifth Respondent was appointed as the Court Broker to carry on the execution process.

The Applicant is the last son of the judgment debtor. He filed this application seeking to object the execution process on the account that the piece of land subject of attachment and sale is his property given to him by his father as a present at his marriage and before the suit that led to its attachment. The Applicant asserts that he was neither a party to the taxation cause nor the execution cause and therefore his piece of land cannot be subject of the execution.

The Respondents resisted the application contending that the land subject to the execution belongs to the Applicant's father as they are all his neighbours and that the Applicant intends to frustrate the execution process by this Application. The Respondents also filed a joint counter affidavit sworn by Marko Ndiki, Jackson Levalo Lesirwa and Lucas Jonas Ngoisay, the neighbours of the judgment debtor, who witness that the land subject of attachment is the lawful property of the judgment debtor.

Submitting in support of the Application, Mr. Lawena adopted the Applicant's affidavit as part of his submissions. He contended that the Applicant's land measuring 35 paces by 35 paces was attached as part of the execution of a case he was not a party. That the land was given to the Applicant by his father, the late Longidareki Ndiki, when he married

according to the Maasai Customs. The Applicant had also made developments on the land. Therefore, as he was not a party to the case, he cannot be held responsible for the debt owed to his father. According to Mr. Lawena, the Applicant depends on the land for his survival. He disputed the evidence given by the ten-cell leader, the Hamlet chairman and others through the counter affidavit arguing that they were not there when the land was handed to the Applicant by his late father.

Mr. Merinyo, on the other hand, while adopting the joint counter affidavits, contested the application arguing that the Applicant conspired to deny the Respondents their entitlement. That the application should not be granted as the Applicant does not state when he got married. He stated further that according to the 5th paragraph of the joint counter affidavit of the witnesses for the Respondent the Applicant is trying to deny them their lawful entitlements. He confirmed that since the witnesses who attested the affidavit were neighbours of the judgment debtor; Marco Ndiki being his blood brother, Jackson being the hamlet chairman and Lucas the Ten cell leader, their evidence should be believed. Mr Merinyo was of the view that as these witnesses attested that there is no house built on the land in question, contrary to what is stated by the Applicant, and as the Applicant did not bother to reply to the counter affidavit filed by the three, the land does not belong to the him but to the judgment debtor.

In a brief rejoinder, Mr. Lawena stated that Longidareki had no obligation of involving anyone while giving the land to the Applicant. He added that

lifting the land from execution does not make the execution futile as other properties may be attached.

The pertinent issue, arising from the submissions by the counsel for the parties and from the affidavits for and against the application, is whether the land subject to attachment is the property of the Applicant thus liable to be lifted.

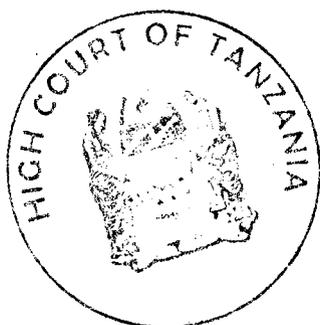
It is noted that the gist of the application and the submissions of the Applicant's counsel is that the land subject of the attachment was given to the Applicant by his father when he got married in accordance with the Maasai Customs. This averment is not supported by any cogent proof. As stated by Mr. Merinyo, the Applicant did not even state when he got married. Had the Applicant specified the time he was given the land (the date of marriage), the Court would probably have been in a position to determine whether the land was given to him in contemplation of the attachment or not. The record of the Execution proceedings indicate that the judgment debtor indicated that the land which was to be attached was not his. The Deputy Registrar did not agree with him stating that the owner will have a chance to object attachment. In the absence of the specific time when the land was handed to the Applicant, the Court may presume that the application was filed as a way to frustrate the attachment as contended by the Respondent's counsel.

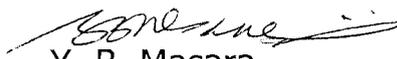
I take this view considering the fact that the Respondents stated that they are neighbours of the judgment debtor. The evidence of the three witnesses, Marco Ndiki, Jackson Levalo and Lucas Jonas, that the land in issue belongs to the judgment debtor was not traversed by the Applicant. I also do not see reasons why I should doubt their evidence.

In civil disputes such as this, the law mandates whoever wishes a particular fact to be decided on his favour to prove the existence of such fact. This is per section 110 of the Evidence Act, Cap. 6 [R.E 2019]. The landmark case of *Miller Vs. Minister of Pensions* [1937] 2All ER 312, is instructive on that aspect. In the instant application, the Applicant has not proved his ownership over the land subject of attachment. He did not even prove when the same was handed to him by his father. I subscribe to Mr. Merinyo's contention that the application aims at frustrating the execution.

In the upshot, and for the reasons above stated, the application fails. I hereby dismiss it in its entirety. The execution process to proceed as ordered. The Applicant to pay costs for this Application.

Order accordingly.




Y. B. Masara
JUDGE
9th October, 2020