

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

MISCELLANEOUS LAND APPLICATION NO. 300 OF 2019

(Arising from Execution No.50 of 2018 and Original Suit, Land Case No.314 of 2016)

DORICE KENETH RWAKATARE..... OBJECTOR

VERSUS

NURDIN ABDALLAH MUSHI.....1ST RESPONDENT
FOSTER ACTIONEER AND GENERAL TRADERS.....2ND RESPONDENT
MUTA ROBERT RWAKATARE.....3RD RESPONDENT
ROSE RWAKATARE.....4TH RESPONDENT
HAULILA HAMPHREY RWAKATARE.....5TH RESPONDENT
TIBE RWAKATARE.....6TH RESPONDENT

RULING

OPIYO J.

The current application is objection proceedings by the applicant intended to object the Execution No. 50 of 2018 whereby the 1st respondent being Decree Holder is intending to evict, the 3rd to 6th respondents from the property registered as 347 Block 43 , Mwenge Area, within Kinondoni Municipality. The Decree which is executed originated from Land Case No. 314 of 2016 between the 1st Respondent and 3rd to 6th Respondents, whereby in the said Land Case the 1st respondent was declared to be the lawful owner of the suit premises.

The 1st respondent herein above (Nurdin Abdallah Mushi), enjoying the services of Mr. Laurent Ntanga, learned Advocate, has raised a preliminary objection on a point of law that, the objector (Dorice Keneth Rwakatare) has no *Locus Standi* to file the application for objection proceedings against respondents as it contravenes with Land Case No. 312 of 2016 and Miscellaneous Application No. 773 of 2016, which were dismissed for want of prosecution. Therefore, this ruling comes to address the merit or otherwise of the raised preliminary objection by the said 1st respondent. The preliminary objection was argued by way of written submissions.

Mr. Laurent Ntanga, counsel for the 1st respondent, stated in his submission in chief that, the objector had previously filed a Land case No. 312 of 2016 praying to be declared as the beneficiary of the suit land and Miscellaneous Land Application No. 773 of 2016 praying for maintenance of status quo in relation to the of the suit premises. Both cases were dismissed for want of prosecution. After all the struggles by the applicant to restore her former suit and application failed, she has decided to come with objection proceeding, which by itself is contrary to the law. The circumstances of the case make her to lack *locus standi* to file such type of application, he argued. He further argued that based on such dismissal of both cases, the only remedy available to the objector (Dorice Keneth Rwakatare) was to file a suit to restore the aforementioned cases in terms of **Order IX Rule 8 and 9 of the Civil Procedure Code (CAP 33 R:E 2002)**. Thus, without restoration of the two earlier dismissed cases above, the objector cannot stand in this application as the provision of the rule IX above precludes her from bringing a fresh suit in respect of the same cause of action.

The counsel continued to contend that, allowing this application to proceed is as good as bypassing the Land Case No. 312 of 2016 that was dismissed for want of prosecution. He substantiated his argument by citing the decision of court in the case of **Omuneke Oloo v Werema Magira (1983), TLR 144**. Where it was held that:-

"a decision in objection proceedings would not render a subsequent suit on the same dispute res judicata and so a party can decide to bypass objection proceedings and resort to a suit to recover his wrongly seized property"

Mr. Ntanga therefore maintained that, based on the above authorities, the objector lacked *locus standi* because the criteria for filling an objection proceeding is that, the applicant must not have instituted the same or related proceedings before, but in the present situation, the objector had previously instituted the same dispute. Therefore, entertaining the objection proceedings is as good as restoring the earlier dismissed case which involved the objector (Land case No. 312 of 2016).

Further, Mr Ntanga argued in the alternative that, the property which the applicant (objector) claims to have an interest on is still under the control of an administrator of the deceased estate, and he has not filed the inventory, therefore the matter is still pending in court with competent jurisdiction over probate matter for the said estate and this court lacks jurisdiction to entertain the dispute which has not been finally determined

by the probate court. Therefore the application for objection proceedings by the objector should be dismissed with costs for lack of merits.

Opposing the preliminary objection, the Advocate for the objector, Mr. Pongolela submitted that, the whole preliminary objection is misconceived and bad in law and the respondent is misleading the court by mixing two cases which are totally different. The counsel for the objector insisted that, the objection is on Land case No. 314 of 2016 which led to execution No. 50 of 2018 of which the objector was not a party to. Thus, the objector has a *locus standi* to institute objection proceedings because the objector has sufficient interest in the property which is a subject matter of execution. The applicant is the one who is in the possession of the said property as she has been living in the same with her young brother and sister for long as the only property they have. He supported his arguments by the case of **Katibu Mkuu Aman Fresh Club vs Dodo Ubwa Mamboya Khamis Khamis Machano Keis, Civil Appeal No. 88/2002 CAT,**

Where it was held that:-

"In dealing with objection proceeding the court had the duty to investigate the claim raised by the objector.

In investigating the claim the court had to ask for evidence to the claim raised. The fact that the applicant/objector was not a party to the suit is all more reason for objection proceeding in which it is open for any claimant or objector."

He therefore argued that as long as the objector was not a party to the land case no 314 of 2016 he has a *locus standi* to file objection

proceedings citing the case of **Josiah Baltazar Baisi and 138 others vs Attorney General and others, Miscellaneous Civil Appeal No. 39/1997, (1998) T.L.R pg 331** in which the Court of appeal had this to say:-

"Today locus standi is not viewed in its original narrow meaning; it has been expanded to include "sufficient interest" so that anyone with sufficient interest may seek a remedy on behalf of others who are also injured."

*Also the case of **CRDB Bank Ltd vs Mwamba Enterprises Ltd and Charles Mlokozi, Commercial case No. 50/2000** where it was stated that actual possession is enough to prove that a person has got interest over the property which is subject to objection proceeding.*

He therefore argued that, the argument of by the applicant that, the objector should resort restoration of Land Case No. 314 of 2016 is misconceived as the objector is objecting Land Case No. 312 of 2016 along with Execution No. 50 of 2018.

On the alternative argument advanced by Mr. Ntanga on the existence of a pending dispute in probate in relation to the property in question, Mr. Pongolela contended that, since the objector has interest in the property liable for execution as a beneficiary in the said estate in dispute, she cannot sleep over her rights by letting the eviction to take place, that is why she had filed the current application by way of objection proceedings. He thus, urged the court to dismiss the preliminary objection with costs.

After going through the submissions by parties through their respective counsels, the time has come to determine whether the preliminary objection has merit or not. The basis of Ntanga's objection is that, the objector in this matter had previously filed a Land case No. 312 of 2016 and Misc. Land Application No. 773 of 2016 in relation to suit property and against the same parties, both of which were dismissed for want of prosecution. He thus argued that the only remedy for such person is to restore her former suit and application that was dismissed. This argument fails to convince this court, because, as argued by Pongolela, the objection proceeding in this case is not objecting execution in a suit to which the objector was a party. Thus, she still can have cause of action in objection proceedings if other criteria on such application are met. This court now should look on whether the applicant's application is competent on that one ground of not being a party to the execution proceedings only. That is, is the application meeting other criteria for the same to stand?

Under Order XXI, Rule 57 (1) and 58 of the Civil Procedure Code (Cap 33 R.E 2002), the court is mandated mandatory to investigate the claim or objection when preferred or made to the attachment as a result of execution of a decree. The section provides that:-

"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."

Based on the above provision, the objection shall be based on the prayer that the court conducts investigation that property in question is not liable to such attachment in execution of a decree. In the current application, the objection is not based on that fact. My view is founded of the fact that, it is not disputed that the disputed property, Plot 347, block 43, Mwenge area, Kinondoni Municipality was a subject matter of execution in land case No 312 of 2016 between the first respondent and 4th to 6th respondents. It is also not disputed that, the disputed property was sold to the 1st respondent as part of estate of the late Keneth Ford John Rwakatare who happened to be a father to objector and 3rd to 6th respondents. The basis of objection in this application as outlined in the chamber summons is that the court investigate the claim that the property in question, Plot 347, block 43, Mwenge area, kinondoni Municipality, belongs to objector, 3rd,4th,5th, and 6th respondents as beneficiaries of the late Keneth Ford John Rwakatare.

From the above facts therefore, as there is no dispute that the disputed property forms part of the estate of the late Keneth Ford John Rwakatare and no dispute that the objector, 3rd,4th,5th, and 6th respondents are beneficiaries of the late Keneth Ford John Rwakatare, the application to investigate undisputed fact is not viable. It follows therefore that, objection proceedings is not maintainable if the subject matter cannot be defended not to be liable for attachment in execution of a decree. In the current situation, where the same subject matter was the one subject to the

attachment in a decree and the applicant intends merely to protect her alleged interest over the property on the ground that she was not made part of the decree in execution, not that the property was not liable to attachment in such execution, objection proceedings is not a right route for such applicant. This is because, the necessary claim in objection proceedings that the property is not the subject for attachment is lacking. So, the objector only meets one criteria of not being a party to the execution proceedings, but all for the objection proceedings to stand.

By saying so, I am not denying the objector any right she may have over the disputed property, but putting a strain on the legal route she chose to claim for such right. One cannot validly challenge her exclusion in the proceedings; he/she might have interest, through objection proceedings, if question of validity of attachment the property in question cannot arise. Thus, not being a party to the proceedings (land case no 314 of 2016 in this case) is not the only quality giving the applicant the necessary locus standi to file objection proceedings as argued by Pongolela.

Therefore, although the line of argument by the by Mr. Ntanga was not strong enough to knock the applicant down, but still reasoning above by the court works on his favour. This application is therefore struck out for being incompetent with no order as costs.

M. OPIYO
JUDGE
17/9/2019