

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., GALEBA, J.A., And RUMANYIKA, J.A.)

CIVIL APPEAL NO. 249 OF 2020

SOSTHENES BRUNO 1ST APPELLANT
DIANAROSE BRUNO 2ND APPELLANT

VERSUS

FLORA SHAURI RESPONDENT

[Appeal from the Judgment and Decree of the High Court of Tanzania,

Dar es Salaam District Registry at Dar es Salaam]

(Feleshi, JK.)

dated the 15th day of June, 2020

in

Civil Case No. 272 of 2012

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RULING OF THE COURT

6th & 14th June, 2022

GALEBA, J.A.:

The dispute giving rise to this appeal involves a piece of land measuring approximately three to four metric acres, prior to its being surveyed in the year 2007 or thereabouts. Following its survey, the land was subdivided into 9 plots, which are Plots No. 1022-1030 Block "A" Mbwani Area in Dar es salaam (the disputed property). The dispute hovering above the property, is to say the least, long term and it is not the first time that the parties are before us. The matter was before this Court

in the year 2015 only to bounce back to the High Court following discovery of certain technical defects with that court's judgment.

A moderately detailed background of this appeal, has it that the dispute over the property started in the year 2000 when John Frank Kioni (not a party to this appeal), lodged Civil Case No. 286 of 2000 at the Resident Magistrate's Court of Dar es Salaam at Kisutu, impleading the respondent to this appeal as the sole defendant. The major prayer in that suit was that the said John Frank Kioni be declared the lawful owner of the disputed property, because, he had allegedly, bought it from Mary Peter Ralphrain on 6th May 2000. On the other hand, the respondent raised a counter claim in that suit seeking, like her counterpart, to be declared the lawful owner of the same property, because she had bought the land on 9th December 1996, from the same seller, Mary Peter Ralphrain. By a judgment dated 25th March 2004, the subordinate court dismissed John Frank Kioni's suit and upheld the present respondent's prayers in the counter claim. It declared her the lawful owner of the disputed property.

On 9th August 2004 a demolition order, shown at page 52 of the record of appeal was issued to Eric Auction Mart & Court Broker (the Court Broker) (not a party to this appeal), for enforcement of the Resident

Magistrate's Court decree. According to the first appellant, it was only on 13th August 2004, when the warrant of attachment was affixed on the disputed property, that he became aware that the property was involved in any live law suit. Thus, on 26th August 2004, he approached the subordinate trial court under Order XXI Rule 57 (1) of the Civil Procedure Code, [Cap 33 R.E. 2002, now R.E. 2019], (the CPC) seeking to establish his interest over the land in dispute *vide*, objection proceedings as per the chamber summons and affidavit contained at pages 57 to 62 of the record of appeal. These proceedings were however, abandoned and were not pursued to a clear finality. In that respect the first appellant's own evidence at page 108 of the record of appeal, reveals that very position where he stated:

"When I became aware, I filed the objection proceedings which I further abandoned (did not make further follow up). I do not know its outcome."

Subsequent to abandoning the objection proceedings, the first appellant joined forces with the second and engaged an alternative Government machinery, that is land delivery authorities, towards officiating ownership of the disputed property, other than through the

court system. According to the record of appeal, on 7th February 2008, the disputed property had been subdivided into nine plots and granted to both appellants as joint occupiers of the land for 99 years. The two were issued with Certificate of Occupancy No. 79255, exhibit P3 contained at page 188 of the record of appeal.

Notwithstanding the above development, on 29th January, 2010, the Resident Magistrates' Court of Dar es Salaam at Kisutu made the following order in Civil Case No. 286 of 2000 as contained at page 60 of the record of appeal:

"Court: The objector's objection to execution proceedings was dismissed for want of prosecution on 22/10/2004. He applied for setting aside a dismissal order, which application was granted on 31/7/2006. Since then, the objector has done nothing to ensure his objection is heard. Upon a letter of complaint by the decree holder that the decree lies unexecuted todate, let execution proceed from the stage it had reached.

Sgd. Hon. I. C. Mugeta – SRM
29/01/2010"

Order: the appointed Court Broker to proceed with execution of the order in the demolition order dated 9th day of August 2004.

Sgd. Hon. I. C. Mugeta – SRM
29/01/2010.”

Subsequent to the above order, on 17th March 2010, equipped with the decree and the demolition order, it appears, the Court Broker demolished some properties erected on the disputed property. This execution of the decree aggrieved the appellants who filed Civil Case No. 93 of 2010 in the High Court impleading the respondent, the Court Broker, the Inspector General of Police and Honourable the Attorney General. Against that case, a preliminary objection was taken at the instance of the defendants and the High Court, Munisi J., (as she then was), struck it out with costs on 6th November 2012 following the appellants’ advocate’s timely conceding to the objection.

Subsequent to that order, the appellants refiled Civil Case No. 272 of 2012 seeking to be declared lawful owners of the disputed property. This time they sued only the respondent and the Court Broker. The respondent disputed the claim and lodged a counter claim in which she prayed to be declared the lawful owner of the disputed property.

On 23rd June 2015, the appellants moved the Court to give orders to amend the plaint in order for them to stream line their claims against the respondent as the sole defendant by dropping the Court Broker from the case. That prayer was readily granted and the amended plaint was lodged on 26th June 2015. In the amended plaint the appellants were praying for a declaration that they were the lawful owners of the disputed property.

Like in the previous pleadings, the respondent raised a counter claim praying for among others a declaratory order that she was the lawful owner of the suit premises, which prayer however, as observed earlier on, had been granted in her favour in Civil Case No. 286 of 2000.

To prove their ownership in the newly filed suit in the High Court, the appellants called two witnesses, the first appellant, PW1 and Mary Paulo, also called Mary Peter Ralphrain, PW2. On the other hand, the respondent called four witnesses, namely, Adolph Singisa Temba, DW1, and John Mkufya, DW2. The other witnesses were Barthromew Shauri, DW3 and the respondent herself, DW4.

After the trial in the High Court, by a judgment dated 11th November 2015, the court, dismissed the suit and like the Resident Magistrate's

Court, granted the prayers in the counter claim, including a prayer that the respondent was the lawful owner of the disputed property.

The appellants were aggrieved and preferred Civil Appeal No. 81 of 2016, now reported as **Sosthenes Bruno And Another v. Flora Shauri**, [2020] 1 T.L.R. 614. In that appeal the appellants raised nine grounds of appeal, but the same were not entertained because, prior to hearing the appeal, the Court noted that the High Court did not determine certain issues, so it quashed the judgment and remitted the original record to the High Court for consideration of the issues that had not been attended to, and ordered composition of a fresh judgment.

Thus, the record was remitted to the High Court and after attending to the issues that had not been resolved in the quashed judgment, a fresh judgment was composed and delivered to the parties on 19th June 2020. In the recomposed judgment, like it was in the previous one, still the respondent was declared the lawful owner of the land. The appellants were still aggrieved by the new judgment and lodged this appeal predicated on 8 grounds of appeal. However, for reasons that will become obvious in this ruling, we will not consider any merits or otherwise of the said grounds of appeal.

At the hearing of this appeal on 6th June 2022, the appellants were represented by Ms. Dosca Mutabuzi teaming up with Mr. Pascal Kamala, both learned advocates and the respondent had the services of Mr. Juma Nassoro, also learned advocate.

Prior to commencement of hearing and after a considerably long engagement with the learned advocates for the parties, we required them to address the Court on whether the proceedings of the High Court in Civil Case No. 272 of 2012 were valid, considering that when the judgment and decree in such proceedings were being passed, there was in existence of a valid decree in Civil Case No. 286 of 2000 declaring the respondent as the lawful owner of the disputed land.

Mr. Nassoro submitted first. He contended that the proceedings in the High Court were a nullity because at the time the appellants went to the High Court, the decree in Civil Case No. 286 of 2000 stood valid and unchallenged. He argued that by virtue of that decree, it meant that the respondent held and continues to hold the land against the whole world including the appellants. He observed that had the appellants wanted to challenge the respondent's ownership of the land, they had to seek revision of the decree of the subordinate court, and not to lodge objection

proceedings as they did because, according to him objection proceedings can only be entertained where there is a warrant of attachment issued against the property whose owner has no relation with the decree. In this case, he argued, there was no warrant of attachment but a demolition order. In the circumstances Mr. Nassoro, moved the Court to nullify the proceedings and set aside the judgment and decree of the High Court and strike out the appeal for challenging a nullity. He too, prayed for costs of the appeal.

In a very short and clear reply, Mr. Kamala did not object to the prayer made by Mr. Nassoro. He however prayed that such orders be entered without costs and that as the objection proceedings in Civil Case No. 286 of 2000 are still pending at the Resident Magistrates' Court at Kisumu, then this Court be pleased to order that the said proceedings be continued from where they were left.

In this matter, there was fairly no difficulty on how to go about it or what orders to make. However, the aspects which presented a bit of contest is the issue of costs and Mr. Kamala's prayer that we order the objection proceedings to be pursued from where they were left at Kisumu

cout in the year 2006. We will come to these two points before winding up this ruling.

We will start with the law on objection proceedings in this jurisdiction, in order to justify why we agree with both counsel on the undisputed aspect of this appeal. The law is covered under the subject, Investigation of Claims and Objections, with a detailed procedure under Order XXI rules 57 to 62 of the CPC. The relevant rules provide as follows:

"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) N/A

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.

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 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.

60. *Where the court is satisfied that the property was, at the time it was attached, in the possession of the judgment debtor as his own property and not on account of any*

other person or was in possession of some other person in trust from him, or in the occupancy of a tenant or other person paying rent to him, the court shall disallow the claim.

61. *N/A.*

62. *Where a claim or an objection is preferred, the*

party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."

The rationale for inclusion, in the CPC, of the above rules in Order XXI, in our view, is to provide for a procedure on how to carry out investigation of claims and objections which may be presented to court by third parties who may be adversely affected by attachments arising from decrees born out of proceedings to which the objectors were not parties. See this Court's decision in **Katibu Mkuu Amani Fresh Sports Club v. Dodo Umbwa Mamboya And Another** [2004] T.L.R. 326.

In that respect, Order XXI rule 57 (1) provides for two different aspects; **one**, an objector, a third party to the court proceedings, is permitted to access the court in order to object to any attachment of the

property in which he has interest, and; **two** the rule vests jurisdiction in the court that passed a decree to hear the objector on his objection as if he was a party to the suit. The proviso to the rule imposes a caveat that, in order for the claim to succeed, the proceedings need not be designedly or unnecessarily delayed by the objector in terms of presenting them to court.

The next rule, which is rule 58 of that Order, provides that after preferring the objection before the court, the applicant has a duty to prove either of the two facts in respect of the property subject of the attachment. **One**, is his interest in the property or; **two** alternatively, he must prove that at the time of the attachment, he was in possession of the property attached.

Under rule 59 of Order XXI, if upon investigation the court finds out, and is satisfied that, for the reason stated in the application, the property when attached, was not in the possession of the judgment debtor or of some person in trust for him or some other people claiming it in his name, the court shall make an order releasing the property from attachment, wholly or to such extent as it thinks fit.

However, under rule 60, if the court makes a finding of fact, after the investigation, that the attached property was in possession of the judgment debtor as his own property and not on account of any other person or was in possession of some other person in trust for him, or in the occupancy of a tenant, the court shall disallow the claim and dismiss the objection.

Under rule 62 of that Order, the decisions of the court under rules 59 and 60 are final and not appealable, as per the decision in **Thomas Joseph Kimaro v. Apaisaria Martin Carl Mkumbo And Another** [2002] T.L.R. 369 and many others. However, a party aggrieved by the decision, under rule 62 of Order XXI, may lodge a suit in the court of competent jurisdiction as per this Court's decisions in the **Bank of Tanzania v. Devram P. Valambhia**, Civil Reference No. 4 of 2003 and **Kezia Violet Mato v. the National Bank of Commerce and Three Others**, Civil Appeal No. 127 of 2005 (both unreported). Obviously, where one loses in a subordinate court in a suit filed pursuant to Order XXI rule 62, has a right to challenge such a decision to the High Court according to law. With that brief highlight on the law on objection

proceedings, we will now get back to the objection proceedings in Civil Case No. 286 of 2000.

According to the affidavit of the first appellant, at page 58 of the record of appeal, it is deponed that he had interest in the suit property that was a subject matter of Civil Case No. 286 of 2000 for, it was allegedly, his property. Complementary to that, Mr. Kamala confirmed at the hearing before us, that the objection proceedings in the Resident Magistrate's Court to establish the first appellant's interest in the property, are currently pending in that court. We indicated above also that one of the prayers of the appellants in High Court Civil Case No. 272 of 2012 was for a declaration that the plaintiffs are the lawful owners of the disputed property. That means the appellants, especially the first, had the same prayers before two different courts at the same time.

Further, both advocates were at one, that leaving the objection proceedings at the Resident Magistrate's Court unattended and filing High Court Civil Case No. 272 of 2012 to prove the same allegation against the same respondent, was unlawful for it was unprocedural. We associate ourselves to the latter submission because it is full of reason and maturity.

In the context of the instant matter, we are of the considered position that, had the first appellant not abandoned his objection proceedings, he would have, quite properly pursued them to finality in the Resident Magistrate's Court. In case his objection was to be dismissed, he would have lodged a suit as indicated above under Order XXI rule 62 of the CPC in order to prove his title to the land. If that suit would have been unsuccessful, that is when the first appellant would have challenged it to the High Court according to law. Instead of following this procedure, the first appellant abandoned it midway to initiate a fresh litigation at the High Court in 2012, which in our view, was a premature pursuit.

That was an abuse of the court process because the appellants, particularly the first, was seeking to ride two horses at the same time, an ill practice also called forum shopping which is illegal in this jurisdiction. This practice, in courts, is most discouraged and very unwanted. See **East African Development Bank v. Blue Line Enterprises Ltd**, Civil Appeal No. 101 of 2009, **The Registered Trustees of Kanisa la Pentekoste Mbeya v. Lamson Sikazwe and Four Others**, Civil Appeal No. 210 of 2020, **Hamis Said Mkuki v. Fatuma Ally**, Civil Appeal No. 147 of 2017 and **Harrison Mandali and Others v. The Registered Trustees of**

the Archdiocese of Dar es Salaam, Civil Application No. 482/17 of 2017 (all unreported).

Before we can finally pen off, Mr. Kamala prayed that we permit the appellants to go back to the Resident Magistrate's Court and take up the objection proceedings from where they were left. On this, we are uncertain and it is doubtful that indeed the objection proceedings which were abandoned in the year 2006 in respect of a decree of 2004, are still legally pending at Kisumu court today 18 years later. That is however, not to say that the first appellant cannot pursue the proceedings, according to law, in case they are pending, as contended by her counsel, what we restrain ourselves to do, is to make an order in that respect. Accordingly, with respect to Mr. Kamala, we are unable to grant his prayer.

In the event, under the provisions of section 4 (2) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019], the entire proceedings of the High Court in Civil Case No. 272 of 2012 are hereby nullified, the judgment is quashed and the decree of that court is set aside as jointly contended by counsel for both parties. In the circumstances, the appeal is struck out for no valid appeal could have been preferred from a nullity.

As for costs, we make no order in that respect because, the issue that has led to the termination of this appeal was raised by the Court *suo motu*.

It is so ordered.

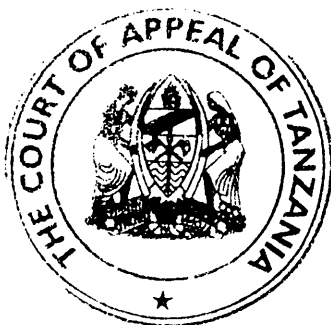
DATED at **DAR ES SALAAM** this 14th day of June, 2022.


S. E. MUGASHA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

This Ruling delivered this 14 day of June, 2022 in the presence of Ms. Ester Msangi, learned counsel for the Appellants, Respondent and in the absence of Mr. Juma Nassoro, leaned counsel for the Respondent who was dully notified, is hereby certified as a true copy of the original.




A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL