

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: NDIKA, J. A., RUMANYIKA, J.A And MDEMU, J.A.)

CIVIL APPEAL NO. 341 OF 2020

UBAPA AUCTION MART 1ST APPELLANT
JOHN SAMSON 2ND APPELLANT
KISAMBI KIHIRI 3RD APPELLANT
SARIGE MAFURU 4TH APPELLANT

VERSUS

SIKIMAYI NYAKIHEMERE RESPONDENT
(Appeal from the Judgement of the High Court of Tanzania at Mwanza)

(Bukuku, J.)

dated the 16th day of October, 2018

in

Land Appeal No. 196 of 2016

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JUDGMENT OF THE COURT

8th & 14th December, 2023

MDEMU, J.A.:

This appeal is from the decision of the High Court of Tanzania sitting at Mwanza. The latter in Land Appeal No. 196 of 2016 quashed the judgement and decree of the District Land and Housing Tribunal for Mara (the DLHT) and made an order to the effect that, 50 acres of land and 5 heads of cattle attached and subsequently sold be restored to the

respondent, else, the appellant should compensate in their equivalent market value.

Facts giving raise to the instant appeal may be stated briefly as hereunder: In the Ward Tribunal of Salama, Mwenyekiti wa Kijiji cha Bigegu (Bigegu Village Chairman) going by the name of Sikimayi Nyakihemere, the respondent, filed separate Land Disputes No. 8 of 2010, 9 of 2010 and 10 of 2010 against the 2nd, 3rd and 4th appellants. The nature of the claim in the three land disputes was that, the land which each appellant claim tittle over it belongs to the village authority. The respondent lost. He thereafter appealed to the DLHT in Land Appeals No. 163 of 2010, 164 of 2010 and 165 of 2010. The DLHT consolidated the three appeals and in the end, upheld the decision of the Ward Tribunal by holding that, the appellants herein were legally allocated the suit pieces of land.

Following that decision, the appellants proceeded with execution processes and also filed a bill of costs to the DLHT amounting to TZS. 3, 844,500.00. As the respondent did not comply with execution order, his 50 acres of land and 5 heads of cattle were attached and ultimately sold in realization thereof. Such attachment and sale was by the order of the DLHT. The respondent thus rushed to the High Court mainly on a complaint that,

the DLHT wrongly ordered attachment and sale of his 50 acres of land and 5 heads of cattle, being his personal properties, while in fact he was not personally liable. In his stance, as he acted in the capacity of a Village Chairman, it was the village authority which was to shoulder such liability. He argued in his written submissions that, the order of attachment ought to have been directed to attach village properties.

The High Court (Bukuku, J.) heard the parties and in the end, as said, quashed the judgement and decree of the DLHT and as such, ordered restoration of the 50 acres of land and 5 heads of cattle to the respondent or compensation as the case may be. The appellants were not happy with that decision, hence the instant appeal on the following grounds:

1. That the learned Judge erred in law and in fact by entertaining the appeal in favour of the respondent while the same was not a party to the proceedings in both the lower land courts, that is to say; the Ward Tribunal and the District Land and Housing Tribunal respectively.

In the alternative;

2. That the learned Judge erred in law and in fact by not observing that the respondent being not a party in the lower courts, that is to say; the Ward Tribunal and the District Land and Housing Tribunal, any objection thereof must be preferred

under the provision of Order XXI Rule 57 (1) and (2) of the Civil Procedure Code, [Cap 33 R.E. 2019].

At the hearing of this appeal on 8th December, 2023 the appellants were represented by Mr. Mussa Joseph Nyamwelo, learned advocate whereas the respondent had the services of Mr. Cosmas Tuthuru, learned advocate also. Both counsels adopted their respective written submissions filed in that behalf in support of or resisting the appeal. We will not reproduce verbatim the said written submissions, but rather we will paraphrase those relevant in resolving the raised grounds of complaint.

Our reading to the appellant's written submissions reveals two reasons being the main thrust upon which the appeal is based. **One**, the remedy available to the respondent on seeing that what was attached was his personal properties, objection proceedings in terms of Order XXI, rule 57 (1) and (2) of the Civil Procedure Code, Cap.33 ought to have been filed. In this, he referred us to the case of **Katibu Mkuu, Amani Fresh Sports Club v. Dodo Umbwa Mamboya & Another** [2004] TLR 326 insisting that, the respondent was duty bound to file objection proceedings contesting attachment of his personal belongings.

Two, the order of the DLHT in Application No.81 of 2013 refusing to illegalize the sale of the respondent's personal belongings is non appealable. The DLHT in that application refused to make such a declaration because procedures in attachment and ultimately sale, were duly followed and also that the DLHT was functus officio.

Regarding the ground of complaint filed in the alternative, it was his submissions that, as the respondent was not a part to the proceedings of Salama Ward Tribunal as well those in the DLHT, the High Court of Tanzania lacked the requisite jurisdiction to entertain Land Appeal No. 96 of 2016 which is the subject of this appeal. He cited to us the case of **Sospeter Kahindi v. Mbeshi Mashini**, Civil Appeal No.56 of 2017 and **Richard Julius Rukambura v. Issack Ntwa Mwakajila & Tanzania Railways Corporation**, Civil Appeal No.2 of 1998 (both unreported) to bolster his assertion.

In the reply written submissions, the respondent's focus was on two aspects. The first one responds to the raised ground of complaint partly. It was submitted that, the respondent was a party in the High Court proceedings but neither in the Ward Tribunal nor in the DLHT. In the

respondent's written submissions at page 3, it is recorded regarding this assertion in this way:

"This is to misled this Honourable Court as the respondent was not a party to the Ward Tribunal but the records of the court shows that the respondent filed Land Application No. 81/2013 before the District Land and Housing Tribunal on 19th August, 2013 to challenge an illegal sale of his 50 acres and 5 heads of cattle and joined the 2nd, 3rd and 4th appellants in that suit Land Application No. 81 of 2013, was eventually dismissed."

The second aspect replied is in respect of objection proceedings raised in the written submissions of the applicant to be the only remedy open to the respondent to challenge attachment and sale. In this one, it is the respondent's submission that, as the notice of execution was not served to the respondent, objection proceedings would not have been filed under the circumstances. Instead, and since attachment and ultimate sale was effected, then the respondent, as of right, filed Application No.81 of 2013 against the appellants to challenge the said attachment and sale. He argued further that, since the said application was dismissed, the appeal to the High

Court was rightly filed. It is on that account, it was concluded in the written submissions that, the appeal be dismissed for want of merits.

We have examined the record of appeal and duly considered the written submissions filed by the parties. For reasons to follow soon, matters raised by the parties in their written submissions relating to objection proceedings will not have a place for deliberations. What we have so far gathered from the adopted written submissions, besides the background giving raise to the land disputes, are matters relating to objection proceedings. It is not clearly spelt out what parties submitted for or against the raised ground of complaint that the High Court erred in entertaining the appeal of the respondent while the latter was not a party in both tribunals below. We think what the appellants wanted us to do in respect of the raised ground of complaint as argued in their written submissions is that, as the respondent did not file objection proceedings regarding attachment and sale of would be his personal belongings, then he conceded not to be a party, and as such, the attached property belongs to a party to the proceedings. As alluded to, we will not stretch ourselves that much far.

On the respondent's part, as said, he partly conceded to be a party in the appeal to the High Court but neither in the Ward Tribunal nor in the

DLHT. The question now is whether, in the circumstances of this land dispute, the respondent herein was a party to the proceedings all along from the Ward Tribunal through the DLHT and in the High Court for that matter. It be understood that, we are not intending here to open a discussion regarding who is a party to the suit in the circumstances of this case. We have one reason for this observation. The learned Judge who determined the second appeal made it clear at page 211 through 212 of the record of appeal in the following version:

*"I will start with the first ground of appeal, in answer to this appeal. It is a fact not disputed that, **at the Salama Ward Tribunal, in Application No. 8 of 2010, the appellant herein, as the chairman of Bigegu village sued the respondents** for the recovery of land which was allegedly allocated to them by the Milembera Village Authority, **before the establishment of the Bigegu Village Government, which the appellant was the chairman of that village.** It is also not disputed that, following the trial tribunal's decision, which ordered the Serikali ya Kijiji cha Bigegu to remove all their belongings in the suit property, it is the same Serikali ya Kijiji cha Bigegu, which appealed to the first appellate tribunal. When the respondents won*

that appeal, they filed execution proceedings against the Serikali ya Kijiji, and not the appellant in his personal capacity.” [emphasis supplied]

Our understanding in the foregoing excerpt is that, there is no dispute that the respondent sued the 2nd, 3rd and 4th appellants in the capacity of him being a Village Chairman. This is also the case in the decisions of Salama Ward Tribunal in Land Disputes No. 8 of 2010, 9 of 2010 and 10 of 2010 filed by the respondent against the 2nd, 3rd and 4th appellants. In application No. 9 of 2010, just one example to mention appearing at page 4 of the record of appeal, is recorded, thus:

"DAI: Na. 9/2010

Mdai: M/KITI S/KIJILI BIGEGU,

MDAIWA: KISAMBI KIHIRI

YAH: ENEO LA KILIMO

HUKUMU MBELE YA: -

- 1. JACKSON KISURA – M/KITI*
- 2. TAABU JUMA – MJUMBE*
- 3. MARY SAMSON –MJUMBE*
- 4. ABBAS MATUTU – MJUMBE*

MAELEZO YA HUKUMU

Mdai Sikimayi Nyakihemere M/Kiti wa kijiji Bigegu, Umri 52 Mkazi wa Bigegu Bunda (Mara) alifika barazani na kutoa malalamiko yake ya kudai

*eneo la kilimo dhidi ya Kisambi Kihiri, Umri 40 mkazi
wa Bigegu Bunda Mara'*

It is from this evidence, in our view, the learned Judge concluded as follows as at page 213 of the record of appeal, which we are unable to fault her:

"It is clear from the above that, the appellant herein, had acted as a representative of the Serikali ya Kijiji Bigegu, as chairman, and did not sue the respondents in his personal capacity. In this particular case, much as it was the appellant who filed the application before the District Land and Housing Tribunal against the respondents, as chairman, on behalf of the Bigegu Village Government, the respondents never objected to such representation. It is trite that, all objections as to misjoinder or non-joinder of parties, must be taken at the earliest possible opportunity. If such objection is not so taken, it is so deemed to have been waived. It is for the above reasons; I consider that the error of impleading the appellant in his individual capacity was merely technical and I am satisfied that, the mere writing the name of Sikimayi Nyakihemere

instead of the Bigegu village did not occasion any failure of justice."

[Emphasis supplied]

What we have so far gathered from the above passage is that, the respondent was present all thorough in this land dispute. In fact, is the one, as we alluded to above, who initially filed land disputes against the 2nd, 3rd and 4th appellants. Equally, he appeared in the DLHT on behalf of Serikali ya Kijiji cha Bigegu in appeals against the appellants which were later consolidated. nonetheless, the appellants did not object on such representation. He also appeared in all applications for execution filed by the appellants themselves which were later consolidated. In this again, we are told, and we entirely agree, was on behalf of Serikali ya Kijiji. It is again the same person (the respondent) who appealed to the High Court in Land Appeal No. 196 of 2016 using his name. We are not taken by surprise in this latter to see him appearing in his name because the properties so attached and ultimately sold, according to the learned Judge, which we are also in agreement, were his personal properties. In this therefore, we are satisfied that the respondent herein was a party and thus it was wrong, as correctly found by the learned Judge, to attach and ultimately sale his person properties.

The above deliberation of the first ground of appeal has also resolved the second ground of appeal filed and argued in the alternative. We will neither therefore deliberate on it nor do we intend to deliberate, as said, on matters related to objection proceedings. That said, we find no merits in this appeal and we accordingly dismiss it with costs.

DATED at **MWANZA** this 14th day of December, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered on this 14th day of December, 2023 in the presence of Mr. Cosmas Tuthuru for the respondent, also holding brief for Mr. Musa Joseph Nyamwelo, learned counsel for the applicant, and Mr. is hereby certified as a true copy of the original.




F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL