

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CIVIL APPEAL NO. 87 OF 2003
(Original Matr. Cause No. 44 of 1995 of RM's Court at Kisutu)**

SAID ABDALLAH KINYANYITE.....APPELLANT

VERSUS

- 1. FATUMA HASSAN.....1ST RESPONDENT**
- 2. JIBREA AUCTION MART.....2ND RESPONDENT**

RULING

SHANGWA, J:

In this case, the respondents have raised a preliminary objection against the appellant's appeal originating from the order of the Court of the Resident Magistrate at Kisutu made on 7.5.2003 in Matrimonial Cause No.44 of 1995. The said court's order was made in the objection proceedings which had been instituted by way of Chamber application.

In that application, the appellant Said Abdallah Kinyanyite was objecting against the attachment and sale of a certain house located at Nzasa, Dar es Salaam with No. CHR/N2/A/984 on ground that it did not belong to the

judgment debtor in the above mentioned Cause, namely one Omari Chingwalu. In its order, the Court of the Resident Magistrate at Kisumu dismissed the appellant/objector's application with costs.

The respondents' preliminary objection against the appellant's appeal in this case appears to be based on two main grounds. First, that the appeal is incompetent and misconceived in law. Second, that an appeal against the trial Court's order made on 7.5.2003 is disallowed under the provisions of the Civil Procedure Code, 1966.

On the first ground of objection, Mr. J.A. Lyimo for the respondents contended that the only avenue which was available to the objector now appellant when the trial Court dismissed his objection/application on 7.5.2003 and disallowed his claim to the ownership of the House located at Nzasa was to file a suit to establish his claim and not to appeal against the court's order. In support of his contention, he relied

on r.62 of O.21 of the Civil Procedure Code,1966. On the second ground of objection, Mr. J. A. Lyimo contended that the appellant's appeal is expressly disallowed under the provisions of the Civil Procedure Code. In support of his contention on this ground, he relied on S.74(1) of the Civil Procedure Code, 1966.

It appears from the above contentions that the respondents' points of objection against the appellant's appeal are purely based on law. Before dealing with those points, let me settle Mr. J.A. Lyimo's concern about the appellant's failure to file his written submissions within the period which had been specified by this court.

In his rejoinder to the appellant's reply submissions to the respondents' submissions, Mr. J.A. Lyimo submitted that the appellant did not adhere to this court's order made on 7.10.2004 in which he was required to file his reply submissions on or before 25.10.2004. He said, he filed them

after that date and without leave of this court. For this reason, he urged the court not to consider them.

Indeed, the appellant did not file his reply submissions by 25.10.2004 as ordered by this court on 7.10.2004. Instead, he filed them on 30.11.2004 which was out of time specified in this court's order. He did so without leave of the court.

It has more than often been held by this court that written submissions which are filed outside the period specified in the court's order and without leave of the court should not be considered even if they contain meritorious arguments. The reason behind this holding is not only because once the court's order is made it has to be respected but also that written submissions which are filed out of such period and without leave of the court have no legal basis. That being the position, I will not consider the appellant's reply submissions which were filed out of time and without leave of this court.

The points of law which have to be determined by this court here are whether or not the appellant was supposed to file a suit to establish his claim over the attached house and whether or not the order of the Court of the Resident Magistrate at Kisumu made on 7.5.2003 in Matrimonial Cause No.44 of 1995 is appealable.

I have looked at the said court's proceedings made on 7.5.2003 in order to find out as to whether or not the said Court's order is subject to appeal. In actual fact, those proceedings were very brief: On the material date, Mr. J.A Lyimo addressed the court as follows and I quote:

"If the objector is absent if he is serious in pursuing this case he would attend the court otherwise I pray the matter to be dismissed"

After the said address, the trial Senior Resident Magistrate F.M. Kiyanga recorded as follows and I quote:

"Court - This matter went into full trial and

judgment was entered. The objector who appeared later I hope he is not a genuine Party. I agree to dismiss the application with costs and I order that the execution to proceed according to the judgment I delivered. Any Party who is dissatisfied should appeal.

(Sgd) Kiwanga, SRM.

7.5.2003."

From the above quoted proceedings, it appears that the appellant's application in which he was objecting to the attachment and sale of the house at Nzasa Dar es Salaam alleging that it belongs to him and not to the judgment debtor one Omari Chingwalu (in Matrimonial Cause No.44 of 1995) was dismissed for his non appearance. The record shows that his application was dismissed for non appearance on the date which had been fixed for mention and not hearing. This was wrong on the Part of the trial Senior Resident Magistrate. A litigant's application should not be dismissed for non appearance on the date fixed for mention. It may be so

dismissed on the date fixed for hearing. As a matter of law, where an application has been dismissed for non appearance of the applicant, the procedure to be followed is to apply to the trial court for setting aside its dismissal order and not to appeal against it. Thus, it was also wrong on the Part of the trial Senior Resident Magistrate to remark that any Party who is dissatisfied with her order should file an appeal.

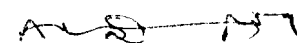
I do not think that after the dismissal of his application for non appearance, the appellant was supposed to file a suit to establish his claim over the attached house as contended by Mr. J.A. Lyimo on his first ground of preliminary objection. I repeat that the procedure to be followed when such a thing happens is to apply to the court for setting aside the dismissal order.

Therefore, I agree with Mr. J.A. Lyimo albeit for a different reason that the appellant's appeal is incompetent and misconceived in law. I agree with him also that in view of the

express provisions of S.74(1) of the Civil Procedure Code 1966 which exclude an order dismissing the application for non appearance of the applicant from the list of orders of the Courts of Resident Magistrate and District Courts against which an appeal lies to the High Court, the appellant's appeal against a Similar order of the Court of the Resident Magistrate at Kisutu dated 7.5.2003 is not allowed in law.

That being the position, I uphold the respondents' preliminary objection and direct the appellant to file an application for setting aside the trial court's dismissal order of his application unless otherwise it is time barred.

For the reasons I have given in this ruling, I hereby dismiss the appellant's appeal but I order that each Party should bear its own costs.

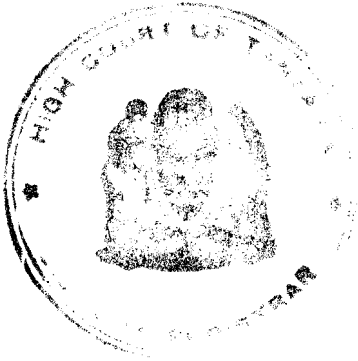


A. Shangwa

JUDGE

16.2.2005.

Delivered in open Court at Dar es Salaam this 16th day of February, 2005.



A. Shangwa

A. Shangwa

JUDGE

16.2.2005.