IN THE HIGH COURT OF TANZANIA

AT DODOMA

(PC) CIVIL APPEAL NO. 57 OF 2002

(From the decision of the District Court of Dodoma District at Dodoma in Civil Appeal No. 23 of 2002 - Original Civil Case No. 13 of 1997 of Chamwino Ikulu Primary Court)

JOBU MDACHI ..... APPELLANT

VERSUS

ELISHA MESSO ..... RESPONDENT

JUDGEMENT

KAIJAGE, J.

ELISHA MESSO, the respondent herein, was a losing party in objection proceedings which he instituted following the execution of an attachment order made against his father, WILSON MESSO, in satisfaction of a judgement in Chamwino (Ikulu) Primary Court Civil Case No. 13 of 1997. In that matter, the appellant herein, JOBU MDACHI, was a plaintiff and the respondent's father was a defendant. Appellant obtained judgement in his favour after the

respondent's father had admitted the former's claim.

In the objection proceedings, the respondent had applied for the release of a bicycle, five goats, one residential house and shambas measuring about 3½ acres all attached in satisfaction of the judgement entered against his father. In its Ruling dated 11th April, 2002, the said lower trial court overruled respondent's objection, ordering that the attached properties be put in the appellant's possession until further orders of the court. Dissatisfied with that decision, the respondent successfully appealed to Dodoma District Court which ordered for the return of the said properties to him. The present appeal is against the decision of the said 1st appellate court.

From the outset, I must observe that the decision of the 1st appellate court cannot be legally sustained. First, instead of confining itself to the decision which was appealed against, the 1st appellate court delved in and entertained extraneous matters which were non-issues before the court of the first instance. In Chamwino Primary Court Civil Case No. 13 of 1997, the appellant obtained judgement upon admission of his claim by the respondent's father. It was therefore a misdirection on the part of the 1st appellate court to consider issues like; whether or not the appellant was validly married to the daughter of the respondent's father.

As rightly submitted on behalf of the appellant, the fundamental issue which called for consideration and determination by the 1st appellate court is whether or not the attached properties belonged to the respondent. As matters stands, the appeal was certainly decided on non-issues.

Secondly, it is clear that the decision of the lower trial court in objection proceeding was given in accordance with Gogo Customary law. This is evident in its Ruling where it held:-

> "... Mahakama imeridhika na ushahidi wa SU.I, SU.3, SU.4, SU.5, na kuona kwamba mali zilizokamatwa ni halali kabisa, kwani hata sheria za mila za kigogo washauri wangu wametoa maoni yao kuwa mtoto yeyote anapokuwa amejitegemea anakuwa na mali zake mwenyewe, maadamu mali hizo hazikukamatwa kwa mwombaji/mpingaji, Mahakama inaamini kuwa mali iliyokamatwa kwa mdaiwa wa awali ni sahihi kabisa ..."

Times without number this court has always underscored a point that where the decision of a Primary Court is based on the local customary law, that decision cannot be interfered with on appeal unless the law on which it is based is patently unconscionable [See; MWENDWA

MTINANGI V. JUMA MAHUMBI [1984] TLR at page 49]. The lower trial court having based its decision on Gogo Customary law, and there being no suggestion as to the unconscionability of that law, the 1st appellate court must have slid into a fundamental error when it disturbed the trial court's decision.

The trial court's decision, however, could only be criticised on one thing; it never addressed the question as to whether or not the attached properties which formed the subject matter of objection proceedings were attachable ones within the meaning of S. 3 of the 4TH SCHEDULE to the Magistrates Court's Act, 1984, the relevant parts of which provides:

> "S. 3 (3) For the purposes of this paragraph "attachable property" shall not be deemed to include:-
>
> (a) – (d) not relevant.
>
> (e) any land used for agricultural purposes by a village, ... or an individual whose livelihood is wholly dependent upon the use of such land; or
>
> (f) any residential house or building, or part of a house or building occupied by the judgement debtor, his wife and dependent children for residential purposes."

I have perused the relevant record and I have to confirm that nowhere did the trial court pause to consider whether or not the house and the shambas measuring 3½ acres were attachable properties within the meaning of the provision of Law herein above quoted. A possibility that these properties were illegally attached could not be ruled out. On this point, I think the 1st appellate court properly addressed the legal problem, but arrived at an erroneous conclusion when it ordered the return of the attached properties to the respondent.

From the foregoing, I find that the present appeal should be allowed, as I hereby do. Consequently, the decision of the 1st appellate court is set aside, and that of the lower trial court is restored with a direction that the executing court should, in the first place, investigate as to whether or not a house and the 3½ acres shambas are attachable properties. If they are not attachable properties, the appellant should be at liberty to re-apply for attachment of judgement debtor's other attachable properties.

Costs to follow the event.

S. S. KAIJAGE

JUDGE

8/5/2006