IN THE HIGH COURT OF TANZANIA

AT TABORA.

PC. CIVIL APPEAL NO. 8 OF 2007

(Arising from Civil Appeal No. 20/2006
Nzega District Court, Originates from Nzega
Urban Primary Court
Civil Case No. 32/2001)

KASEMA s/o MASUNGWI.....APPELLANT

Versus

MAKONDA s/o KISHIWA..... RESPONDENT

JUDGMENT

19th Feb. 07 & 10th April, 07

MUJULIZI, J.

This is an appeal arising from execution proceedings, in respect of decree of the Nzega Urban Primary Court in Civil Case No. 32/2001, between Makonda Kishiwa (Decree Holder) V. Shabani Ngamba (Judgment debtor). The suit was for claim for refund of dowry price under Sukuma customary law, by the former husband (plaintiff) of the Defendant's daughter, upon dissolution of marriage without the daughter bearing any child during her wedlock. The decree holder claimed and was granted refund of 7 heads of cattle, 1 Goat plus Shs. 3000. The case was heard and determined **ex-*parte*.**

The Judgment Debtor did not appeal nor set aside the decree. However, the appellant did not receive the 7 heads of cattle, 1 Goat and the Tshs.3, 000/= from the Judgment debtor. Consequently he embarked on execution of the decree by seeking to attach the heads of cattle from third parties, whom he alleged to be in possession of the Judgment debtor's cattle and goats.

After unsuccessfully attempting to execute the decree in the manner aforesaid, he finally obtained an attachment order against the Appellant herein on 08/2/2006, who unsuccessfully objected to the attachment before the Primary Court. Dissatisfied, he appealed to the District court, which dismissed his appeal. Hence this appeal.

For reasons that will come out in this judgment, I will not dwell on the merits of the appeal.

On 29/03/2007, when the matter was called up for hearing before me in the absence of the Appellant, I proceeded to give an order quashing the objection proceedings and nullifying the order of attachment of the Appellant's heads of cattle. I ordered for their release and advised the Respondent to seek execution of the decree in another mode permitted by law. In that order I promised to give the reasons for so doing on a later date. The following are the reasons;

The first issue, I have to deal with is whether or not the Primary Court had powers to order or issue warrant of attachment against the Appellant's properties in the way it did or at all, since the Appellant was not the judgment debtor.

By S. 19 (l) (b) of the Magistrates Courts Act (Cap.11.R.E. 2002) " the practice and procedure of primary courts shall be regulated and, subject to the provisions of any law for the time being in force, their powers limited;

"(b) in the exercise of their Civil jurisdiction, by the provisions of the Fourth Schedule to this Act, and, where the law applicable is customary law in so far as it is not inconsistent with the provisions of the Fourth Schedule."

By clause 3 (1) (b) and (d) a Primary Court has among other powers, powers to "(b) award compensation" and "(d) order the restitution of any property."

It is my considered opinion that the decree subject of the execution and subsequent objection by the Appellant herein was one of restitution and not compensation. Perhaps it will help to clear the matter if I reproduce the short judgment of the Primary Court.

"HUKUMU

Mdai alioa binti wa Mdaiwa Shabani s/o Ngamba mwaka 1998 Mdai *alitoa mahari ya Ng'ombe 7 Mbuzi 1 na Ths. 3,000/= hakuzaa na binti wa mdaiwa. Ndoa yao imevunjika na Talaka imetolewa. Ndipo mdai alipofungua dai la kudai mahari. Mdaiwa alipelekewa K/shaurini 14/5/2001 akafika Mahakamani, shauri lilianza kusikilizwa 30/5/2001 Mdaiwa alikuwpo shauri lilipangwa 6/6/2001 alikuwepo likapangwa 14/6/2001 Mdaiwa alikuwepo shauri likapangwa 22/6/2001 hakufika – 29/6/2001, 1/8/2001,13/8/2001 hakufika – 23/8/2001 hakufika ndipo*

tulipokea ushahidi wa .S.M. 2, Jeremia ***Kazito, na S.N.3 Makelege s/o Ngusa ambao walithibitishia Mahakama kwamba kweli Mdai alitoa Mahali ya Ng'ombe 7, Mbuzi 1 na Tshs. 3,000/= kumuoa binti wa Mdaiwa. Kwa ushahidi huo kwamba Ndoa ya Mdai na bintii wa Mdaiwa imevunjwa, na kwa ushahidi huo wa mahari kwamba Ngo'mbe 7, Mbuzi 1 na Tshs.3,000/=zilitolewa kama mahari na kwa ushahidi kwamba Mdai hakuzaa na binti wa Mdaiwa. Mdai ameshinda naye Mdaiwa ameshindwa na gharama ya kesi."***

The order consequent to the above finding was conclud in the following words;

"Amri: Mdai arejeshewe Ng'ombe 7 Mbuzi 1 na Ths. 3,000/=."

I am left in no doubt, that the above judgment and consequent order was an order for restitution. Indeed the Respondent was also not in doubt, as to what he prayed for and obtained.

On 9/11/2001 before the Primary court, the decree holder made the following application;

"Naomba kukaza hukumu ili mahari yangu Ng'ombe 7
Mbuzi 1 na Ths. 3,000/= zikamatwe Ng'ombe hizi
ziko kwenye zizi la Mwananjigilima wa Ngukumo
na Mponda wa Ngukumo."

Meaning – I pray for execution of the decree to recover my dowry price by warrant of attachment to issue against Mwananjingilima and Mpande of Ngukumo. The 7 heads of cattle and 1 Goat are in their kraal.

The application was granted and an order for attachment of 7 heads of cattle, 3 Goats and strangely enough the cash of Tshs. 3,000/= from the kraal of Mwananjingilima and Mpenda issued in the following words:

> "**Amri**: ***Mdai akaze hukumu Ng'ombe 7 mbuzi 3 na Ths. 3,000/= vikamatwe zizini mwa Mwananjilima na Mpenda.***"

But, as I have already stated this and other attempts to execute, did not succeed. The record shows that on 25/1/2006, the decree holder appeared before the Primary Court once again and reported that the decree was yet to be satisfied and he called upon the Court to summon, and order the Judgment debtor to settle the decree failing which he would execute the decree.

On 08/02/2006 the judgment debtor appeared before the lower court as ordered and stated that he did not have cattle nor goats wit which to settle the decree, but that he was anticipating to harvest crops later in the year. In his own words;

> ***"Sina ng'ombe wala mbuzi kumlipa mdai nategemea mavuno ya mwaka huu."***

Objecting strenuously, the decree holder (Respondent herein) stated that contrary to the above quoted statement, the judgment debtor had cattle and goats at his home.

In his own words;

> "***Mdai: Mdai ni mwongo anazo ng'ombe nyumbani kwake na mbuzi hivyo naomba hati ya kukaza hukumu mwaka huu mvua ni za taabu.***"

Consequently the Court ordered for a warrant of attachment to issue. But surprisingly, the attachment order named other persons, not the judgment debtor, but a total stranger to the proceedings. A person who was not even named by the Applicant as above quoted. The order issued in relation to KASEMA MASUNGWI of Mihama Village, Mizibasiba Ward, the Appellant herein. Subsequently, his kraal was invaded and 7 heads of cattle and 3 Goat taken into possession of the VEO.

The objection to the attachment on the grounds that the Appellant had no relationship with the judgment debtor and that the attached cattle and goat were the Appellants property was rejected. Hence the Appeal, to the District Court.

It is clear to me that there is no law empowering the Primary Court to attach properties in the hands of third parties in the manner it did herein or at all.

It was wrong for the Court to issue a general warrant of attachment contrary to it own order. The order was for restitution, "***kurejeshewa.***"

Now, "restitution" is a noun defined in the New Concise, Oxford English Dictionary to mean – "the restoration of something lost or stolen to its proper owner."

In this case the Respondent was claiming for restitution of dowry price paid to the judgment debtor. Although no evidence was lead to specify the heads of cattle whether they were bulls or cows or a combination of both, it is clear that the order referred to the specific heads of cattle given to the Judgment debtor.

It was not an order for compensation so as to afford a chance to settle the order by way of equivalent values either in terms of cash or by same number. Therefore, such order could not be enforced against any other person not being the judgment debtor.

It was wrong in particular, but it is also wrong in general. The jurisdiction of the Court can not go beyond parties who are not impleaded in the case before it.

But in this case the power of execution of the Primary Court is very limited. An order for attachment may only be issued by a primary court in relation to recovery of an amount of money including compensation or costs awarded by such Court. Refer to Rule 3(2) of the Fourth schedule to the MCA.Cap.11. R.E. 2002.

By clause 4 to the same schedule any further execution against a decree holder who has failed to comply with on order of the primary court is by way of application to the District court.

The statute does not empower a primary court to proceed against properties in the hands of third parties. Indeed our entire law of civil procedure does not empower Courts to attach properties in the names or possession of third parties save by way of a garnishee order in case of a money decree.

Indeed, objection proceedings by their very nature arise in a situation whereby an order for attachment has been issued against properties believed to be owned by a judgment debtor and actually in his possession at the time of attachment. A third party is allowed to go to court to object to the attachment on the basis that he is the owner of the attached properties and they do not belong to the judgment debtor.

This is the only incidence where a third party, a stranger to proceedings before a Court, may without summons or leave of the court be heard in the matter.

It is instructive to note that under the Civil Procedure Code, in case such objection is overruled the remedy available to the unsuccessful objector is to file suit to determine ownership of the disputed property. It is not by way of appeal.

The rationale for this is clear. Innocent third parties should be not be made to suffer inconvenience and cost, consequent to actions enforcing private rights to which they were strangers.

It was therefore wrong in this case for both lower Courts to determine the matter by way of evidence subsequent to attachment of the Appellant's cattle. Indeed both lower courts wrongly cast a heavy burden of proof on the Appellant to prove that he had title to the cattle found in his possession.

The execution powers of the primary court are limited to attachment and sale of property belonging to and in the possession of the judgment debtor. Therefore the burden the once of proof that the property sought to be attached is the property subject of the order for restitution and is in the hands of the judgment debtor is on the Decree holder. Not otherwise.

In the foregoing premises even if there was evidence that the judgment debtor had actually parted with possession of the heads of cattle and the goat subject of the decree with a view to avoid execution of the decree, the correct procedure would be for the applicant to seek an order for the arrest and detention of the Judgment debtor in accordance with Rule 5 to the Fourth schedule. The Primary Court would not have powers to follow such cattle in the hands of an innocent third party without notice of the illegality.

The appeal therefore, succeeds. The Appellant to get his costs both in this court and the Court below.

A.K. MUJULIZI

JUDGE

10/4/2007

Order:

DR: Transmit the judgment to the District Court of Nzega for delivery to the parties upon notice.

A.K. MUJULIZI

JUDGE

10/4/2007