

**IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM**

**PC. CIVIL APPEAL NO. 112 OF 2007**

*( From Temeke District Court Civil Appeal No. 50 of 2006)*

**FATUMA KITWANA ..... APPELLANT**

**VERSUS**

**1. SALUM ABDALLAH DILUNGA**

**2. MUNAWAR S. NYENGO ..... RESPONDENTS**

*Date of last order – 22/5/2008*

*Date of Judgment - 8/7/2008*

**J U D G M E N T**

**Mwarija, J.**

The appellant Fatuma Kitwana and the 2<sup>nd</sup> respondent, Munawar S. Nyengo were husband and wife. Their marriage was dissolved by the Primary Court of Temeke in Civil Case No. 11 of 2005 following a petition filed by the 2<sup>nd</sup> respondent. Consequent upon the dissolution of marriage was an order for division of matrimonial assets by the trial court. The appellant was to be paid ¼ of the value of matrimonial properties which

the trial court found that the parties jointly acquired. They included a house, the subject matter of this appeal.

When the trial Primary Court was executing its judgment, it ordered that the house, which came to be described as house No. AZM/MTG/825 situated at Mtoni Azimio ni Temeke District be valued and sold so that the appellant can be paid her decreed value. Following the attachment order, the 1<sup>st</sup> respondent Salum Abdallah Dilunga wrote a letter to the Primary Court informing the court that the house belonged to him not the 2<sup>nd</sup> respondent and therefore objected to its attachment and sale. The Primary Court Magistrate replied the letter and informed the 1<sup>st</sup> respondent that the court in its decision had found that the appellant had adduced evidence proving that she had a right in respect of the house.

The 1<sup>st</sup> respondent then applied for revision in the District Court. Upon that application for revision instituted on 28/8/2006, Civil Appeal No. 50 of 2006, the subject matter of the present appeal, was opened. The learned Senior District Magistrate proceeded to hear the parties by allowing them to

tender documents to prove ownership of the house. She finally wrote judgment in appeal declaring the 1<sup>st</sup> respondent, whom she referred interchangeably in her judgment as the applicant and the appellant, to be the owner of the house.

Dissatisfied with the decision of the District Court, the appellant has preferred this appeal. She was assisted by the women's Legal Aid Centre both in the drafting of the petition of appeal and the written submissions. The 1<sup>st</sup> respondent was represented by MM & Associates Advocates while the 2<sup>nd</sup> respondent was represented by Mr. Said Mayunga, learned counsel.

Given the reasons which I intend to give herein below, I need not consider the parties' submission on appeal. As stated earlier, the objection by the 1<sup>st</sup> respondent was communicated to the Primary Court through a letter. The Primary Court Magistrate replied to that letter and in the reply the 1<sup>st</sup> respondent's complaint was dismissed. That was not a proper procedure which an objection to execution should have been dealt with. The 1<sup>st</sup> respondent ought to have filed an

application objecting to the attachment of the house and the trial Primary Court would have determined that application after hearing the parties. This is the procedure which the Primary Court is required to follow as per the provisions of Rule 70 of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules, GN 310 of 1964 as amended by GN 119 of 1983. The Rule provides as follows:

- (1) Any person other than the judgment debtor, who claims to be the owner of or to have some interest in property which has been attached by the court may apply to the court to release the property from the attachment, stating the grounds on which he bases his objection.*
- (2) On receipt of an application under subrule (1), the court shall fix a day and time for hearing the objection and shall cause notices thereof to*

*be served upon the objection, the judgment debtor.*

*(3) . . . . .*

*(4) On the day fixed for hearing, the court shall investigate the objection and shall receive such evidence as the objector, the judgment creditor and the judgment debtor may adduce.*

*(5) If the court is satisfied that the property or any part of it does not belong to the judgment debtor, it shall make an order releasing it, or such part of it, from the attachment."*

It is clear from the above cited provision that as the Primary Court did not hear and determine the objection proceedings, there could not be any appeal to the District

Court against the decision on the objection by the 1<sup>st</sup> respondent. Again the District Court did not have jurisdiction to receive evidence intended to prove the ownership of the house. It only had appellate jurisdiction and therefore the learned Senior District Magistrate erred in receiving evidence of documents intended to prove ownership of the house and finally arriving at the contested decision. The District Court could not have done so even if it exercised its revisional powers. The proper move was for it to direct the Primary Court to comply with the provisions of Rule 70 of the above cited Rules.

From the foregoing, since the District Court acted without jurisdiction, I quash the proceedings and judgment arising therefrom and order that the objection proceedings, if any, be filed in the court with original jurisdiction, that is; the Primary Court. The appeal is therefore allowed but on a different ground as shown above. I order no costs as the appellant was litigating under a legal aid <sup>h</sup>sceme.<sub>a</sub>

It is so ordered.



*ag*  
A. G. Mwarija

**JUDGE**

8/7/2008

Date: 8/7/2008

Coram: Mwarija, J.

For the appellant – Present

For the Respondent –Present by Mr. Gastor Mdegela, Principal  
Legal Officer of the council's Co. of  
Advocates for the 1<sup>st</sup> respondent.

Judgment delivered.



*ag*  
A. G. Mwarija

**JUDGE**

8/7/2008

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