

**IN THE HIGH COURT OF TANZANIA
AT DODOMA**

**PC CIVIL APPEAL NO. 22 OF 2008
(ORIGINAL CIVIL APPEAL NO. 6 OF 2007 OF DODOMA
DISTRICT COURT AT DODOMA –
ORIGINAL CIVIL CASE NO. 17 OF 2006
OF KILIMATINDE PRIMARY COURT)**

WILSON MABALWE APPELLANT

Versus

MADIRISHA MAZOZO RESPONDENT

16/04/2009 & 15/05/2009

JUDGEMENT

This is a second appeal from the decision of Manyoni Primary Court at Kilimatinde – In Civil Case No. 17 of 2006 in which the present appellant **WILSON S/O MABALWE** won his main case against one **CHARLES MZOZO**. Thereafter, in the execution of the trial Primary Court decision, he attached the cattle of the present respondent **MADIRISHA MZOZO**, the physical brother of **CHARLES MZOZO**, judgement debtor. In my opinion, this is a straight forward case but it is unfortunate that the way in which the appellant and his counsel have been handling it, makes the whole matter to appear difficulty, long and confusing.

Let me give a brief outline of the facts giving rise to this appeal and which may justify my above observations.

Sometimes back in 2004, the appellant **WILSON S/O MABALWE** and one **CHARLES S/O MZOZO** were buddies in cattle business. In the course of their business transactions Charles Mzozo failed to pay the appellant his 4 heads of cattle or TShs.880,000/= in accordance to their agreement. The appellant sued Charles Mzozo in the original Civil Case No. 17 of 2006 (Wilson s/o Mabalwe Vs. Charles s/o Mzozo). It appears that all efforts to summon and bring Charles s/o Mzozo before the trial Primary Court to answer the claims ended in vain; and the matter proceeded Ex-parte.

In its exparte judgement dated 24th January, 2007, the trial Primary Court, unanimously ruled in favour of the appellant Wilson s/o Mabalwe. There was no application to set aside that Exparte decision nor appeal.

Consequently, on 11/04/2007 the attachment warrant against Charles Mzozo was issued directing that 25 heads of cattle in the kraal of the respondent, Madirisha Mzozo be seized to settle the debt.

The respondent, Madirisha Mzozo who is the physical brother of the judgement debtor Charles Mzozo filed an objection proceedings before the trial Primary Court against that attachment.

In its conscience unanimous decision dated 27/07/2007, the trial Primary Court allowed the objection on the following reasons: **One**, the respondent/objector was not a party to the Civil Case No. 17 of 2006 between Wilson s/o Mabalwe and Charles Mzozo; **two**, there was no scintilla of evidence to establish or even to suggest albeit remotely that the attached 25 heads of cattle found in the objectors kraal belongs to the judgement debtor or that there was any time the judgement debtor happened to hide his cattle in the objectors kraal; **three**, that based in the evidence from the objectors side and that of SU2 (Musa Ernest) the Village Executive Officer and SU3 (Alexanda Mduma) the Hamlet Chairman, the judgement debtor was not a cattle keeper but a mere cattle vendor; and **four**, that the attachment of the objectors 25 heads of cattle was, unjust and unlawful. As a result the trial Primary Court ordered for release of the attached heads of cattle and advised the appellant/deeree holder to submit a proper list of the judgement debtor's properties for attachment.

The appellant Wilson Mabalwe was not satisfied with that decision of the trial Primary Court. On 20/08/2007 through his advocate he filed Civil Appeal No. 6 of 2007, originating from PC Civil

Case No. 17 of 2006 but for unknown reasons the names of the parties were changed to **Wilson s/o Mabalwe (appellant) vs. Madirisha s/o Mzozo (Respondent)**. This was an anomaly because Madirisha Mzozo was not a party to the main case but a mere objector who appeared at the stage of execution.

Nonetheless, the first appellant District Court at Manyoni went ahead and decided the appeal on its own merits and found in favour of the respondent/objector. In upholding the decision of the trial Primary Court, the first appellate District Court insisted that the respondent/objector was not a party to the Civil Case No. 17 of 2006 and there was no evidence to establish that the attached 25 heads of cattle belongs to the judgement debtor. The first appellate District Court also found that the purported annexure API to the petition of appeal was signed under coercion/duress by the objector in his bid to stop the executing team led by SU2 and SU3 to attach his cattle. In that document dated 17/05/2007 the respondent/objector was given time to look for his brother, judgement debtor or else his heads of cattle would have been attached. Later on 31/05/2007 the execution was done and the objectors 25 heads of cattle were unlawfully attached.

Still disgruntled, the appellant is now before this court intending to challenge the decision of the lower courts. His petition of appeal contain one ground of appeal that the first appellate District Court erred in law and fact in dismissing the appeal without

properly evaluating the evidence on record and specifically disregarding the exhibit which showed the commitment of the respondent in the matter.

In this second appeal the appellant was represented by Mr. Nyabiri, Learned Advocate while the respondent/objector was represented by Mr. Nyangarika, Learned Advocate. On 17/03/2009, I allowed the counsels to argue the appeal by way of written submissions.

Having gone through the record of proceedings of the lower courts, and having read the counsels written submissions, the question is whether there is any substantive point of law or fact to be discussed and determined in this appeal. In my view the concurrent decisions of the lower courts are sound and legally indomitable. The trial Primary Court dealt with the objection proceedings made by the objector/respondent in accordance with the law i.e. Rule 70 (1) (2), (3), (4) and (5) of The Magistrates Courts (Civil Procedure n Primary Courts) Rules, Cap 11 R.E. 2002. Parties were heard, evidence was critically evaluated and analysed and a proper decision was reached.

In the first appellate District Court, the matter was again thoroughly considered on its merits despite of the fact that the appeal was wrongly filed. That appeal should have been filed in the name of original parties and not objector as the respondent. The

objector was not a party to the main suit before the trial Primary Court. The name of the objector should have appeared as a third party. In my considered view that was innocuous irregularity which does not occasion any injustice to the parties.

I have keenly perused the trial Primary Court record of proceedings, specifically to discover on how the so called Annexure API found its way to the proceedings. My efforts ended in vain. In the actual of fact the said document was introduced in the record of proceedings at the first appeal stage as an annexure to the petition of appeal. There is nowhere in the trial Primary Courts record of proceedings showing that the said document was discussed, produced and admitted as exhibit or otherwise before that court of first instance. Therefore such document has no evidential value in this matter.

On the other hand, even if that document was indeed produced in accordance to the procedure, still, I agree with the findings of the first appellate District Court that the respondent/objector was forced to sign it when he was being confronted with unlawful exercise of attachment of his 25 heads of cattle. He was the one who rushed to the trial Primary Court to file objection proceedings immediately after promising to look for the judgement debtor; and by all standard of imagination the objector had no legal duty or responsibility of looking

for and bring the Judgement debtor nor to pay the debt: The record is clear that the respondent/objector was forced to give such promises in order to save his heads of cattle from that unlawful attachment engineered by the appellant and his henchmen. There is ample evidence on record that even SU2, the village Executive Officer and SU3, the hamlet Chairman who were among the supervisors in the attachment exercise did concede in their testimonies during objection proceedings that the objector/respondent was not a party to the main case; that the judgement debtor had no heads of cattle to be attached and that they were the ones who advised the objector to comply with the court's order of attachment and later file his complaints because the attachment was actually unlawful.


In my opinion, any guarantee, promise or agreement originating from unlawful exercise or arrangement is void ab-initio. Therefore section 123 of the Tanzania Evidence Act and the doctrine of Estoppel raised by the advocate for the appellant has no room in this case.

It must be noted that the respondent/objector was dragged into this matter by the conducts of the appellant when the later listed and labeled the formers 25 heads of cattle as property of the judgement debtor hence attachment. It is quite interesting that now the appellant is attempting to hold the respondent/objector liable

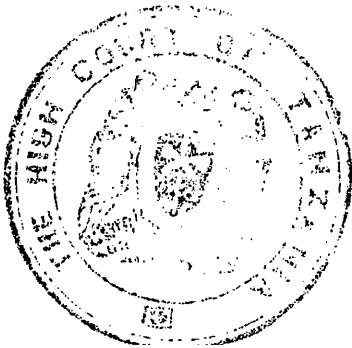
while even his main suit, Civil Case No. 17 of 2006 was determined ex-parte against the judgment debtor.


In conclusion, I am convinced beyond limit that this appeal was a waste of time because it lacks any merit whatsoever. The concurrent decisions of the lower courts are hereby upheld. Appeal is dismissed with costs to the respondent/objector.




M.S. SHANGALI
JUDGE
15/05/2009

Judgment delivered today 15th May, 2009 in the presence of Mrs. Munissi, Learned advocate for the appellant and Mr. Nyangarika, Learned advocate for the respondent. All parties present in person.




M.S. SHANGALI
JUDGE
15/05/2009