IN THE HIGH COURT OF TANZANIA
AT DODOMA

(DC) CIVIL APPEAL NO. 03 OF 2016

(Appeal from the decision of the Resident's Magistrate's Court of Dodoma at Dodoma in Civil Case No. 05 of 2012)

1. KIBAKWE SACCOS	.....	1st APPELLANT
2. SAMSON MWAKA	.....	2nd APPELLANT
3. AGREY MWISOLA	.....	3rd APPELLANT
4. JEREMIA ISSAKA	.....	4th APPELLANT
5. JESCA MSALICHUMA	.....	5th APPELLANT
6. ASHERY LUSINDE	.....	6th APPELLANT
7. CARLOLINE LESANGISA	.....	7th APPELLANT
8. MARIAM SAMILA	.....	8th APPELLANT
9. MARIA SAMILA	.....	9th APPELLANT
10. MARIA KIGOSI	.....	10th APPELLANT
	VERSUS	
1. LAURIAN NGINGO	.....	1st RESPONDENT
2. BETHA NGINGO	.....	2ndRESPONDENT

JUDGMENT

01/11/2016 & 06/12/2016

SEHEL, J.

This appeal originates from the Resident Magistrate's Court of Dodoma at Dodoma (hereinafter referred to as "the trial court"). The 1st respondent filed a suit against the appellants for unlawfully appropriating the 1st respondent's properties. The 1st respondent

therefore claimed against the appellants jointly and severally for an order that:

a) The appropriation of the respondent's properties by the appellants was unjustified and unlawful;

b) The ultimate sale and transfer/deliverance of the said properties of the respondent to the appellants was unjustifiable and unlawful;

c) Appellants to return the respondent's properties or payment of the total sum of Tshs. 95,000,000/=(Say ninety five million) being the value of the properties appropriated;

d) The appellants acts to appropriate and/or attach and sale the properties of the respondent was negligently undertaken and the respondent is entitled to the payment of Tshs. 55,000,000/= or any other amount as general damages;

e) The payment of the interest of paragraph (c) above at the rate of 12% from April, 2012 to the date of payment in full;

f) Costs of the case;

g) Any other reliefs as the Court may deem fit to grant.

The trial court after hearing the suit granted both the 1st respondent and 2nd respondents Tshs. 80,000,000/= being specific damages, or the appellants to return back the respondent's properties. The trial Court also granted the respondents Tshs. 20,000,000/= as general damages and an interest of 21% of Tshs. 80,000,000/= from April, 2012 to the date of payment in full. I wish to point out here that the name of the 2nd respondent came into the picture in the judgment and drawn order of the trial Court. The 2nd respondent was neither a plaintiff nor made a party to the proceedings by any court order as such I hold that the impleading or joining of the 2nd respondent at the judgment stage was improper and illegal.

Be it as it may, the appellants through the services of Supreme Law Chamber appealed to this Court with five grounds of appeal since they were dissatisfied with the judgment and decree of the trial Court. The grounds of appeal are;

1) That the trial court erred in law and fact in awarding the respondent specific damages of Tshs. 80,000,000/= when actually the same was not proved and also not pleaded;

2) That the trial court erred in law and fact in awarding the respondent general damages of Tshs. 20,000,000/= when actually he is not entitled to the same;

3) The trial court erred in law and fact in holding that the respondent's properties be returned as they were unlawfully attached and sold when actually the respondent defaulted to pay the 1st appellant's loan and the same were sold to recover that loan;

4) The trial court erred in law and fact in failing to understand that the 1st appellant is registered legal entity capable of being sued solely in its own name without joining its workers;

5) The trial court erred in law and fact in entertaining issues of land when actually it has no jurisdiction over the same.

By order of this court, the appeal was argued by way of written submissions whereby both parties dully complied with the filing schedule as ordered.

In the process of composing the judgment, I noticed that there is legal issue that parties have to address this court. The said legal issue is whether it was proper for the 1st respondent to institute a fresh suit in challenging execution proceedings of Kibakwe Primary Court in Civil Case No. 15 of 2011. This issue was raised by the appellants at the trial court in their joint written statement of defence but it was struck out for want of prosecution. This court therefore invited parties to address it as to whether the 1st respondent should not have proceeded by way of objection in the same court that ordered the attachment.

The 1st respondent was of the view that it was proper for two reasons. First, the attached properties were not part of attachment order. Secondly, the order of the Primary Court was for attachment and not for sale thus the selling of attached properties that were mentioned in the order and the ones not mentioned in the order was

improper. Mr. Machibya, learned advocate holding brief for Mr. Kyaruzi, learned advocate for appellants was of the view that it was not proper for the respondents to institute afresh suit. He said if the respondent was not satisfied with the decision then the proper procedure was to lodge an appeal against the properties that were mentioned in the attachment order and for the ones that were not mentioned in the attachment order then the proper procedure was to file objection proceedings. In this way, the counsel said, it will avoid the issuing of conflicting and confusing court decisions.

As instigated earlier, the 1st respondent was the one who filed the suit against the appellants. In his plaint, he complained about his properties being taken by the appellants without any colour of right. Appellants in their joint written statement of defence raised a defence that the sale was done through proclamation order of Kibakwe Primary Court in Civil Case No. 15 of 2011. During the trial, the 1st respondent tried to justify his reason as to why he decided to file a fresh suit. He said that he was not a party in Civil Case No. 15 of 2011 at Kibakwe Primary Court. The argument that the 1st respondent

was not a party does not have any justification for him to institute a fresh suit. It is a salutary rule that any party be it a judgment debtor himself or a third party may object to the attachment on ground that such property is not subject and/or liable to attachment or on some other grounds. Such objection has to be filed in the court which passed the decree and that covers the 1st respondent herein. And if the 2nd respondent, a party to a main suit at the Primary Court, was not satisfied with the decision of the Primary Court, then she had a right of appeal.

A similar circumstance occurred in the case of **Kangaulu Mussa Vs. Mpunghati Mchodo [1984] T.L.R 348.** In this case Mpunghati Mchodo (the defendant) attached Kangaulu Mussa's cattle (the plaintiff) in execution of a court decree passed by the District Court of Dodoma in Criminal Case No. 122 of 1981, to which the plaintiff was not a party. The plaintiff opened a fresh suit in the High Court. At the hearing, the late Lugakingira, J (as he then was) invited parties to address the court whether it was proper for the plaintiff to institute a fresh suit instead of proceeding by way of objection in the court

which ordered the attachment. It was argued that the attachment was unlawful and since the plaintiff was not mentioned in the attachment warrant was not a party then it was proper to institute a fresh suit. In dealing with this issue, the late Lugakingira, J (as he then was) said:

> *"I am aware that a person may bring a fresh suit where he could also have proceeded by way of objection. This is not a statutory rule but it seems to be accepted in practice. That being so, it means that the court is vested with discretion to entertain or not to entertain a suit which could have been brought by way of objection, depending on the circumstances of each case. The circumstance of this case do not reveal any grounds upon which it would be more to the advantage of the parties nor that justice would be better served for this court to take over a matter in which the District Court has jurisdiction by way of objection. Whether the plaintiff was named in the warrant of attachment or not is beside the point. The statutory rule is that any person aggrieved by the execution of a decree*

may object to the court which passed the decree and that covers the plaintiff. There should also be some order and sanity in the institution of proceedings. Where a matter has started in one court it is proper for that matter and the resultant effects to be concluded in that court. If anyone is still aggrieved, there is of course a right of appeal. But for a higher court to take up such a matter directly just because practice permits it, is to import disorder in the administration of justice and I am personally not prepared, where I can help it, to be a party to such disorder. In the circumstances, I am not satisfied that Mr. Alimwike has raised sufficient grounds upon which to dispense with the jurisdiction of the Court which ordered the attachment. I also think that in the circumstances of this case, the matter can only be properly and speedily dealt with by the District Court, and full justice can only be obtained there. I say that full justice can only be obtained there because if the plaintiff were to succeed in this court, and an order were made for the restoration of the cattle, the defendant would have to

go back to the District Court to obtain another warrant of attachment. This Court cannot issue one. If the plaintiff thinks he can succeed, therefore, let him succeed in the District Court which also has the power to bring the matter to a logical conclusion. For these reasons, the suit is struck out. The plaintiff is at liberty to proceed by way of an objection in the District Court. I make no order as to costs since this matter was raised by this court."

It follows then that the 1st respondent was required to file his objection at Kibakwe Primary Court as it is the proper court to deal with the issues raised by the 1st respondent at the trial Court, that is, whether the properties were unlawfully appropriated or not. Also as held by the late Lugakingira, J (as he then was) full justice could be obtained for both parties at Kibakwe Primary Court since after the attachment and sell of the 1st respondents' properties being held unlawful by the Resident Magistrate's Court, the appellants cannot go back to Kibakwe Primary Court to obtain another warrant of attachment. Therefore, the filing of the fresh suit created a disorder

in the administration of justice and the Resident Magistrate's Court erred in entertaining the fresh suit. It is obvious that the appellants have been denied their vested right to the decree which ought to be made effectual. As correctly stated by Mr. Machibya, the order of the Primary Court was reversed by the Resident Magistrate's Court of Dodoma unprocedurally as such the proceedings and order of the Resident Magistrate's Court was uncalled for and made it to be illegal.

In that regard, I proceed to quash the proceedings of the Resident Magistrate's Court and set aside the judgment and decree issued on 20th day of October, 2015 for being illegally made. The 1st respondent is at liberty to proceed by way of an objection, if he so wishes, subject to limitation period. Since the issue was raised by the Court then I make no order for costs. It is so ordered.

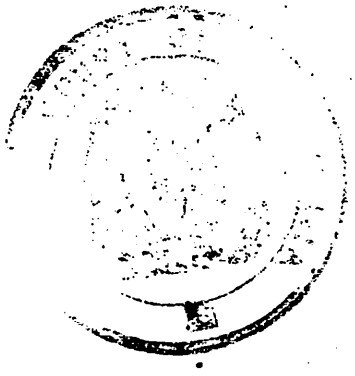
DATED at **Dodoma** this 13th day of December, 2016.

B.M.A Sehel

JUDGE

Judgment delivered in open court at Dodoma under my hand and seal of the court, this 13th day of December, 2016 in the presence of the 2nd appellant and 1st respondent. All other parties are absent.

Right of appeal is fully explained to the parties.



B.M.A Sehel

JUDGE

13th December, 2016.