

**THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

PC. CIVIL APPEAL No.09 of 2018

*(Arising from Bariadi District Court Civil Appeal No.56 of 2017, original civil case no. 53 of 2017
Kalemera Primary Court.)*

AKISA CHAGEMBE.....APPELLANT

VERSUS

MALONGO MAHINA.....RESPONDENT

JUDGMENT

14/11/2019 & 21/02/2020

G. J. Mdemu, J.

This is a second appeal. In the Primary Court of Kalemera, the Appellant Akisa Chagembe filed civil suit No. 53 of 2017 objecting attachment of a matrimonial home being execution of a decree in civil case No. 30 of 2016 between Malongo Mahina (decree holder) and Bajile Mshole, husband of the Appellant. She was not successful. She appealed to the District Court of Bariadi in civil appeal No. 56 of 2017. Again, she lost, hence the instant appeal.

Brief history of this suit is that, on 6/4/2015, in civil case No. 30/2016, Bajile Mshola borrowed Tshs. 2, 500,000/= from Malongo Mahina. The loan was to be paid in one year at the monthly instalment of Tshs. 210,000/=. Later on 18/12/2015 on what came to be titled as "TAMKO RASMI HAPA OFISINI", the said Bajile Mshola admitted the claim in the office of a Village Executive Officer (VEO) and promised to pay the whole loan sum by 01/6/2016. He defaulted payment of the said loan. This moved the Respondent to file civil case No. 30 of 2016 in the Primary Court of Kalemera. Bajile Mshola who was the Defendant, defaulted appearance as he refuted service. The matter was thus heard exparte

on 3/8/2016. The exparte judgment was delivered on 11/08/2016, in which, the Respondent became victorious.

After complying with procedures of execution, including form No. MCA/63, it was stated in this latter form that:

“unaamriwa ukamate pesa Jumla ya Tshs 3,000,000/= toka kwa madaiwa Bajile Mshola wa Nyamikoma na pesa ikikosekana, kamata kiwanja cha biashara na majaruba ekali 1 mali ya mdaiwa iliyoko kitongoji cha Fogofogo Nyamikoma, Kata ya Kabita (W) Busega, mali hiyo iuzwe ili kulipa deni la mdai kama ilivyoamriwa mbele ya mahakama hii”

With this, execution proceeded and it was reported to court on 11/4/2017 in the following manner:-

“UTEKELEZAJI

Leo tarehe 11.4.2017 nimekamata kiwanja cha mdaiwa Bajile Mshola. Kiwanja chenye ukubwa wa hatua 34 urefu na hatua 25 upana za mtu mzima upande wa Magharibi kinapakana na MADALA Mashariki TATU SELEMAN, Kaskazini MOROGENI na Kusini mwenye kiwanja hakujulikana jina, pia nimekamata kibanda cha biashara chenye milango mitatu. 1. Duke takataka 2. Dule la vinywaji na 3. Hakuna kitu chochote ndani.

MAJARUBA EKARI 1

Sikukamata kutokana na mdai kushindwa kutambua mahali yalipo.

Nimekamata mali hiyo baada ya kukosekana Tshs (3,000,000/=) milioni tatu kama hati ilivyonieelekeza.

Aidha hati hii nimetekeleza wakati mdaiwa hayupo ila mke wa mdaiwa alikuwepo na alikataa kushiriki zoezi hilo kwa madai kuwa yeye hajui chochote.

VIONGOZI WALIOLUWEPO WAKATI WA KUTEKELEZA

1. **SAMWEL BUGALI – M/kiti wa kitongoji cha FOGOFOGO**

2. **ERIMINA T. MOSHA – VEO – Nyamikoma**

Pia mdai Malongo Mahina alikuwepo

Mwisho naomba uipokee na kuifanyia kazi taarifa hii.”

This therefore appears to have given birth to civil case No. 53 of 2017 in which, on 23/7/2017, Fogofogo Hamlet Chairman moved the Primary Court of Kalemere following complaint of the Appellant that on 20/7/2017 she found notice of auction intending to auction a matrimonial home in execution of a decree in civil case No. 30/2016. As stated above, on 4/8/2017 in civil case No. 53 of 2017, the Appellant lost. In her appeal No. 56 of 2017 in the District Court of Bariadi, again the Appellant lost on 7/12/2017. The findings of the trial Primary court which got affirmed by the District Court on appeal was that, the matrimonial home was not attached as complained by the Appellant. The latter was not happy, hence the instant appeal on the following grounds:-

1. *That, the Appellate Magistrate erred in law and fact for upholding a decision of the Primary Court while the same was obtained without considering that the house to be sold was/is a matrimonial home.*
2. *That, the Appellate Magistrate erred in law and fact for dismissing the Appellant's appeal while according to the evidence on records, the house to be sold was not part of the mortgage for the loan obtained.*

3. *That, the lower courts erred in law and fact for holding on favour of the Respondent based on forged evidences.*
4. *That, the Appellate Magistrate misdirected himself for holding that, in mortgaging matrimonial property, spouse consent is not necessary/mandatory.*
5. *That, the Appellate Magistrate erred in law and fact for upholding a decision of the Primary Court while the same was decided against watertight evidence.*
6. *That, the Appellate Magistrate erred in law by his failure to decide anything in other grounds of appeal apart from spouse consent.*

This appeal came for hearing on 14.11.2019, whereby the Appellant was represented by a personal representative and the Respondent enjoyed the service of Deusdediti Luteja, learned Advocate. On that date, parties agreed their appeal be heard by way of written submissions. Their prayer was granted as prayed. Parties complied. The Appellant's written submission was filed on 16th of December, 2019 in which the Appellant argued grounds 1,2,3 and 4 leaving grounds 5 and 6 unattended.

In her written submission, she argued the first ground of appeal that, the house to be sold is a matrimonial property and was acquired through joint efforts between the Appellant and her husband as their marriage still subsists. To support her first ground of appeal, the Appellant cited the provisions of **Section 59 (1)(2)(a) of the Law of Marriage Act, Cap 29** insisting that, a matrimonial home cannot be disposed of during subsistence of marriage and without consent of another spouse and that, the same cannot be the subject of attachment.

In the second ground of appeal, the Appellant submitted that, the matrimonial home to be auctioned was not part of the mortgage for the loan obtained. Since it was not mortgaged, then the Appellant was not aware of it.

She added that, there is no document to prove that the said matrimonial home was mortgaged by the Appellant's husband.

As to the third ground of appeal, she submitted that, there is forged evidence of the Respondent that, Sili Bajile who was present when the Appellant's husband mortgaged the matrimonial home, was not there. She further stated that, mortgaging matrimonial home is a process, and the Appellant's son one Sili Bajile cannot sign and witness the event of mortgaging as he is not a spouse. She concluded that, children have no contributions in the acquisition of a matrimonial home.

She continued to submit on the fourth ground of appeal that, alienating a matrimonial home by way of sell, gift, lease, mortgage or otherwise require the consent of both spouses. Therefore, she added that, absence of consent of one spouse, renders the sell, gift, lease, or mortgage a nullity. She concluded her submission by arguing that, the appeal be allowed with costs because the decisions of both the trial and the appellate court did not comply and adhere to the law.

In reply, the Respondent filed his written submission on 30th December 201. He started to argue the first ground of appeal that, the Appellant faults the decision of the first appellate court that it was obtained without considering that, the house sold was or is a matrimonial home, is unfounded. He contests this averment on the ground that, in the Primary Court of Kalemela, it was established that, what was attached and sold was a house used for business purposes and not a matrimonial home as alleged. He submitted that, the Appellant advanced to court nothing beyond mere allegations that, the house is a matrimonial house.

He distinguished **Section 59(1) of the Law of Marriage Act, Cap. 29** as there has never been any disposition of rights in the house in question between

the Appellant's husband and the Respondent. He added that the Appellant is in an attempt to mislead this court. No evidence advanced to the Court of first instance that, the said house was a matrimonial home. He further submitted that, as the Primary Court of Kalemela has already decided in civil case No.30 of 2016, and that no appeal, revision, or any remedial measure was taken by the judgment debtor, the Appellant cannot come through a back door to fault the decision of the Primary Court regarding its determination of the rights and liabilities between Appellant's husband and the Respondent herein. He also submitted by citing the case of **Issa A. Abdallah and another V. Robert Kusena, Civil Appeal No.146 of 2009**, where the High Court at page 6 of the typed judgment stated that:

"It is pertinent to note that the exparte judgment in RM Civil Case No.70 of 1993 has not been reversed to date, therefore it is a valid judgment and order of the Court of law with competent jurisdiction, therefore however illegal or irregular, it remains valid until set aside by a superior Court".

Furthermore, he argued that, civil case No.30 of 2016 is not the subject of this appeal and that, the judgment debtor is not a party to these proceedings. He urged this Court to refrain from making orders on the findings of the Primary Court of Kalemela in civil case No. 30 of 2016. He further cited the fourth schedule to the **Magistrate Court Act, Cap. 11** in the provisions relating to civil jurisdiction of Primary Courts, provides at **Rule 3(3)(f)** that, attachable property does not include any residential house or building or part of a house or building occupied by the judgment debtor, his wife and dependent children for residential purposes.

On the second ground of appeal, he argued that, the said house is a property of Bajile Mushola, the Appellant's husband and the judgment debtor in

civil case No.30 of 2016 and that, was attached and sold in execution of a decree of the Primary Court as per **Rule 3(2) of the Fourth Schedule to the Magistrate's Court Act, Cap 11**. He continued to submit that, upon reading the Appellants submission in chief, they are in themselves crafted to challenge the legal relationship between the Appellant's husband and the Respondent. Therefore, to him, the findings of the Primary Court of Kalemela, in civil case No.30 of 2016 are not subject of the present appeal.

As to the third ground of appeal, he submitted that, as the house was sold in execution of a decree, the Appellant's submission on the allegation of creation of a mortgage have no merit as they are misconceived and uncalled for. He also contested tenaciously this ground of appeal as it raises seriously allegations of criminal matters. He submitted that, this Court, is not a proper forum to determine one's criminality. He supported his third ground by citing the case of **Masagati Deokary and Another v. Oscar M. Kizuguto and Another, Land Appeal No.222 of 2017**, at page 13 of the judgment where it was decided that; *"A civil court is not a proper forum to determine criminal allegation"*

On the fourth ground of appeal on spouse consent, the Respondent contested as is a new ground of appeal raised for the first time in this Court which is the second appellate Court. He therefore prayed to this Court to refrain from determining this ground of appeal. He supported his point by citing the case of **Melita Naikimanjal and Loishilaari Naikiminjal vs Sailevo Loibanguti,(1998) TLR 120**. The learned counsel thus urged the appeal be dismissed with costs. Parties ended here as there was no rejoinder.

Before I resolve complaints in the grounds of appeal, I have noted that, the District Court on appeal entertained grounds of appeal which had no basis with the findings of the trial court. At page two of the judgment, the trial court made the following observation:-

“Mahakama baada ya kuuchambua ushahidi wa pande zote mbili inaonyesha kuwa, mdaiwa alikuwa na kesi mbele ya Mahakama kama hii akimdai mume wa mdai, pia hadi hatua ya ukamataji ulipofikia, mdai alijulishwa pia mali iliyokamatwa ni nyumba ya biashara na siyo ya kuishi wanandoa. Hivyo, kwa ushahidi huo, mdai hana shahidi yoyote wa kuupa nguvu ushahidi wake, hivyo tunaamua mdai ameshindwa na kupoteza ada na gharama zote za shauri hili.”

With this position, ground two in civil appeal No. 56 of 2017 on mortgaging the matrimonial house was crafted with no basis of the decision and therefore, the learned Appellate Magistrate was not justified to deliberate on that. In that stance, I will not deliberate on ground two on mortgage and also ground four regarding consent of spouse in mortgaging the matrimonial property. The two were not basis of the decision.

Reverting to the grounds of appeal, specific in ground one that, the Appellate Magistrate erred in upholding the decision of the trial court that, the house sold was not a matrimonial house; I do not think if there is any substance in this complaint. One thing to note is that, the Appellant did not prove her claim at the trial court that the auction notice attached to her house was in respect of execution of a decree in civil case No. 30/2016. Actually, both the complaint at the trial Primary Court and the evidence of the Appellant does not indicate anywhere that what was to be done in the alleged matrimonial home had any nexus with Civil case No. 30/2016. For clarity, I reproduce part of the complaint and evidence of the Appellant as hereunder. As to the complaint, it reads partly as hereunder:-

“Mtajwa hapo juu ndugu AKISA CHAGEMBE amefika kwa mwenyekiti wa kitongoji kulalamika kwamba tarehe 20/07/2017 muda wa saa 7:00 mchana aiikuta nyumbani

kwake nyumba ya familia imebandikwa matangazo ya kuuzwa nyumba yake ya familia. Hajui kinachoendelea. Anapiga pingamizi la kuuzwa nyumba. Nimemtuma huko suala litatuliwe.”

This was a letter from Hamlet Chairman of Fogofogo to the Magistrate incharge of Kalemere Primary Court. This is what initiated civil case No. 53 of 2017. At the hearing, the Appellant who testified as SM1, testified at page 2 as follows:

“Nakumbuka tarehe 20/7/2017 saa 7:00 mchana mtoto aliniambia kuna matangazo ya kuuza nyumba ya familia. Nilienda na kukiri na kuja mahakamani sina zaidi.”

In both the complaint and the testimony of the Appellant, as quoted above, the following deficiencies have been noted. **One**, the notice to auction the house was not brought in evidence. **Two**, in the complaint, the Appellant never indicated that the said notice was in respect of execution of a decree in civil case No. 30 of 2016. **Three**, in her evidence, the Appellant did not confirm presence of the auction notice found in her house. **Four**, the child who informed the Appellant on the auction announcement was not called in evidence. I thus share the concern of the counsel for the Respondent and the findings of the trial Primary Court that, the Appellant have in total failed to establish her claim. This has also resolved ground five of the petition of appeal on making findings against availability of watertight evidence.

As to reliance on forged evidence complained by the Appellant in ground three of the complaint; the Appellant also raised this ground in her petition of appeal to the District Court. In her written submission, the Appellant argued as hereunder:-

“That, the lower courts erred in law and fact for holding in favour of the Respondent based on the forged evidence.”

I have failed at all to underscore where the Appellant retrieved those facts. There is nowhere in the records of civil case No. 53 of 2017 one can locate those facts. I think, Mr. Luteja is correct that, the Appellant is trying to argue facts in civil case No. 30/2016 which not only she was not a part, but also that the current appeal rose from civil case No. 53 of 2017 and not civil case No. 30 of 2016. In my view, under the circumstances, nothing like forged evidence can be established. These argument of the Appellant are unfounded.

As to ground five on failure of the appellate Magistrate to decide on other grounds of appeal, this again is unfounded in two fold, one as stated above, those grounds of appeal introduced matters which did not form basis of the trial court's findings and **two**, that the Appellant did not submit on this ground in her written submission.

As noted, there is a concurrent finding of facts of the two courts below. This being the case, it is trite law that, this court should not interfere with a concurrent finding of facts/evidence of the two courts below, unless there is misdirection of such facts to that effect. I have noted nothing regarding misdirection of evidence in arriving at such findings in the two courts below. In view thereof, this appeal lack merits and is accordingly dismissed with costs.



Gerson J. Mdemu
Judge
21/02/2020

Dated at Shinyanga, this 21 February, 2020.



Gerson J. Mdemu
Judge
21/02/2020