

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[IN THE DISTRICT REGISTRY]**

AT ARUSHA

CIVIL APPEAL NUMBER 24 OF 2018

(Arising from Misc. Civil Application Number 29 of 2018, Original Civil Case Number 108 of 2016 in the Resident Magistrates' Court of Arusha at Arusha)

RICHARD NDERANGUSHA KIWELU

(Suing as a next friend of GODWIN

RICHARD).....APPELLANT

Versus

BAKARI MASUNGA.....1ST RESPONDENT

BEATRICE G. ABEID.....2ND RESPONDENT

FIRST WORLD INVESTMENT

COURT BROKERS.....3RD RESPONDENT

JUDGMENT

Date of last order: 07/02/2020

Date of judgment: 13/03/2020

MZUNA, J.:

This appeal is against the decision of the RMS court, which refused to grant objection proceedings raised by the appellant consequent upon judgment which was entered in favour of the first respondent Bakari Masunga who successfully sued the second respondent in Civil Case No. 108 of 2016 which proceeded ex parte as the said Beatrice Abeid did not file the Written Statement of defence.

There was filed an interim injunction order against the third respondent restraining her from attaching and selling the house of his son, one Godwin Richard, located at Sokoni One area, whom at the time of the alleged purchase was aged four (4) years. The gist of the said application is that, the son of the plaintiff was not a party to the said Civil Case No. 108 of 2016 and hence not indebted in any way whatsoever. The court found that the application was not proved by the applicant to the required standard. It proceeded to dismiss it with costs.

Aggrieved, the appellant brought this appeal which was argued by way of written submissions. A total of seven grounds of appeal have been filed. Mr. Simon E. Mbwambo, learned advocate appeared for the plaintiff while Mr. Mathias Dominick Safari, also learned advocate appeared for the 1st and 3rd respondents.

The main issue is whether this appeal has merit. During hearing, Ground No. 7 of appeal was dropped and therefore will not be part of my decision.

Starting with ground No. 1, it is argued that the trial Magistrate did not frame issues which according to the learned counsel such omission without giving reasons is a fatal irregularity which led to unjust and unfair decision. He referred this court to the case of **Frank M. Marealle v. Paul Kyauka Njau** [1982] TLR 32 to buttress his position.

In reply thereto, the learned counsel submitted that since the application before the trial court was not a fresh suit, there was no requirement of framing issues as provided for under Order XIV Rule 1(5) of

the Civil Procedure Code, Cap 33 [R.E. 2002], (Cap 33). The 2nd respondent did not oppose this ground of appeal.

Reading from the above submission, I should point out that the case of **Frank M. Marealle v. Paul Kyauka Njau** (supra) emphasized the need for the court to stick to the framed up issues. That in mind, Section 2 (1) of the Law of Limitation Act, Cap 89 [R.E. 2002] defines suit to mean any proceeding of civil nature instituted in any court but does not include an appeal or application.

What was before the trial court is Miscellaneous Application No. 29 of 2018 was not a suit. Therefore, the requirement for framing of issues does not apply. Ground No. 1 of appeal is bound to fail.

I now turn to ground 2 of appeal. The main complaint in this ground is that the trial Magistrate did not assign reasons for her decision. In opposition, the 1st and 3rd respondents said that the court gave reasons for the decision at page 4 of the typed ruling. I have gone through the ruling delivered by the trial court and I am of the view that the learned trial Magistrate did assign reasons for her decision. The same is stated at page 5 and 6 of the typed court ruling delivered on 25/02/2018. That said, this ground is resolved against the appellant too.

I propose to consolidate grounds 3, 5 and 6 of the memorandum of appeal, which deals with matters of evidence. The appellant submitted that the respondents never testified by oral evidence. He is of the view that since they only filed submissions, he was denied his right of cross-examination. He also argued that the trial Magistrate did not accord weight to his

testimony that he is the father to his son whom he preferred the application on his behalf. That, the rejection of sale agreement as documentary evidence by the trial court prejudiced his right, he further said.

In opposition, the learned counsel for the 1st and 3rd respondents says the trial court gave due weight to the evidence of the appellant but the same was not credible. The 2nd respondent did not oppose these grounds of appeal.

Reading from the record, it is clear that the respondents did not testify in court. Upon closure of the applicant's testimony the trial court did not call the respondents to respond to the testimony given by the appellant. The 1st and 3rd respondent just asked for time to file their submissions while the 2nd respondent said had nothing to file. This set of events according to the appellant denied him the right of cross examination as submission is not evidence.

The appellant did not cite any law which says the respondents ought to have adduced evidence in objection proceedings. Actually he is the one who benefitted because he adduced evidence. The law, section 57 and 58 of the Civil Procedure Act, Cap 33 RE 2002 says about the court to:-

"Investigate the claim or objection with the like power as regards the examination of the claimant or objector and in all other respects, as if he was a party to the suit..."

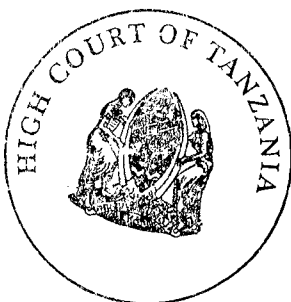
Section 58 makes it even clear that "the claimant or objector **must adduce evidence** to show that at the date of the attachment he had some interest in, or was possessed of, the property attached." (Emphasis mine).


That means, to my understanding, actually the objector is the one who has to adduce evidence. If the appellant saw it necessary for the respondents to adduce evidence he ought to have said so before the investigating Magistrate. Their evidence in chief was adduced which granted judgment in favour of the 1st respondent. With the advent of overriding objective, this court cannot bless appeals like this one which is designed to delay the decree holder to benefit from his/her fruits. I see no procedural irregularity which occasioned a miscarriage of justice as alleged by the appellant. The alleged sale agreement was received in court and therefore was given attention in the decision.

There was also issue of *locus standi* which I dare say was properly dealt with because the second respondent was not a party in the alleged sale agreement while she is the one who resides in that house with the said Godwin Richard (minor).

The appellant has other remedies including institution of a suit to claim such property after the objection proceedings had been dismissed. I am fortified to this view by the decision of this court in the case of **Omoke Oloo v. Werema Magira** [1983] TLR 144 (HC), the decision which I fully associate myself with.

For the above stated reasons, this appeal is bound to fail. It is dismissed with costs.




M. G. MZUNA,
JUDGE.
13/03/2020