**IN THE HIGH COURT OF TANZANIA**

**IN THE DISTRICT REGISTRY**

**AT MWANZA**

**PC CIVIL APPEAL NO. 45 OF 2019**

(Arising from Civil Appeal No. 22 of 2018 at Bukombe District Court; Original Civil Case No. 37/2018 at Runzewe Primary Court)

**PENDO EDWARD ..... APPELLANT**

**VERSUS**

**MASHILA SITA ..... RESPONDENT**

**JUDGMENT**

**28/04 & 06/05/2020**

**RUMANYIKA, J.:**

The genesis of the appeal is a decision of 21/06/2019 of the District Court of Bukombe in Civil Appeal No. 22 of 2018 which upheld decision of 10/12/2018 of Runzewe Primary Court (the trial court) against objection proceedings in Civil Cause No. 58/2018 with respect to warrant of attachment issued in Civil Case No. 37 of 2018 of the trial court for 11 (eleven) heads of cattle in favor of Mashila Sita (the present respondent). Like the respondent, Pendo Edward (the appellant) appeared in person.

The three (3) grounds of appeal revolve around points as under:-

(1) That the District Court erred in law not holding that having invited the assessors but it did not record their opinion the trial court was not properly constituted.

(2) That the District Court erred in law and fact not holding that refusal of the objection proceedings it wasn't justified.

(3) That the District erred in law and in fact for not appreciating provisions of the Law of Marriage Act that being wife of the judgment debtor the appellant had a right to personally own the property.

When the appeal was called on 28/04/2020 for hearing, but following the global outbreak of the coronavirus pandemic, and pursuant to my order of 17/03/2020 by way of video/ virtual court conferencing both parties were online (mobile numbers 0763166455 and 0757831232) respectively, I heard them.

Additional to her "petition" of appeal, the appellant submitted, **(1)** that all the 11 heads of cattle attached belonged to her personally and she was a stranger to the executed decree **(2)** that if anything, and before granting loan to the irresponsible husband, and the heads of cattle were matrimonial property the respondent should have sought and obtained her consent. That is all.

It appears having adopted contents of his reply to the petition of appeal the respondent submitted that indeed the appellant had not been a party to the loan agreement but she did not objection to attachment of the heads of cattle until at a later stage in 2018. That is all.

Questioned by court for clarification, the respondent submitted that lending one's husband Shs. 4,000,000/=, he knew it from the word go that any default would lead to the appellant's family to suffering the consequences.

The question whether or not the claims of Shs. 4.0 million against the appellant's husband Kefa Paulin (not a party here) were proved on the balance of probabilities. I will come back to it soon.

What makes it all a nullity is the fact that like the trial court did, it appears on the balance of probabilities the District Court was satisfied that the 11 (eleven) heads of cattle did not personally belong to the appellant but matrimonial, therefore liable to be attached, and the order and warrant of attachment was in accordance with the law raised much as the appellant brought no witness in court to show that the heads of cattle was her inheritance therefore personal. On this one, the trial should have remembered that a degree of proof by plaintiff, say in a case where purely the issue was of ownership it was different from claims by applicant in objection proceedings.

Looking at the evidence on record, very briefly the respondent stated that at the request of the appellant's husband he advanced loan of shs. 2,770,000 in three unequal installments for paddy business at Masumbwe, (not shs. 4.0 Million as alleged in Exhibit "A").

Kefa Pauline (the appellant's husband is on record having admitted claims of shs. 2,778,000/= (in 4 unequal installments) for some mineral business at Singida (not paddy).

I promised to come back to the issue whether or not the claims of shs. 4,000,000/= which led to order and attachment of the elven heads of cattle were proved on the balance of probabilities required by the law. The answer is no! Not only the lending respondent, and, if at all borrower appellant's husband fundamentally differed about the purposes of, but also

the sum involved/transacted ranged between shs. 2,770,000/= and Shs. 2,778,000/= much as with respect to the inflated shs. 4,000,000/= Exhibit "A" one did not tell the purposes or real source of the claims. In fact reading it plainly Exhibit "A" it sounds be a mere commitment one to pay but not a loan agreement per se. Perhaps the deference was interest chargable but that one cannot be accepted at this stage, because the only Exhibit "A" was silent. Leave alone the parties' evidence on record.

It follows that now that in express terms the judgment debtor only admitted the claims but a lesser sum of shs. 2,778,000/= the decretal sum and warrant of attachment should have been issued only with respect to equivalent and reasonable property not eleven (11) heads of cattle and two houses!

With regard to the issue whether or not the eleven (11) heads of cattle were the appellant's personal property (as alleged by her) or matrimonial, the appellant may have failed to substantiate the claims sufficiently yes, but for the wrong course taken subsequent to the trial dismissing the objection proceedings. It is trite law that where objection proceedings were dismissed, the aggrieved applicant is enjoined to institute a civil suit against the judgment debtor and the decree holder with a view to the court determining the issue of ownership with respect to the attached property. It is very unfortunate that the District Court admitted and entertained the subsequent Civil Appeal No. 22 of 2018.

Without prejudice to the foregoing discussion, and the point is, in my considered opinion equally important, now that the two courts bellow were of the settled view that the eleven (11) heads of cattle were matrimonial

property therefore in execution of the decree liable to be attached, it is very unfortunate that absence of proof of the claims of shs. 4.0 Million notwithstanding, the courts bellow took no trouble to see whether or not the appellant's consent was sought and obtained much as she disputed existence of the loan and, if anything, the purported decree holder had no appellant's consent. Leave alone benefits to the judgment debtor's members of the household from the alleged loan. Justice demands that for the betterment of some African members of households who traditionally suffer from stereotype, oppressive and at times irresponsible men, all the loans secured by husbands in the backs of their wives they shall be considered personally attached to men only of which in case of default wives and children should not suffer the consequences. To the courts of law this one should be a wakeup call.

As the claims of shs. 2,778,000/=only were proved against Kefa Paulin (judgment debtor) personally, the property attached was matrimonial under the obtaining circumstances and the appellant's consent was not sought or obtained the loan advanced to her husband, the order and warrant of attachment is lifted and for that reason the impugned decision and orders are quashed and set aside respectively. If need be, the respondent find any appropriate and lawful way to recover the proved shs. 2,778,000/=only from the appellant's husband personally. The appeal is allowed with costs. It is ordered accordingly.

Right of appeal explained.

THE HIGH COURT OF TANZANIA
JUHURU NA UMOJA
MWANZA

**S. M. RUMANYIKA**
**JUDGE**
**01/05/2020**

It is delivered under my hand and seal of the court in chambers. This 6th May, 2020 in the absence of the parties with notice (copies to be supplied immediately).


**S. M. RUMANYIKA**
**JUDGE**
**06/05/2020**