

IN THE HIGH COURT OF TANZANIA

AT TANGA

DC. CIVIL APPEAL NO.6 OF 2009

***[Originating from Civil Case No.14 of 1998
of Tanga District Court]***

M/S ESSAJI ENTERPRISES.....APPELLANT

VERSUS

M/S MSELEM STORE.....RESPONDENT

Date of last order: 21/9/2011

Date of Judgment: 15/11/2011

JUDGMENT

Teemba, J;

This appellant has preferred this appeal challenging the order of the District Court of Tanga which refused to grant an order to send the respondent to prison as a way of executing a decree. In 1998, the appellant instituted a civil case No.46 of 1998 in the District Court of Tanga against the respondent. The court received evidence and finally decided the matter in favour of the appellant. The appellant was awarded shs.4,732,200/= as a principal sum; interest at the rate of 31% from the date due to the date of judgment; interest of the decretal amount at the rate of 12% from date of judgment till date of final payment; plus costs of the suit.

The respondent, M/S Mselem Store failed to pay several merchandize bought on credit from the appellant. The respondent was dissatisfied with the judgment and decree of the District Court. He appealed to the High Court but his

appeal was dismissed with costs. He never appealed against the judgment of the High Court. However, he did not satisfy the decree passed against him. The appellant initiated the execution proceedings and the respondent offered his house situated on plot No.294 at Muheza to be sold to satisfy the decree. Zainabu Ally, the respondent's ex-wife, raised an objection that the house is a matrimonial and a family residential premises. The District Court, guided by **section 48(1)(e) of the Civil Procedure Code, [Cap.33 R.E. 2002]**, sustained the objection by holding that the house is a family property and residential one which can not be attached to satisfy a decree. The appellant thereafter, decided to lodge another application to have the respondent be sent to jail as a civil prisoner. The District Court perused the record and noted that there was a list of items/properties allegedly belonging to the respondent. This list was presented/filed in the objection proceedings. On the basis of this list, the learned Resident Magistrate refused the application and directed the Applicant/Appellant to conduct a thorough investigation on the possibility of attaching other properties as the order to send the respondent to jail is the last resort.

The appellant was aggrieved and has appealed to this court on the ground that "the learned Principal resident Magistrate grossly misdirected himself in law and on the facts in basing his decision on the pleadings in Miscellaneous Civil Application No.27 of 2007 in which one Zainabu Ally Abdallah was the Applicant, instead of basing the same on the relevant law and facts adduced before him."

Mr. Mramba, learned advocate appeared and represented the appellant whereas the respondent Mr. Mselem appeared in person. It was argued by Mr. Mramba that the respondent was summoned by the lower court to show cause why he should not be sent to prison as a civil prisoner for failure to pay the decretal amount in civil case no.46 of 1998. He added that, in determining the application, the magistrate went astray to consider evidence/facts which were in another case instead of considering the law and narrations given in that application.

The respondent, on the other hand, submitted that he surrendered the title deed for his house on plot No.294 of Muheza but the appellant does not want to attach and sell it. He added that there are other properties which can be attached but the applicant is insisting of sending him to prison. The respondent submitted that it appears that the applicant has a specific agenda to see him going to jail. At the same time, it was the respondent's argument that he is Jamal Abdallah Mselem and not Mselem Store. He added that, the trial court was not informed the actual person who traded as Mselem Store. The respondent urged the court to dismiss the appeal on the basis that the ruling appealed against is not appealable under section 50 and 75 of the Civil Procedure Code, [Cap.33 R.E. 2002].

In his rejoinder Mr. Mramba submitted that there are no grudges against the respondent except that the Applicant is interested in the payment of the

decretal amount. It was his argument that if the respondent is serious in satisfying the decree he can sell the properties and pay the applicant.

It is apparent clear from record that the respondent has neglected or failed to pay the decretal amount since 2001 when the decree was passed against him. It is also clear from the court proceedings [in the lower court] that the respondent uses various techniques to delay execution of the decree. He offers the house on plot No.294 situated at Muheza in which his family resides. The fact that there is a Ruling of the same court that the property is a residential house and therefore not attachable, the respondent is insisting on attaching the same house. The record of the lower court indicates that the respondent was given several chances for him to pay the decretal amount. I agree with the learned Resident magistrate that the option to send him to prison as a civil prisoner is the last resort.


However, it appears from record that the decree was passed in 2001 and the Ruling/order appealed against was delivered on 17th March 2009. The issue here is whether the lower court was right to bring up the list of respondent's properties which are attachable although they were not stated by any party when arguing the application. To be sincere, I consider anything on record in respect of the case between these same parties is relevant. This is the same court which passed the decree and heard the objection proceedings where a list of properties was produced allegedly to be owned by the judgment-debtor. It is

the same court which was asked to give an order and declare the respondent as a civil prisoner.

It is common and expected that courts have a duty to dispense justice. In so doing, they consider the pleadings and any relevant information available in respect of the parties and the area in dispute. In the present appeal, the court had all the record including the list of respondent's properties formerly presented to the same court. The lower court just took note of the list in order to decide the application fairly. The same list was repeated by the respondent when arguing this appeal. It is my settled view that, the lower court did consider the pleadings in determining the application before it. The properties listed may be attached and sold to satisfy the decree unless it is proved that the same have been transferred, concealed or removed by the judgment debtor.

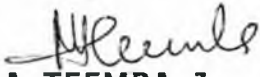
Before I pen down, I wish to agree with the respondent that the suit was between M/S Essaji Enterprises and M/S Mselem Store. These are legal persons and not individual persons.

For the foregoing reasons, I decline to allow the appeal. Under the circumstances of this case, I order each party to bear own costs.


R.A. TEEMBA, J.
15/12/2011

Court:- The judgment is delivered in the presence of both parties. Mr. Mramba for the appellant is also present.




R.A. TEEMBA, J.
15/12/2011