

**IN THE HIGH COURT OF TANZANIA  
DAR ES SALAAM DISTRICT REGISTRY  
AT DAR ES SALAAM**

PC CIVIL APPEAL NO. 126 OF 2020

**AFRAHA SAIDI NANYALIKA.....APPELLANT**

**VERSUS**

**ISMAIL CHANDE ISMAIL..... RESPONDENT**

(Arising from the decision of Ilala District Court,)

**(Kijoya, Esq- RM.)**

Dated 5<sup>th</sup> November 2019

in

Civil Appeal No. 48 of 2019

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**JUDGEMENT**

16<sup>th</sup> December 2020 & 23<sup>rd</sup> February 2021

**Rwizile. J**

Facts leading to this appeal are expedient to tell. Parties to this appeal are friends. It was in October 2011, when the appellant borrowed money from respondent for his mineral business. It was alleged by the respondent that; he borrowed a total of 15,000,000/=. As time passed by, the appellant failed to honour his promises of paying the loaned amount. As a result, the respondent decided to institute a civil suit (Civil Case No. 41 of 2018) against the appellant at Buguruni Primary Court.

The case was heard and decided in favour of the respondent. The trial court ordered the appellant to pay the loan. It was not certain as to when he was supposed to pay the same. According to the records, it seemed the appellant failed to pay loan amount. On 21<sup>st</sup> December, 2018 the trial court ordered attachment of the appellant's house

in execution of the decree. The appellant's wife one Khadija Jumbe objected the attachment. She claimed that the attached house is a matrimonial property and she did not know anything about the loan. On 5<sup>th</sup> April 2019, the trial court ruled in favour of the objector and released the house.

The respondent was aggrieved by the decision. He therefore appealed to the District Court of Ilala in Civil Appeal No. 48 of 2019. The District court allowed the appeal and found out that the order to stay execution by the trial court was unlawful. The appellant was aggrieved by the decision of the District court, hence this appeal. It is preferred on the following grounds;

1. That the resident magistrate erred in law and fact in entertaining an appeal against a person who was not the objector in the objection proceedings. The resident magistrate erred in reversing the ruling of the trial court on the objection proceeding without the involvement of the objector.
2. That the magistrate erred in law and fact in holding that there was no supportive evidence to satisfy the court that Khadija Jumbe was the wife of the appellant, while marriage was not in dispute during the objection proceedings at the trial court.
3. The resident magistrate erred in law and fact in holding that the order for stay of execution on attachment of the respondent's house was not in conformity with the law and ineffective.

He therefore prayed for this appeal to be allowed with costs. At the hearing appellant appeared in person while the respondent was represented by Mr. Akiza Rugemalira learned advocate. Parties agreed to argue this appeal by written submission.

In support of the appeal, appellant argued on ground one and its alternative that, it was wrong for the district court of Ilala to entertain an appeal against him when he was not the objector. He said, since the appeal was against the ruling of the objection proceedings, the respondent ought to have appealed against the objector. He asserted on the alternative ground that; it was wrong also for the first appellate court to reverse the ruling of the trial court on objection proceedings without involving the objector.

As for ground three it was urged that, since Khadija Sultan was not party to the appeal at the district court, that is why she was not able to tell the court why she said she was his wife. It was his submission further that, the issue was not when was their marriage been contracted, rather he said it was the status of the house at the time of execution. According to him the house was matrimonial property, it was an error for the appellate court to rule that there was no supportive evidence that Khadija Sultan was his wife, while he added, there was no dispute on the status of marriage.

As for the last ground it was submitted that, the trial court released the house from attachment, he said, the same did not order for stay of execution. He added that, the trial court had the power to order attachment of the property and order for its released if it does not qualify for the same, he added that, as it was decided during the objection proceeding by trial court concerning his house. He therefore prayed for this appeal to be allowed with costs.

Contrasting the appeal, Mr Akiza Rugemalira learned advocate argued that, the district court was right in determining the appeal against the appellant, since he said, the names of the objector did not appear to be one of the parties to the suit. He cited the last paragraph of page 12 of the judgement of Ilala district court. He then said, this ground is unfounded and should be dismissed with costs. When arguing on the alternative ground, he said, since the name of the objector never appeared as a party to the suit, he then said the district court was right in reversing such ruling even when the objector was not involved.

It was his submission on ground three that, the fact that marriage was not in dispute according to him, was not an impediment for the objector to produce evidence to prove the existence of marriage and if the house was a matrimonial property. He cited section 112 of TEA, [Cap 6 RE 2019], that whoever alleges must prove. He also referred to page 13 of the district court judgement. And the case of **Barelia Karangirangi vs Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017 at page 8 (last paragraph). He added that, to say the objector is the appellant's wife was not enough unless there was evidence to prove the same. He said this ground lacks merit and hence, should be dismissed.

As for the last ground it was stated that, since there was no evidence given by the objector to satisfy that the said house was matrimonial, and that since the names of objector was not party to the suit, it was therefore right for the district court to declare the ruling of the trial court ineffectual.

He said more that, there is no other property of the appellant for attachment. He therefore prayed for this appeal to be dismissed with costs and the court to upheld decision of the trial court.

In re-joining, appellant maintained what he submitted in his submission in chief.

Having considered the submission of the parties and the records of the lower court. I propose to determine in the first-place ground one, then grounds two and three as they appear in the memorandum of appeal.

It is in records that appellant had failed to pay his loan which led to his house to be attached for sale. It is not in dispute that one Khadija Sultan who claimed to be the appellant's wife objected the attachment and the trial court ruled in her favour. It was because of that ruling, the respondent herein appealed to the district court.

Coming to the issue at hand, the appellant argued that it was wrong for him to be made party to the appeal since the appeal was against the objection proceeding and he was not the objector. It is my considered view that, the appellant ought to have raised an objection at the district court that he was not supposed to be party to the appeal. Instead, he argued the appeal as if he was the objector. I have gone through the grounds raised at the district court, most of them were challenging the ruling on the objection proceedings, and the appellant had submitted against the same as if he was the objector. I agree with the counsel for the respondent that, the objector was not party of the main suit, but also, I do not see how appellant was prejudiced being party to the said appeal. This ground lacks merit hence dismissed.

As for ground two, I agree with the counsel for the respondent that, it was wrong for the trial court to rule in favour of the objector and release the house from attachment by mere claims that the objector was the appellant's wife without sufficient proof to that effect. It is a settled rule that whoever alleges must prove. The same is provided under section 110(1)(2) of [Cap 6 R.E 2019] which states as hereunder reproduced;

*110.-(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

Therefore, it was the duty of the objector to prove that, she was the wife of the appellant and the house attached was their matrimonial property/home. What transpired in the proceeding at the trial court on 22<sup>nd</sup> March, 2019 is as hereunder;

*MAELEZO YA MKE WA SU1 KHADIJA JUMBE*

*Napinga kuuzwa nyumba kwasababu mimi ni mke wa SU1 na nina Watoto na pia sikushirikishwa kwenye madai haya.*

*SM1*

*Tupo kwenye utekelezaji hivyo nyumba iuzwe tu au SU1 atoe hizo fedha*

*SU1*

*Bado sina fedha za kulipa*

*AMRI*

*Shauri tarehe 5/4/2019 kwa uamuzi*

For the foregoing proceeding it is crystal clear that no evidence was adduced by the objector to prove her allegation that she was her wife and that the house was a matrimonial one. The Court of Appeal in the case of **Paulina Samson Ndawavya vs Theresia Thomas Madaha**, Civil Appeal No. 45/2017 at page 15-16, held that;

*It is a trite law and elementary that he who alleges has a burden of proof as per section 110 of Evidence Act, [Cap 6 R.E 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved.*

I therefore hold that the district court was right to rule that, the objector did not adduce adequate evidence to prove her objection. Hence, I dismiss this ground for lack of merit.

As for the last ground, this ground will not hold me much as it was determined in the previous ground, it was clearly shown in the records of the trial court that no evidence was adduced to prove that the attached house was the matrimonial property. So, with respect I think, it was wrong for the trial court to release the same from being attached for sale. Rule 70 of GN No. 310/1963, 119/1983 provides that;

*70. Objection to attachment by other persons*

*(1) Any person, other than the judgment debtor, who claims to be the owner of or to have some interest in property which has been attached by the court may apply to the court to release the property from the attachment, stating the grounds on which he bases his objection.*

*(2) On receipt of an application under subrule (1), the court shall fix a day and time for hearing the objection and shall cause notices thereof to be served upon the objector, the judgment-creditor and the judgment debtor.*

*(3) No order for the sale of such property shall be made until the application has been determined and if any such order has been made, it shall be postponed.*

*(4) On the day fixed for the hearing, the court shall investigate the objection and shall receive such evidence as the objector, the judgment-creditor and the judgment debtor may adduce.*

*(5) If the court is satisfied that the property or any part of it does not belong to the judgment debtor, it shall make an order releasing it, or such part of it, from the attachment.*

Rule 70(4) of GN No. 310/1964, 119/1983 provides clearly that the court shall investigate the objection and receive evidence adduced at the hearing of the objection proceeding. As per records no evidence was adduced from the objector and the other

party to the suit. I must say I see no reason to fault the judgement of the district court. This ground lacks merit and it is hereby dismissed.

For the reasons stated above, I see no merit in this appeal, I therefore dismiss the same in its entirety with costs.

**A.K. Rwizile**

**JUDGE**  
**23.02.2021**

 Recoverable Signature

X 

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Signed by: A.K.RWIZILE

