IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]

AT ARUSHA.

(PC) CIVIL APPEAL NO. 49 OF 2020

(C/f the District Court of Arumeru, Civil Appeal No. 4 of 2020, Originating from Maji ya Chai Primary Court Civil Case No. 64 of 2013)

FESTO SETH ..... APPELLANT

Versus

KUWAYAYATA SACCOS LTD ..... RESPONDENT

JUDGMENT

18th February & 19th March 2021

Masara, J.

Facts leading to this appeal are somehow complicated given the duration and a myriad of suits, applications and appeals that taken to resolve the dispute herein. The dispute started in 2012 when the Respondent herein advanced a construction loan amounting to TZS 600,000/= to one Eunice/Yunis Festo, the Appellant's wife. The loan was carrying an interest of 3% for each month, and in case of a delay to repay the agreed instalments and interests the chargeable penalty was 10% of the outstanding loan plus interest. According to the loan agreement, the money was to be paid in instalments at the end of each month in a period of 10 months, and the last instalment was to be made on 14/12/2012.

The Respondent filed a suit against the said Yunis at Maji ya Chai Primary Court. According to the evidence in the trial Court, she paid only two instalments tallying to TZS 119,800/= and interest of TZS 34,800/=. Exhibit A that was also admitted at the trial shows that she had also paid a down payment of TZS 218,000/. But the Respondent maintained that she had not repaid TZS 545,000/= up to the time the instalment

repayment expired. When the suit was filed, the Respondent's claim against Yunis had escalated to TZS 1,199,000/=. At the trial, the said Yunis maintained that she had repaid the whole amount extended to her.

On 13/8/2013, the trial Court ruled in favour of the Respondent, ordering the Appellant's wife to pay the whole amount of TZS 1,199,000/= as claimed. She appealed to the District Court of Arusha vide Civil Appeal No. 41 of 2013. On 5/11/2014, the District Court dismissed the appeal upholding that of the trial Court. Still dissatisfied and eager to fight for what she believed to be her right, she tried to appeal in this Court. Noting that her appeal was time barred, she filed Misc. Civil Application No. 136 of 2016 in this Court seeking extension of time upon which she could appeal. In its ruling delivered on 13/6/2016, this Court (Maghimbi, J.) dismissed the application.

It is noted that while the Appellant's wife was still pursuing the appeals, the Respondent applied for attachment and sale of a three-acre farm allegedly belonging to her located at Loita Nkomaala village, Nkoanrua ward. On 29/4/2015, the trial Court ordered attachment of the said farm and on 26/6/2015 the same Court issued an order to sell the said farm so that the Respondent can be paid the amount due. The farm was sold by auction to one Nickolus J. Mungure for TZS 2,150,000/=. It is not known where the excess money went. Incidentally, the purchaser of the farm did not take control of the farm and was refunded money on 23/9/2015. Almost a year later, on 27/10/2016, a loan officer of the Respondent, one Asanterabi Julius Kaaya, wrote a letter to the Magistrate in Charge of the trial Court asking the trial Court to authorise the Respondent to occupy

the said farm. On 31/10/2016, the trial Court, R.R. Kashero, Magistrate, ordered that the farm be handed over to the Respondent for their own use. This was done in the absence of the decree debtor (Yunis). The Magistrate used the following words:

> *"Kwa kuwa mdeni mhukumiwa (sic) amekuwa msumbufu mpaka kiasi cha kusababisha Sacoss (sic) imrudishie pesa zake kutokana na usumbufu huo basi mahakama hii inatoa amri eneo hilo akabidhiwe mdai mhukukuwa (sic) Kuwayayata Sacoss kwa matumizi yake. Fomu za kukabidhi ardhi zitolewe."*

The District Commissioner, Arumeru, was directed to hand over the farm to the Respondent by the letter of the Resident Magistrate Incharge, Arumeru on 16/11/2016. It is not known whether the Respondent ever took control of the said farm. It is on record that on 15/2/2017, the decree debtor, accompanied by the Appellant deposited the decretal sum at the trial court. They were issued with a receipt to acknowledge the payment. It is also on record that the Respondent declined to take the money paid to the trial Court.

Thereafter, on 22/5/2017, the Appellant intervened by filing an Objection Proceeding at the trial Court claiming that the farm that was ordered to be attached was not the property of Yunis, but his. He claimed to have inherited it from his father. In the ruling against the Objection Proceeding delivered on 25/9/2017, the trial Court dismissed the Application for being time barred. The Appellant appealed to the first Appellate Court vide Civil Appeal No. 25 of 2017.

While that appeal was still pending, he also filed Civil Revision No. 2 of 2018 in this Court, seeking to revise the trial Court decision. In the midst,

the Appellant's wife repaid the claimed amount at the trial Court. This Court (Mwenempazi, J.) after hearing the parties ordered the matter to be settled administratively by the Deputy Registrar. Amicable settlement could not succeed. On 14/11/2018, the Deputy Registrar directed the first Appellate Court to proceed with the Appeal that was pending. The file was returned to the District Court without a judicial determination of the revisional proceedings. In its judgment delivered 7/5/2019, the first Appellate Court dismissed the appeal because it was filed in the name of the Appellant's wife instead of the Appellant's own name.

The Appellant filed Misc. Civil Application No. 21 of 2019 at the District Court, praying for extension of time to appeal in that Court against the decision in the Objection Proceeding. In its ruling delivered on 10/1/2020, the District Court granted the application for extension of time. On 13/2/2020, the Appellant filed Civil Appeal No. 4 of 2020 in the District Court. On 20/5/2020, the District Court dismissed the appeal with costs upholding that of the trial Court. the Appellant still discontented has approached this Court seeking to reverse the decisions of the two lower Courts on the following grounds:

(a) *That, the learned Resident Magistrate erred both in law and fact in affirming the judgment of the trial court to attach and sell the farm of the appellant in satisfaction of the decree of the trial court without considering that the decretal amount has been paid and deposited in court for collection by the Respondent;*
(b) *That, the District Appellate Court erred in law and in fact in holding that the Respondents were correct in refusing to receive the money paid in satisfaction of the decree while the aforesaid money was what was claimed by the Respondent in Court from the Appellant but not the farm of the Appellant;*
(c) *That, the learned Resident Magistrate erred both in law and in fact in ignoring to consider the petition of appeal presented before*

the Court for consideration particularly ground No. 3 of the said petition; and

(d) *That, the learned Resident Magistrate erred both in law and in fact for failure to give a reasonable judgment to meet the ends of justice hence occasioned miscarriage of justice on the Appellant in insisting the Respondent to hold the farm of the Appellant which is under attachment while decretal money had been paid.*

For the above grounds, the Appellant prays that the appeal be allowed with costs and the Respondent be ordered to collect the money which is deposited in the trial Court.

At the hearing of this appeal, both parties appeared in Court in person unrepresented. The Respondent was represented by one Mr. Godson Meela, the secretary of the Respondent. It was agreed that the appeal be argued through filing written submissions. The Appellant was to file his submissions in chief on 25/11/2020 and the Respondent to file their reply submissions by 10/12/2020. The Appellant was to file his rejoinder by 18/2/2021. The Court directed that parties appear for necessary orders on 18/2/2021. On that date, only the Appellant entered appearance. Incidentally he had not received a copy of the Respondent's written submissions. I directed that the matter be fixed for judgment on 19/3/2021.

Up to the time of composing this judgment, it is only the Appellant who wrote his submissions as directed. For unknown reasons, the Respondent did not file a reply submission. It is trite law that failure to file written submissions as ordered by Court is tantamount to failure to enter appearance on the day fixed for hearing. This is what was decided by the Court of Appeal in ***National Insurance Corporation of (T) Ltd &***

Another Vs. Shengena Limited, Civil Application No. 20 of 2007 (unreported) where the Court observed:

> *"The Applicant did not file submission on due date as ordered. Naturally, the court could not be made impotent by a party's inaction. It had to act. ... It is trite law that failure to file submission(s) is tantamount to failure to prosecute one's case."*

From the above view, it is the finding of this Court that the Respondent has waived the right to challenge the appeal as preferred by the Appellant. That said however, the Appellant has to satisfy that his appeal has merits. I will determine the grounds of appeal as submitted.

Submitting in support of the grounds of appeal, the Appellant contended that while the dispute was still pending in Courts, on 15/2/1017, the Appellant's wife went back to the trial Court and deposited the claimed amount of TZS 1,199,000/= for the Respondent to collect. The trial Court upon receiving the money, summoned the Respondent to collect the money but the Respondent failed to collect the same. The Appellant added that the District Court dismissed the appeal for simple reasons that the objection application was time barred therefore the Respondent refused to collect the money without considering the order of the High Court which was delivered on 13/5/2016 which implies that the trial Court record was still in the High Court.

According to the Appellant, the objection proceeding was properly filed in the trial Court in compliance with Rule 70 of the Magistrate Courts (Civil Proceedings Originating in Primary Courts) Rules 1964. He fortified that the Appellant, being the owner of the land that was subjected to sale, had interest in that property. Both the trial Court and the first Appellate Court

did not investigate the matter in terms of Rule 70(4) of the above cited Rules. He maintained that the two lower Courts failed to adhere to rule 85 of the above Rules and instead based its decision on. According to him, there is evidence on record that at the time the trial Court ordered sale of the property, the decretal amount had been fully deposited in the trial Court by the judgment debtor on 15/2/2017, therefore there was no need for the sale of the property.

I have carefully gone through the grounds of appeal, the submission by the Appellant as well as the trial Court record, the main issue calling for determination is whether this appeal has merits.

I agree with the Appellant that the trial Court in dismissing the Objection proceeding before it made reference to Rule 84(2) of the Magistrate Courts (Civil Proceedings Originating in Primary Courts) Rules 1964. The trial Magistrate affirmed that the time within which a party can file objection proceeding objecting the sale of his property is thirty days, but the application was made after almost a year after the sale order and subsequently the handover of the said property to the Respondent was issued.

For the purpose of ascertaining the correctness of the trial Court finding, let me reproduce the relevant provision relied on by the trial Magistrate. Rule 84 provide as follows:

> *"84-(1) Where movable property has been sold, it shall be delivered to the purchaser on payment in full of the purchase price.*
> *(2) Where immovable property has been sold, the court shall, if no application has been made within thirty days to set aside the sale, issue to the purchaser a certificate of specifying the property sold and*

certifying that the interest of the judgement debtor in that property has been transferred to the purchaser:
Provided that where it is provided by any law that a disposition of immovable property shall be of no effect or shall be inoperative without the approval or consent of some person or authority other than the court, the court shall not issue the certificate under this rule unless such approval consent has first been obtained."

Although the above provision makes reference to application to set aside sale order, and the same has to be made within thirty days as held by the trial Court, the relevant provision which the trial Court should have invoked is Rule 85 thereof. It provides:

"85-(1) On application made ***within thirty days by any person affected or of its own motion, the court may set aside a sale of immovable of property if it is satisfied:*** *-*

(a) That there has been fraud or material irregularity in the proceedings leading up to, or in the conduct of, the sale; or

(b) That *the* ***judgement debtor had no saleable interest in the property sold.***

Provided that no sale shall be set aside unless the judgement creditor, the judgement debtor, the purchaser and any other person affected have been given an opportunity to be heard and produce evidence." (emphasis added)

The two above provisions of the law are self-explanatory. Rule 85 states that a person intending to file objection proceedings claiming that the property ordered to be sold or attached is not the property of the judgment debtor, has to do so within 30 days from the date the attachment and or sale order was issued. The record shows that the order was made on 29/6/2015. One can therefore safely conclude that at the time the Appellant filed the objection proceedings, he was out of the prescribed time. This legal position notwithstanding, I note that the whole

dispute is tainted with illegalities which taint the decisions of both the trial Court and the District Court.

First, it is not known why the farm in dispute was attached in the first place. According to the evidence at the trial court, particularly Exhibit B which is titled "Mkataba wa Mkopo wa Vifaa", the said farm was not put as security for the loan. Clause 5 thereof which is titled "mdhamana" which I take it to mean "security" for the loan lists three items; namely, "kifaa/vifaa chenyewe, wadhamini wawili and Dhamana kama ilivyo kwenye fomu ya tamko la dhamana kwenye fomu ya maombi ya mkopo." One may be tempted to take the third item to be the said farm. However, that was not made part of the documents tendered before the trial Court. The attachment of the farm was done at the execution stage. I do not know how the Court concluded that the said security was the property of the said Yunis. Further, why didn't the decree holder attach the "kifaa" "wadhamini" be asked to pay before going for a three-acre farm for a debt of TZS 1,199,000/=.

Second, according to Rule 84 (2) of the Magistrate Courts (Civil Proceedings Originating in Primary Courts) Rules 1964, after sale of the property was made, the trial Court was duty bound to issue to the purchaser a certificate specifying the property sold and certifying that the interest of the judgement debtor in that property has been transferred to the purchaser." This was not done. That is why there is no record of the excess of the proceeds of the sale being handed over to the judgment debtor. There is also no record of the public auction alleged to have been

conducted. The only available document that touches on the sale is a photocopy of a receipt allegedly refunding the purchase money.

Third, the trial Court is recorded to have entertain the application to hand over the 'sold' land to the Respondent. This was done a year after the alleged sale took place. It was done without the judgment debtor being summoned and was accompanied by words that condemned the said judgment debtor. She ought to have been summoned to defend the said application. In any case, having directed the first sale, the Court could not unilaterally alter its previous decision from selling the attached property to handing over the property to the Respondent. Incidentally, the trial Court does not justify this later decision and the same was done without attaching a specific value to the property. The value of the property was necessary in order for the Court to direct that the excess thereof be handed to the judgment debtor and for jurisdictional purposes.

Fourth, after the nullification of the first sale, there is no evidence that the Court complied with Rule 84(2) above stated. Further, there is no evidence that the hand over ever took place.

Fifth, there is no dispute that the interest charged on the loan appears to be exorbitant. From exhibit A, the judgment debtor had paid TZS 119,800/= and interest of TZS 34,800/=, excluding TZS 218,000/= down payment up to 27/4/2012. That means out of the principal loan, the Respondent owed her just over 260,000/=. She alleges to have finalised payment while the witness for the Respondent was away on studies. She referred to an exhibit "AU" which does not appear in the record. Even if it

was to be considered that she failed to repay the amount due, one wonders how the claim escalated to over a million shillings.

Sixth, it is on record that the judgment debtor deposited the amount due at the trial Court and that the Respondent declined to take the money. While dismissing the Appellant's appeal, the District Court stated that the trial court was justified to dismiss the Appellant's objection due to lapse of time. It did not deal with some of the illegalities pointed out, including the fact that the decretal money was already paid by the judgment debtor. The two courts below did not even state what was to be done with the money deposited or ask how the execution was done. I consider this to be a misdirection on the part of the two courts below. Refusal to take the decretal amount leads me to agree with the Appellant that the interest of the Respondent was not repayment of the loan but taking over of the piece of land. Courts should not be used by greedy litigants at the expense of depriving parties their source of livelihood.

The last illegality I find in this matter relates to the way Civil Revision No. 2 of 2018 was handled by the Deputy Registrar. The assigned Judge directed the Deputy Registrar to try and mediate the parties herein administratively. He was not asked to deal with the substance of the Revision. The fact that he decided to refer back the file to the District Court for it to continue with the hearing of the appeal appear to me to be a decision de jure and de facto. After failing to reconcile the parties administratively, he should have referred back the matter to the judge concerned for him to make a determination of the matter.

The pointed out matters above leads me to a conclusion that an investigation into the authenticity of the Appellant's claim over ownership of the attached piece of land was necessary. That aside, the fact that the attached property appears to have a value surpassing the decretal amount and that it was attached without following normal procedures, it is directed that the same be lifted from attachment.

Consequently, this appeal is allowed. In exercise of powers vested to me by section 44(1)(b) of the Magistrates Courts Act, Cap. 11 [R.E 2019] set aside the decision of the District Court in Civil Appeal No. 4 of 2020 and that of the trial Court (Civil Case No. 64 of 2013) and direct that the attached farm which was illegally attached, sold and later reallocated to the Respondent be released from attachment and handed over to the Appellant and his wife forthwith. The trial Court should henceforth hand over to the Respondent the money deposited by the Appellant's wife on 15/02/2017 as full discharge of the Respondent's claim against one Yunis Festo. Considering the illegalities pointed out, and realizing that such illegalities may not directly be attributable to any of the parties, I direct that each party bears their own costs for this appeal and the courts below.

Order accordingly.

Y. B. Masara
JUDGE
19th March, 2021.