

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF SONGEA  
AT SONGEA**

**PC CIVIL APPEAL NO. 1 OF 2021**

**(From Original Civil case number 273 of 2019 of Songea Urban Court and  
Civil Appeal No. 24 of 2020 at Songea District Court)**

**RAMADHANI SALUM ABDALLAH..... APPEALANT**

**Versus**

**YOHANA MASOLE .....RESPONDENT**

**JUDGEMENT**

**Date of Last Order: 18/03/2021.**

**Date of Judgment: 27/04/2021.**

**BEFORE: S.C. MOSHI, J.**

This is a second appeal. The first appeal was heard by the District Court of Songea at Songea. The case originates from Songea Urban court Civil case number 273 of 2019. The Respondent successfully sued the appellant for a sum of T.shs 13,513,500/= being money advanced to the appellant to facilitate his business of selling airtime vouchers. He was ordered to pay the amount within five months from the date of judgement, that is 18/10/2019 to 18/03/2020.

The agreed period expired; the appellant didn't pay the sum of money as ordered by the trial court. Hence the respondent started the process of executing the court decree. The respondent requested the trial court for attachment of appellant's house which is on plot No. 21 RR located at Ruvuma Juu. The appellant raised objection to the attachment

on the ground that the same is a residential house. However, the trial court overruled the objection; consequently, the house was sold through a public auction.

Aggrieved, the appellant preferred an appeal to the District court, where the appeal was registered as Civil Appeal No. 24 of 2020. However, the District Court didn't make a decision on the substance of the appeal as presented in the petition of appeal, it found that the appeal had been overtaken by events. Aggrieved by the decision the appellant has appealed to this court on the following grounds: -

- 1. That, the first appellate court erred in law and fact to rule that the appeal was taken by the event basing on the evidence that the house was already sold while the period of appeal was not yet elapsed according to the law.*
- 2. That, the first appellate court erred in law and fact to rule that the appeal was taken by the event without taking into consideration that the order of attachment and sell of the residential house occupied by the appellant and his family was done contrary to the law.*
- 3. That, the first appellate court erred in law and fact to rule the appeal was taken by event without taking into consideration that the order of attachment of residential house occupied by the*

*appellant and his family was attached wrongly since was not used as collateral to the respondent.*

- 4. That the first appellate court erred in law and fact to rule that the appeal was taken by the event without taking into consideration that the primary court entertaining the matter which involve land while it has no jurisdiction of doing so.*

At the hearing of this appeal the appellant appeared in person whereas the respondent was represented by Mr. Zuberi Maulid, advocate. The appellant had nothing to add, he prayed the court to adopt his petition of appeal to be part of his submission.

Mr. Zuberi submitted among other things that, the District court correctly dismissed the appeal as it considered the evidence and the law, the primary courts civil procedure rules. The house was sold following the court's lawful order and the sale vide a public auction. He cited Rule 72 and 77 of the Magistrates' courts (Civil Procedure in Primary Courts) Rules which empowers the Decree holder to apply to court to sell judgement debtor's property. The court may order sale of the property through public auction.

He submitted further that rule 85 provides for actions that could have been pursued, that is applying for setting aside the sale.

On the second and third ground, Mr. Zuberi stated that the District Court did correctly held that the house was not family's house and that it was not collateral. The appellant didn't raise this fact that the house was family's property at trial court. Hence the court rightly refrained to consider this argument. He said that, the house was not collateral, it was sold following court's order during execution process.

On the fourth ground he said that, the ground is baseless as the record of the trial court does apparently show that the primary court did not determine a land matter. The court exercised jurisdiction on civil matters as the law empowers the primary court to order attachment of properties including immovable properties. He prayed the court to dismiss the appeal for lack of merits with costs.

In rejoinder, the appellant submitted that he did inform the trial court that the house was a family property.

The main issue for determination is whether this appeal is tenable.

Proceedings in primary court in civil cases are governed by the Magistrate Courts (Civil Procedure in Primary Courts) Rules G.N 310 of 1964. After the primary court has made an award or order for payment of money and such money has not been paid on the day fixed by the court, the award or order may be enforced by the primary court by

attachment and sale of property of the judgement debtor. Execution of orders and awards is covered by part iii of the above rules.

Rule 56 of the above rule, provides that: -

*56. "Enforcement of awards and orders for payment of money.*

*When a court has made an award or order for the payment of money and such money has not been paid, the award or order may be enforced by the court by attachment and sale of the property of the judgment debtor."*

As pointed earlier in the case at hand the appellant didn't pay the money to the respondent as ordered by the trial court, hence the respondent proceeded with execution of the order for payment of money under rule 56.

All in all, I find this appeal to have no merits, as all the procedures pertaining to execution of the award were followed. The judgment creditor who is the respondent in this appeal applied to the trial court for attachment of the property of the judgement debtor, the appellant herein, who was summoned on 27/03/2020 before H. Songoro RM. Thereafter the appellant appeared on 30/03/2020 where he raised objection to the attachment and prayed to be given time so that he could pay the debt for four years. The case proceeded with execution proceedings, thereafter on 17/04/2020 the court ruled thus I quote: -

*"Mara baada ya Mahakama hii kuona maelezo hayo ya pande zote mbili ilibaini kua mjibu maombi hana sababu ya msingi ya kwanini hajatimiza hukumu ya Mahakama katika kesi ya madai no 273 na vilevile hana sababu ya msingi ya kwanini mali yake (nyumba ilioko kwenye plot No 21 RR, Ruvuma Juu) isikamatwe na kuuzwa kufidia deni la mwombaji. Hivyo Mahakama haina budi kuhitimisha kua mjibu maombi katika shauri hili kwa kauli ya Pamoja anakubaliana na maombi ya mwombaji kua nyumba hio ya mjibu maombi ikamatwe na kisha iuzwe kufidia deni lake".*

The literal meaning of the quoted phrase is that appellant didn't advance sufficient cause as to why his house on plot number RR, located at Ruvuma Juu should not be attached, therefore the court ordered that the said house be attached and thereafter be sold to realize the decretal sum.

On 04/05/2020 the appellant filed an objection against the attachment of his house under rule 63(1) (b) and 69 of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules GN. No. 119 of 1983. He alleged that it was a residential house. The objection was heard and on 7/08/2020 the court overruled it and held that the objection was baseless. The sale was conducted by Twins Auction Mart Co Ltd and Court Broker as ordered by the court on 29/08/2020. It is true that the sale was

conducted before the expiration of time to appeal as stated by the appellant in his first ground.

Section 20(3) of the Magistrates' Courts Act, Cap. 11 R.E 2019 provides for 30 days time within which the aggrieved by an order may make an appeal, it reads thus: -

*"Every appeal to a district court shall be by way of petition and shall be filed in the district court within thirty days after the date of the decision or order against which the appeal is brought".*

However, a right to appeal does not bar the execution process. A party wishing to stop the process may apply to the executing court to stay the execution proceeding pending the filing and determination of the appeal.

On the second ground of appeal, it is common ground that a residential house used by the judgement debtor and his family is not liable to attachment. Paragraph 3(3) (f) of the 4<sup>th</sup> schedule to Magistrates Court Act Cap. 11 R.E 2019 which relates to civil proceedings before Primary courts does categorically provide that a residential house or building or part of a house or building occupied by judgement debtor, his wife and dependant for residential purpose is not subject to attachment. The appellant was duty bound to prove that the house subject to attachment was a residential house by bringing witnesses who could show that it

was family residential house. Among others, the witnesses could be his wife or dependants living in the house. This was not done, therefore I subscribe to the trial court's finding that the house was not a residential one.

Regarding the third ground, I have passed through the record of the trial court, it is true that the appellant's house was not used as a collateral to the respondent following the money given to him. However, the said house came in during the execution processes. It is apparent on record that the trial court ordered the appellant to pay a sum of money to the respondent to settle the decretal amount, but the money was not paid on the fixed date. Therefore, the respondent applied for attachment and sale of the appellant's house in the process of enforcing the decision of the trial court.

On the last ground of appeal, I am alive of section 4 of the Land Disputes Courts Act Cap. 216 R.E 2019 which ousts magistrates courts' civil jurisdiction in any matter under the Land Act, Cap. 113 and the Village Land Act Cap 114. However, the suit before the trial court in the case at hand didn't fall under the land law, rather it involved execution of its orders through attachment and sale of the appellant's house. I therefore, find that this ground too has no merits.

That said I subscribe to the position of the first appellate court. The proper course of action which was supposed to be taken by the appellant was to file an application setting aside the sale under rule 85 which reads thus: -

*85. "setting aside of sale in execution*

*(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 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."*

That said, the appeal is dismissed with costs.

Right of Appeal Explained.



*[Signature]*  
**S.C. MOSHI**

**JUDGE**

**27/04/2021**