

**IN THE HIGH COURT OF TANZANIA  
IN THE DISTRICT REGISTRY OF SHINYANGA  
AT SHINYANGA**

**PC. CIVIL APPEAL NO. 21 OF 2019**

**MARIAM MAYUNGA.....APPELLANT**

**VERSUS**

**ELIAS CHEYO.....1<sup>ST</sup> RESPONDENT**

**NGANGA SAYI.....2<sup>ND</sup> RESPONDENT**

[Appeal from the Judgment of the District Court of Bariadi]

(Hon. Mrio)

dated the 9<sup>th</sup> day of August, 2019

in

Civil Appeal No. 18 of 2018

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**JUDGMENT**

9<sup>th</sup> & 01<sup>st</sup> April, 2021.

**MDEMU, J.:**

This is a second appeal. In Lugulu Primary Court, the 2<sup>nd</sup> Respondent successfully claimed against the 1<sup>st</sup> Respondent for the sum of Tsh. 4,537,000/= that arose from contract. It was in civil case No. 40 of 2017. In executing the decree, the court ordered sell of the 1<sup>st</sup> Respondent's house. There is when the Appellant herein stormed in, objecting in two aspects that, the house subject for execution is a matrimonial property and that she had

no knowledge of the Respondents' debt. The Appellant did this through Civil Case No. 5 of 2018. In the final analysis, the Appellant lost. Aggrieved with that decision, the Appellant again unsuccessfully appealed to the District Court of Bariadi through Civil Appeal No. 18 of 2019. Hence, this second appeal on the following five grounds: -

- 1. That, both the trial court and the 1<sup>st</sup> appellate court erred in law and in fact by holding in favor of the Respondents while the attached property is both matrimonial house and residential house.*
- 2. That, both the trial court and the 1<sup>st</sup> appellate court erred in law and in fact by disregarding that the attached matrimonial house was obtained by joint efforts of both the Appellant and the 1<sup>st</sup> Respondent.*
- 3. That, both the trial court and the 1<sup>st</sup> appellate court erred in law and in fact by failure to evaluate, analyze and assess the evidence on the records as to whether the attached matrimonial house is subject to attachment.*
- 4. That, both the trial court and the 1<sup>st</sup> appellate court erred in law and in fact by holding in favor of the respondents*

*while they failed to prove the exact name of the appellant and no exhibit tendered to prove the same.*

*5. That, both the trial court and the 1<sup>st</sup> appellate court erred in law and in fact by holding in favor of the respondents while they failed to prove their case on the balance of probabilities.*

On 9<sup>th</sup> of March, 2020, the appeal came for hearing. Both parties appeared in person unrepresented. The Appellant when submitting in support of the appeal started by adopting all her grounds of appeal and added that, as the house was a matrimonial property and not part to the loan then she faulted the trial court for ordering its attachment and sale. The Appellant went further stating that, the 1<sup>st</sup> Respondent is her husband since the year 2000. Notwithstanding, she had no knowledge of loan agreement between the Respondents herein. Again, she submitted that, the house subject to attachment is a family house constructed in the year 2003 and that, she is living therein.

On his side, the 1<sup>st</sup> Respondent replied by admitting to have taken loan two times from the 2<sup>nd</sup> respondent. Amplifying on that assertion, he added that, the first loan was Tshs. 400,000/= and Tshs. 700,000/= as a second

loan, of which, he submitted to have paid all. Accounting for the ongoing debt, he stated the same to have accrued from interest therefrom, of which he showed his intention to pay by instalments. Moreover, the 1<sup>st</sup> Respondent submitted to have secured loan from the 2<sup>nd</sup> Respondent without notifying the Appellant.

The 2<sup>nd</sup> Respondent, unlike what the 1<sup>st</sup> Respondent stated, submitted that, the Appellant was involved by the 1<sup>st</sup> Respondent in acquiring the said loan and that, there was no house when the order to attach was issued. He then called upon this court to venture into evidence claiming the same to be overwhelming.

In rejoinder the Appellant claimed that, the 2<sup>nd</sup> Respondent is not telling the truth. She finally prayed for the appeal to be allowed. That was the end of parties' submissions.

I have gone through both parties' submissions together with the entire record available. The issue before me is whether the house in question was lawfully attached in executing a loan of Tshs. 4,537,000/=.

According to the records, the Appellant objected sale of house basing on the ground that, she did not consent mortgaging the same during loan



acquisition. In answering this issue, the District Court's decision in the last two paragraphs but one is to the effect that, there was no need of a spouse consent as the 1<sup>st</sup> Respondent doesn't dispute taking loan and that, he failed to repay. As the house at issue is the only property he has, then attaching it for loan repayment is a lawful act. Further records show that, execution failed due to one woman with her kids objected eviction. I suppose that might be the 1<sup>st</sup> Respondents' family. The issue remains; was it lawful to attach the house in line of the District Court's decision?

It is not in dispute under Rule 56 of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules that, attachment and sale of property of the judgment debtor is allowable. The said Rule is reproduced as hereunder:

*"56. 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....."*

In terms of rule 62 of the the Magistrates' Courts (Civil Procedure in Primary Courts) Rules, not every property of the judgment debtor is subject for attachment. I hereby quote it for easy of reference:

*"63(1) On receipt of an application for attachment, the court shall, if satisfied that the award or order has not been satisfied and that the property specified in the application is attachable, issue a warrant of attachment: Provided that no warrant of attachment shall be issued in respect of-*

*(a) any land used for agricultural purposes by a village, an ujamaa village, a co-operative society, or an individual wholly dependent upon the use of such land; and*

*(b) any residential house or building occupied by the judgment debtor, his wife or dependent children for residential purposes."*

The records show that, by the time the trial court ordered attachment and sale of the house at issue, it was the only property the Respondent had and that, it was occupied by the 1<sup>st</sup> Respondent and his family. For that

matter, the house at issue is not attachable as per rule 63(1)(b). Had the appellate magistrate endeavored in finding whether the property subject for attachment is attachable under the cited rule, she wouldn't have reached the holding she made.

Also, it is not in dispute that, as the Appellant was not a party to Civil Case No. 40 of 2017 between the Respondents herein, there was no room for her to appeal on it. However, while I was passing through its records, I noted two features worth to be addressed herein.

Firstly, throughout the entire records, the 2<sup>nd</sup> respondent claimed from the 1<sup>st</sup> Respondent Tshs. 4,537,000/=. That is the amount the 2<sup>nd</sup> Respondent pleaded to be awarded. In an astonishment, the trial court in its decision awarded him Tsh. 4,645,000/=. This means, the trial court awarded more than what was pleaded. It is unjustifiable.

Secondly, the records show that, the 1<sup>st</sup> Respondent secured a loan of Tshs. 520,000/= mortgaging his house. He failed to repay it. He again approached the 2<sup>nd</sup> Respondent and secured another loan of Tshs. 4,125,000/= mortgaging the same house. Further, it is on record that, the 1<sup>st</sup> Respondent was advanced loan by the 2<sup>nd</sup> respondent with interest. I am

convinced to believe so because how can the 2<sup>nd</sup> Respondent be advanced a greater loan of Tshs. 4,125,000/= to the same person having the same security without paying the first loan of Tshs 520,000/= ? Where is the agreement for the first unpaid loan? Did the 2<sup>nd</sup> Respondent waived the claim? Was it included in the 2<sup>nd</sup> loan? Such speculations are non-allowable.

With that stand, strengthened with no evidence to the contrary, I am compelled to believe that, the 2<sup>nd</sup> Respondent contravened conditions stipulated under section 7 of the Banking and Financial Institutions Act, Cap. 342 R; E 2002 for want of valid license to advance loan on interest. This same position was held in the case of **David Charles v. Seni Manumbu, Civil Appeal No. 31 Of 2006** (unreported). With that note, I am of the strong view that, the loan contract between the Respondents was illegal, thus void.

All said and done, I find the appeal with merit and is accordingly allowed. I hereby set aside both the trial and the 1<sup>st</sup> Appellate courts' proceedings and decisions. Both parties to bear own costs.

It is so ordered.



~~Gerson J. Mdemu~~  
JUDGE  
01/04/2021

**DATED** at **SHINYANGA** this 1<sup>st</sup> day of April, 2021.

