IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]

AT ARUSHA.

(PC) CIVIL APPEAL NO. 26 OF 2019

(C/f the District Court of Arusha Civil Appeal No. 17 of 2019, Originating from Arusha Urban Primary Court Civil Case No. 68 of 2017)

LEGACY AND BLESSING MICROFINACE ..... APPELLANT

Versus

MAGRETH GREDSON MACHANGE ..... RESPONDENT

JUDGMENT

26th May, 13th August, 2021

Masara, J.

Magreth Gredson Machange, the Respondent, instituted a civil suit against **Legacy and Blessing Microfinance**, the Appellant, and another party known as **Mangwembe 2011 Co. Limited,** at Arusha Urban Primary Court (the Trial Court), for a claim of TZS 12,040,000/=. In a judgment delivered on 20/3/2017, the trial Court was satisfied that the claim was proved. As a consequence, the trial Court ordered the Respondents to pay the whole amount of TZS 12,040,000/= as claimed. To appreciate the gist of the appeal, I will endeavour to summarise the episodes antecedent to this appeal.

The Appellant is a microfinance Company registered under the Companies Act, Cap. 212. The company primarily engages in lending/advancing credits to individuals on profits. The Respondent approached the Appellant and borrowed TZS 1,500,000/=, which she promised to repay within a month, together with TZS 450,000/= as an interest. She did not pay the loan in full as agreed. A balance of TZS 537,000/= was unpaid. On 6/2/2017, the Appellant entered into agreement with Mangwembe 2011 Co. Limited (the 2nd Respondent in the trial Court) in order for the latter to collect the Appellant's debts from long-standing debtors including the Respondent.

On 7/2/2017, the Respondent was issued with a notice of defaulting payment of the loan. She was asked to pay the outstanding balance of TZS 537,000/= within seven days. The Respondent paid a total of TZS 394,000/= by 14/2/2017. On the same day she asked for two days to finalize the remaining balance. On 15/2/2017, Mangwembe 2011 Co. Limited, on instructions of the Appellant, went to the Respondent's boutique in her absence and took 26 pairs of suits and 12 coats, worth a total of TZS 12,040,000/=. At that moment, the Respondent was at the hospital attending a patient.

On the very same day, the Respondent approached the trial court and instituted Civil Case No. 68 of 2017 against the Appellant and Mangwembe 2011 Co Ltd. Service was issued to the Respondents but, despite acknowledging service, they did not enter appearance. The case was therefore heard ex-parte. On 20/3/2017, the trial Court delivered its judgment ordering the two to pay the Respondent herein the money claimed, being the value of the garments taken from the Respondent's boutique. The Appellant and her agent did not pay as ordered by the trial Court. On 16/5/2017, the Respondent went back to the trial Court, seeking to execute the decision of the trial Court. The trial Court granted the execution and ordered the properties of the Appellant, to wit, a motor vehicle make Toyota Noah with registration No. T. 825 CPR and other office equipment to be attached and sold. On 14/7/2017, after the car was attached, the Appellant approached the trial Court seeking to set aside the ex-parte judgment that was delivered on 20/3/2017, but in a ruling delivered on 7/8/2017, the trial Court dismissed the application stating that the Appellant failed to adduce sufficient cause. It was further held that the application to set aside the ex-parte judgment was time barred. According to the record, it was only the motor vehicle that was attached and sold. The execution report issued by First World Investment Court Broker on 12/10/2017 shows that the motor

vehicle was sold at TZS 7,000,000/=, the Respondent was paid TZS 5,000,000/= and the rest of the money was considered costs of the broker.

On 12/12/2017, the Respondent went back to the trial Court and prayed to attach the Appellant's hardware so as to cover the remaining balance of TZS 7,020,000/=. The trial Court granted the prayer. It ordered the attachment and sale by auction of the said hardware. According to the report by First World Investment Court Broker of 12/2/2018, the said hardware belonged to someone else and not the Appellant. That prompted the Respondent to approach the trial Court on 24/9/2018 seeking to attach another property which is a house located at Baraa Street, Kimandolu Ward within Arusha Region. On 24/9/2018, the trial Court gave its ruling and ordered attachment and sale of the above-mentioned house. The house was attached. While pending sale by auction, the Appellant by way of objection proceedings filed in the trial Court on 19/11/2018, objected the sale of the house claiming it to be matrimonial house and not property of the Appellant. The Appellant further complained that the car and other office equipment attached could suffice to cover the Respondent's claim.

The trial Court vacated its earlier order of attaching the house because it was family property and not property of the Appellant on 15/3/2019. The trial Court referred to its judgment, holding that TZS 12,040,000/= that the Respondent ought to be paid was to be shared equally between the Appellant and her co-respondent, Mangwembe 2011 Co. Limited. Therefore, the Appellant was ordered to pay TZS 1,020, 000/= and the balance of TZS 6,020,000/= was to be paid by Mangwembe 2011 Co. Limited. That ruling did not please the Appellant who preferred appeal to the District Court of Arusha (the first Appellate Court), vide Civil Appeal No. 17 of 2019. The first Appellate Court dismissed the appeal upholding the decision of the trial Court. The Appellant

still aggrieved, has preferred this second appeal on two grounds as reproduced verbatim:

a) *That, the Honourable Magistrate erred in law and fact by upheld (sic) the decision of Arusha Urban Primary Court while the same was obtained with full of procedure (sic) irregularities; and*
b) *That, the Honourable Magistrate erred in law and fact by awarding respondent to be paid 1,020,000/= by the Appellant while there was no justified proof to do that since the respondent has already attached and sale (sic) properties of the Appellant which satisfied the decretal sum.*

Basing on the above grounds of appeal, the Appellant prays that the judgment of the first Appellate Court be quashed and set aside and the appeal be allowed with costs.

Before me the Appellant entered appearance through Ms Getrude Meela, Director of the Appellant, while the Respondent entered appearance through Mr. Elibariki Maeda, learned advocate. The appeal was heard through filing of written submissions.

To begin with the first ground of appeal, the Appellant's representative contended that the trial Court ordered both the Appellant and Mangwembe 2011 Co. Ltd, as the co respondent in the trail Court, to pay TZS 12,040,000/= to the Respondent. However, it was only the Appellant's properties that were attached, while the co-respondent paid nothing. According to Ms Meela, the Appellant is a company lawfully incorporated; therefore, it is an entity distinct from its shareholders, with powers to own property and powers to sue or be sued, referring to the famous decision in ***Solomon Vs. Solomon & company Ltd*** [1897] AC 2. She averred that the motor vehicle that was attached and later sold does not belong to the Appellant, but it is a personal property of Gasto Peter Meela who is the Director of the Appellant. That the order of the trial Court aimed at attaching the properties of the company and not Directors' properties, therefore the Court erred in attaching the property which does not

belong to the judgment debtor. He backed his assertion by citing the decision in ***Mrs Nuru Mbaraka Vs. Awadhi Abeid Hiyala and Bahati Abeid Hiyala*** [2002] TLR 188. The cited decision emphasized that Courts are bound to attach properties that belong to the judgment debtors per se.

Submitting on the second ground of appeal, Ms Meela asserted that the ruling of the trial Court dated 24/9/2018 has no legal justification since there is no proof that the attached motor vehicle was sold on a minimal price to cover the TZS 12,040,000/= that they were obliged to pay. She fortified that there was no any receipt issued to the Appellant or presented in Court to prove the exact price the motor vehicle was sold. According to Ms Meela, the trial Court's order to attach and sell the house of the Director of the Appellant that is located at Baraa Street was another wrong order because the house is not the property of the Company.

Ms Meela went on to state that on 15/3/2019 the same trial Magistrate ordered the Appellant to pay the Respondent TZS 1,020,000/= and Mangwembe 2011 Co. Ltd to pay the balance of TZS 6,000,000/=. She insisted that since the Appellant's properties attached and sold had value exceeding the TZS 12,040,000/= adjudged against them, compelling the Appellant to pay TZS 1,020,000/= has no legal justification. According to Ms Meela, it was not only the motor vehicle that was attached, but there were other properties, including two office tables, sofa set and water dispenser. She insisted that the motor vehicle itself had a market value of TZS 14,000,000/=, leave alone the other items that were attached. She concluded that if the properties attached and sold did not suffice to cover the Respondent's claim, it means that the attached properties were sold below the market value, contrary to Magistrates Courts (Civil Procedure in Primary Courts) Rules. Basing on her submission, Ms Meela prayed that the Court allows the appeal with costs.

On his part, Mr. Maeda faulted Appellant's submissions contending that the ruling of the trial Court that was delivered on 24/9/2018 which is among the decisions the Appellant challenges is time barred. He prayed that submission regarding that ruling be expunged from the record.

Responding to the first ground of appeal, Mr. Maeda averred that a primary court is empowered to order payment of any amount and in case that money is not paid, the trial Court is also empowered to order attachment and sale of any attachable property. The learned advocate made reference to rule 3 of the 4th Schedule to the Magistrates Courts' Act, Cap. 11 [R.E 2019]. In his view, rule 56 of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules gives the trial Court powers to enforce its award by attachment or sale. He was therefore of the view that the trial Court cannot be faulted for ordering attachment of the Appellant's property.

Mr. Maeda amplified that the allegation that the trial Court decision was full of procedural irregularities, by attaching the property of Gasto Peter Meela who is the director of the Appellant instead of attaching the property of the company, is a new fact that was not raised in the trial Court or during execution proceedings in the trial Court. To buttress his contention, Mr. Maeda made reference to decisions in ***James Funke Gwagilo Vs. Attorney General*** [2004] TLR 161 and ***Yara Tanzania Limited Vs. Charles Alloyce Msemwa t/a Msemwa Junior Agrovet and 2 Others***, Commercial Case No. 5 of 2013 (unreported) which stated that a point not raised at trial cannot be raised on appeal.

Mr. Maeda's response to the second ground of appeal is that the Appellant's property was sold by the Court broker and not the Respondent, and to prove the sale, there was a report that was submitted in Court. The learned advocate

fortified that the question of market value ought to have been discussed at the trial Court against the Court broker and not at this appellate stage. He however blamed the Appellant for not challenging the Court broker's report whose copy was served on the Appellant stating that it is an indication that the Appellant was satisfied with the sale. On the basis of his submission, the learned advocate urged the Court to find the appeal unmeritable and dismiss the same with costs.

I have noted that according to the scheduling order, the Appellants was to file rejoinder submission by 5/5/2021, but the record shows that rejoinder submission was filed on 10/5/2021. This implies that the rejoinder submission was filed out of time and without seeking extension of time. For that reason, I will not consider the rejoinder submission in the determination of this appeal since it was filed outside the time ordered by the Court.

Having outlined the facts and the submissions made by the parties, I proceed to determine the dispute before me. I have as well ventured in detail on the record of both lower Courts. The pertinent issues for determination are whether the appeal is competent before this Court and whether the two lower Courts were justified when they ordered the Appellant to pay the Respondent TZS 1,020,000/=.

Pertaining to the first issue, the Appellant faults the entire proceedings and decision of the trial Court in Civil Case No. 68 of 2017, stating that they were marred by procedural irregularities and that the attachment and sale of the Appellant's motor vehicle was tainted with patent illegality. Her main complaint was on the attachment and sale of the Appellant's motor vehicle make Toyota Noah, with registration Number T. 825 CPR. According to the Appellant, the motor vehicle that was attached and sold was not the Appellant's property, but a private property of Gasto Peter Meela, one of the Directors of the Appellant.

From the Appellant's first ground of appeal and the submissions thereto, it is apparent that the Appellant is appealing against the entire proceedings and decision in respect of Civil Case No. 68 of 2017. This can easily be drawn from the wording of the first ground of appeal and the submissions in support thereof. It is noted that the judgment in respect of Civil Case No. 68 of 2017 was delivered on 20/3/2017. The Appellant made an application to set aside the *ex-parte* judgment but the application was dismissed on 7/8/2017. Thereafter the Respondent made an application for execution of the Court's decision. Attachment and sale order of the Appellant's motor vehicle was issued. Execution was carried on and the Appellant's motor vehicle was sold in public auction and report to that effect was filed in Court on 12/10/2017.

Having seen the series of events that took place, the appeal to the District Court was filed on 9/4/2019. From the day the sale of the motor vehicle took place in the course of executing the trial Court's decision to the date the appeal was filed is almost two years. Discernibly, challenging the trial Court's decision after two years, the Appellant is miserably out of time. Equally, challenging the sale of the motor vehicle in executing the trial Court decree is vividly outside the prescribed time, because the sale was completed on 12/10/2017, almost two years from the date the appeal was filed in the first Appellate Court.

The Appellant also faulted the two rulings delivered by the trial Court dated 24/9/2018 and 15/3/2019 respectively. In the former, it was a ruling after the Respondent had moved the Court to attach and sell the Appellant's house located at Baraa Street, Kimandolu Ward within Arusha City. In respect of that ruling, I have two observations to make. First, the ruling was delivered on 24/9/2018; just like the other decisions pointed out above, the appeal against that decision cannot be entertained since it is time barred. Second, the orders

in that decision were vacated by the trial Court in the subsequent ruling of 15/3/2019.

It is noted that after the prayer to attach the Appellant's house was granted, the Appellant filed objection proceeding objecting attachment and sale of that house since it is family house and that it did not belong to the Appellant. The order of attaching the Appellant's house was set aside by the trial Court. The Appellant's claim therefore is inconceivable because the order to attach the Appellant's house was no longer in existence. Therefore, the ruling that was delivered on 24/9/2018 cannot be subject of this appeal, since time to appeal against that order had lapsed and no extension of time was sought. The only appealable decision/order in Civil Case No. 68 of 2017, is the ruling that was delivered on 15/3/2019 because the Appeal was filed within 30 days prescribed by law.

Just like the findings of the first Appellate Court, the complaint whether the motor vehicle that was sold was the property of the Appellant's Director and not the Appellant's own property at this stage appears to be an afterthought. This is due to the obvious reasons that it is a new fact that was not raised in the trial Court. Further, the Appellant neither objected attachment and sale of the said motor vehicle nor its procedure. As a matter of law, matters not raised and determined in the trial Court cannot be entertained at the appellate stage. There is plethora of authorities to that effect. For example, the Court of Appeal in ***Richard Majenga Vs. Specioza Sylivester***, Civil Appeal No. 208 of 2018 (unreported), observed:

> *"It is a settled principle of the law that at an appellate level the court only deals with matters that have been decided upon by the lower court."*

See also: ***Hotel Travertine Limited and 2 Others Vs. National Bank of Commerce Limited*** [2006] TLR 133 and ***James Funke Gwagilo Vs. Attorney General*** (supra).

From the above observation, it is the finding of this Court that any appeal against the decision of the trial Court in respect of Civil Case No. 68 of 2017, is time barred. But, as stated above, the only decision in respect of that case that is competently appealable is the ruling/order that was delivered on 15/3/2019. That said, the first issue is partly resolved in the affirmative on the ground that the only ruling that can competently be assailed by this appeal is the ruling that was delivered on 15/3/2019 which is covered in the second issue.

I now turn to the second issue which is also a response to the second ground of appeal. The Appellant's complaint is the trial Court's order for the Appellant to pay the Respondent TZS 1,020,000/= while the Appellant's properties whose value could cover the decretal sum were attached and sold.

The trial Court judgment subject of this appeal ordered the Appellant and Mangwembe 2011 Co. Ltd to pay the Respondent sum of TZS 12,040,000/=. In the first place, neither of the two adhered to the order. Thereafter, execution of the decision was enforced by attachment and sale of the Appellant's motor vehicle, make Toyota Noah, with Registration Number T825 CPR. From the proceeds of the sale, the Respondent was only paid TZS 5,000,000/=. The Respondent had no other option than going back to the trial Court seeking to have her claim settled in full.

In civil cases, the purpose of execution is to have the judgment paid in full. See the Court of Appeal decision in ***Balozi Abubakari Ibrahim and Another Vs. MS Benandys Limited and 2 Others***, Civil Appeal No. 6 of 2015

(unreported), where the Court quoted an informed extract from Lord Denning, M.R. in **Re Overseas Aviation Engineering (G8) LTO** [1962] 3 All E.R.12 at page 16 who had this to say:

> *"Execution means, quite simply, the process for enforcing or giving effect to the judgment of the court: and it is completed when the judgment creditor gets the money or other thing awarded to him by the judgment"*

In that sense, the Respondent was right to approach the trial Court seeking to attach the Appellant's house so as to have her claim settled in full. However, following the objection proceeding initiated by the Appellant, in the ruling delivered on 15/3/2019, the trial Court vacated its previous order. In that ruling, the Appellant's house that was attached was released and the Appellant was ordered to pay the remaining balance of TZS 1,020,000/=. The rest of the claim was to be covered by Mangwembe 2011 Co. Ltd.

As stated earlier on, the Appellant did not appeal against the decision of the trial Court that ordered them to pay the Respondent. Similarly, the order of the trial Court to attach and sell the Appellant's motor vehicle was not contested. The trial Court was thus right in ordering execution, and so long as the proceeds of the sale did not suffice to cover the whole amount owed, the Appellant is duty bound to make good the balance. If the Appellant cannot do it voluntarily, then any other property of the Appellant may be attached and order of sale issued so as to cover the remaining balance.

Her complaints that the other properties attached and sold could cover the whole claim is misconceived since any query regarding the attachment and sale ought to have been communicated in the trial Court at the earliest possible opportunity. It is quite clear that the record does not show any other property of the Appellant that was attached and or sold. Challenging the attachment and

sale at this stage is untenable. Therefore, the order to pay the Respondent TZS 1,020,000/= is justifiable.

The other complaint made by the Appellant that the trial Court ordered the TZS 12,040,000/= to be shared by themselves and Mangwembe 2011 Co. Ltd, but that it was only the Appellant's property that was attached, was well addressed by the trial Court in the 15/3/2019 ruling and the judgment of the first Appellate Court. Since the Appellant's property that was attached and sold did not even meet the Appellant's part of the claim, I see no injustice occasioned on their part. In the end result, the second issue is resolved in the affirmative.

In the upshot, it is the finding of this Court that the appeal is wanting on merits. It is accordingly dismissed with costs. The decisions of the two lower Courts are hereby upheld.

Order accordingly.

Y. B. Masara
JUDGE
13th August, 2021.