

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOB A DISTRICT REGISTRY

AT BUKOB A

(PC) CIVIL APPEAL NO. 49 OF 2020

*(Arising from Civil Appeal No. 20 of 2018 of the District Court of Bukoba at Bukoba and Originating from Civil-
Case No. 08 of 2017 of the Bukoba Urban Primary Court)*

HAWA SHABANI----- APPELLANT

VERSUS

THEMISTOCLES KAMUGISHA-----1ST RESPONDENT

ISACK BAHATI-----2ND RESPONDENT

HADIJA HAMU-----3RD RESPONDENT

JUDGMENT

~~Date of Last Order: 30/09/2021~~

Date of Judgment: 12/11/2021

Hon. A. E. Mwipopo, J.

This appeal is against the Civil Appeal No. 20 of 2018 of the Bukoba District Court delivered on 15th November, 2018. The Appellant namely Hawa Shabani filed the Memorandum of Appeal on 25th December, 2020 which contains 7 grounds of appeal. The said grounds of appeal are as follows hereunder:-

1. *That, the District Court erred in law and facts for entertaining the matter out of time in absence of leave to extend time.*
2. *That, the District Court erred in law and facts for entertaining the appeal which was overriding the judgment of the District Court vide Civil Appeal No. 06 of 2016 dated 03rd May, 2016 and Execution Order No. 51 of 2014.*
3. *That, the District Court erred in law and facts for commencing the hearing of appeal before entertaining the preliminary objection in point of law which was lodged by the Appellant.*
4. *That, the District Court erred in law and facts for reversing the matter of execution to wit allow the sale of the house which belong to the Decree Debtor.*
5. *That, the District Court erred in law and facts for allowing extraneous matters to wit sale agreement which was not tendered on the trial stage.*
6. *That, the District Court erred in law and facts for allowing the appeal on ground that the sale of discrete house was due while the discrepancy and procedure of sale of immovable property was occasioned.*
7. *That, the District Court erred in law for allowing the appeal basing on merely words of the Appellant.*

In order to understand the case, the brief background of the dispute will suffice. The Appellant unsuccessfully sued Isack Bahati, the 2nd Respondent herein, in Bukoba Urban Primary Court Civil Case No. 51 of 2014 for recovery of shillings 20,000,000/= she spent in paying for school fees and other losses she spent to her daughter Alphonsina Beda who was married by the 2nd Respondent while she was a school girl. The Appellant successful appealed to the Bukoba District Court in Civil Appeal No. 06 of 2014 where the District Court find the Primary Court had no jurisdiction and quashed its decision and proceeded to order the 2nd Respondent to pay the amount claimed by the Appellant. The Appellant proceeded with execution of the District Court Decree where the Bukoba Urban Primary Court on 09th October, 2017 ordered for attachment of the house at Kibeta, Anyama Street allegedly owned by the 2nd Respondent to be sold for recovery of the discretal amount.

The 1st Respondent namely Themistocles Kamugisha, who by that time was in possession of the house, unsuccessfully filed Application No. 08 of 2017 in Bukoba Urban Primary Court objecting the sale of the house as he has already purchased it since 13th August, 2014 from the 2nd Respondent and his wife namely Hadija Hamu who is the 3rd Respondent in this appeal. Aggrieved by the decision of the Primary Court, the 1st Respondent successfully appealed to the Bukoba District Court in Civil Appeal No. 20 of 2018. The District Court in its

judgment dated 15th November, 2018 held that attached house was owned by the 1st Respondent and it released the disputed house from attachment. The Court went on to set aside Primary Court decision and the decree holder was advised to find another property of the 2nd Respondent to be attached. The Appellant was not satisfied with the decision of the District Court and filed the present appeal on 25th December, 2020.

Mr. John Rutahimurwa, Advocate who represent the Appellant, decided to withdraw Appellant's ground of appeal No. 1 and 3, argued ground No. 2 independently and submitted ground No. 4, 5, 6 and 7 jointly.

He commenced with the 2nd ground where he submitted that the District Court erred to entertain the appeal which was overriding the judgment of the same District Court in Civil Appeal No. 06 of 2016 dated 08th May, 2016 and execution order No. 52 of 2014. The District Court in Civil Appeal No. 6 of 2016 determined the dispute between the Appellant Hawa Shaban and 2nd Respondent namely Isack Bahati. The 1st Respondent was not a party. The 2nd Respondent did not appeal against the decision and the matter ended there. He is of the view that it was wrong for the 1st Respondent to instituted Civil Case No, 8 of 2017 at Bukoba Urban Primary Court against the Appellant, Isack Bahati – 2nd Respondent and Hadija Hamu- 3rd Respondent. The decision which has already been decided by the District Court could not be filed to the Primary Court once

again through objection proceeding as the 1st Respondent did. The District Court erred to entertain the Civil Appeal No. 20 of 2018.

On the ground No. 4, 5, 6 and 7 the District Court erred in Civil Appeal No. 20 of 2018, he submitted that the District Court erred to make its decision relying on the contract of sale between the 1st and 2nd Respondents which was not valid. In the original case No. 8 of 2017 before the Bukoba Urban Primary Court at page 2 of the judgment the 1st Respondent tendered a contract of sale which has no signature of the wife of the second Respondent. Also, he said that there was no spouse consent to show that the wife of second Respondent consented for the house to be sold which is against section 56 and 59 (1) of the Law of Marriage Act which provides for protection of interest of the spouse in Matrimonial property. He averred that the 1st Respondent did not file any document to prove that the house was in his hands after it was sold to him. That, the allegation by the 1st Respondent that 2nd Respondent has no wife has no basis since the 1st Respondent was supposed to be aware before he bought the land and there is evidence in the civil case No. 51 of 2014 that the Respondent admitted to have a wife who is the daughter of the Appellant. He concluded by stating that the District Court misdirected itself to quash the decision of the same court.

In reply, Mr. Ally Chamani, who is Advocate representing the Respondent, briefly submitted that objection proceeding is filed at the trial court which made the decision. Allegation that the District Court misdirected itself has no basis as the Court acted properly.

On the ground No. 4,5,6 and 7, the Counsel stated that the main issue on those grounds is absence of 1st Respondent's wife consent. He said that the issue is an afterthought as those who witnessed the sale were neighbours who did not disclose that the seller has a wife. The issue has no weight the Appellant is a third party who had no relationship with the house in dispute. There was no issue at the time of sale that the 2nd Appellant has a wife. For that reason the principle of buyer beware does not apply. The sale of the house in dispute was done before the execution case filed by the Appellant as it is shown in the decision of the 1st Appellant court at page 8.

In his rejoinder, the Appellant's Counsel submitted that the issue of the sale of the house was in dispute the moment it was raised by the 2nd Respondent. The purchaser of the land was supposed to satisfy himself of the details of the land he want to buy. The law does not say that the wife has to complain for the case to be heard by the court.

From submissions, the issue for determination is whether or not the appeal has merits.

The Appellant submitted on the 2nd ground that the District Court erred to entertain the appeal which was overriding the judgment of the same District Court in Civil Appeal No. 06 of 2016 dated 08th May, 2016 and execution order No. 52 of 2014. The District Court in Civil Appeal No. 6 of 2016 determined the dispute between the Appellant Hawa Shaban and 2nd Respondent namely Isack Bahati where there was no appeal. It was wrong for the 1st Respondent to instituted Civil Case No, 8 of 2017 at Bukoba Urban Primary Court against the Appellant, Isack Bahati – 2nd Respondent and Hadija Hamu- 3rd Respondent. The decision which has already been decided by the District Court could not be filed to the Primary Court as objection proceeding as the 1st Respondent did. As a result he District Court erred to entertain the Civil Appeal No. 20 of 2018.

~~The objection proceedings in the Primary Court is provided in rule 69 and 70 of the Primary Courts Civil procedure Rules, G.N. No. 310 of 1964 as amended by G.N. No. 119 of 1983. Rule 69 of the Rules provides for objection to attachment by a party to proceedings and rule 70 provides objection to attachment by other persons. Rule 70(1) of G.N. No. 310 of 1964 provides as follows hereunder:-~~

"70.-(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 attachment. He must state the grounds on which he bases his objection."

From above cited rule, the any person who claim to be the owner or who have interest in property which has been attached by Primary Court may apply to the Court to release the property from attachment. The person has to apply for the release of the attached property in the Court which attached the said property. Objection proceedings is filed during attachment. This Court was of the same position in the case of **Anastazia Sospeter V.Mwajuma Elias**, PC. Civil Appeal No. 31 of 2018, High Court of Tanzania, Shinyanga District Registry, at Shinyanga, (Unreported), where it held that:-

"As correctly put by the appellant, objection proceedings are filed during the attachment and not otherwise."

The rule provides in rule 70(4) and (5) of G.N. 310 OF 1964 that the Court has to investigate the objection after receiving evidence from the objector, judgment creditor and appropriate order given by the court.

In the case at hand, there was nothing wrong with the procedure taken by the 1st Respondent in this case or the trial Court. The evidence in record shows that the Bukoba Urban Primary Court ordered attachment of the house in dispute on 09th October, 2017. The 1st Respondent instituted Application No. 8 of 2017 in the Bukoba Urban Primary Court objecting the attachment of his house. The Primary Court after hearing the evidence adduced by both parties dismissed the application. The 1st Respondent successfully appealed to the District Court in Civil

Appeal No. 20 of 2018. There is nothing wrong for the 1st Respondent to institute the case at the Primary Court and the decision given by the District Court in Civil Appeal No. 20 of 2018 was proper.

The law clearly provides in rule 70(5) that if the Court is satisfied that the property or any part thereof does not belong to the judgment debtor, it shall make an order releasing it or such part of it, from the attachment. This means that the Primary Court has mandate to hear and determine the application objecting the attachment of the property where there is sufficient reason. What the District Court did in this case is not overriding its judgment in Civil Appeal No. 06 of 2016 dated 08th May, 2016 as it was alleged by the Appellant. The District Court released the property which does not belong to the judgment debtor from attachment. ~~The decision of the District Court in Civil Appeal No. 06 of 2016 is~~ still validly intact and the Appellant has to attach another property of judgment debtor to satisfy the decree. Thus, I find that the Appellant's 2nd ground of appeal has no merits.

On the issue that the District Court erred solely its decision on the contract of sale between the 1st and 2nd Respondents which was not valid, the Appellant argued that the tendered contract of sale has no signature of the wife of the second Respondent or spouse consent to show that the wife of second Respondent consented for the house to be sold. This is against section 56 and 59

(1) of the Law of Marriage Act. The 1st Respondent was supposed to be aware before he bought the land and there is evidence in the civil case No. 51 of 2014 that the Respondent admitted to have a wife who is the daughter of the Appellant. The Respondent on his part said that the sale of the house was witnessed by neighbours who did not disclose that the seller has a wife. The Appellant being a third party had no relationship with the house in dispute. The sale of the house in dispute was done before the execution case filed by the Appellant as it is shown in the decision of the 1st Appellate court at page 8.

As it was submitted by the Respondent, the sale of the house in dispute was done on 13th August, 2014 before the execution case was filed in 2017. The sale of the house was done even before the Appellant appealed to the Bukoba District Court in Civil Appeal No. 06 of 2016 which its decision was delivered on 03rd May, 2016. The decision of District Court granted Appellant's prayer to be paid shillings 20,000,000/= compensation by the 2nd Respondent. The said sale agreement was tendered and admitted as Exhibit "A" by the 1st Respondent on 06th March, 2018 as it is seen in page 10 of the typed proceedings of the Primary Court. Thus, the same is part of the proceedings. The said sale agreement prove that the sale of the house was witnessed by several witnesses including the Street Executive Officer and an Advocate. The Appellant claims that there is no signature or consent of the 2nd Respondent's wife as the house is matrimonial

property has no basis. There is no evidence at all to prove that the said house was matrimonial property and the Appellant being not the owner of the house could not be in position to prove that the 2nd Respondent wife did not consent to the sale. The same was supposed to be raised by the wife of the 2nd Respondent. Thus, I find this ground of appeal has no merits.

Consequently, I find that the appeal has no merits in its totality and I hereby dismiss it with Cost.



A.E. MWIPOPO

JUDGE

12/11/2021