

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA**

PC CIVIL APPEAL NO. 53 OF 2021

(Arising from Civil Appeal No. 5 of 2021 of Bukombe District Court at Bukombe.)

ELIZABETH DONALD MAGAZI----- 1st APPELLANT
BENJAMINI DONALD MAGAZI-----2nd APPELLANT
SAIMON DONALD MAGAZI-----3rd APPELLANT
PASCHAL DONALD MAGAZI-----4th APPELLANT

VERSUS

COSMAS JOHN MDONGO----- 1st RESPONDENT
PASTORY MADUHU-----2nd RESPONDENT
JOSEPH SALAMBA NDIZU-----3rd RESPONDENT
SHASHINHALE AUCTION MART &
GENERAL TRADING COMPANY LTD-----4th RESPONDENT

JUDGMENT

Last Order: 21.06.2022
Judgement Date: 30.06.2022

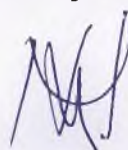
M. MNYUKWA, J.

The appellants herein were the objectors before Ushirombo Primary Court contesting the sale of peace of land, which was sold through auction to the 3rd respondent. The brief background that led to this appeal

goes as follows; The 2nd Respondent herein instituted Civil Case No. 91 of 2021 before Ushirombo Primary Court claiming a sum of Tsh. 860,600/= against the 1st Respondent. The 1st Respondent admitted the claim but failed to pay the admitted amount, in which the peace of land was attached and sold to the 3rd Respondent through an auction conducted by the 4th Respondent herein in execution proceedings.

After the sale of that land, both appellants instituted an objection application to challenge the sale of the attached land during execution, claiming an interest on the said land as it is their late father's land. After hearing the objection application, the trial court dismissed their application basing on the point that, they failed to prove that the sold land was their fathers' land. Dissatisfied the appellants appealed to Bukombe District Court via Civil Appeal No. 5 of 2021 raising 4 grounds of appeal as follows;

1. *That the trial magistrate erred in law and fact by adjudicating the matter in favour of the 3^d Respondent (JOSEPH SALAMBA NDIZU) while the judgement debtor (1st Respondent) had no sealable interest in the property sold. (wetland/shamba).*
2. *That the trial magistrate erred in law and fact by deciding the matter in favour of 3^d Respondent (JOSEPH SALAMBA NDIZU) while judgement debtor, judgement*



creditor and 4th Respondent had never summoned in trial court to testify or to produce their evidence as per the requirement of law.

- 3. That the trial magistrate erred in law and in fact by disregarding the strong evidence adduced by the appellants both orally and documentary hence reaching to erroneous decision.*
- 4. That, the trial magistrate erred in law and fact by hearing and deciding the matter in favour of the 3^d Respondent (JOSEPH SALAMBA S/O NDIZU) while the Appellants managed to prove their case on required standard.*

The 1st appellate court dismissed their appeal on the reason that the appellants had no locus stand, as they were neither the administrators of their father's estate nor owners of the said land. The appellants were further aggrieved and they have now appealed against the decision of Bukombe District raising 4 grounds of appeal as follows;

- 1. That the District Court erred in both law and fact by upholding the decision of Ushirombo Primary Court while judgement debtor (1st respondent) had no sealable interest in the property sold.*
- 2. That the District Court erred in both law and fact by upholding the decision of Ushirombo Primary Court while judgement debtor, judgement creditor and 4th*

Respondent had never summoned I n trial court to testify or to produce their evidence as per requirement of law.

3. That the District Court erred in both law and fact by upholding the decision of Ushirombo Primary Court while the strong evidence adduced by Appellants both orally and documentary was disregarded.

4. That the District Court erred in both law and fact by upholding the decision of Ushirombo Primary Court while the estate of the said late Donald John Magazi was already distributed to his heirs and the Appellants jointly own the land in dispute (joint tenancy) under customary rights of occupancy. The Appellants father late Donald John Magazi died in 1992 and administrators of estate was appointed one John Donald Magazi who also died in 2011. That the said administrators died after closing the administration of estate thus makes the Appellants to sue and object the sale on their own names.

The appellants prayed before this court to quash the judgement and orders of lower courts, an order to set aside sale in execution and any other reliefs deem fit to grant.

During the hearing of this appeal, the Appellants were represented by Nestory Kuyula, learned advocate. The 1st respondent appeared in person, while the 2nd, 3rd and 4th respondents did not appear and therefore the suit preceded exparte against them. The appeal was argued orally.

In his submission, Mr. Kuyula started off with the 1st ground of appeal in which he argued that, the 1st appellate court erred in law and in facts because judgement debtor has no interest on the disputed property which was sold. That, the property sold is the appellants' property and therefore it was not supposed to be attached. He cited Order 85 (1)(b) of the Primary Court (Civil Procedure Rules), that the Court may set aside an order of sale of a property if the judgement debtor has no sealable interest in the property sold. That, the appellants presented their objection and tendered their exhibits but the court below dismissed their objection and so they pray for the appeal to be allowed.

On the second ground of appeal, Mr. Kuyula argue that, the first appellate court erred to uphold the trial court's decision while the judgement creditor and 4th respondent were not called in court to give evidence that the disputed plot belonged to the judgement debtor.

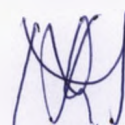
He further submitted that, according to Rule 85(1)(b) of the Primary Court (Civil Procedure Rules), the duty to prove ownership is on the judgement creditor who was the second respondent. That in this case the judgement creditor did not prove his ownership of the disputed plot before the trial court and first appellate court, and even the broker who was involved in selling the property was not called.



He further argued that, the provision of Order 85 was not complied with as it was only the 3rd Respondent, the buyer who was called. The 3rd Respondent also did not prove ownership but stated that he bought the plot by the order of the court. He therefore prayed for the appeal to be allowed.

Moving to the 3rd ground of appeal, the appellants' counsel submit that, the appellants tendered exhibits which was the letter from the village council to the trial court to prove their ownership. However, the trial court's records are silent if the said letter was tendered. That, the trial court did not consider the evidence by the three witnesses and therefore he prays for this appeal to be allowed.

On the 4th ground of appeal, the appellants' counsel argues that, the 1st appellate court upheld the decision of the trial court while the disputed plot was already divided among the heirs who are the appellants and they jointly own the disputed land under customary right of occupancy. That the appellants' father died in 1992, and John Donald Magazi was appointed as his administrator. That, the administrator also died in 2011 after he has closed the probate and that's why the appellants sued in their own personal capacity. That, the appellants are not the administrator of their late fathers' estate. Since the administrator died that's why the



appellants failed to tender the documents to show the distribution of the estate.

That, this ground was not heard and determined by the 1st appellate court, as it was raised on the day of the hearing. He further argues that, it is the position of the law that you can add additional ground of appeal on the day of the hearing. He cited the case of **Itashi Energy (T) Ltd vs Khamis Maganga**, Civil Application NO. 200/16 of 2020 to cement his submission. He thus prays for this appeal to be allowed.

Responding, the 1st respondent shortly submitted that, indeed, he is not the owner of the disputed land and he is not involved in any way. That, he was given a loan with interest by the 2nd Respondent and he failed to pay the loan. That, he just kept 4 sewing machines as the security for a loan which was not taken by the 2nd Respondent. The appellants' counsel had no rejoinder and therefore that was all in submissions by the parties.

In determining this appeal, I have one issue to answer which is whether this appeal has merit. Before I start to determine the ground raised and argued by parties, it is worth noting that, this is a second appeal, in which the two subordinate courts had similar findings. As a second appellate court, I am duty-bound not to interfere with the



concurrent findings of the courts below, unless it is apparent that there was a misapprehension of evidence, miscarriage of evidence or violation of principles of procedural law that led to a miscarriage of justice. (See the case of **Fatuma Ally vs Ally Shabani**, Civil Appeal No. 103 of 2019 and **Abdallah Kilabwanda vs Abdul Ally Mnawa**, PC Civil Appeal No. 9 of 2019)

The appellants have raised four grounds of appeal, and the appellants' counsel has argued them chronologically. However, I choose to start with the second ground of appeal, for the reason that it suffices to dispose of the entire appeal.

On the second ground of appeal, Mr. Kuyula's submissions relied on the provision of Order 85(1)(b) of The Magistrate Courts' (Civil Procedure in Primary Courts) Rules, GN. No. 310 of 1964. That, it was the judgement creditor's duty to prove ownership of the property in which in our case at hand he was not summoned to do so. I agree with the Appellants' submission that the application for setting aside sale in execution which was conducted by the trial court is governed by The Magistrate Courts' (Civil Procedure in Primary Courts) Rules, GN. No. 310 of 1964. In which Rule 85 provides that;

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 sealable 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.

(2) for the purpose of satisfying itself as to any matter for the purposes of this rule, the court may summon and examine any person and require him to produce any document in his possession relating thereto

(3) Where a sale has been set aside under this rule, the purchase shall be entitled to receive back any moneys paid by him.

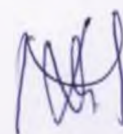
Thus, the Rules require the trial magistrate to summon the judgement creditor, judgement debtor, the purchaser and any other person who was necessary to be present during the hearing of such application.

The court's records reveal that, after the application was set for hearing (page 8 of the trial court's typed proceedings), a trial magistrate

ordered for the respondent whom is not clear on the application who was the respondent. The trial magistrate also summoned the purchaser and the court broker. On the day set for hearing, the court coram shows that, only the judgement creditor was present, without showing if the objector and judgement debtor was present or if they were not present the reason for their absence was not shown and the application proceeded to be heard. After the applicants' case was closed only the purchaser was heard on defence side.

On that basis, it is not clear if all parties were summoned as required by Rule 85 as the records are silent. And even if we assume that they were not present, their absence was not shown and still, the case was heard without showing why the case was heard while other parties were absent.

It is my considered view that the provisions under Rule 85 aims at giving all necessary parties a right to be heard before a trial court can determine who is the rightful owner of the sold property. I need not to give a lengthy lecture about the importance of the right to be heard which its roots are from the Constitution of The United Republic of Tanzania, Cap 2 R.E 2019. As, it is a cardinal principle of law that, a person should not be condemned unheard as it was held in the case of **Mbeya-Rukwa**



Autoparts and Transport Ltd vs Jestina George Mwakyoma (2003)

TLR 251.

This right should cautiously be exercised by the trial magistrate even when the outcomes of the case will be the same as if that party would have given a right to be heard. This was the holding in the case of **Abbas Sherally and Another vs Abdul Fazalboy**, Civil Application No. 133 of 2002, where the Court of Appeal held that;

"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice"

Therefore, I agree with the Appellants' counsel that Rule 85(1) of The Magistrate Courts' (Civil Procedure in Primary Courts) Rules, GN. No. 310 of 1964 was not complied with, as the other parties were not given an opportunity to be heard as required by the law. The 1st respondent has responded to the appellants' submission by saying that he had no interest on the said land. It is my considered view that the 1st respondent's assertion was to be given at the trial court when the court was supposed

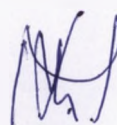


to satisfy itself whether the sold property belonged to the 1st respondent or not.

It is vividly clear from the record of the trial court, as it relied its decision on the reason that, the appellants had no locus stand to sue as they were not the administrators of their late father's estate, as well as they had insufficient evidence to substantiate that the land belonged to them. The trial court's decision was upheld by the 1st appellate court which in my view did not determine all raised and argued grounds of appeal.

The 1st appellate court relied on the trial court's decision that the appellants had no locus stand. However, the appellants had raised an issue of irregularity on hearing in their petition of appeal through the second ground of appeal, which the 1st appellate court failed to determine.

From this reasoning, it is my firm view that the concurrent findings of the two lower courts have led to a misapprehension of justice. For the reason that, the trial court failed to observe the procedural rules by failure to summon the important litigants to adduce evidence and so their right to be heard was infringed and therefore misapprehension of evidence. Likewise, the 1st appellate court failed to observe such irregularity although it was raised as a ground of appeal. For that reason, I find it



necessary and wanting to fault the decision of the 1st appellate court and the decision of the trial court on the application to set aside sale.

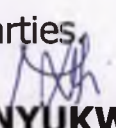
As earlier said this ground suffices to dispose of this appeal, and I hereby allow this appeal and quash the decision of the 1st appellate court, the proceeding on application to set aside sale together with its Ruling. I order the application to set aside sale to be heard afresh before another magistrate. No order as to costs.

It is so ordered.





M. MNYUKWA
JUDGE
30/06/2022

Right of appeal explained to the parties


M. MNYUKWA
JUDGE
30/6/2022

Court: Judgment delivered this 30th June, 2022 in the presence of Appellants' counsel and 1st Respondent.


M. MNYUKWA
JUDGE
30/6/2022