

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF DAR ES SALAAM)
AT DAR ES SALAAM

CIVIL APPEAL NO. 240 OF 2021

(Arising from Ruling and Decree of the District Court of Kilosa in Civil Revision No. 02 of 2018, before Hon. S.B Fimbo, Rm, dated 25th of April, 2019 originated from Civil Cause No. 01 of 2021 from Gairo Primary Court)

HEMEDI CHANDE KIPELEWELE.....APPELLANT

VERSUS

FATMA IBRAHIM HASSAN.....RESPONDENT

JUDGEMENT

Hearing date on: 11/8/2022

Ruling date on: 16/8/2022

NGWEMBE, J:

The appellant, being aggrieved by the ruling and subsequent orders of Kilosa District Court in Civil Revision No. 02 of 2018. The revision originated from Civil Cause No. 01 of 2021 at Gairo Primary Court. The appellant after being aggrieved with the revision lodged an appeal in this court armed with four grounds of appeal. For easy of reference, grounds for appeal are summarized hereunder: -

1. That, the Trial Magistrate erred both in law and fact by raising an issue *suo moto* and used the same as reason for the decision without affording the parties right to be heard.
2. That, the Trial Magistrate erred in both law and fact by making findings that order of attachment of the vehicle in dispute was done without the consent or the approval of the senior Magistrate in Charge.
3. That, the Trial Magistrate erred in law and fact by making findings that, the purported motor vehicle ordered for attachment is seemed to be expensive compared to the claimed amount by the applicant.
4. That, the Trial Magistrate erred in law and fact by ruling that the said property attached for the sale is a matrimonial property.

Briefly, this appeal traces its background from year 2017 in Gairo Primary Court, where the appellant Hemed Chande Kapelewele successfully sued Juvenary Jeremia Munene @ James Madini for the recovery of his debt of Eight Million and Seven Hundred Thousand (TZS. 8,700,000/=). During execution, the property of Juvenary Jeremia Munene @ James Madini, a Car with registration No. T 705 BSF Toyota Land Cruiser was attached by order of the court. It is when Fatuma Ibrahim Hassan, the wife of the Juvenary Jeremia Munene @ James Madini surfaced and brought an objection before the trial court, that the attached property is a matrimonial property. She elucidated that, the basis for her objection is that, as a wife of Juvenary Jeremia Munene @ James Madini, she is not aware of the debt her husband owed Hemed Chande Kapelewele (the applicant) or any other contract to that effect.



Unfortunate for her and her husband, the Trial Magistrate over ruled the objection basing his decision on Rule No. 63 (1) (a) & (b) GN. 119 of 1983, which listed the properties that cannot be attached and sold on execution. Vehicle is not among the properties that the Rule prohibits to be attached and sold. The trial court proceeded to order the Court Brokers to continue with attachment and sale. Aggrieved therein, Fatuma Ibrahimu Hassani through Chamber Summons supported by an affidavit prayed for a revision on the ruling and second the District Court of Kilosa to order new exhibit for attachment.

Fortunately, this time, her tireless efforts paid up. The District Court of Kilosa on its revision, over ruled the trial court's decision on attachment of the said vehicle. The reasons in support of the decision against attachment of the said vehicle were; That the order for attachment was not done consented by Senior Resident Magistrate In charge. The second reason was on presumption that Toyota Land Cruiser is believed to attract more value and an expensive vehicle, which under circumstances, one cannot allow the attachment of the same in lieu of satisfying a loan of Tsh. 7,500,000/=. As such the District magistrate ordered the applicant to find another property for the court to attach and such attachment order should be approved by the District Court. Aggrieved against that decision and reasoning, the appellant filed this appeal.

Having summarized the genesis of this appeal herein, and the memorandum of appeal being so made, this court invited parties for hearing. On the hearing date, the appellant procured the services of learned advocate David Elisha, and the respondent was absent. The



matter was ordered to proceed *exparte* after observing that the respondent has been served several times with summons to appear in court but failed.

As such, Mr. David Elisha argued that, the memorandum of appeal comprises four (4) grounds, however he abandoned the last ground and argue the remaining grounds. Argued generally that parties were not invited to submit on the issue raised by the court *suo moto* and the same were used as the reason for the decision. The issues raised *suo moto* are contained in grounds two and three; that the Trial Magistrate erred in both law and facts by making findings on attachment of the vehicle in dispute without consent or approval of the Senior Resident Magistrate in Charge.

The second issue was to the effect that, the Trial Magistrate erred in law and fact by making findings that, the purported motor vehicle subject to attachment is seemed to be expensive compared to the claimed amount. As such, the counsel submitted that, the act of the District Court was contrary to the natural justice. He referred this court to the case of **Christian Makondoo Vs. Inspector General of Police and Another, Civil Appeal No. 40 of 2019.**

Rested by submitting that, the attachment order by Primary Court need not be approved by Senior Resident Magistrate, and prayed the decision of the District Court be nullified.

I have thoroughly considered the grounds raised by the appellant in this appeal, I am settled in my mind that, the fate of this appeal lies on one question of whether it was proper for the District Court of Kilosa to raise *suo motu*, determine and make findings on two legal issues of

whether the order of attachment of the said vehicle required consent or approval from Senior Resident Magistrate In Charge; and second whether it is right to attach a property which has high value (Toyota Land Cruiser T 705 BSF) compared to the debt to be recovered (Tsh. 8,700,000/).

Perusing the District court's records, it is apparent that the respondent prayed the court to revise the decision of Gairo Primary Court delivered on 2/2/2018. The issues raised on that revision by the respondent did not include the above two issues. Reasons for her application as per the affidavit were contained in paragraphs 3,4,5,6,7 of which none of them touches the above two issues.

It is settled that, pleadings guide and bind parties in their litigation. Likewise, the court is obligated to decide the case based on the parties' pleadings. In case the court find an important issue in the course of composing his judgment, always that new issue should be placed on record and parties should be invited to address on it. I am fortified with the decision of the Court of Appeal in the case of **Scan-Tan Tours Ltd Vs. The Registered Trustees of the Catholic Diocese of Mbulu, Civil Appeal No. 78 of 2012 (unreported)** where, after referring to Mulla on **Civil Procedure, Vol. II, 15th Edition at page 1432** and the cases of **Hadmor Productions Vs. Hamilton (1982) 1 All ER 1042** and **Blay Vs. Pollard & Morris, 1930 1 KB 311**, the Court concluded that: -

" We are of the considered view that generally a judge is duty bound to decide a case on the issues on record and that if there are other questions to be considered he should be placed on

af

record and the parties be given opportunity to address the court on those questions."

The Court went on to insist that a decision of the court should be based on the issues which are framed by the court in consultation with parties and failure to do so results in a miscarriage of justice.

In the instant appeals, it is vivid, at page 10, that the District Magistrate, when composing his decision, raised two issues which were not on parties' pleadings.

In arriving to the conclusion, the magistrate, at page 10 of the decision reasoned that: -

"I find that the order for attachment of the vehicle in dispute was done without the consent or approval of the senior Resident Magistrate in charges....."

".....but my assumption a Toyota Land Cruiser vehicle, is believed to be an expensive vehicle, in which under normal common sense, one cannot allow the attachment of the same in lieu of satisfying a loan of 7,500,000/= the primary court magistrate in charge should have considered any other property belong to the defendant to be under attachment other than this..."

As rightly submitted by the appellant, nowhere in the records where parties were invited to address same and thus, were denied the rights to be heard. The question remains, whether an order for attachment required consent or approval from the senior Resident Magistrate in



charges, and whether a property of high value than the debt can be attached?

It follows therefore, that failure to afford the parties right to be heard offended the basic principle of natural justice. In the case of **I.P.T.L. Vs. Standard Chartered Bank (Hong Kong) LTD, Civil Revision No.1 of 2009 (unreported)** the Court categorically stated that:-

"No decision must be made by any court of justice, body or authority entrusted with the power to determine rights and duties so as to adversely affect the interests of any person without first giving him a hearing according to the principles of natural justice..."

Now what is the way forward or legal consequences, on the circumstances on which the court denies parties to be heard? It is settled that any breach or violation of that principle renders the proceedings and orders made therein a nullity, even if the same decision would have been reached had the parties been heard. (See **Abbas Sherali and Another Vs. Rabdul Sultan H.M. Fazalboy, Civil Application No.33 of 2002 (unreported)** and **I.P.T.L. Vs. Standard Chartered Bank (supra)**).

This accords with the stance taken the Court of Appeal in the case of **Wegesa Joseph M. Nyamaisa Vs. Chacha Muhogo, Civil Appeal No. 161 of 2016 (unreported)** where the Court held: -

"In the instant appeal we are minded to re-assert the centrality of the right to be heard guaranteed to the parties where courts,



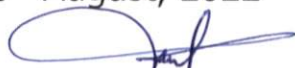
while composing their decision, discover new issues with jurisdictional implications. The way the first appellate court raised two jurisdictional matters suo motu and determined them without affording the parties an opportunity to be heard, has made the entire proceedings and the judgment of the High Court a nullity, and we hereby declare so"

Even without labouring much on these two issues, obvious the District Magistrate erroneously overruled the decision of the Primary Court. To the best of my understanding during execution, any property of the judgment debtor may be attached irrespective of its value.

In the final analysis, this appeal has merits same is allowed, the ruling and drawn order of the district court of Kilosa is hereby quashed and set aside.

It is so ordered.

DATED at Morogoro this 16th August, 2022



P.J. NGWEMBE

JUDGE

16/08/2022

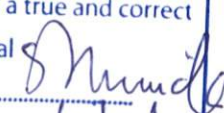

Court: Ruling delivered at Morogoro in Chambers on this 16 day of August, 2022 in the presence of David Elisha Advocate for the appellant and absent of Respondent

Right to appeal to the Court of Appeal explained.

SGD: HON. S.J. KAINDA

DEPUTY REGISTRAR

16/08/2022

Certify that this is a true and correct	
copy of the original	
Deputy Registrar	
Date	18/8/2022
	at Morogoro