

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

PC CIVIL APPEAL NO. 54 OF 2021

*(Arising from Civil Revision No. 11 of 2021 of the District Court of Geita, Originated
from Civil Case No. 59 of 2022 from Bugando Primary Court)*

PENDO MGINI----- APPELLANT

VERSUS

MASHALA JUMA ----- 1st RESPONDENT

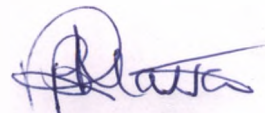
EDWARD MALIYATABU----- 2st RESPONDENT

JUDGEMENT

*Last Order: 29.09.2022
Judgement Date: 04.10.2022*

R. B. MASSAM, J.

This is the second appeal before this court where the appellant is now appealing before this court against the decision of the District Court of Geita in Revision application No.11 of 2021. It goes briefly that, before Bugando Primary Court, the 2nd respondent filed a Civil Case No. 06 of 2021 against the 1st respondent over a claim of Tshs. 5,520,000/=. The case was proved against the 1st respondent who was ordered to pay the sum and costs of the case. The 1st respondent did not honor the order of the court and the 2nd respondent applied for execution of the decree and attached the house of the 1st respondent. The appellant objected before



the trial court claiming that the house was her property and not of the 1st respondent. After the hearing of the objection, the trial court dismissed her claim for the reason that she did not prove her claims to the standard required.

She filed a Revision No. 21 of 2021 before the District Court of Geita which was dismissed. Aggrieved the appellant is now appealing before this court with 3 grounds of appeal thus:-

1. That both courts below erred in law not to hold that the property subject to execution was the appellant's property.
2. That both lower courts erred not to rule out the property in dispute was the matrimonial property not subject to execution/attachment.
3. That the whole decision was against the evidence and law on record.

By the order of the court dated 22.09.2022, the case was argued by the way of written submissions whereas parties complied. The appellant was represented by Emanuel John and the second respondent had a service of Mr. Paschal Joseph while the 1st respondent was absent and did not file submissions.

Submitting on the first ground, the appellant learned advocate claims that the trial court erred for not discussing the evidence in record. Referring to exhibit tendered, he avers that the two lower courts failed to



rely on the document tendered which shows that the house belongs to the appellant. He avers that, the house subject to attachment is a matrimonial house and not subject to attachment.

Referring to page 5 of the District Court judgment, he avers that the order requiring the appellant to call the 1st respondent was not proper for he was on run and could not be traced. He insisted that, apart from the sale agreement tendered, the appellant had a sufficient reason that the appellant was a legal owner. Insisting, he referred this court to the case of **Anastazia Sospeter vs Mwajuma Elias** PC Civil Appeal No. 31 of 2018. He, therefore, prays that this appeal to be allowed with costs.

Replying to the appellant's submissions, Mr. Pascal Joseph submitted that, the house which is subject to this appeal is neither matrimonial nor a personal property for the appellant for the situation stated can not stand at per. He referred to section 2 of the Law of Marriages Act Cap.29 RE: 2019, he insisted that the house do not fall to the category of a matrimonial home.

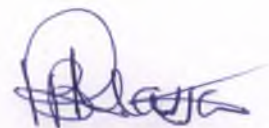
He went on avers that the appellant claims that the house is a matrimonial house as stated on 2nd ground of the appeal while she gave evidence that the house is her personal property. Referring to the trial court proceedings, he insisted that the evidence of the respondent at a trial court contradicts her grounds of appeal. referring to page 4 of her



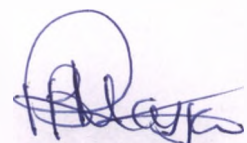
affidavit she claimed that the house is her own property where her family used to stay while at the trial court specifically on page 9 of the trial court, she testified that the house belongs to Mashala Juma the 1st respondent. He retires prays this appeal to be dismissed.

In determination of this case my point of consideration is whether the appeal is merited.

As it stands, the genesis of this appeal is an objection proceeding originated from the Primary Court of Bugando at Geita applied for by the third part, now the appellant before this court the objection proceeding was made under Rule 70 of the Primary Courts Civil procedure Rules Government Notice No. 310 of 1964. According to this provision a person other than a judgement debtor who at the time of the attachment has some interest on the property attached may apply to the court to have the property released from attachment. The Primary court whose objection proceedings has been filed is required to call parties involved namely, a person filing the objection, the judgement creditor and the judgement debtor on the objection. The rules demand the objection to be investigated and appropriate order given by the court. The trial court examined the objection and find that the objector did not satisfy the court that she has interest over the attached house, the findings which were also confirmed by the 1st appellate court.



On the first ground of appeal, the appellant claims that the lower courts failed to rule that the house is the property of the appellant. As it appears on records, on page 6 of the trial court proceedings, the appellant claims that the house is her sole property. She also called Ezekiel Kamandwi who testified in her favour and tender a sale agreement exhibit 1A and John Kalimanzila. In the evidence on record, both the witnesses who testified in favour of the appellant at the trial court did not connect the house in dispute and their testimony and the exhibit tendered. The law is clear under Regulation 1(2) of The Magistrates' Courts (Rule of Evidence in Primary Courts) Regulation, GN No. 22 of 1964 which requires the person alleging the existence of some facts must prove their existence for the court to rule in his favor. See the case of **Dr. A. Nkini and associate Limited vs. National Housing Cooperation** Civil Appeal No. 72 of 2015, also in **Registered Trustees of the Archdiocese of Dares salaam vs The chairman Bunju village Government** in Civil Appeal No. 147 of 2006, **Anthony Masanga vs. Penina [mama Mgesi and Lucia [mama Anna]** civil appeal No. 118 Of 2014. As it stands, this ground lacks merit for the appellant failed to exhibit in the standard required that the house was her sole property.

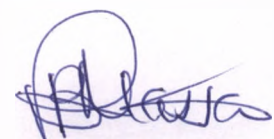


On the second ground of appeal, the appellant claims that both lower courts erred not to rule out the property in dispute was the matrimonial property not subject to execution or attachment. The appellant learned counsel cited the case of **Anastazia Sospeter vs Mwajuma Elias** PC Civil Appeal No. 31 of 2018 in support of his claims. I agree with the learned counsel that if the property to be attached is a matrimonial or used for residence is not subject to attachment. I also hold that in reference to Paragraph 3 (3) (f) of the 4th schedule to the Magistrates Court Act, provisions relating to civil proceedings before the Primary Courts provide categorically that residential house or building, or part of a house or building occupied by the judgment debtor, his wife and dependent children for residential purposes is not subject to attachment.

In order for the court to rule that the house was a matrimonial house, the fact was to be established and proved by the appellant. On records, while the appellant claims that the house was a matrimonial house, in her evidence, she did not prove that she is a wife to the 1st respondent.

On the trial court records, at page 6, when the appellant was cross examined she testified that:-

*"Mashala Juma ni Mume wangu na ninamfhamu vizuri
Mashala Juma, tumetofautiana kwa muda mrefu sasa.*



*Tulishagawana mali bado hatujaachana hatukugawana
kisheria tulikubaliana tu.'*

The appellant witness John Kalimanzila while testifying in favor of the appellant, he has this to say:-

"Tangia mwaka 1995 nilikuwa kakubilo, sikufahamu kama alikuwa na mume."

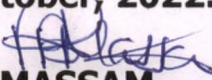
The evidence of the appellant did contradict in establishing that there was an existing marriage which the house subject to attachment was a part to it. For what is on records, the appellant did not manage to establish that there was a subsisting marriage between the appellant and the 1st respondent for the court to invoke Paragraph 3 (3) (f) of the 4th schedule to the Magistrates Court Act, Cap 11 RE: 2019. Therefore, this ground also fails.

On the third ground that the whole decision was against the evidence and law on record, could not detain me much for the trial court analysed the evidence on record and reached to its decision. In fine, I find that the appeal has no merit and therefore fails. I proceed to uphold the decision of the two trial court below and dismiss the appeal with costs.

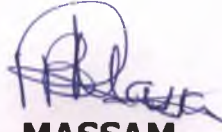
It is so ordered.

DATED at MWANZA this 4th October, 2022.




R.B. MASSAM
JUDGE
04/10/2022

Court: Judgment delivered on 04th October, 2022 in the absence of parties advocates.

A handwritten signature in blue ink, appearing to read 'R.B. Massam', written over a circular stamp or mark.

R.B. MASSAM
JUDGE
04/10/2022