

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MUSOMA DISTRICT REGISTRY**

**AT MUSOMA**

**MISC. CIVIL APPEAL NO. 53 OF 2022**

*(Arising from decision of the District Court of Musoma at Musoma*

*in Civil Appeal No. 51 of 2021)*

**BETWEEN**

**ADAMU KITUCHO KEZEGE.....APPELLANT**

**VERSUS**

**KANYORO M. JUMA.....1<sup>ST</sup> RESPONDENT**

**ROCK CITY TAKERS LIMITED.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

*9<sup>th</sup> & 25<sup>th</sup> November, 2022.*

**M. L. KOMBA, J.**

A dispute arose during execution of court order in **Civil Case No. 251 of 2019** where Musoma Urban Primary Court (the Primary Court) ordered attachment of the house belonging to the appellant. The appellant successful objected the execution and ordered to reimburse the 1<sup>st</sup>respondent at Primary Court but he decided to appeal to District court of Musoma at Musoma (the first appellate court), Civil Appeal No. 51 of 2021 with nine grounds. Hon. Marwa T. J. District Magistrate entertained the appeal and partly allowed the appeal in the sense that the house which belong to the appellant is not subject to attachment but so far as the 1<sup>st</sup> respondent is

entitled to be reimbursed the sum of Tsh. 1,110,000/ as ordered by Musoma District Court in Criminal Appeal No. 68 of 2018 and also advised the respondent to find other properties belonging to Adam Kitucho and his brother Zilio Kitucho to be attached or else they may be made civil prisoners. For the second time the appellant was not satisfied by decision of the District court of Musoma at Musoma and he decided to knock the door of this court for reliefs in eight grounds;

1. ***That, the first appellate court erred in law and fact when upheld the decision of trial court in civil appeal No. 64/2019 which upheld the decision of primary court while appellant was not a part to a criminal case No. 1094/2016.***
2. ***That, the first appellate court erred in law and fact when ordered properties of appellant be attached and sold without taking into account that appellant was penalized with no reason as he never commit(sic) any wrong to respondents.***
3. ***That, the 1<sup>st</sup> appellate court erred in law and fact to uphold decision in civil appeal NO. 64/2019 while the said Judgment contain various illegality.***
4. ***That, the 1<sup>st</sup> appellate court erred in law and fact when failed to realized that appellant was ordered to reimburse the 1<sup>st</sup> respondent on the reason that he failed to file objection proceeding on time when his family house was attached and sold without taking into account that respondent by that time lived in other(sic) district.***
5. ***That, the 1<sup>st</sup> appellate court erred in law and fact to uphold illegal decision as the respondent failed to follow proper procedures of***

*execution.*

6. ***That,*** the 1<sup>st</sup> appellate court erred in law and fact for upholding decision in civil appeal No. 64/2019 while the 1<sup>st</sup> respondent failed to join the seller as necessary party.
7. ***That,*** the 1<sup>st</sup> appellate court erred in law and fact to order the 1<sup>st</sup> respondent be reimbursed while he never produce (sic) evidence to support that he was the one who bought the house family property of appellant.
8. ***That,*** the 1<sup>st</sup> appellate court erred in law and fact when failed to determine other grounds of appeal without justification.

The parties were consulted on the subjects to cherish the right to be heard, both appellant and 1<sup>st</sup> respondent appeared in person, unrepresented and for the purpose of understanding their case properly, they prayed for and were granted leave that documents for this appeal be filed in Kiswahili. For that purpose, the appellant had to re file petition of appeal in Kiswahili.

Appellant submitted that this appeal traces its root in Criminal case No. 10 of 2016 where his relative, Zilio Kitucho was convicted of stealing and sentenced to imprisonment and fined Tsh. 400,000/-. That fine caused his house to be sold in auction where the 1<sup>st</sup> respondent was a successful bidder. He contended that the attachment of house was ordered by the Primary Court and was implemented by the Ward Executive Officer (WEO). He

complained that he was not party to lower court proceedings but end up to be told to pay the money while Zilio Kitucho had served his sentence.

Appellant submitted further that 1<sup>st</sup> respondent rely on WEO's document but he doesn't have any other document and that appellant had never conducted any business with Kanyoro Juma and therefore his claim should be directed to Zilio Kitucho and WEO but not to the appellant. He concluded by saying that he doesn't find any reason for him to be part of respondents claims and pray this court to allow the appeal and order appellant not to reimburse the respondent.

Mr. Kanyoro Juma, the 1<sup>st</sup> respondent had a very short submission. While protesting for the appeal he prays the court to recognize that the case before this court is a civil case and not criminal one and for that reason this court should consider previous court decisions so that justice could be seen to be done. The 1<sup>st</sup> respondent in his submission was wondering how the appellant deny to be party of this civil case while his name is in court pleadings. That was the end of his submission.

When given chance to rejoin his arguments, the appellant submitted that his name is in court proceedings because he objected the execution proceeding

when his house was sold after being attached. It was his contention that the sale of his house was the proceeds of criminal case of Zilio Kitucho and all the documents had the name of Zilio Kitucho like case No. 94 of 2016.

In handling this appeal I had time to peruse the record of the previous courts over the subject matter and petition of appeal together with reply to the petition. In considering directives of the Court of Appeal in **Firmon Mlowe vs The Republic**, Criminal Appeal No. 504 of 2020 Court of Appeal at Iringa (Unreported) where it was directed that the court is at liberty to address the grounds separately or generally or the decisive one only, it must specifically indicate so in the judgment. In the appeal at hand, I will generalize ground of appeal which has similar root and others will be responded separately.

In 1<sup>st</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> grounds of appeal, appellant is complaining the first appellate court to uphold findings in Civil Appeal no. 64 of 2019 and Criminal Case No. 1094 of 2016. From the record, all this mess originates from Criminal Case No. 1094 where one of the court orders was not fulfilled, Zilio Kitucho was supposed to compensate the victim to the tune of Tsh. 400,000/.

In course of execution of decree, the house which was in occupation of Zilio Kitucho was attached and sold to first respondent. the appellant was not satisfied by attachment and sale and his objection succeeded with a condition that the appellant and his brother Zilio Kitucho should reimburse the 1<sup>st</sup> respondent. The order was confirmed by the High court in **PC Criminal Appeal No. 14 of 2018**. This order was not appealed of and was not fulfilled as a result the 1<sup>st</sup> respondent instituted a civil suit (**Civil Case No. 251/2019**) in order to recover his money. Appellant and his young brother Zilio Kitucha lost the appeal (**Civil Appeal No. 64 of 2019**) at the District Court and Appeal to the High Court (**Civil Appeal No. 63 of 2019**) was dismissed for want of prosecution.

From that sequence of events, it is obvious that the decision in **Civil Appeal No. 64 of 2019** traces its root in **PC Criminal Appeal No. 14 of 2018**. Both decisions are valid and they need to be honored and therefore it was right for the first appellate court to uphold the same. From the foregoing analysis, this court finds ground 1, 3, and 6 are wealthless and they should not be maintained.

Ground No. 2 and No. 4 the appellant is complaining that he commits no wrong but he was ordered to reimburse the respondent. It is my opinion



that this issue can be a good ground of appeal but, was supposed to be raised while challenging the decision of the High Court in PC Criminal Appeal No. 14 of 2018 which ordered the same and not in Civil Appeal No. 51 of 2021. I failed to locate any order nullifying or rather reversing the decision in PC Criminal Appeal No. 14 of 2018. What was done by the first appellate court was just amplifying what was already decided. The trial Magistrate was right to pronounce other properties of appellant and his brother Zilio to be attached or else may be made civil prisoner. This is the position of the law as provided in Order XXI Rule 28 of Civil Procedure Code, Cap 33. from that truth, therefore, this court finds ground 2 and 4 has no merit.

About illegal decision as reflected in ground number 5, it is my advice that, if at all there is illegal decision or illegality in list of cases concerning the parties in this appeal, the proper way to deal with it is by appeal. Appellant is advised to appeal to the proper court against the said illegal decision. It is well established that decision which was not reversed or nullified by proper authority will still be valid until is nullified. If, the decision was not nullified then it has to be implemented. I find this ground is devoid of merit.

Court records show that the reimbursement order as complained under ground No. 7 of this appeal was pronounced in **Criminal Appeal No. 68 of**

**2018** at Musoma District Court and confirmed by the High Court Mwanza Registry in **PC Criminal Appeal No. 14 of 2018** during appeal. The Legal system in our country provides for hierarchy of courts and that when party is not satisfied by decision of one court, appeal lies to the court which is higher in hierarch. Decision which the appellant is complained of was pronounced by this court, Mwanza Registry, that mean it can be challenged to Court of Appeal and there is no short cut on this. So far as the order was not altered, it is still enforceable and that the first appellate court was correct to refer that decision and therefore I find this ground lacks merit.

The appellant complained and raise as a ground number 8 that the first appellate court failed to determine other grounds of appeal. It is a settled principal that each ground in appeal must be argued and decided. The court may opt to address the grounds separately or generally or the decisive one only, it must specifically indicate so in the judgment. See **Firmon Mlowe vs Republic** (supra). From the first appellate court record, judgment of the Hon. Marwa in **Civil Appeal No. 51 of 2021** which was delivered on 29 March, 2022 at very first page it explains that there were nine grounds of appeal and the court condensed all grounds to form two grounds which were reproduced in the second page of that judgement. By elaborating that all



grounds have been condensed into two, the Magistrate rightly dealt with all grounds as was directed in the case of **Firmon Mlowe vs Republic** (supra) and therefore this ground lack feet to stand.

Consequently, the appeal is dismissed with costs.

Dated at **MUSOMA** this 24<sup>th</sup> Day of November, 2022


**M. L. KOMBA**

**Judge**

Judgment delivered this 25<sup>th</sup> day of November, 2022 in the presence of the appellant and 1<sup>st</sup> respondent.

Right of appeal explained.



  
**E. R. Marley**  
**Ag. DEPUT REGISTRAR**  
**25<sup>th</sup> November, 2022**