

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

**IN THE SUB-REGISTRY OF MANYARA**

**AT BABATI**

**LAND APPEAL NO. 266 OF 2024**

*(Originating from Land Application No. 34 of 2022 of District Land and Housing Tribunal for Manyara at Babati)*

**METOLDI DOMEL.....APPELLANT**

*VERSUS*

**1. SAMSON KURAY.....**  
**2. EMMANUEL MICHAEL MATHIAS.....**  
**3. KIBAIGWA AUCTION MART.....** } **RESPONDENTS**

**JUDGMENT**

*13<sup>th</sup> March and 17<sup>th</sup> May, 2024*

**MIRINDO, J.:**

The first respondent successfully sued "Emmanuel Matias" before Endasaki Primary Court in Hanang' District for the recovery of 3,400,000/= TZS. Emmanuel Matias, is now the second respondent in this appeal and features as Emmanuel Michael Mathias. When the second respondent informed the Primary Court that he was unable to pay the decreed amount at once, the first respondent applied for execution and sought to attach the second respondent's plot. The attachment was

stalled when the appellant lodged objection proceedings complaining that the plot earmarked for attachment had since been sold by the first respondent to the appellant. The Primary Court nullified the sale agreement and dismissed the objection proceedings. The attachment went on and the plot was advertised for sale by public auction.

As a result, the appellant instituted a separate case on 13/7/2022 before Babati District Land and Housing Tribunal to be declared lawful owner of the attached plot. Another prayer was for a declaration that the respondents had no legal right to auction the plot but are mere trespassers who should be ordered to vacate from the plot and a permanent injunction be issued against them. In his pleading before the Tribunal, the appellant attached, among other things, a copy of the sale agreement between the second respondent and himself.

The first respondent's defence was that the sale agreement had already been nullified by the Primary Court and he was not a trespasser; he was simply enforcing the Primary Court's decree. The second respondent admitted the claim.

At the trial the appellant paraded the witness who testified in the objection proceedings before the Primary Court. The first respondent did not testify in-chief but was surprisingly cross-examined and questioned by a Tribunal's assessor where he narrated about the attachment process and the advertisement of the plot for

public auction by the third respondent, the court broker. The second respondent testified about the sale agreement.

On 18/11/2022, the Tribunal held that the appellant should have appealed against the decision of the Primary Court and since the Tribunal was not the appellate court for Primary Court's decisions, it dismissed the claim. On appeal to this Court, it was held on 27/2/2023 that although Rule 70 (1) of the Magistrate's Courts (Civil Procedure in Primary Courts) Rules, GN No 310 of 1964 is silent on whether unsuccessful third party in objection proceedings may file a separate suit, there is some authority that a separate suit is the only way out. This Court remitted the case for the Tribunal to make its findings on the claim because the appellant had the right to institute a separate suit.

The Tribunal recomposed the judgment as directed by this Court and delivered it on 23/11/2023. The Tribunal dismissed the claim on the ground that the first respondent was not a trespasser; he was simply enforcing the decree of Endasaki Primary Court.

The appellant has now appealed to this Court on two grounds of appeal. Both grounds of appeals raise only one question for consideration: is the decision of the trial tribunal against the weight of evidence?

At the hearing of the appeal, the appellant was represented by learned counsel, Mr Godfrey Mlingi while the first respondent was represented by the learned counsel, Mr Abdallah Kilobwa. The second and third respondents appeared in person. Mr Mlingi, learned counsel argued that the appellant duly proved that he was the owner of the plot which was attached in execution of the decree of Endasaki Primary Court. The learned counsel, argued that the Tribunal should have been jealous of its own jurisdiction and was not bound by the evidence given in the objection proceedings before the Primary Court.

Mr Kilobwa, leaned counsel, vehemently opposed the appeal. He argued that the issue of ownership of the attached plot had already been decided by Endasaki Primary Court. He pointed out that the appellant had accepted the decision as he did not challenge the Primary Court's decision by way of appeal or revision. Under these circumstances, it was right for the third appellant to sell the plot by public auction. In response, Mr Mlingi argued that in law objection proceedings are not subject to appeal, one is simply required to institute a fresh suit.

The issue whether objection proceedings are appealable was determined by this Court on the first appeal to this. Contrary to the popular conception the prohibition of an appeal or revision in respect of objection proceedings in District Courts, Courts of Resident Magistrates and the High Court is a statutory rule and not a rule of practice. In a better-known case of **Kangaulu Mussa v Mpunghati**

**Mchodo** [1984] TLR 348, a third party, instead of lodging objection proceedings in the trial court, instituted a separate suit founded on tort in respect of the unlawful attachment of his cattle before Dodoma District Court. This Court held that it is a rule of practice that a third party may opt to institute a separate case instead of lodging objection proceedings, and may thereafter appeal. But in the circumstances of the case before the Court there were no sufficient reasons why the plaintiff could not proceed by way of objection proceedings. In light of the various decisions of the Court of Appeal, these conclusions may require reconsideration because filing a separate suit is a statutory requirement and appealing against objection proceedings is also statutorily barred. It is not simply a rule of practice.

Rule 62 of Order 21 of the Civil Procedure Code [Cap 33 RE 2019] provides that:

Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.

One of the clearest judicial interpretation of this rule is in **Bank of Tanzania v Deveram P Valambhia** (Civil Reference No 4 of 2002) [2003] TZCA 38 where the Court of Appeal held that objection proceedings under Rule 62 are subject to a separate suit which are appealable:

Our reading of the rule extracted above, makes it abundantly clear that if no suit is instituted by the party against whom the order is made under this rule, and subject to the result of the suit, the order is conclusive. In our view, in the course of the suit the party against whom the order was made can among others, challenge the validity or otherwise of garnishee order as well as establishing its rights. The decision from such a suit would, we venture to think, be open to appeal. On the other hand, if no suit is preferred, ...we are of the view that the order remains intact and conclusive. That in our view is the import of rule 62 Order 21.

Appealability of a particular decision is a constitutional or statutory question. For this reason the Court of Appeal in **Katibu Mkuu, Amani Fresh Sport Club v Mamboya and Another** [2004] TLR 326 (Civil Appeal 88 of 2002) [2003] TZCA 10 held that as the Zanzibar Civil Procedure Decree had no rule equivalent to Rule 62, a right to appeal against objection proceedings existed.

Primary Courts have different procedural rules from those applicable in the High Court and other Magistrates' Courts. Objection proceedings in primary courts are regulated by Rule 70 of the Magistrate's Courts (Civil Procedure in Primary Courts) Rules, GN No 310 of 1964. Rule 70 is differently worded and does not contain a provision for a separate suit. The vast majority regarding objection proceedings from Primary Courts have the subject of appeal to District Court and later to this Court without any disapproval from this Court.

I will cite few examples in support of this view. In **Rusambi Nkohozi v Nkohozi Butega**, (PC) Miscellaneous Civil Appeal 10 of 1986, High Court of Tanzania at Tabora there was an appeal against objection proceedings emanating from Buhoro Primary Court. The Primary Court ordered the attachment of four heads of cattle apparently belonging to a third party. The third party lodged objection proceedings in Kasulu District Court. A Senior District Magistrate in Kasulu District Court wrote a letter to a Ward Secretary of Buhoro and also served a copy of to the Primary Court directing that four heads of cattle that had been attached be released. On appeal to the High Court, Korosso J held that this was procedurally wrong:

In the first place, I don't think it was procedurally right for the learned Magistrate to hear the objection to attachment of the cattle. The Primary Court Magistrate by whose court the order or warrant of attachment had been issued should have been the proper judicial officer to entertain, hear and determine the evidence for and against objection to attachment. Any party aggrieved by the decision of the Primary Court would be entitled to appeal therefrom to the District Court. What is more, there is nothing to show that any evidence had ever been heard by the learned Senior District Magistrate for and against the attachment.

From this holding, objection proceedings from Primary Courts are appealable. In both **Lukasi Paskali v Mgwabi Mkaka**, (Dodoma Registry) (PC) Civil Appeal No 13 of 1987, High Court of Tanzania at Dodoma (1988) (unreported) and **Kwiga Masa v Samwel Mtubatwa** [1989] TLR 103, Samatta J dealt with appeals on objection



proceedings emanating from Mtwikira and Mpwapwa Urban Primary Courts, respectively, and addressed, among other things, the burden of proof in objection proceedings.

In **Maunda Nzagu v Elias Masunga Maige**, (PC) Civil Appeal 91 of 1990, High Court of Tanzania at Mwanza (1989), Mwalusanya J entertained an appeal by an objector who defaulted appearance before Ikizu Primary Court.

There was an appeal against objection proceedings in **Emmanuel Mroya v Peter Kasenge**, (PC) Civil Appeal 1 of 1990, High Court of Tanzania at Arusha (1990) emanating from Mkuu Primary Court in Rombo District. The respondent sought a declaration that the appellant be restrained from trespassing on to his land. But since this declaration was impossible without finding on the issue of ownership, the Primary Court made a finding on ownership in favour of the respondent. This finding gave rival claims by way of objection proceedings between the respondent and heirs to the suit land. The suit land was a subject-matter of inheritance between the appellant and other heirs. The appellant successfully appealed to this Court before Nchalla J.

Another appeal against objection proceedings was in **Jobu Mdachi v Elisha Messo**, (PC) Civil Appeal 57 of 2002, High Court of Tanzania at Dodoma (2006). In this case, the appellant successfully sued the respondent's father in Chamwino Ikulu Primary Court. The Primary Court overruled the objection proceedings filed by the



respondent. On a further appeal to this Court, Kaijage J directed that the Primary Court should first investigate whether the house and the plot sought to be attached were attachable properties. If they are attachable, the appellant be at liberty to re-apply for attachment.

The final example is to be found in **Kasema s/o Masungwi v Makonda s/o Kishiwa**, (PC) Civil Appeal 8 of 2007, High Court of Tanzania at Tabora. A decree-holder attached heads of cattle belonging to a third party as part of enforcement of the decree of Nzega Urban Primary Court. The third party unsuccessfully appealed to Nzega District Court. On appeal to this Court, Mujulizi, J allowed the appeal partly because:

...even if there was evidence that the judgment debtor had actually parted with possession of the heads of cattle and the goat subject of the decree with a view to avoid execution of the decree, the correct procedure would be for the applicant to seek an order for the arrest and detention of the judgment debtor in accordance with Rule 5 to the Fourth Schedule. The Primary Court would not have powers to follow such cattle in the hands of an innocent third party without notice of the illegality.

Besides, the lack of a direct statutory bar to appeal, the scope of objection proceedings in Primary Court seems to be expansive having regard to the nature of evidence authorised under Rule 70 (4) of the Magistrate's Courts (Civil Procedure in Primary Courts) Rules, GN No 310 of 1964. The sub-rule provides that:

On the day fixed for the hearing, the court shall investigate the objection and shall receive such evidence as the objector, the judgment-creditor and the judgment debtor may adduce.

Rule 58 of Order 21 of the Civil Procedure Code is restrictive on the nature of the evidence to be received on objection proceedings. It states that:

The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.

The scope of investigation in objection proceedings under the Civil Procedure Code is generally limited to possession and not to complicated issues of title as was reaffirmed by Nsekela J in **CRDB Bank Ltd v Mwamba Enterprises Ltd and Charles Mulokozi**, Commercial Case 50 of 2000 High Court of Tanzania (Commercial Division) at Dar es Salaam,

What emerges from these cases is that when the court is dealing with an objection under Order XXI rules 57, 58, 59 and 60 of the CPC, the court should concentrate on the question of possession of the property the subject of attachment and then decide whether the judgment-debtor is in possession of the property on his own behalf or on account of or in trust for some other person. If the property is in the actual possession of some person other than the judgment-debtor, then the court has to decide whether that possession is in trust for or on behalf of the judgment debtor: The court should not be concerned with the question of title unless necessary for its decision on the question of possession. [References omitted]

It was for this reason that in **Ally Issa Mussa v Mwidadi Ally Mwila and Two Others**, Commercial Case 91 of 2009, High Court of Tanzania (Commercial Division) at Dar es Salaam (2011), Makaramba J declined to investigate issues of title. This restrictive nature of the objection proceedings was in 2006 reaffirmed by the Court of Appeal in **Thomas Mbando v LART and Liquidator of Mwatex**, Civil Appeal 30 of 2001.

As this Court on the first appeal ruled that the appellant was entitled to institute a separate suit, I am not at liberty to arrive at a different conclusion. As the Court held that it was appropriate to institute a separate suit, the question for consideration is whether the "separate suit" was duly conducted.

From the record of the Tribunal's proceedings, the Tribunal purported to act on the judgment of Endasaki Primary Court which was not duly tendered before it. Notwithstanding the direction given by this Court on the first appeal, the trial tribunal had problem in dealing with the previous decision of the Endasaki Primary Court given in objection proceedings between the same parties.

At this stage it is important to clarify the effect of a decision in objection proceedings on a subsequent separate suit. In terms of section 51 of the Land Disputes Courts Act [Cap 216 RE 2022] District Land and Housing Tribunals are governed by evidential rules set forth in the Evidence Act, Cap 6, the current edition being that of 2022.

Just like cases where an appellate court order retrial and pleas of *res judicata* and autrefois acquit and convict do not apply, it is clear that in a separate suit subsequent to objection proceedings, the plea of *res judicata* does not apply. As was held by Munyera J in **Omoke Oloo v Werema Magira** [1983] TLR 144 at 145:

It means that a decision in objection proceedings would not render a subsequent suit on the same dispute *res judicata*.

If the plea of *res judicata* does not apply, the previous judgment given in the objection proceedings is not conclusive between the objector and the decree-holder. To hold otherwise would render the separate nugatory. Thus, the previous judgement, in other words, the actual decision or findings arrived at in the objection proceedings cannot be used as evidence to decide the points which are at issue in the subsequent suit. The previous judgment is relevant only to show the existence of the original decree between the decree-holder and the judgment-debtor and not its conclusiveness between the objector and the decree-holder. It follows that where there is a separate suit, the trial tribunal is governed by the provisions of section 45 of the Evidence Act [Cap 6 RE 2022]. Section 45 provides that:

Judgements, orders or decrees, other than those mentioned in sections 42, 43, and 44 are irrelevant unless the existence of such judgement, order or decree is a fact in issue, or is relevant under some other provision of this Act.

The purposes of section 45 as stated in Rao K (2009), **Sir John Woodroffe and Syed Amir's Law of Evidence**, 18<sup>th</sup> edn, Vol 2, Nagpure: Lexis Nexis Butterworths Wadwa, at page 2430 are the following:

...the first object appears to treat every case a class by itself so that the judgment delivered in one case may not be availed of by parties to another case and the second object appears to be to maintain the independence of the courts by preventing the parties from submitting before the court hearing their cases the judgments of other courts...

Under the Civil Procedure Code, objection proceedings are essentially summary in nature and its findings are not conclusive in a separate suit. As stated in Sarkar SC and Sarkar PC, **Sarkar: Code of Civil Procedure**, 11<sup>th</sup> edn, Vol 2, Haryan: Lexis Nexis, 2006, at pages 1758-1759:

If the party against whom the order...is made brings no suit under this rule, the order is conclusive against him or persons claiming under him, *ie*, he cannot as plaintiff or as defendant in any other proceeding assert the title which has been denied to him or raise the point by way of defence...The order is conclusive only as regards the particular property in dispute and not with reference to any other matter...The order is conclusive as against the party against whom the order is made and against the properties involved, in the claim. Where the judgment-debtor is not a party to a claim case, the order is not conclusive against him... An order in... [an objection proceeding is] summary in nature...[and] do[es] not operate as *res judicata* in a subsequent suit for possession...

It follows that the Babati District Land and Housing Tribunal misdirected itself on the status of the decision of Endasaki Primary Court on objection proceedings.

I quash the proceedings and judgment of the Tribunal and order retrial before a different chairperson and set of assessors within forty-five days after the delivery of this judgment and dispatch of the records to the Tribunal. Each party to bear its own costs.

Dated at BABATI this 14<sup>th</sup> day of March, 2024



**F.M. MIRINDO**

**JUDGE**

**Court:** Judgment delivered this 17<sup>th</sup> day of May, 2024 in the presence of the appellant and the first respondent in person, and in the absence of the second and third respondents. B/C: William Makori (RMA) present.

Right of appeal explained.



**F.M. MIRINDO**

**JUDGE**

**17/5/2024**