IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF ARUSHA AT ARUSHA

AT ARUSHA

CIVIL APPEAL NO. 39 OF 2023

(C/F Civil Revision No. 01 of 2023 of the District Court of Monduli at Monduli, arising from Civil Case No. 15/2021 in Kisongo Primary Court)

JUDITH ISAYA LONGISHU.....APPELLANT

Versus

CHARLES MALAIKA.....RESPONDENT

JUDGMENT

03rd & 10th May 2024

TIGANGA, J.

Out of the ordinary, the parties have been in court corridors for the past four years. They started before Monduli Primary Court, at Kisongo, in Civil Case No. 15 of 2021 where **Charles Malaika**, the respondent herein successfully sued **Leonard Leo Haule** for recovery of Tsh. 3,500,000/= (Three million and five hundred thousand). The trial court held in favour of the plaintiff. Following that victory, the decree-holder applied for execution of the decree and the court ordered the house of the judgment debtor located at Sinoni in Monduli township on Plot 153 Block "R" be attached and sold in satisfaction of the decree.

Following that order, the current appellant **Judith Isaya Longishu** who introduced herself as a wife of the judgment debtor filed objection

proceedings challenging the attachment and sale of the house in question, for being the matrimonial house. The objection proceedings were dismissed by the order of the trial Court dated 09th September 2022 for want of merits.

Dissatisfied by that order, the appellant filed Civil Revision No. 01 of 2023. That application was also dismissed and the trial court decision was upheld. Still disgruntled, the appellant herein filed this appeal by advancing two grounds of appeal as follows;

1. *That, the learned magistrate in her revisional powers erred in law and fact by deciding that the appellant herein was given a right to be heard by the trial court without giving weight to the stare decisis principle in her decision which led her to come out with erroneous decisions.*
2. *That, the learned magistrate in her revisional powers erred in law and fact by failing to make a proper evaluation of evidence adduced by the appellant herein at the trial court which resulted in an erroneous decision.*

He, in the end, invited this court to quash the orders of both the trial court and the revisional court.

Before this Court, parties were represented by Counsel. While the appellant had the service of Mr. Elidaima Mbise, learned Counsel, the Respondent procured the legal service of Geofrey Mollel who appeared

holding the brief of Mr. Alfa Ng'ondya, Advocate. With the leave of the Court, the appeal was argued by way of written submissions.

Submitting in support of the petition of appeal, Mr. Elidaima Mbise, Advocate when arguing on the first ground, submitted that, on page 4 of the Ruling of the District Court, the learned magistrate quoted rule 45 of the Primary Court Civil Procedure Rules (PCCPR), which do not provide for rejoinder in civil cases before the Primary Court. He was against the findings of the trial court that, since the provision does not provide for a rejoinder in Primary Court, it was proper for the trial court not to give room to the appellant at Kisongo Primary Court to rejoin. In his view, that is not correct and he invited this court to determine whether the trial and revisional Court, were correct in deciding so and whether the conclusion that the appellant was given a right to be heard was correct in the absence of the right to rejoinder.

He contended further that, whether was it true as held by the revisional court, that the PCCPR does not provide for a rejoinder in the Primary Court, in other words, whether, the facts that the law is silent as to whether a rejoinder is mandatory in primary court cases or not takes away the right of the parties to rejoin before it. In his view the correct position that a party is as a matter of right entitled to rejoin and failure to give him such right affects the proceedings. He referred to the case of

Hai District Council and Another vs Kilempu Kinoka Laizer and 15 others, Civil Appeal No. 110 of 2018, CAT to cement his conviction. He averred that; the procedure stipulated under the case referred to above was not followed.

Mr. Mbise argued that there was no rejoinder during the hearing of the objection proceeding as reflected in the ruling of "*pingamizi la shauri la madai No. 15/2021*". He alleged that the records are clear that there was a submission from the objector, followed by a submission from the Respondent; but there was no rejoinder. He argued further that, if the objector had no rejoinder, then it was supposed to be indicated on the record and in the ruling. He referred to the case of **Hai District Council and another (supra),** where the court held *inter alia* that;

> *"It is not disputed that failure to afford the right to make a rejoinder submission amounted to denying them the right to be heard."*

He submitted further that; the principle of stare decisis principle which is applicable in Tanzania requires the decision made by a court higher court in the hierarchy to bind all lower courts. In other words, a decision by the Court of Appeal binds all the courts below unless, the written law states otherwise, he said. He argued further that, in case the written law is silent, the decision of the Court of Appeal cuts across from

the High Court to the Primary Court. He contended that a right of rejoinder is mandatory in all courts.

When submitting on the second ground of appeal, he cited the case of **Attorney General v Wafanya Biashara Ndogo Ndogo Kariakoo Cooperative Society Ltd,** Misc. Civil Application No. 606 of 2015, High Court of Tanzania, at page 13 where the court held that: -

> *"The meaning of revision, the applicant intends to file in this court, if the application for extension of time the same will be granted will require the court to look again carefully and critically the proceedings or decision or order of the trial court for purpose of being satisfied that the proceedings, decision, or order made by the trial court is correct, legal and proper and if it is not, to correct or improve the same."*

He went further to refer to the case of **Venerands Maro, Winifrida Ngasoma vs Arusha International Conference Center**, Civil Appeal No. 322 of 2020, CAT, and quote pg. 13 as follows:

> *"We are fortified in that regard, because sitting in revision, the High Court was required to consider if the arbitrator made a proper evaluation of all the facts and circumstances and whether or not the decision was judicially a correct one."*

Mr. Mbise, argued that the court sitting as a revision (sic) court can re-evaluate the evidence of the lower court. He submitted further that the respondent did not object at the Primary Court that the attached house is

a family house, and the family lives there. More so, he was of the view that it was not disputed that the objector was the judgment debtor's wife. He raised one question which is whether the house was attachable.

He cited the case of **National Bank of Commerce vs Cosmas Makisi (1986) T.L.R 127**, where the High Court Judge held *inter alia* that a residential house used by the judgment debtor and his family is not liable for attachment.

He submitted further that, there was no need to produce evidence to prove that it was a family house, as the family was residing therein, and, this fact was not disputed by the respondent herein. He also contends that the revisional court held that the relationship between the appellant and the judgment debtor did not prove that they were husband and wife. The revisional court forgot that it was not denied by the respondent that the appellant was husband and wife, since it was not denied, means that fact was admitted.

Since the appellant became aware of the debt in 2020; he contended that it was not proper for her and her family to carry the burden of paying the debts. He prayed for the appeal to be allowed with costs.

In response therein, the Counsel for the Respondent resisted the appeal. In such an endeavour he argued the first ground that, the counsel

for the appellant misdirected himself that the appellant was not given a right to be heard by the trial court. He further, submitted that the procedure for hearing civil matters to the Primary Court is governed by the Magistrate's Courts (Civil Procedure in Primary Courts) Rules. He averred that the matter was heard by calling witnesses and adducing evidence before the trial court. In his view, at the time of the hearing, Rule 45 (1) of the Magistrate's Courts (Civil Procedure in Primary Courts) Rules, was applied, which provides that:

> *"Order of evidence,*
> *The evidence shall be given in such order as the court directs:*
> *Provided that, unless the court otherwise directs, the claimant shall first state his case and produce the evidence in support of it and the defendant shall then state his case and produce the evidence in support of it."*

He argued further that, the procedure was duly complied with, therefore all parties were availed with the right to be heard contrary to the contention of the appellant herein. Hence, the cited case by the appellant is distinguishable from the case at hand.

On the second ground of appeal, regarding the learned magistrate in her revisional powers failure to make a proper evaluation of evidence adduced by the appellant. The counsel for the Respondent submitted that

whoever wishes the court to decide in his or her favour must prove every fact constituting the claim. The principle is clearly stated under Regulation 1 (2) of the Magistrates Courts (Rules of Evidence in Primary Courts) Regulations. The appellant herein, claimed to the trial court that the house which was attached to execute the decision of the court was a family house and the appellant is the wife of the judgment debtor.

However, the appellant herein failed to produce any document to the trial court to prove that she is the wife of the judgment debtor, or even to bring any witness to substantiate the same. He argued further that, the appellant herein, was aware of the respondent's claim against the judgment debtor whom she claims to be her husband without any tangible evidence. So, the appellant did not have clean hands before the court.

More so, the counsel submitted that the appellant tendered nothing before the trial court to prove that the house about to be attached for execution was and is a family house, as quoted on page 4 of the ruling. Not only that, he averred that the relationship between the judgment debtor and the appellant herein was not proved to be that of husband and wife. As it was not established by either documents or independent witnesses. Therefore, he prayed for the appeal to be dismissed with costs.

Having summarized the rival arguments of learned advocates, and perusing both the trial court and revisional court records. The learned advocate for the appellant lamented against the order of both the trial and revisional court that, his client (the appellant) was not afforded a right to be heard, by not allowing her to make a rejoinder before the trial court.

In the first ground of appeal, the appellant is inviting this court to determine whether the failure of the appellant to have a rejoinder (sic) before the trial court amounts to a denial of the right to be heard. With due respect to the Counsel for the Appellant, from the outset, I am not subscribing to that assertion because the procedure of handling civil cases in Primary Courts is governed by the **Magistrate Courts (Civil procedure in Primary Courts) Rules,** G.N No. 119 of 1983 [Cap. 11 R.E 2002]. To be specific, Rule 45 which is reproduced hereunder for ease of reference:

"45. *Order of evidence*

The evidence shall be given in such order as the court directs: Provided that, unless the court otherwise directs, the claimant shall first state his case and produce the evidence in support of it and the defendant shall then state his case and produce the evidence in support of it."

On that, the Counsel for the appellant contended that the trial court did not allow the appellant to have a rejoinder after the respondent herein

replied to the objection filed by the appellant herein. As per the Rules governing procedure in Primary Court, that is not the position. Objection proceedings procedures in Primary Court are stipulated under rule 70 (1) of the **Magistrate Courts (Civil Procedure in Primary Courts) Rules**, G.N No. 119 of 1983 [Cap. 11 R.E 2002].

Looking at the import of Rule 70 it is clear that once objection proceedings have been raised then the court before which the objection proceedings have been raised shall investigate the objection by receiving evidence from the objector, the judgment debtor, and the decree-holder.

Speaking of evidence, it means the parties must testify on oath or affirmation. Now in my understanding of the law, rejoinder is always the procedure obtaining only where submissions are received and not the evidence, where the evidence is involved then it is re-examination.

The whole provision of rule 70 of the said Rules, does not state anything about rejoinder. Going through the records of the trial court, it is clear that, only the parties gave evidence proving and disproving the objection proceedings filed before the trial court. They did not call any other witness than themselves There is no single witness, on both sides who was called to testify. Further, there is no provision of the law in the rules, which compulsorily requires the trial court to accord an opportunity to the objector a right to rejoinder or re-examination after the respondent

has given his defence on the objection. I have carefully gone through the trial court records, and it reveal that on 26/08/2022, the appellant was heard by the trial court. This was done in accordance with the requirement of Rule 70 of the said Rules (supra) after he was cross-examined on what she said, the record is clear that she decided to close her case. The assertion that he was not allowed to make rejoinder, is neither supported by any law nor any practice obtaining in the Primary Courts. That being the position, I find the first ground of appeal devoid of merit and is found to be baseless.

Coming to the second ground of appeal, the question is whether both the trial and revisional court failed to evaluate evidence of objection proceedings. The Counsel for the appellant submitted three things; **one**, that the house attached is a family house; **two**, that the appellant is the wife of the judgment debtor, and was never involved in the transaction; and **three**, the house is used for residential purposes, therefore it cannot be subject to attachment.

In reply, the Counsel for the respondent resisted the assertion and averred that, there is no proof produced by the appellant's counsel which proved the contention.

Looking at the arguments by both parties, one can easily gaze that the argument is based on the burden and standard of proof. It is the

cardinal principle that, he who alleges must prove. In the case of **Paulina Samson Ndawavya vs Theresia Thomas Madaha,** Civil Appeal No. 53 of 2017, CAT (unreported), having stated:

> *"...It is equally elementary that since the dispute was in a civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other..."*

See also the cases of **Anthony M. Masanga Vs Penina Mama Ngesi and Another**, Civil Appeal No. 118 of 2014, (unreported), **Godfrey Sayi vs Anna Siame (As Legal Representative of The Late Mary Mndolwa**), Civil Appeal No. 114 of 2012, and **Mathias Erasto Manga vs Ms. Simon Group (T) Limited**, Civil Appeal No. 43 of 2013 (all unreported). In the latter case the Court among other things, stated:

> *".... the yardstick of proof in civil cases is the evidence available on record and whether it tilts the balance one way or the other..."*

Although these authorities were decided in the interpretation of section 110 of the Evidence Act, [Cap 6 R.E 2022] which in all respects resembles regulation 1(2) of the **Magistrates Courts (Rules of Evidence in Primary Court) Regulations G.N. No. 22 of 1964 and 66 of 1972** which provides that;

Where a person makes a claim against another in a Civil Case the claimant must prove all the facts necessary to establish the claim, unless the other party, (the defendant) admits the claim. The exemption to this rule is in only two scenarios, **one**, where the law directs that it is the responsibility of the defendant to prove (it shifts the burden) and, **two,** where the defendant admits the claim.

In deciding the second ground of appeal, I shall accordingly be guided by the stated principle, to determine if the appellant discharged the burden of proof on the balance of probabilities. In the event, I have gone through the records, it reveals all the allegations relied upon.

That is to say, it is alleged that the appellant and the judgment debtor are husband and wife; it is also alleged that the house attached is used as a residential house for the appellant's family; and that the appellant was never engaged in a transaction between the respondent herein and judgment debtor.

These allegations were not proved by any evidence. There is no evidence to prove that the appellant and the judgment debtor were a married couple, that the house was a residential one, or that he was not involved in the transaction when the matter which resulted in the attachment of the said house was contacted. The allegations are just mere words and there is no evidence given to prove the said contention. At the

level of this appeal, Mr. Mbise submitted that, since the allegations were disputed then they were deemed to be admitted. With all due respect to Mr. Mbise, if we read the import of regulation 1(2) of **Magistrates Courts (Rules of Evidence in Primary Court) Regulations, G.N. No. 22 of 1964 and 66 of 1972,** the law is clear that generally, the burden is on the shoulder of the claimant to prove all allegations upon which his/her claim are based. For the claimant to be exempted from this duty, the matter must be admitted, or the matter must be the one which the law provides that they should be proved by the person against whom the claim is made.

In this case, to the contrary, there is no express admission of any of these facts and the law does not shift the burden of proof. It remained incumbently a duty of the appellant to prove the said assertion which she did not do.

As correctly stated in the case of **John Chuwa vs. Antony Ciza** [1992] TLR 233, and **Kighoma Alli Malima vs Abbas Yusufu Mwingamno**, Civil Application No. 05 of 1987 (Unreported) where it was held that mere words cannot stand to prove anything in court.

In view of what I have endeavoured to discuss, I do not find any cogent reason to fault the decision of both, the trial and revisional court.

Thus, the grounds of appeal are not merited, consequently, I dismiss the appeal in its entirety with costs.

It is accordingly ordered.

DATED and delivered at **ARUSHA** on this 10th day of May 2024.

J.C. TIGANGA

JUDGE