

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 162 OF 2022

(Arising from the ruling in Misc. Civil Application No. 215 of 2021 before the District Court of Kinondoni, which has the root from Civil Case No. 93 of 2020 before Kawe Primary Court)

BULLEM INVESTMENT APPELLANT

VERSUS

SELEMANI JUMA TUNGU RESPONDENT

J U D G M E N T

08th & 16th December, 2022

MWANGA, J.

The Appellant, Bullem Investment appealed against decision of the District Court of Kinondoni from the rulings in Miscellaneous Civil Application No. 215 of 2021 which has a root from Civil Case No. 93 of 2020 from Kawe Primary Court.

The material facts regarding this matter are that; the respondent herein Seleman Juma Tungu filed a case at Kawe Primary Court in Madai Daawa MIT 04/20/MM/93 of 2020 against the appellant, claiming a

recovery of loan advanced to the appellant way back in 2014. In her order dated 27th July, 2020 the Primary Court of Kawe ordered the appellant to pay the respondent the principal amount of Tshs. 16,000,000/= plus compensation of 5% of the stated amount, which was equated to Tshs. 800,000/=.

On 11/02/2021 while in the process of execution of her orders, the primary court, on request by the appellant, ordered the payment to be made on instalments and in two categories. The first category included the payment of Tshs. 500,000/= each month for a period of three months consecutively. The second category included the payment of Tshs.1,000,000/= each month soon after the completion of earlier three months of the first category, until the whole debt is discharged. The court proceeded further that failure by the appellant to honour his request, the execution shall be by attachment of the properties.

It is undisputed fact that, so far, the appellant has paid Tshs. 1,500,000/= only, that is, from 11/02/2021 to date. Following such failure of the appellant to abide by orders of the Kawe Primary Court, on 07/09/221 the respondent complained via a letter to Hon. R.S Tamambele, RM about the conduct of the appellant and that agreed mode of payment have not worked on his part, hence the same shall be

reviewed. The trial Magistrate reviewed its order and proceeded to issue further order of attachment of the appellant bank account **No. 103-347-777-TIB** and directed that, the claimed sum shall be transferred to the respondent NMB Account No. **23110041098**. On 09/09/2021 while issuing the order, the trial Magistrate had this to say;

'Kwa kuwa mdaiwa ameshindwa kulipa pesa ya mdai kwa wakati kama alivyoamriwa na mahakama, ikiwa mdai ameomba Akaunti ya mdaiwa yenye Na. 103-347-777 TIB Bank izuiwe na kiasi cha Tshs. 16,300,000/= kiingizwe kwenye akaunti yake mdai yenye No. 23110041098 NMB, kwa kuwa uwezo wa kulipa anao, hivyo mahakama inakubaliana na ombi lake, na mahakama inaomba kibali katika mahakama ya wilaya kuweza kuzuia kiasi hicho cha pesa na kuingizwa kwenye akaunti ya SM'.

The trial Magistrate proceeded that; ***'Amri: Barua ya kuomba kibali itolewe kwenda Mahakama ya Wilaya.'***

It is unfortunate that nothing is on record showing implementation of the order of Kawe of Primary Court. Instead, the respondent filed a new Miscellaneous Civil Application No. 215/2021 under Rule 56 of the Magistrate Courts (Civil Procedure in Primary Courts) Rules, GN No. 310

of 1964, Section 95 of the Civil Procedure Code, Cap. 33 R.E 2019 and Section 2 of the Judicature and Application of Laws Act, Cap. 358 R.E 2019 seeking steps to be taken in the execution of the judgment of Kawe Primary Court by attaching the same A/C No. **1933477777-TIB** and A/C No. **206065000053-NMB** both owned by the appellant by transferring Tshs. 16,300,000/= to the respondent's Account No. **23110041098 -NMB**.

The District Court granted the application. It followed that Bank account No. **103-347-777 -TIB** and account No. **206065000053-NMB** of the appellant were attached by drawn order of the district court dated 11th November, 2021.

Before issuing the said ruling, Mr. Killey Mwitasi, the learned counsel who also represented the appellant at the district court raised two points of preliminary objection. **One**, that the district court lacked jurisdiction to process execution of the award or order rendered by the primary court. **Two**, that procedures adopted to execute the award of the primary court were not followed.

The district court overruled the objection. On interpreting rule 56 of the Magistrates Court (Civil Procedure in Primary Court) Rules, the district court magistrate stated as follows: -

'I have carefully read the provision of Rule 56 on the part of provision that ...' The court shall with the consent of the district court having jurisdiction, transfer the application to the district court which shall proceed in accordance with the provisions of the Civil Procedure Code. I believe the consent of the district court can be obtained in two ways; either by filling an application and been admitted and secondly the primary court can transfer the file administratively. Since the provision of Rule 56 is clear that the district court can entertain all these kinds of matters...'

The appellant was aggrieved by the rulings of the District Court, hence this appeal. The dissatisfaction was expressed on the following areas;

1. That the District Court of Kinondoni erred in law and fact to hold that it had jurisdiction to executed the monetary judgment entered by the Kawe Primary Court.
2. That District Court of Kinondoni wrongly and illegally usurped the jurisdiction of the Kawe Primary Court.
3. That the District Court of Kinondoni erred in law and fact to hold that the matter was properly before it.
4. That the District Court of Kinondoni after having granted application to attach the appellant's bank accounts, later acted with injustice to order two banks (namely NMB Bank and Tanzania

Commercial Bank) where the appellant is having bank account, each bank to attach the amount stated in the application which render double payment to the respondent.

This court was therefore invited to allow the appeal with costs, quash the ruling and its decision of 17/08/2022 and 31/05/2022 and order further that the case file be remitted to Kawe Primary Court to proceed with execution proceedings according to law.

At the hearing, Mr. Killey Mwitasi learned counsel argued that jurisdiction issue is very fundamental and it can be raised even at appellate stage even if it was disallowed by the lower court. He cited the authority in **Tanzania China Friendship Textile Ltd Vs Our Lady of Usambara Sisters [2006] TLR 70.**

In arguing 1st and 2nd grounds of appeal, the learned counsel stated that the district magistrate misapplied Rule 56 of the Magistrate Courts (Civil Procedure in Primary Courts) Rules, GN No. 310 of 1964. It was his contention that, the said rule applies where the property sought to be attached and sold is a share in the capital of a company or shares in any partnership property. It was his view that, the rest of orders or awards of the primary court shall be executed by the primary court itself including attachment and sale of the property of the judgment debtor.

The learned counsel cited the authority in **East Africa Development Bank Vs Blueline Enterprises Ltd**, Civil Appeal No. 110 of 2009, (Unreported) CAT that money or account is the property which can be attached.

As to the 3rd ground of appeal, the learned counsel submitted that the case file was transferred to the district court contrary to the law as the matter involved non attachment of shares as specified by the law for that matter.

In the 4th ground of appeal, he submitted that, in law, a party is granted what he is entitled for otherwise the prayer becomes a nullity. It was his submission that attachment of two accounts i.e TIB account attached on 25/08/2022 and NMB on 14/04/2022 renders double payment to the respondent.

The respondent vibrantly apposed the appeal. He contended that decision of the district court was proper on account of the jurisdiction it had to entertain the matter in accordance with Rule 56 of the Magistrate Courts (Civil Procedure in Primary Courts) Rules.

It was his further reply that, procedures of execution adopted by the court was a result of advice that was given by Betha, a court clerk working at Kinondoni District Court.

In response to the attachment of two bank accounts, he reiterated that the appellant consistently told the court that he did not have the bank account and every now and then he provided bank accounts with no money at all. He added that, the bank accounts were not seized but relatively the appellant is limited to operate the account not beyond Tshs.16,300,000/= which is the subject matter of the attachment. It was his further assertion that, the appellant defaulted the payments since July, 2021 and had he settled the debt he would have been discharged the same to date.

Re-joining on the submission by the respondent, the learned counsel pointed out that advice by the court clerk is not law and so adhering to such advice was totally wrong. It was further submitted that payment on instalment as issued by the primary court was not illegal as per rule 54 (3) and (4) of the Magistrate Courts (Civil Procedure in Primary Courts) Rules. It was again his argument that if the appellant was dissatisfied with the model of payments, the primary court would have reviewed its decision and ordered otherwise.

I have gone through the submission by the parties at length and came up with the controversy to be resolved as to whether the district court has jurisdiction over execution of orders or awards of the primary court relating to attachment of the bank account of the judgement debtor. The controversy lies under Rule 56 of the Magistrates Court (Civil Procedure in Primary Courts) Rules. For easy of reference the rule reads;

Rule 56: 'When a court has made an award or order for the payment of money and such money has not been paid the award or order may be enforced by the court by attachment and sale of the property of the judgement debtor.'

Provided that where the property sought to be attached and sold is:

- a) A share in the capital of a company, co-operative society or other corporation; or***
- b) The judgement debtor's share in any partnership property or profit, not being a share liable to attachment and sale under the provision of rule 57.***

The court shall with the consent of the district court having jurisdiction, transfer the application for execution to the district court which shall proceed

in accordance with the provisions of the civil procedure code.

The reading of the provision above covers two aspects. **One**, the award or order for the payment of money where such money has not been paid the award or order may be enforced by the court by attachment and sale of the property of the judgement debtor. Under the said rules, the court is defined to mean primary court, hence such orders or awards like the one which is the subject of this appeal are executable by the primary court itself.

Two, it covers aspect of the property sought to be attached and sold is a share in the capital of a company, cooperative society or other corporation; the judgement debtor's share in any partnership property or profit, not being a share liable to attachment and sale under the provision of rule 57. In the second aspect, the rule provides for a different approach that the primary court, with the consent of the district court, shall transfer the application for execution to the district court.

On account of the contents of the said rule, I have no hesitation agreeing with the learned counsel for the appellant that the learned district magistrate misapplied the provision of rule 56. Bank account being among the properties known to law as outlined in the case of **East**

Africa Development Bank Vs Blueline Enterprises Ltd(Supra), is subject to attachment by the primary court.

I hasten to state further that, order of attachment of account is one of the matters which arose in the Kawe Primary Court and according to the rule, it is matters outside jurisdiction of the district court. Consequently, it cannot be enforced by that court as it falls within the exclusive jurisdiction of the primary court.

As to the procedures, the primary court ought not to seek consent and or transfer the application for execution to the district court on matters relating to attachment of the bank account or having a new application altogether as it was done in by the district court of Kinondoni in this matter. These are matters which do not require confirmation by the district court either, otherwise the rules would have stated so. The Kawe primary court which issued the order or award and consequently granted execution by way of attachment should have written a letter directly to the bank for implementation of its order or award.

To the contrary, the district court or the respondent for that matter adopted an approach which firstly, was not within the ambit of the law, and secondly, was very bureaucratic which ultimately, creating

unnecessary hurdles, delays and confusion to the parties in attainment of their rights.

For instance, in this appeal, the execution of the order by attachment of the account was issued by the primary court on 09/09/2021. To date, December, 2022 the respondent has not being able to recover his legal rights substantially concluded by the primary court. The appellant is not challenging the decision of Kawe Primary Court and good for him he had started settling the debt to the tune of Tshs. 1,500,000/=. One of the big cries by the appellant in this appeal was and still is non adherence to prescribed procedures by the district court in executing the order or award of the primary court without legal justification.

The respondent, mounted in his submission that he made a fresh application in the District Court of Kinondoni on account of advice given by a court clerk. As rightly contended by the learned counsel, a court clerk is not law. By relying on a bad advice given by whoever including a court clerk or even a judicial officer does not carry any weight or add value in the respondent's case. The law has to be strictly adhered to and no more.

It is important that a court clerk or judicial officers, its staff and the like should refrain from giving legal advice to the parties in relation to their cases. This will protect them from being misquoted and, most importantly avoid to put themselves or institution into disrepute. That will also help to avoid bringing confusion to the parties in whatever manner.

I therefore state that, the district magistrate holding that he had jurisdiction to execute order or award of the primary court relating to the attachment of the account under rule 56 was made in error and I so hold. Having said that, I am equally agreeing with the learned counsel for the appellant that the proceedings of the district court conducted without jurisdiction is a nullity.

It now goes without saying that the only valid and legal order or award is that of the primary court ordering attachment of the bank account No. A/C **No. 103-347-777 -TIB** to the extent that no consent or transfer of case file to the district court is required in respect of the matter.

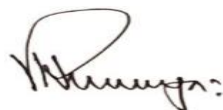
An order of Kawe Primary Court attaching bank account No A/C **No. 103-347-777 -TIB** of the appellant herein, shall be affected accordingly by the primary court informing the relevant authority of that

bank via a letter to implement the said order or award. Apart from that, no any other bank account of the appellant shall be in place, including bank account **No. 20606600053-NMB**, which was attached earlier, shall be subject of attachment unless the executing court with requisite jurisdiction orders otherwise.

I therefore, allow the appeal, quash the rulings of the District Court of Kinondoni in Misc. Civil Application No. 215 of 2021 on its decision dated 17/08/2022 and 31/05/2022 and further subsequent or incidental orders thereto the lower court case file shall be remitted to Kinondoni District Court for the same to be transmitted to Kawe Primary Court for immediate implementation of its order or awards.

No order as to costs for obvious reasons that the appellant has been unenthusiastic in complying with the court orders without legal any justification.

Order accordingly.



H. R. MWANGA

JUDGE

16/12/2022

COURT: Judgement delivered in Chambers this 16nd day of December, 2022 in the presence of the learned counsl for the appellant and the respondent in person.



H.R MWANGA

JUDGE

21/12/2022