IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 76 OF 2021

(Appeal from the decision of Resident Magistrates' Court of Moshi at Moshi dated 25th May 2021 in Misc Application No 14 of 2019)

DIRECTOR OF PUBLIC PROSECUTIONS .....APPELLANT

VERSUS

DOMICIAN GENAND RWEZAURA .....1st RESPONDENT

LILIAN GOODLUCK LYATUU .....2ND RESPONDENT

JUDGMENT

19th Sept. & 24th October 2023

A.P.KILIMI, J.:

This appeal emanates from application for objection of attachment and sale of property via misc. application No 14 of 2019 which originally came from criminal case no 230 of 2017.

The background, albeit in brief, as discerned from the record is that, 1st respondent hereinabove was convicted in criminal case and ordered among them to pay Tsh. 47,000,000/= to the complainant of that case. Upon failure to pay, the appellant filed an application for execution of the decree

by way of attachment of 1st respondent's house situated at Holili. The court issued an order for attachment of the said property and appointed broker to accomplish the mission. In the middle of auction, the 2nd respondent showed up to object the attachment of that property for being a wife of the 1st respondent because she had joint effort over the property. The application for that objection was filed before court and the same pass through objection proceeding, and at the end the court determined in favour of the objector (2nd respondent). Aggrieved with that decision the appellant filed this appeal on the following grounds:

i) That the trial court erred both in fact and law by ruling that the 2nd respondent has interest over the attached property; and
ii) That the trial Magistrate erred in law and facts by ruling that the attached property was acquired by joint efforts.

At the hearing of this appeal, the appellant was represented by Ms. Edith Msenga whereas the second respondent enjoyed the service of Mr. Martin Kilasara learned advocate, the first respondent appeared in person unrepresented. It was conclusively agreed this appeal be argued by way of written submissions.

Before I proceed with brief submissions in this court, in the outset to avoid confusion of respondents, I wish to say initially in this matter appellants were two DPP as first appellant and one Grace Thadeus Meela the second respondent. On 24th July 2023 Ms. Msenga learned State Attorney who appeared representing the DPP prayed to amend the petition of appeal to remove the second appellant, the said prayer was not objected and granted. When she filed the said amended petition of appeal as ordered to be filed on 23/07/2023. The same display the first respondent is Dominician Genand Rwezaura and the second respondent Lilian Goodluck Lyatuu. Therefore, be it as it may remain the respondents with the above status.

Supporting her grounds of appeal, Ms. Msenga submitted on the first ground that, the 1st respondent has no interest in the attached property. That the property plot. No. 287 and 289 block A at Holili formerly was owned by one Epafra Eza Teete who on 2005 by virtue of love and affection transferred to one Winfrida Kamuliza Domisian who was later on 2012 transferred the same land to the 1st respondent by virtue of love and affection. By virtue of that transfer on 2012 the 1st respondent became a sole owner of the attached property, hence the trial Magistrate erred to declare the 2nd respondent has interest of the said property. The counsel

for the appellant added that under Section 60(a) of Law of Marriage Act [Cap 29 R.E 2019] provides for rebuttable presumption that one spouse can own property to the exclusion of other during subsistence of marriage. It was the duty of the second respondent to rebut that presumption by bringing evidence that attached property was jointly acquired. Therefore, it was wrong for the trial magistrate to decide the second respondent has interest over the land.

On the second ground of appeal, the mentioned learned State Attorney submitted that the property acquired in the name of one spouse is presumed to belong to that spouse unless the presumption is rebutted. It is undoubted that property acquired during subsistence of marriage by joint effort is termed as matrimonial asset and it belongs to both parties but the 2nd respondent in this case failed to show that she had joint effort over the property. To buttress this, he cited the case of **Habiba Ahamadi Nangulukuta & 2 Others vs Hassani Ausi Mchopa (The administrator of Estates of the late Hassan Nalilo) Civil Appeal No. 10 of 2020 CAT Mtwara**. For the 2nd respondent to establish that she has marriage with the 1st respondent does not automatically prove joint efforts in acquisition of the property. She cited the case of **Yesse Mrisho vs Sania**

Abdul Criminal Appeal No 147 of 2016. Either she submitted that, for the property to be non-attachable to the execution of decree it has to be the residential home where judgment debtor and his family reside. The property at hand is commercial property and not residential house therefore it can be attached. The counsel concludes by saying that the 1st respondent is the sole owner of the property and the 2nd respondent has no joint effort to that property.

Responding to the above, Mr. Kilasara the counsel for the second respondent submitted that, the second respondent married first respondent on 2003 and on 2004 through sale they jointly acquired a suit property described as Plot No 287 and 289 Block A Holili withini Rombo District. At the time they bought the property was undeveloped and through their joint efforts the Respondents built one storey building therein. He cited the case of **Adriano Gedarm Kipalile vs Ester Ignas Luambano, Civil Appeal No 95 of 2011 CAT Zanzibar.** The counsel further submitted that as long as the 2nd Respondent is legal wife of the 1st respondent and the property was acquired during the subsistence of their marriage and she substantially contributed to the acquisition and development of the suit property then she has equal interest over the property.

The counsel for the second respondent further submitted that the said Winfrida Kamuliza Domisian who transferred ownership to the second respondent is the eldest daughter of 1st and 2nd respondent and at the time of transfer was a minor. If the former dully transferred the property, then that disposition was null and void ab initio.

On the second ground of appeal Mr. Kilasara submitted that the property was jointly acquired since 2004 and in between 2007 and 2011 the respondents through jointly effort developed the said property for commercial use for family gain. Either the property being commercial property does not relinquish the 2nd respondent's rights and interest over the property. Since the affidavit are evidence can be relied upon to establish a particular fact. See **Bruno Wenceslaus Nyalifa vs Permanent Secretary, Ministry of Home Affairs and Another, Civil Appeal No 82 of 2017.**

In respect to first respondent, he argued that the respondents are still husband and wife that through their unions acquired the suit property jointly. Therefore, so long as the first respondent never dispute the joint ownership,

then the second respondent has an interest over the property. The act of first respondent not disputing on the joint ownership of the property with the 2nd respondent does not free him from the liabilities. It is now the duty of the appellant to find another property owned by the first respondent.

Having going through the submissions of both parties, the records and the decision of the trial court, in my view the two grounds of appeal relate because if at all the appellant is alleging that the property was acquired jointly automatically means each of the two have interest over the said alleged property thus will be deliberated as one. Therefore, for conveniently disposal of the same, two issues appears material to me as guidance;- First, whether the suit property jointly acquired by the respondents to make them have interest equally, and secondly, whether the property can be subject to attachment.

Before I proceed with these issues, since this is an appeal from objection proceeding, I wish to highlight the law in regard to objection proceeding in criminal cases, after distress warrant issued. According to section 329 (1) (5) and (6) of the Criminal Procedure Act Cap. 20 R.E. 2019 provides the manner objection proceeding is determined as follows;-

"329.-(1) Any person claiming to be entitled to have a legal or equitable interest in whole or part of any property attached in execution of a warrant issued under section 327 may, at any time prior to the receipt by the court of the proceeds of sale of such property, ***give notice in writing to the court of his objection to the attachment of the property*** *and the notice shall set out shortly the nature of the claim which the person (in this section called "the objector") makes to the whole or part of the property attached and certify the value of the property claimed by him,* ***such value being supported by an affidavit which shall be filed with the notice.***

(5) Upon the date fixed for the hearing of the objection, ***the court shall investigate the claim and, for that purpose, may hear any evidence which the objector may give or adduce and any evidence given or adduced by any person served with a notice*** *in accordance with subsection (4).*

(6) Where upon investigation of the claim, the court is satisfied that the property, attached was not, when attached, in the possession of the person ordered to pay the money or of some person in trust for him, or in the occupancy of a tenant, or other person paying rent to him, or

that, being in the possession of the person ordered to pay the money at such time it was so in his possession not on his own account or as his own property but on account of or in trust for some other person or party on his own account and partly on account of some other person, the court shall make an order releasing the
property, wholly or to such extent as it thinks fit, from attachment."

[Emphasis supplied]

From the excerpt of the law above, thus to answer the first issue the court must hear or consider evidence from the objector to prove that the alleged property was jointly acquired. I have scanned the record on objection proceeding at the trial court, it is apparent the one filed objection is the second respondent, indeed she filed notice of objection and duly sworn affidavit as per requirement of the law above. Thus, the next point to be considered is whether she did adduce evidence to prove what she alleged in her notice of objection.

According to the trial record, the said objection was heard by way of oral submissions, this means the counsel for objector submitted in support

of the above documents presented in court which prayed to be adopted and also the state Attorney submitted and prayed her counter affidavit be adopted. In respect to the first respondent who appeared in person he said vividly and admitted that although the said property was registered as a separate property but is for family use, but the record shows he did not file any affidavit to that effect.

Starting with the submission of the objector's counsel, it was stated in the amended notice of objection, that she has legal and equitable vested interests over the suit property since 2004, and after the purchase she and the first respondent subsequently developed the same, all process of purchasing also were stated, current marital status and all stuffs said therein. I have considered the above law quoted, in my interpretation of what stated on notice of objections are not evidence than a mere notice to the decree holder and the court.

I think if the law could have intended the same to be taken as evidence, either could have stated specifically or could have not in the next subsection stated specifically the modality of proving objection by evidence. Nonetheless, the same was reiterated by the counsel for objector during oral submission, thus since submissions are not evidence. I am settled that all

stated in the above notice and submission by the learned counsel orally and that of the first respondent are not evidence. Therefore, I am settled that cannot be taken that the above law of adducing evidence in objections proceeding were complied with.

In respect to the second document filed by the objector, is the affidavit of the objector, who is the second respondent in this appeal, the relevant paragraphs are one and two which provides that;

> *"2. That I am also the Objector to the attachment and the intended sale of the property situated on Plot Nos. 287 and 289, Block 'A', Holili within Rombo District and lawful wife of the Judgement Debtor.*
> *3. That the said two plots were jointly acquired in 2004 and substantially developed by the Objector and the Judgement debtor between 2007 and 2011 by constructing one storey building thereon. The said property forms part and parcel of our matrimonial asset."*

I am aware that affidavit is evidence, but I have considered the nature of the matter at the trial court, in respect to above averments, despite of the fact that the said affidavit did not crave to annex important documents to prove the same in such respect, still according to section 329 (5) of Criminal

Procedure Act, I cannot hold that the trial court can investigate and reach a justice decision from the affidavit which is not exhaustive for not annexing important documentation and original be tendered in the objection proceeding. Actually, in objection proceeding nothing were tendered to that effect to prove the same, since it was a mere submissions parties to the case.

It is a settled law under section 110 of Evidence Act Cap. 6 R.E. 2022 that, whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. And also, when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. Therefore, it was the duty of the 2nd respondent to prove joint ownership.

Therefore, it is my settled opinion that, the fact that the property was acquired during the time of marriage alone cannot prove the joint ownership nor matrimonial asset just in the status of existing of marriage. It is mandatory for one who allege that property acquired in subsistence of marriage in the name of one spouse alone to prove joint effort either in the time of acquisition or in developing it. From this observation I borrow leaf from the wordings of my brother Matuma, J. in the case of **Happyness**

John vs Bavesh Hindocha & 2 Others [2022] TZHC 15016 (TANZLII) when he held that;

> *"Therefore, the marriage is not there to mean; private ownership of properties by either spouse dies with the marriage and an automatic change of ownership thereof from either spouse to both spouses. Each spouse shall continue to enjoy legal rights in relation to his previous owned properties and even to acquire new one during the existence of the marriage. Such rights extend to disposition of property without necessarily requiring consent of the other spouse. There has been long standing misconception by the public at large and even some judicial staffs that once the marriage is established both spouses are owners of each and every property acquired by one of them. It is high time we stop such misconception. Matrimonial assets are not, and in fact unless the contributions by both spouses towards their acquisition and or their further developments are sufficiently proved."*

Therefore, it was the duty of the 2nd respondent to rebut that presumption by bringing an evidence showing the property was jointly owned by them. Since there is no evidence from second respondent showing the same hence

the issue of joint ownership remains unproved. Moreover, in view of the decision of the trial court did not even evaluate the said scanty evidence after summarising of the same, at page six of the said decision, the learned Principal Resident Magistrate immediately after summarise the evidence said;

> *"To be honest I think Madam state attorney has forgotten the principal of joint efforts properties. Even if the same sold to another person if it is proved that it was acquired by joint efforts the same can never be separate property and the usually the buyer have to either sue the vender or find for another suitable property. Same applies to the decree holder. If it appears that the property cannot be attached, he or she is obliged to search for another property because in law the spouse's right never been easily lost. With regard to the third issue since the second issue has proved that the property in dispute was acquired by joint efforts it leaves no doubt that the objector has both legal and equitable right in that property and to attach it and sale it may lead to miscarriage of justice."*

From the above I have failed to grasp how the court reached the decision that the objector proved that the property in dispute was acquired with joint

effort without analysing the evidence tendered to that effect. I wish to fortify my view basing on the the decision of the court in **Leonard Mwanashoka vs Republic** Criminal Appeal No. 226 Of 2014 (Unreported), which cited its earlier case of **Yasini s/o Mwakapala vs Republic** Criminal Appeal No. 13 of 2012 where the Court warned considering the defence was not about summarising and had this to say;

> *"It is one thing to summarise the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. It is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis."*

Coming to the second issue whether the suit property is subject to attachment. The base of attachment of that property was through application for execution made under criminal procedure act. And since it was objected, therefore the alleged property to be sold must be proved that is free from any encumbrances as stated above. Although many were said in objection proceeding but unfortunately, I may say legally were not proved.

In the circumstances and considering what I have discussed above, I am of considered opinion that the trial court in objection proceeding misapprehended in respect to prove of evidence as envisaged by the law above, thus renders the decision of the said objection proceeding untenable.

In the premises, I invoke the powers of this court under section 366 (1) (c) of the Criminal Procedure Act (supra), nullify the trial court's objection proceeding and I proceed to set aside its ruling dated 25th May 2021 forthwith. It is so ordered.

Dated and delivered at **Moshi** this 24th day of October 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

JUDGE
Signed by: A. P. KILIMI

Court: - Judgment delivered today on 24th October, 2023 in the presence of Wanda Msafiri assisted by Edith Msenga both learned State Attorney and Mr. Edwin Tanga, Advocate holding brief of Martin Kilasara, Advocate first and second respondent absent.

Sgd: A. P. KILIMI
JUDGE
24/10/2023

Court: - Right Appeal Explained.

Sgd: A. P. KILIMI
JUDGE
24/10/2023