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DECIDED
12 September 2014

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IN THE HIGH COURT OF TANZANIA. [LAND DIVISION] AT MTWARA __ ,

- MISC.CIVIL APPEAL No. 4 of 2011] ASMA MOHAMED ~ APPELLA VERSUS DAMIANI NANNIMUKA & TWO OTHERS Date of last Order - 26/8/2014 Date of Judgment- 12/9/2014 KIBELLA, J. The dispute between the plaintiff and the defendant has originated from Employment of the plaintiff with the defendant. The plaintiff claims that the defendant has breached the terms of the employment contract by terminating the plaintiff's services without just cause. The defendant denies the plaintiff's claims and states that the plaintiff was terminated for gross misconduct. The plaintiff seeks an order of reinstatement and compensation. The defendant seeks an order of summary judgment and costs. The court finds in favour of the plaintiff and orders that the plaintiff be reinstated to his former position and awarded compensation. The defendant is ordered to pay the plaintiff's costs. The court also orders that the plaintiff be awarded an order of specific performance to complete the construction of the house on Plot No. 14 Block "GG" M-ajengo street Mtwara Municipality, which is the house in dispute. It appeared that the house having been attached, was sold to the appellant herein ASMA MOHAMED. 1

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... --, ---, .. , ;, -~..... ,.. :.... ~~-n-.,;~..~~k--"~:e;d;~::i~~~~~!L~_..-;2:~::~!!~{j-
~;;!;~.;~;;,~;~;;.{-'rj~m~"M~~~~~lir~~~~tl?';!;...pi.;Z~,ti•~~~~-~;; •t•~~~l,'Jtfl~,i,,lill'l':~J~::~ / T-he
Respondent' Damiani Nannfmuka wh.o was _living the_re}n refused to . vacate the suit
hou~ claiming thatJhe same -was legally in the _property. · - On 4/4/2011 an ··evicti~n order
·was::issued _by the Resident Magistrate inGharge ~/"tltwaf~;~ ,req~irlng the
j0dgment .Debtor MAM CU or any other ' . ···· . person living . therein.: to ·.v~_ate ~he suit
house. Objecting to the sai~ ", " .., t(,,•; - . ::::~::i:t
~::~rvi~::~ro!:i:t::::stf(:~~~~~::an~::n;t~k~~~ Procedure Code [Cap.33 R.E 2002) praying for
his prope~leased from attachment and an ·order for p_ermanent injf~(dtsi' against the st
appellant. He filed that application on 31 May, 2 ~. . . . 1£:J _ 0~ her. part the . app~llant
who was ~ Defendant in the said apphcation through the service of Mr. M~~ learned
advocate, raised a i · preliminary objection stating amon@t~il9er grounds, that

the applicant's [Respondent herein] application was overtaken by event. The said application was filed as the issue of ownership of the disputed house was not yet determined by a court of competent jurisdiction. He went further and

- f) vacated tREL \Jcti;~ "o~der · wheri it allowed the 1st Respondent Dami~ni · ' Nann&o continue residing in the suit house on the ground that neither ~party had a nght to evict the other the issue of ownership will be d~rmined by the Court of competent jurisdiction. . · The appellant ~SMA MOHAMED who was the first defendant in the said objection proceedings_wa.\$ _aggrieved by the District Court findings, 2 ,, ... !('t'" ∴ ...!-∴ : ∴ r, !• ',;.i -∴ . ~ ~ ~ ∴{.. 1,. ∴ .. -- -- ---- and through the service of.'Mr. Mtembwa.~~_arned Advo_~ate has filed this , • . • • I , _ appeal relying on the following.grounds:-.. •
1. That the Honourable trial Magistr~e erred in law and in fact by ,. . -. . , . _∴_ ∴... determining the niatt~-on m~rit,s, before qe!~r-Wining the r_ai~ed . . "t,, .. ~:, ~ ∴;• ,... . • -: L preliminary objection... .
 2. The honourabl'e trial magistra~~ erred in law and in f a i t ~ _ failure to realize that the issue of ownership of the d1~lted house could not be determined by the honorable ~ t such preliminary stage._ _ _ _ \$. ·
 3. 'fhe honourable tnal magistrate erred in la~~llure to realize that the trial court having issued th~ e ~ order became functus officio and thus could y9J~ have ·jurisdiction· to invalidate or issue contradici.o#eP . ·
 4. The honourable trial magistr~,~"- e:red in law and in fact by \-,;,;,;∴ ..,,,∴ ∴ "" failure to - _realize that ~n~r~kr allowing the 1st ~espondent to ∴ ,, ∴∴V:"""stf&'in the disputet¢,~e was.with no leg~.L!?,?.sis;" ∴ .,1 . . ,,,∴ ;_-_,.,,". ~: ~,~ . _ . ~ .- . . .
- . At the comm~ment of the hearing of this appeal the appellant vla's representeRy~r. Mtembwa learned advocate. The 1st respondent on his part v~erson and unrepresented. ." ∴ ~ ~ g i n su_pport· of the appeal, Mr. Mtembwa submitted on th_e'first gr&-~ci that _the District Court ought to have fl rst determined -the raised p~mary objection before going into the ment of the applic-at-ion as required by Order XIV rule 2 of the civil Procedure code. He supported his contention by citing the case of MSANGANG'ANDWA vs. CHIEF JAPHET WANZAGJ AND OTHERS [2006] TLR 351. 3
- '!,...~,,. •. '!'• ,...,,,,___ ;!'-∴::~•~:-∴;;>,- ∴.M~::~~~~~; ∴';!"~Jil!~...~ ~ ~ - =∴.-∴~;~:-!' ∴ . _fl'_ . ,,_ On the second ground Mr. Mtembwa was of the view that the trial Magistrate was not required to determine the issue ·of ownership, as the same had already been delt by the trfal court When it issued an order of _--~attachment and ,sale.iof the attachme:ht.!prop.e.rty. -.He added that tve . respondnt ~as supposed at the very time

wthen the property. was being. attached to file an objection for attach_ment under Order XXI rule W~d · (2) of the C1vI Procedure Code, and If the court could ha,ve be~~fie~ that the same was ni>t a prop/rly of MAMCU, it could ~~~ased the property. But since the issue of attachment and sale wtJs already effected it could have been imp~~sible for the sarrie court to~~~~therwise. . . ~y- . l) On the third ground Mr. Mtem~bwa ~nnitted that, the Resident .. , Magistrate ha~ing issued an eviction OF, e~l was functus officio. The . same court could not have invalidat1~t;iat unless where it is proved that . . there was fraud or misinformati~ \Citing the case of SCHOLASTICA . , . . -;;,,,-;;,,r;,,,;-_*BENEDIC ! TV , 5: 4 MA !~,~· · , , 0 -r1N ,a,c:::#D/CT [1993] TLR ~;, ...·u~r····!:"w<:,i;,,,,,.,.,..... ·W-.~ ... , ,;,,,;,,~· ·; · ~~~1!... anu the tase of B/B1 ~·i/J+,,~I-;-,_-;.· KISOKO MERD~RD ~~J1sTER FOR LAND [1983] TLR 250. H.e .. :·:, viewed that m this ,C~~~th~ Resident Magistrate havmg vacated that order, It ,ec . erre d as h e Was:w::~ US Oll . --o . . u: . ICIO. r~ , , . ,t\ ~~~ on\he last ground, Mr. Mtembwa argued that the order of l . :\.

the .tag.istrate allowing_ the ls res~onded_ to reside in the "disputed_ ~ ~ a s with no legal basis, and the tnal. magistrate was not im~artial on this matter as lt considered the matter basing on the social and economic status of the litigant contrary to what is provided under article 107(2) (a) of J) the Constitution of United Republic of Tanzania. He concluded by praying for his appeal to be ~llowe~--~- :- ~ _.'~~~~=}~".~---;, ~. __ .. -, -l- .' (4 -- ;:i;,, ~ ~ ~ On hi\$>part, _ ,'. · :~·-.. :~·-., treJ ;espondent b~ing. ~ Layman not knowl~dgeable in st ~,~:-,~·-~·-~·; < .i)i' _ ." .." ~ , · ~ ' . . . law, had. :nothing _mater_ial: to res·pond to the appellant's submission. . He ;:~;},t_-:_;'!':.;,' :_,~-. :~>('·t.,~·-\·-~_... · . , .7 •• simply .).~YJ}~c:i :?8i:s :(f~urf to cori-sider · his - document a reply to the .. J. ~-~,·. 1· · , f~" < · ' · · , · me.moranduni "qf appeal filed in this appe.?I ,<3.hd dismiss_t~e=appeal. . ,~::~ _ , :~;/i,,,,,: , ~,~_~i:-~'_:~:t::~,..~:::\C: \.~"1!.t:/_) , ~ *, ('ti_ ,,. . . . 1.? L ~ .. t' . . . : Havin~!g~e:f~fiy and with the eyes of caution gone_t!7ough ~£~r court's r~~6~~~{~:and the respective documents filed by th~ par1Je~his court togeth~r. with the submission from Mr. Mtembwa lear~!

d:Ocate, the question to be determined is whether the appell~s merits._ On the first and second ground\$ I partly agree with Mr Mter,nbwa that the trial Magistrate erred and grossly misdirected hims~not entertaining the preliminary objection which· was raised by ~ppellant a_nd whfo_h. Was c_rdered by the same court to _be a r g u ~ y of written submission .. In view of Order XIV rule 2 of the C1vlit~..cedure Code, the tnal magistrate . : : had a duty to determine · mat!e~): law first before laboring o.n other __ ,,s,Hrs~a~:~::~~::~!!

~;!!;~::~9:~Q::~~;~t:t:t:::~a::~~lst:t:::~ ~t½:i~ application to ha~~t~prematur~ly fl~d on account that the ~arties were disputing on the_ ls~ of ownership which was not ye!.

deter~rnnd by the · court of compQnt jurisdiGtion. If- the!. fri~i';,;~g1~trate would have · _,,~entertai~~a~plication on _merit.we would have expected for the said 'tf~ applicrafj;e.fl, to· be granted by_ releasing the attached property and setting a-s~i?e sale, or reje~ted by dismissing the appiication without /J'uowing t~espondent to continue residin_g in the suit house. . - . _ The trial magistrate took· its own path in determining the· said application. However, _ I am of the further view that such path had no legal _backing. · He wrongly rejected to entertain· the a~plicc1tion on the gr~und _that the isi_u~ o(o~wner?hip was not

y et resol~d. ,.-~.:<_.,,.._- ~ _::~~~=r~.;.~::~_,,-_ :.-:#-:::.. .. ~*.-> =-;... :~_-;_;*-. .-- bi
the cb·urt f.compete~t. _ - _ :: --- .- ... ~ 5 t.;>- 1" ...,;. ~.:.,;!·

1. I have noted that the said application was simply brought under Order XXI rule 57 (1) and (2) and 59 of the Civil Procedure Code objecting to the attachment made in execution of the decision in *Emphyloymnicus v. No. 11 of 1997*. It is therefore to be released. The property from attachment upon being satisfied that the property was wrongly attached. It could have gone to that extent after entertaining a Preliminary Objection raised by the appellant. He neither entered the preliminary objection nor entertained the application on it. Both the Respondent's application and the appellant's preliminary objection were never touched by the trial magistrate, that was completely wrong in the administration of justice. This takes me to the third ground which will also be discussed generally. On these grounds, I am in full agreement with "Mr. Mtembwa" that the trial Magistrate erred in vacating the eviction order. The issue before the court is whether the order of the trial magistrate was correct. The respondent is claiming that the order of the same court attaching the property and order for sale are still intact. It should be noted that the invalid eviction order without first releasing the property from attachment is meaningless. This means that the eviction order will be vacated still the 1st respondent **Damian Mtembwa would not be entitled to the property because there is no order which declared him the legal owner of the property as well as no order which did set aside the attachment and sale of the property.** I therefore subscribe to Mr. Mtembwa's argument that the order of the trial magistrate to allow the respondent to continue residing in the suit house has no legal basis. Having discussed as above, I have thought of the possibility of ordering a re-trial as prayed by Mr. Mtembwa, but I am of the opinion that doing so will cause unnecessary hardship to both parties for the following reasons. First the attachment of the property and ultimately sale of the same has been effected way back in 2011, even before the said application objecting to that attachment was filed on 31/5/2011. It is clear that the house has already been sold to the third party who is the appellant. Under Order XXI rule 57(1) and (2) of the Civil Procedure Code, the trial court has power to investigate the objection to attachment, but where there is such a delay as in this case the trial court cannot be in good position to investigate on the matter. The provision of Order XXI rule 57(1) is to that effect, and it provides: "Provided that no such investigation shall be made where the court considers that the claim or objection was designed by the defendant to unnecessarily delay the trial." Since the order of attachment and sale are still intact, it is the 1st respondent who is the aggrieved party in the whole circumstances of the case, and the only good reason that the 1st respondent may wish to take is provided under Order 62 which reads: "Where a claim or an objection is preferred by a party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute."

[illegible]

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