

TANZANIA / JUDGMENT

GREGORY final

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF
MWANZA AT MWANZA LAND APPEAL NO. 20937 OF 2024 (Arising from District Land and
Housing Tribunal for Mwanza in Misc. Application No. 135 of 2024) GREGORY P. MADATA
..... APPELLANT VERSUS ASHIFA
KANJI RESPONDENT

JUDGMENT

18th November & 13th December, 2024. CHUMA, J. The appellant herein is aggrieved by the decision of the District Land and Housing Tribunal for Mwanza (hereinafter the tribunal) in Misc. Application No. 135 of 2014. The background of this matter is easy to tell. The parties herein had a tenancy agreement on certain business premises within the Mwanza region. It was alleged by the respondent that the appellant neglected to pay rent and therefore the respondent decided to close the appellant's business. The respondent herein through Application no 241 of 2019 before the tribunal, sued the applicant herein for breach of tenancy agreement and arrears of rent. The appellant on his part raised a counterclaim claiming for specific damages arising from loss of business at the time the respondent closed his business. The trial tribunal awarded to the respondent TZS. 36,360,000/- as arrears of rent and the appellant was awarded TZS. 130,000/- per day of the time his 1 business was wrongfully closed by the respondent herein. The matter escalated to this court through Land Appeal No. 62 of 2021 where the appellant herein appealed and the respondent cross-appealed. This court increased the damages awarded to the respondent to TZS. 39,160,000/- and maintained damages of TZS. 130,000/- per day for 61 days in favor of the appellant herein. The respondent, therefore, preferred an application for execution before the trial tribunal praying attachment of a House on Plot No. 477 Block 'N' located at Buhongwa ward within Nyamagana District of Mwanza (the suit house). The appellant herein objected to the said execution for the reason that the house is a matrimonial home used by the appellant together with her wife Angelina Tito and their children. Having heard the objection, the trial Tribunal dismissed the objection and ordered the suit house be attached and sold. The decisions of the tribunal amused the appellant. He preferred this appeal pegged on three grounds;

1. The trial tribunal erred both in law and fact by entering findings that the suit house be attached and sale emotionally, without considering that the said property is a matrimonial home or marital property.

2. The trial tribunal erred in law by wrongly or misinterpreting section 59 (1) of the Law of Marriage Act by holding that the 2 interests of the spouse in matrimonial home/marital property are protected by caveat.
3. The trial tribunal erred both in law and facts by failing to weigh out evidence adduced by the appellant during the trial. During hearing parties were represented by Messrs. Joseph Madukwa and Iche Mwakila respectively. It was the submission of Mr. Madukwa in respect of the first and second grounds that, the house on Plot No. 477 Block 'N' Buhongwa Mwanza is a matrimonial home for residential purposes therefore not subject to attachment in execution under section 48 (1) (e) of the Civil Procedure Code, Cap 33 R.E 2019 (the CPC). The same position was emphasized in the case of Godfrey Kimbe Vs. Peter Ngonyani, Civil Appeal No. 41 of 2014 on pages 12 and 13. That, there were no counter-affidavits to contest the fact that the house in issue is a matrimonial home. That, the trial tribunal misdirected itself by arguing that the appellants' wife failed to prove the issue of ownership and interest by not filling the caveat. On the third ground of appeal, he submitted that the appellant managed to establish the fact that the house subject to attachment is a matrimonial home and hence not liable for attachment by attaching even a marriage certificate but the respondent never counted or challenged it in anyhow. The trial tribunal failed to weigh out the evidence adduced by 3 the appellant during the trial contrary to the dictate of the decision in the case of Hemed Said Vs. Mohamedi Mbilu [1994] TLR 113. In reply, Mr. Mwakila submitted that the trial tribunal was right in its decision on the ground that, the suit House bears the name of Gregory Pascal Madata. That, in an application for execution, an affidavit to show cause is for a Judgement Debtor to explain why the execution should not proceed and in accordance with the case of Rosemary M. Hamilton Vs. Dr. George Oreku & Another Civil Application No. 15/01 of 2023, two things have been discussed, one that a debt has been paid or he is ready to pay. That, there was no proof submitted in court by the appellants' wife that the house in issue is a matrimonial home the trial tribunal left with no evidence to that aspect. That, the court of appeal in the case of Hadija Issa Arerary Vs. Tanzania Postal Bank, Civil Appeal No. 135 of 2017 on page 12 insisted that, if the property subject to attachment is solely in the husband's name the spouse has to file a caveat objecting alienation of that property by showing her interest. In the absence of any proof section 48(1)(e) of the CPC cannot apply. That, the case of Godfrey Kimbe (supra) is not applicable. On the third ground, Mr. Mwakila submitted that the judgment debtor ought to show cause why the execution should not be carried out. 4 That, there was no need for the respondent to file a counter affidavit rather it was for them to show cause only. In his rejoinder, Mr. Madukwa was of the view that the cited two cases by Mr. Mwakila are distinguishable. In the case of Hadija Issa Arerary Vs. Tanzania Postal Bank (supra), the main issue was mortgage and lack of spouse consent while in the case of Rosemary M. Hamilton Vs. Dr. George Oreku & Another (supra), the main concern was on execution process by way of arrest and detention as civil Prisoner. That, affidavit to show cause is among any form of affidavits that ought to be controverted by a counter affidavit. Having considered the submissions of parties for and against, the issue before me for determination

is whether this appeal has merit. Since the grounds of appeal interrelate, I will therefore determine them conjunctively by answering one question as to whether the trial tribunal correctly attached the suit house. I align with the appellant's submission on one hand that, according to section 48(1) (e) of the CPC, matrimonial homes are not subject to attachment, see the cases of Paulina Mathias Sizya Vs. William Thomas Ilama & Another, PC Civil Appeal No. 3829 of 2024 and Shalon Janson Vs. Gaudin & 2 Others, PC Civil Appeal No. 7 of 2022 (both Unreported). 5 In this matter, it was correctly submitted by Mr. Madukwa that, the appellant herein objected attachment of the suit house for one reason of being a matrimonial home. The respondent herein filed no counter affidavit therefore in law the respondent without a counter affidavit had no basis to deny what was stated in the affidavit. In the case of East African Cables (T) Ltd Vs. Spencon Services Limited, Misc. Application No. 61/2016 (HC-unreported) my brother Mruma J. said inter alia that: - "...When a person swears or makes a sworn declaration of a fact, the best way to challenge him/her is to swear a fact which tends to show that what he sworn to was false." Nevertheless, even in the absence of the counter affidavit, the court is still under the duty to scrutinize what was stated in the affidavit as it was stated in the case of Salma Abdalla Ali Vs. Umrat Ali Mohamed (Suing as Administratrix of the Estate of the late Omary Juma), Misc. Commercial Application No. 10 of 2020 (unreported) where this court held inter alia that; "I am quite in agreement with Mr. Manono that affidavit on its own is sufficient evidence. However, like all evidence, is governed by the law of evidence, and is subject to evaluation." 6 As I have said herein the affidavit to show cause was sworn by the appellant himself stating that he built the said house with Angelina Tito by their joint efforts and they intend for the said house to be used as a family residential house. In my view, the said affidavit falls short of proving the interests of Angelina Tito without her affidavit stating her interests. In the case of Salma Abdalla Ali Vs. Umrat Ali Mohamed (Suing as Administratrix of the Estate of the late Omary Juma), (supra), this court pages 10 and 11 stated that: - "Whereas the marriage between the applicant and the 3rd respondent as reflected in annexure "A", is essentially not being challenged, but without the 3rd respondent's affidavit supporting the assertion, the applicant's claim remains unsubstantiated. As correctly submitted by Mr. Masumbuko, who knows if the two were still married and not divorced. And if they are divorced then this Court would not be the proper one for her to claim her rights. If not, still it is important for the 3rd respondent to say something, which he has not..." (Emphasis added) In this matter, it is not in dispute that the applicant and Angelina Tito were married on 20.4.1996 as proved by the Marriage Certificate attached to the affidavit. However, the objection as to attachment was raised by the appellant himself, Angelina Tito was neither a part nor her 7 affidavit supported the application. Further, although paragraph 4 of the affidavit mentioned the spouses to have been living with their children in the suit house, the children's names were not mentioned, and/or their birth certificates were not attached to the affidavit. The objection would have been tangible had it filed by the appellants' wife not the appellant himself. Moreover, it is not also in dispute that, the appellant is a judgment debtor in a decree on which no appeal has been preferred by the appellant. In my view, apart from objecting attachment of the suit House, he was supposed to tell the trial tribunal and this

court that he is willing to satisfy the decree of this court. Objecting to execution without an alternative and commitment on how the decree will be satisfied appears as a delaying tactic of the judgment debtor. I agree with the remarks of my Brother Morris J. in the case of Rahel Chossa Vs. Gabaseki Kuboja Mgewa & Another, PC Civil Appeal No. 68 of 2021 that: - “It is not yet over, in civil litigation, until execution processes land to effectuality. Holding a court's decree or order is sometimes heartwarming to a winning litigant but to translate it into tangible results, oftentimes, one travels on an overly protracted route.” 8 In the end result, though Angelina Tito didn't need to register a caveat against the suit house to protect her interest, the objection by the appellant herein failed to prove that the said house was a matrimonial home used by the appellant, his wife, children or other dependents. This appeal thus lacks merit, I proceed to dismiss it with costs. It is so ordered. The right of appeal is fully explained to the parties. DATED at MWANZA this 13th day of December, 2024. W. M. CHUMA JUDGE 9 The judgement delivered in court before Mr. Madulu Madulu learned counsel for the appellant and Mr. Yuda John advocate for the respondent this 13th day of December, 2024. J. MUSAROCHE DEPUTY REGISTRAR 10

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