

TANZANIA / JUDGMENT

20051115 TZHC Dr es Salaam

COURT
TZHCDECIDED
15 November 2005

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IN THE HIGH COURT OF TANZANIA ~ AT DAR ES SALAAM • CIVIL APPEAL NO. 159 OF 2002
HAMISI SAID HEMED APPELLANT VERSUS

1. SAID MOHAMED)
2. YAHAYA HAJI YAHAYA) RESPONDENTS

JUDGMENT

Oriyo, 1. The appellant, Hamis Said Hemed, filed objection proceedings at the trial court against the sale of his residential house at Mbagala Kiburugwa to the second respondent. The sale of the house was intended to get money to refund the first respondent for money paid by the first respondent to the appellant as purchase price of a house which later turned out not to belong to the appellant. After the sale, the first respondent was duly refunded but todate the second respondent who bought the house has not been able to take over vacant possession of the house because the appellant has, despite court orders, refused to yield up vacant possession. The memorandum of appeal has 4 grounds of appeal. Of significance here is ground one where the appellant faults the trial court for not making proper investigation to satisfy itself that the appellant, HAMISI SAID HEMED, and HAMIS MOHAMED SALUM are names of the same person that is, the appellant. Apparently the respondents had separately filed suits against the appellant using the name of HAMIS Mohamed Salum and the house at Mbagala was auctioned as belonging to the said Hamis Mohamed Salum. At the trial court, one of his objection grounds was that the suits by the respondents were against Hamis Mohamed Salum and therefore he was not a party to the suits but the house attached and sold by public auction at Mbagala belonged to him. In his testimony, he testified that his name is Hamis Said Hemed and PW2 confirmed that. It is not clear from the record how the respondents came up with the name of Hamis Mohamed Salum. One and the most likely possibility is that the appellant had used the name of Hamis Mohamed Salum in his abortive attempt to sell a house to the first respondent. Under normal circumstances, I would be inclined to call for some additional evidence before deciding in one way or the other; if not for the unveiled circumstances. According to the record, it appears that the house that was ordered to be sold by public auction and purchased by the second respondent is a residential house. The law prohibits attachment and sale of a residential house. SECTION 48 (1) of the Civil Procedure code 1966 provides:- "The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings 2 Provided that the following

shall not be liable to such attachment or sale, namely:-

- (a) - (d) Inapplicable
- (e) any residential house or building, or part of a house or building occupied by the Judgment debtor, his wife and dependant children for residential purpose;" In view of the clear provisions of the law, the trial court erred in ordering the attachment and the sale of the appellants house at Mbagala Kiburugwa. The order of attachment and sale are therefore set aside and the sale nullified. However, the liability of the appellant for the abortive, fraudulent sale of the house in Mwananyamala which did not belong to him is not affected by this order. His liability survives and is still there. Let the record be remitted to the trial court for the execution process to start afresh. On the costs of the appeal; I have considered the circumstances surrounding the matter and the fact that the dispute arose out of the appellant's own fraudulent acts of selling property which he knew was not his. I have nullified the sale of his residential house not because his appeal has merits but because that is what the law says; a residential house should not be attached and sold in execution of a decree. Otherwise it will be wrong for the appellant to feel victorious; he is still liable to make good the results of his fraud. I therefore condemn him to pay the costs of the appeal. Accordingly ordered. K.K. Oriya JUDGE 15/11/2005 704 words 4

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