

TANZANIA / JUDGMENT

raphael sariro vs beatrice sariro and 2 others 2021 tzhc 2044 29 january 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY OF MUSOMA AT MUSOMA PC CIVIL APPEAL NO 32 OF 2020 RAPHAEL SARIRO..... APPELLANT VERSUS BETRICE SARIRO Ist RESPONDENT IDAYA MASEKE 2nd RESPONDENT ZONOBIA B. MASAGIDA3rd RESPONDENT (Arising from Civil Appeal NO. 28/2020 at Musoma District Court, Original from Civil Case No. 137/2019 at Musoma Urban Primary Court)

JUDGMENT

Kahyoza, J 21st Dec. 2020 & Feb., 2021 This is a second appeal by Raphael Sariro, the objector. The appellant and the first respondent are couples. The facts, which precipitated into the current appeal are that: Idaya Maseke, the 2nd respondent sued Beatrice Sariro, the 1st respondent praying for payment of Tzs. 1,070,000/=. Idaya Maseke alleged that Beatrice Sariro borrowed that amount of money and failed to settle the loan. The suit proceeded ex parte against the first respondent. The second respondent, Idaya Masele, won the case. She applied for execution, praying to attach a refrigerator, a gas cooker, a gas container a cupboard, a coffee table, a sofa set, TV set, satellite dish and a decoder. The primary court appointed the third respondent to execute the decree. Third respondent, the ward executive officer, attached a sofa set, a gas cooker, a gas container, a flat TV screen, a decoder (receiver) and a refrigerator. i The appellant instituted objection proceedings in the to the primary court protesting the attachment of the household items in satisfaction of the decree. The grounds of objection were that the attached items are family property and that they are more valuable than the decretal sum. He added that the items were household items for that reason not attachable goods. The primary court dismissed the objection proceedings. Aggrieved, the appellant appealed to the district court. He lost the appeal. Still dissatisfied, he appealed to this Court. The appellant adduced five grounds of appeal, which could be summarized into one ground of appeal that is whether the attached property was subject of attachment. The appellant argued in support of his grounds of appeal and prayed the same to be considered. As expected, the first respondent supported the appeal. She added that the items were attached in her absence. The second respondent, the judgment creditor

submitted that the judgment debtor was troublesome and she faced a number of civil cases against her. Were the attached items subject of attachment? Given the above submissions, it is evident that all attached goods were households items. They are a sofa set, a gas cooker, a gas container, a flat TV screen, a decoder (receiver) and a refrigerator. The law, i.e. the Primary Court Civil Procedure Rules, GN 55/1963 (the PCCP) and the Forth Schedule to the Magistrates' Courts Act, Cap. 11 R.E. 2019 (the 2 Schedule) stipulates that the executing court may only attach and sell attachable property of the judgment debtor. They provide as follows;- Rule 62 of the PCCP states-

62. If any money payable under an award or order has not been paid on or before the day fixed by the court under rule 54(3), the judgment creditor may apply to the ex parte to court for the attachment of the attachable property of the judgement debtor. While paragraph 3 of the Schedule provides that-
- 3 (2) Any amount, including compensation or costs, awarded by a primary court under this paragraph may be ordered to be paid at such time or times or by Such installments or in kind or otherwise as the court shall think just and, in default of the payment of any such amount or any installment of the same when due, the court may order that such any such amount or any installment of the same when due, the court may order that such amount or such installment, as the case may be, shall be levied by attachment and sale of any attachable property belonging to and any salary accrued or to become due to the person against whom the order was made. It is crucial for the executing court to establish that the property subject of attachment is attachable property. To ascertain whether the property is attachable or not, the executing primary court has to consider paragraph 3(3) of the Schedule. Sub-paragraph (3) of paragraph 3 of the Schedule provides property of the judgment debtor, which are not subject of attachment. All items unspecified in that sub-paragraph are attachable property. It provides:-
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- (3) For the purposes of this paragraph, "attachable property" shall not be deemed to include-
- (a) the necessary wearing apparel, cooking utensils, bed and bedding of the judgment debtor and of his wife and children;
 - (b) the manual tools of artisans or of agriculturist;
 - (c) the salary or wages of any person to the extent of-
 - (i) the whole of the salary of wages, where the salary or wage does not exceed eighty shillings monthly; (ii) eighty shillings where the salary or wage 88 exceeds eighty shillings monthly but does not exceed one hundred and fifty shillings monthly; (Hi) two-thirds of any salary or wage which exceeds one hundred and fifty shillings monthly;
 - (d) any fund or allowance declared by law to be exempt from attachment or sale in execution of a decision or order;
 - (e) any land used for agricultural purpose by a village, an Ujamaa Village, a cooperative society, or an individual whose livelihood is wholly dependent upon the use of such land; or

- (f) any residential house or building, or part of a house or building occupied by the judgment debtor, his wife and dependent children for residential purposes. I reviewed the attached property vis-a-vis items specified under sub- paragraph (3) of paragraph 3 of the Schedule and arrived at a conclusion that none of the attached items is excluded from attachment except for a gas cooker and a gas container. It is not beyond any stretch of the imagination, to contend that cooking utensils may include a gas cooker and a gas container in the contemporary world. In the 1963 when the PCCP was promulgated one would not have contemplated that a gas cooker and a gas container would be part and parcel of food preparation in the modern society. I read a gas cooker and a gas container in the cooking 4 utensils. I find therefore, that a gas cooker and a gas container are not subject to attachment. Other items attached are attachable items in execution of the court decree. The appellant raised another complaint that the property attached are not sole property of the judgment debtor. They are family property. I stated earlier that the appellant and first respondent are couples. The Law of Marriage Act, Cap. 29 R.E. 2019 (the LMA) allows ownership of the property by one of the couples in exclusion of the other. The law presumes that the property acquired during the substance of the marriage in the name of one of the couples is that person property unless the contrary is proved. Section 60 of the LMA states-
60. Where during the subsistence of a marriage, any property is acquired-
- (a) in the name of the husband or of the wife, there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse; or
- (b) in the names of the husband and wife jointly, there shall be a rebuttable presumption that their beneficial interests therein are equal. In the current case the appellant submitted that the property is the family property. The second respondent contended that the attached property belongs to the second respondent, the appellant's wife. There is no proof from any of the competing parties by producing receipts or any documents of ownership to prove who is the owner of the attached items between the appellant (the first respondent's husband and objector) and the first respondent (the appellant's wife and judgment debtor). However, given the nature of the attached items, which are a sofa set, a flat TV 5 screen, a decoder (receiver) and a refrigerator it is hard to find that they absolutely belong to the first respondent in the exclusion of the appellant in the absence of evidence. I find on the balance of probability that the appellant and the respondent had beneficial interest in the attached property and that interest is equal. It is my findings that the appellant, the judgment debtor's husband had beneficial interest in the attached property, which are the sofa set, the gas cooker, the gas container, the flat TV screen, the decoder (receiver) and a refrigerator, for that reason those items are not subject of attachment. By way of passing, I wish to point out that the Civil Procedure Code, Cap. 33 R.E. 2019, (the CPC) bars an objector to appeal against the ruling dismissing the objection proceedings. See Order 21 Rule 57 of the CPC and the cases of Shakila Malick Vs. Said Almasi, Civil Appeal No. 3/99 CAT (unreported) and BOT Vs. Valambia, Civil Reference No. 4/2013. In the latter, the Court of Appeal of Tanzania stated, thus:- "It is therefore apparent to us that even in India, the

position of the law until the amendment was effected in 1976 was that the right of appeal from the decision of the court in objector proceedings upon investigation was curtailed". The MCA is silent. Since the current matter originated in the primary court for that reason the CPC do not apply. This was the sole reason I entertained the instant appeal. 6 I wish to add that given the above findings, I will not determine the issue whether the attached items were more valuable than the decretal sum. Eventually, I find that the primary court wrongly ordered the attachment of the property in satisfaction of the decree. I raise the attachment order and order the property to be restored to the appellant immediately. Each party shall bear its own costs basing on the nature of this matter. It is according order. J.R. KAHYOZA JUDGE 29/01/2021 Court: Judgment delivered in the presence of the appellant and the first and second respondent in person. The third respondent absent with leave. B/C. Catherine - Present. J.R. KAHYOZA JUDGE 29/01/2021 7 Court: Right of appeal explained. J.R. KAHYOZA JUDGE 29/01/2021 8

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