

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA

MISCELLANEOUS CIVIL APPLICATION No. 42 OF 2021

(Arising from the Judgment of this court in Civil Appeal No. 49 of 2020)

NILA JOSHUA MAJOLA.....APPLICANT

VERSUS

ELIZABETH MAGINA.....1ST RESPONDENT

JOEL KASONGI MALANDO.....2ND RESPONDENT

RULING

17th & 10th September, 2021.

TIGANGA, J.

The applicant, Nila Joshua Majola, lodged this application on 29th April 2021 by way of Memorandum of Review seeking orders of this court to review this court's decision in High Court Civil Appeal No.49 of 2020, Hon. Mashauri, J, which was delivered on 01st April, 2021. The application is predicated on one ground which is;

1. That, there is apparent error on the face of record when this court held that there is another case file titled Misc. Application No. 08 of 2020 originating from Criminal Case No. 08 of 2020 in which Elizabeth Magina and another are applicants and Nila Majola is respondent.

It was the applicant's prayer that;

1. The judgment in Civil Appeal No. 49 of 2020 be reviewed and set aside.
2. This review be allowed with costs.
3. Any other and further relief(s) that the Honourable Tribunal (sic) deems fit and just to grant.

At the hearing of this application on 17th August 2021, parties appeared and argued the application in person via audio teleconference. The applicant took off first and submitted that the impugned decision was based on a misconception that the applicant had claimed under Criminal Case No. 08 of 2020 while there was no such case, but instead there was an Appeal No. 49 of 2020 in which he was seeking for an order to allow the execution of the decision in Civil Case No. 14 of 2015 because those who objected the execution were not parties to the original case and that he never sued them.

He submitted further that, he won Civil Case No.14 of 2015 and none of the defendant appealed against the decision, meaning that they were satisfied with the decision. According to him, it was until when he filed execution proceedings, when the respondents who were not party to the case, appeared and instituted Misc. Civil Application No. 10 of 2020. He in the end prayed for this court to allow the execution against

Benjamin Kasongi and his guarantors and any other reliefs as it may deem fit to grant.

Replying to the submission made by the applicant, the 1st respondent submitted that, the land which the applicant wants to attach is hers; she inherited the same from her parents. She submitted further that one Benjamin Kasongi is her son in law but the land is not his. According to her, there is enough evidence from the village authority to prove that fact, and that is why Hon. Mashauri decided on her favour.

The 2nd respondent's reply was to the effect that the decision by Hon. Mashauri was correct. Supporting his argument, he submitted that, it is an inferred fact that, appealing against the respondents meant that the applicant knows them. He submitted further that, the business that was done between the said Benjamin Kasongi and the applicant was supposed to relate to the properties of Benjamin Kasongi and not those of the respondents. Lastly, it was his prayer that this court finds that the applicant was supposed to deal with the guarantors and not family or clan properties.

In his rejoinder to the reply made by the respondents, the applicant contended that the properties which were pledged by Benjamin to be attached when the case was ongoing were the same

properties subject of execution. He furthered his rejoinder by stating that, the 2nd respondent is the son of one of the guarantors and the property he is disputing to be attached is that of the guarantor which was pledged as security. He concluded his submission by praying that the decision of the Magu District Court be allowed so that he can proceed with execution.

That being the summary of the submission in support and against the application, this court is set to determine one question whether this application has merits. The main ground by which the applicant is moving this court to exercise its jurisdiction under section 78 of the Civil Procedure Code [Cap 33 R.E 2019] to review the impugned decision is that there is an apparent error on the face of record of the impugned decision. This is alleged in line with Order XLII Rule 1 of the CPC (supra) as one of the criteria to be considered by the court in reviewing its own decision, and then it is the duty of this court to satisfy itself that, there is indeed apparent error on the face of the record of the impugned decision.

The applicant has argued that the impugned decision was made based on a misconception that the applicant was claiming under Criminal Case No. 08 of 2020 while the applicant had no such a case. Going

through the decision in High Court, that is Civil Appeal No. 49 of 2020, it is clear that, the same was struck out for what the court termed as lack of clarity.

That being a summary of the submission made for and against the application at hand, I find it to be important to briefly point out the following facts for easy appreciation of the matter before hand. From the record and submission made by the parties, the decision which is sought to be reviewed is that of High Court Civil Appeal No. 49 of 2020, which arose from Misc. Application No. 10/2020 which originated from Civil Case No. 14 of 2015 of Magu District Court. In order to appreciate the fact of the case, the background of the dispute is important.

In Civil Case No. 14/2015, Nila Joshua Majola, Sued, Benjamini Kasongi whose relationship with the applicant in these proceedings emanates from the contract of cotton purchase entered into between the two, in which the said Benjamini Kasongi was entrusted as clerk on behalf of the applicant in the cotton buying/purchasing exercise of S & C Ginning Co. Ltd, Bulamba of Bunda in the Cotton Purchasing Season of 2014/2015. The claim emanates from the loss allegedly caused or rather incurred by the said Benjamini Kasongi in the process of cotton purchasing.

Together with Benjamini Kasongi, the applicant also sued one Shida Philipo, Zakayo Malando and Naomi Migamba, who in the contract entered to by the applicant and Benjamini Kasongi, stood as sureties, depositing or pledging as securities their properties which were houses worth Tshs 4,500,000/=, 25 cows and 27 acres shamba situated at Lumala Village, as a bond in that contract.

From the record, the said Benjamini Kasongi incurred or caused loss of Tsh 3,690,000/= consequent of which, himself and his sureties were sued in Civil Case No. 14/2015.

After full trial in that case, the District Court, Hon. E. P. Kente, RM found that the claim was proved on the balance of probabilities therefore found in the favour of the applicant. Following that victory and after that judgment has not been appealed against, the applicant commenced execution proceedings in which seemingly, some of the properties attached were either of the respondents in this application, or they were the properties which the respondents had interest in.

That prompted the respondent to file Misc. Civil Application No. 20/2020 against the current applicant asking for the District Court to give the following orders:

- i) To grant an order restraining the respondent from selling one house, seven acres of Land and 3 cattle interested by the family members of the applicants in that application who are the respondent in this application which is at Lumala Village in Busega District.
- ii) To grant leave for stay of execution pending determination of the application No. 10/2020.
- iii) Costs and any other relief as the court could deem fit and just to grant.

That application was filed under Order XXXVI, Rule 6 (1) (2) of the Civil Procedure Code [Cap 33 R.E 2019] and any other enabling provision. Unfortunately, the provision upon which the District Court was moved in the said application was the provision providing for attachment before judgment. Therefore it was irrelevant in the circumstances of the case.

Looking at the nature of the application, the same was supposed to be objection proceedings objecting the attachment of the properties which in one way or another were not related with the dispute and therefore were not supposed to be subjected to attachment and execution. In my considered view, this was supposed to be preferred

under order XXI Rules 57, 58 and 59 of the Civil Procedure Code [Cap 33 R.E 2019].

From this point, I can see the first ground to be the base upon which Hon. Mashauri, J, in High Court Civil Appeal No. 49/2020 got confused.

Further to that, after the District Court had heard the parties, it proceeded to decide the application No. 10/2020 as if that was an application for stay of execution, while in fact it was an objection proceedings which required the Court upon receiving the objection to investigate the claim raised by the objector in respect of the properties attached, where the objector was supposed to adduce evidence of possession of interest in the property attached before the Court had made an order releasing the attached properties, after being satisfied that, the application had merit and the objector had managed to establish by evidence the interest in the said properties.

The District Court, misconceived the prayers in the chamber summons of Misc. Civil Application No. 10/2020 that it was asking for stay of execution as the main application, but, the applicant asked for temporary stay pending hearing and determination of Misc. Civil

Application No. 10/2020 the fact which can be inferred from the second prayer, which read that:-

"(ii) That the Court be pleased to grant leave for stay of execution pending determination of this application"

The term "this application" was referring to application No. 10/2020.

It is unfortunately that, all these facts were not made clear before the Honourable appellate Judge, who had been opportune to know these facts. Had he been opportune, he would have noticed these anomalies and decided otherwise. That said, I find the said judgment reviewable in terms of Section 78 and Order XLII of the Civil Procedure Code [Cap 33 R.E 2019], on the grounds that, the order striking out the appeal was made by the Court without being abressed with a number of facts which I have earlier on pointed out.

I thus review the said decision in High Court Civil Appeal No. 49 of 2020 to the extent and on the reason explained above. Instead this Court order that the decision given in the Misc Civil Application No. 10/2020 of Magu District Court was actually given basing on the misconception of the application itself, as instead of dealing with

objection proceedings, the court erroneously dealt with stay of execution, thereby misconceiving the decision made there from.

Having so found and held, I invoke the powers of this Court under Section 79 of the Civil Procedure Code (supra) to revise the ruling of the District Court given in Misc. Civil Application No. 10/2020, and nullify the same. I consequently direct the trial Court to reopen the proceedings in that application and investigate on the lodged objection, give the chance to the objector to give evidence to prove their objection and show their interest in the property attached and give ruling after considering the evidence submitted in support and opposition of the objection. This is notwithstanding the misconception of the provision of the law upon which the application was made which is cured by overriding objective as conceived by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 [ACT No. 8 of 2018] which now requires the courts to deal with cases justly, and to have regard to substantive justice.

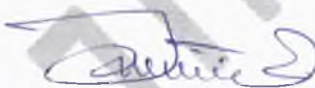
Further more, there is one other anomalies which I have noted in the proceedings, that is the original hand written decision made by the District Court in Misc. Civil Application No. 10/2020, is titled "judgment", while the typed and signed copy of the same is titled the "ruling of the

court". It be noted that the decision which results from objection proceedings are normally rulings, they are never judgment.

That said, the decision in the Misc. Civil Application No. 10/2020 of the District Court is nullified, the matter are remitted to the District Court for the said court to reopen up the proceedings in that application for the Court to proceed in accordance with Order XXI Rules 57, 58 and 59 of the Civil Procedure Code [Cap 33 R.E 2019].

It is so ordered.

DATED at **MWANZA** this 10th day of September 2021.




J. C. TIGANGA

JUDGE

10/09/2021.

This ruling delivered in the presence of the parties in person on line vides audio teleconference.



J. C. TIGANGA

JUDGE

10/09/2021.