

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: KILEO, J. A. , MBAROUK, J. A. AND MANDIA, J. A.)

CIVIL APPEAL NO 60 OF 2009
BETWEEN
ALLY JUMA MWANGOMBA & 143 OTHERS.....APPELLANTS
AND
THE ATTORNEY GENERAL.....RESPONDENT

(An Appeal from the Ruling and Order of the High Court of Tanzania at Dar es Salaam)

(Mihayo J.).

**Dated the 29th day of February 2008
In
Civil Case No.144 of 1996)**

JUDGMENT OF THE COURT

24th November, 2009 & 2nd February 2010

KILEO, J. A.:

The appellants, (numbering 144 in all) were villagers of Tondoroni village in Kisarawe District, Coast Region. Sometimes in 1986 they were required by the Government to shift from the village as the area was needed for some other public use. The appellants were promised compensation. No compensation was however paid despite several efforts in following up the matter. In 1996 the appellants filed a suit in the High Court seeking an order for compensation of unexhausted improvements. The principal amount claimed as per plaint then was shs 138,000,000/=. The plaint also

contained a prayer for interest at 35 % p. á. from 1986 to date of judgment and at 12% from date of judgment till final payment. The Government did not resist the claim and judgment on admission was entered by Msumi, J. as he then was on 16 October 1996. A certificate under the Government Proceedings Act, 1967 was issued accordingly. The amount specified in the certificate that was issued on 18th November 1996 was shs. 3,583,993,579/=. This included the principal amount of shs. 138,000,000/= and interest of shs. 3,445,993,579/=. The appellants' complaint is that the amount specified in the certificate has not fully been satisfied as only shs 50,000,000/= was deposited in court. This resulted in several communications and applications before the High Court. The decision, which is the subject of this appeal, was given by Mihayo, J. on 29th February 2008 pursuant to an application filed on 15th November 2006. In that application, which was preferred by chamber summons under the provisions of section 95 and Order XLIII rule 2, Order XXI rule 1 of the Civil Procedure Code read together with section 15 and 16 of the Government Proceedings Act, the Attorney General who was the applicant sought the following orders:

- (a) *The Honorable Court be pleased to issue specific directions to the Applicant as to which Order/Decree of the Court that shall be executed by the Judgment Debtor.*
- (b) *The Hon. Court be pleased to clarify and issue specific order / directive to the Applicant/Judgment debtor on*

whether the Decree of this Court is in conjunction with the Judgment of Hon, Msumi J (as he then was) dated 16th October, 1996.

- (c) The Honourable Court be pleased to direct the Judgment Debtor that there was no any understanding between the judgment Debtor and Decree Holder in effecting execution of the Court decree and payment of shs. 762,044,696/= was not complying with the Court order.*
- (d) Such other or further directions as the Court may deem just and fit to issue.*

After hearing the parties the learned judge found that there was only one decree to execute and found further that the decree had been fully satisfied.

The appeal before us, which was argued by Mr. Marando, learned advocate for the appellants, is based on the following four grounds:

- 1. That the learned judge erred in fact and in law by making a conclusion that the decree holders were unknown (except for a few who kept coming to court) while at the time leave for a representative suit was filed the names of the 144 decree holders were made public according to law.*
- 2. That the learned judge erred in fact and in law by making a conclusion that the decree holders were paid all their money through the District Commissioner for Kisarawe, while*

there was affidavit evidence that those who were paid by the office of the District Commissioner were other villagers and not the decree holders.

3. That the learned judge erred in fact and law when he held that the decree has been satisfied when there was no evidence that the 144 decree holders were paid the decretal amount of shs.138,000,000/= plus interest thereon. The learned judge should have found that the amounts paid out by the government were just compensation to other villagers and not satisfaction of the decree.
4. The learned trial judge erred in law and in fact in accepting second valuation when at the time of filing of the suit and admission of claim by the respondents a valuation had already been done and pleaded in respect of known decree holders.

Mr. Chidowu, learned Principal State Attorney who represented the Attorney General at the hearing of the appeal rightly pointed out that the main issue in this appeal is whether the 1996 decree has been satisfied.

While agreeing that the decree which was passed in 1996 had not been satisfied, Mr. Chidowu was however quick to point out that there were some variations agreed upon by the parties as per court record and that the amount of shs 762,044,686/= was the amount

that the parties agreed would satisfy the decree. Mr. Chidowu contended that this amount was paid.

Mr. Marando strongly challenged Mr. Chidowu's contention that there were variations in the decretal amount. He stated further that the only amount paid in respect of the decretal amount was shs. 50,000,000/= that was deposited in court. Referring to Order XXI rule 2(1) of the Civil Procedure Code -Cap 33, R.E.2002, the learned counsel argued there is nothing on record to prove that there was variation of the decree. In elaboration, Mr. Marando submitted that once the decree was issued and certificate issued any variation to be effected would have to be through a laid down procedure. He cited Order XXI rule 2 sub-rules (1)-(3) which provide:

(1)Where any money payable under a decree of any kind is paid out of court or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the court whose duty it is to execute the decree and the court shall record the same accordingly.

(2) The judgment debtor also may inform the court of such payment or adjustment and apply to the court to issue a notice to the decree-holder to show cause, on a day to be fixed by the court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or

adjustment should not be recorded as certified, the court shall record the same accordingly.

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any court executing the decree.

In further support of his argument that a particular procedure had to be adopted in order to effect a variation Mr. Marando made reference to **G. P. Pabari vs Meghji Shah and Others** (1961) E.A. 676. In this case the Court of Appeal for Eastern Africa was discussing the application of Order 19 r. 2 of the Uganda Civil Procedure Rules which is similar to Order XXI rule 2 of our Civil Procedure Code. The facts of the above case show that the respondents had obtained judgment against the appellant in Kenya. The decree was then sent ~~to the magistrates' court at Jinja, Uganda for execution.~~ Before execution, advocate for the respondent wrote to the court stating that the matter had been settled between the parties and that the attachment should be withdrawn. Subsequently, a prohibitory order was issued pursuant to an application for execution by the respondents. The appellant then applied to the High Court to set aside the prohibitory order on the grounds that the decree was incapable of execution as a settlement had been reached between the parties and the court had been so informed; and that there had been a novation by a partial payment by the appellant and the issue to the respondents of promissory notes by a third party for the

balance. The High Court dismissed the application holding that there was no clear evidence that a settlement had been reached. The Court of Appeal confirming the decision of the High Court held:

- (i) **There was no sufficient evidence that there had been novation and the letter from the advocate for the respondents did not necessarily mean that the decree had been adjusted and did not amount to a certificate for the purposes of O. 19, r. 2 (1) of the Civil Procedure Rules.**
- (ii) **As the appellant had not followed the procedure prescribed in O. 19 r. 2 (2) of the Civil Procedure Rules the alleged adjustment of the decree could not be recognized by the court, with the result that the court was entitled to make the prohibitory order.**
- (iii) **The application was misconceived and the appellant's remedy as judgment debtor was to inform the court under O.19 r.2 (2) of the payment or adjustment which he alleged and to apply for the issue of a notice to the respondents to show cause why the payment or adjustment should not be recorded.**

We are at one with the Court of Appeal for Eastern Africa that provisions dealing with adjustment of a court decree must be strictly adhered to. Short of that a court should decline to recognize any adjustment.

We have carefully examined the record before us and we must confess that we have been unable to see anything therein which proves that there was any adjustment of the decree that was entered on 16 October 1996. Further still, there is nothing on record

to show that the appellants were paid anything apart from the 50 million shillings that was initially deposited in court.

Mr. Chidowu submitted that the appellants were partly paid through the court and also through the District Commissioner for Kisarawe. Referring to the proceedings of 10/11/2002, the learned Principal State Attorney stated that the appellants were in court when the amount of shs 762,044,686 was mentioned and they agreed to this amount. Vouchers to prove the payments were not tendered and Mr. Chidowu submitted that they had affidavit evidence to prove payments. Apart from the fact that there were no payment vouchers to prove payments, the proceedings mentioned did not show that there was any adjustment of the decree. In order to appreciate the gist of what took place in court we find it pertinent to reproduce the proceedings of 10/11/2000 and up to 14/12/2000:

"10/11/2000

Coram – Bubeshi, J.

For the Plaintiffs – In person

For the Defendant – Ngwembe Mrs., Mrs. Shomari & Mrs. Mihayo, SA Trainees

Ngwembe – MJ, I have to report that verification has been finalized since vol. contains names of these whose properties have been acquired. Further, the amount to be paid is Tshs. 762,044,686. The payment will start on July 2001, then in

October 2001 and December 2001. The payments will take place at the District Office. The money deposited in Court will be consolidated together. The funds would also be deposited in same account at the time of payment.

Order – In chamber mention 24/11/2000

Sgd – A.G. Bubeshi, J.

10/11/2000

24/11/2000

Coram – Bubeshi, J.

For the Plaintiff – Mashaguri

For the Defendant – Ngwembe & MS Mihayo

CC – Alphonse.

Ngwembe – MJ I wrote and also met the Treasury Officials concerning the Plaintiffs claim and money deposited in this Court. Treasury has agreed and is listing the names down and what they entitled to. The list will be filed in court next Friday 1/12/2000.

Plaintiff's Spokesmen Abdallah Nampamba – MJ I agree with what has been stated and we are waiting to hear on 1/12/2000.

Order – In chamber mention 1/12/2000.

Sgd – A.G. Bubeshi, J.

24/11/2000

4/12/2000

Coram – B.D. Chipeta, J.

Mr. Ngwembe for A. G.

ORDER – Mention in chamber 5/12/2000.

Sgd – B.D. Chipeta, J.

4/12/2000

5/12/2000

~~Coram B.D. Chipeta, J.~~

D/H's – Present

Mr. Ngwembe for AG

Mr. Ngwembe – My Lord we have followed up the position. I have done my best. I have a letter of 1/12/2000 with list of names of 144 persons and amount to be paid to them. I pray I write the court and file the schedule so that they can be paid. I pray to file it on 6/12/2000.

Order – Application granted.

Sgd – B.D. Chipeta, J.

5/12/2000

11/12/2000

Coram – B.D. Chipeta, J.

Court – The money deposited in court be paid to the 144 people as contained in the list compiled by Attorney General as filed herein.

Sgd – B.D. Chipeta, J.

11/12/2000.

A careful perusal of the above proceedings will show that they are far from establishing compliance with the provisions of Order XXI rule 2 of our Civil Procedure Code. In short, there was no adjustment of the decree. There was no certificate from the decree holders that the decree had been adjusted and there was no application by the judgment debtor to the court for the decree holder to show cause why payment should not be recorded as certified. Since the alleged adjustment was neither certified nor recorded as certified, the court would have no mandate to recognize any adjustment. The learned trial judge stated in his ruling that he had very strong feelings that the respondents/decrees holders had been paid of all their money

through the District Commissioner for Kisarawe. The court however, as stated by Mr. Marando, acts on facts not upon 'strong feelings'. The court record does not show any where, by way of vouchers or otherwise that the appellants were among those who were paid through the District Commissioner's office. He who alleges has the duty to prove. The respondents were unable to prove payment to the appellants, of the decretal amount apart from the 50 million shillings that was deposited in court. The affidavit of Wilson Elieneza Mgonja does not assist the respondent's case. It does not amount to an adjustment of the court's decree in terms of Order XXI rule 2. Moreover it was not annexed with any payment vouchers or any other document to support payments to the decree holders.

Having given the matter due consideration, we find the appellants ~~to have sufficiently established all the four grounds of appeal.~~ The matter in the High Court was a representative suit, therefore the fact that only a few 'kept on coming to court' as stated by the learned High Court judge could not be taken to affect their case. As already discussed, there was no proof that the appellants had been paid all their money through the District Commissioner's office. The decree entered on 16. 10. 1996 and certificate accordingly issued by the Registrar in terms of section 15 of the Government Proceedings Act, 1967 (now section 16) has been satisfied only to the extent of payment of shs. 50,000,000/= deposited in court. In the circumstances, both the ruling and order of the High Court, (Mihayo,

J.) dated 29th day of February, 2008 cannot be allowed to stand. The ruling is quashed and the orders made thereby are set aside. The appeal is in the event allowed with costs.

Dated at Dar es salaam this 29th Day of January, 2010

E. A. KILEO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL



I hereby certify this to be a true copy of the original


N. N. Chusi
Deputy Registrar