

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And MASHAKA, J.A.)

CIVIL APPEAL NO. 64 OF 2017

**UNYAGALA AUCTION MART LTD AND
COURT BROKERS1ST APPELLANT
PATRICK KISWIVI SANGA (As Administrator
of the Estate of the late ABEL SANGA) 2ND APPELLANT**

VERSUS

**BLUE ROCK LIMITED 1ST RESPONDENT
GEM & ROCK VENTURES CO. LTD 2ND RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Tanzania
at Arusha)**

(Mwaimu, J.)

dated the 9th day of March, 2015

in

Land Case No. 21 of 2007

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JUDGMENT OF THE COURT

29th November & 06th December, 2022

KWARIKO, J.A.:

This appeal challenges the decision of the High Court of Tanzania at Arusha District Registry (the trial court) in Land Case No. 21 of 2007 in which the respondents emerged the winners. However, this matter

originated from the decision of the High Court of Tanzania, Commercial Division at Dar es Salaam in Commercial Case No. 7 of 2003 in which Njake Enterprises Limited (the decree holder) won a suit against Tanzania Sewing Machines Co. Limited (TASEMA), the judgment debtor. Among other reliefs, the decree holder was awarded an order of quiet possession of a building situated on Plot No. 11 Block A Section F, Arusha Municipality comprised in Certificate of Title No. 143 (the suit premises). In satisfaction of the decree, an order of execution dated 24th August, 2006 was issued for vacant possession of the suit premises. The second appellant trading in the name of the first appellant was appointed to execute the order of eviction of the judgment debtor from the suit premises. However, the execution of the court order could not take place for the reason that the court broker was denied access into the suit premises. As such, the court ordered that the decree holder be placed in possession of the suit premises even by breaking into it, should there be any further resistance.

It occurred that the respondents were among the tenants in the suit premises who claimed that, on 26th February, 2007 they found that their rented portions in the suit premises were forcibly broken into and most of their properties were missing. Upon investigation, they learnt that the appellants were responsible for that act. They thus filed the suit in the

trial court against the appellants and Njake Enterprises Limited claiming for: an order for immediate restoration in their respective premises; payment of TZS 241,383,000.00 and 510,436,000.00, the value of the lost properties to the first and second respondents respectively; general damages to be determined by the court; interest at the rate of 14% per annum; and costs of the suit.

For their part, the appellants denied the claims contending that the eviction was lawful since a notice to that effect was served to the judgment debtor. And that, if there was any claim, the respondents ought to direct it to their landlord who was duly notified of the eviction. The appellants also claimed that at that time all tenants were aware of the eviction and had vacated with their belongings and left the doors open.

At the end, the trial court found that, at the time of the execution, the respondents who were tenants in the suit premises were not served with a 14 days' notice as provided by the law. As such, it declared the whole exercise a nullity and held the appellants and the decree holder in Land Case No. 21 of 2007 jointly and severally to compensate the first and second respondents TZS 241,383,000.00 and 510,436,000.00 respectively; general damages of TZS 50,000,000 to each respondent; interest on the decretal sum at the rate of 12% per annum from the date

of filing the suit to the date of judgment; interest on the decretal sum at the rate of 12% from the date of judgment until full satisfaction and costs of the suit.

The appellants were aggrieved by that decision hence came to this Court upon the following three grounds of appeal:

- 1. THAT, the learned trial Judge erred in law and in fact in not finding that the execution carried out by the appellants was proper.*
- 2. THAT, the learned trial Judge erred in law in awarding damages to the respondents in the absence of any evidence to support the awarded damages.*
- 3. THAT, the learned trial Judge erred in law and in fact in not finding that the respondents' claims against the appellants were not proved on the required standard.*

Both parties complied with the requirements under rule 106 (1) and (6) of the Tanzania Court of Appeal Rules, 2009 and filed written submissions.

At the hearing of the appeal, the appellants were represented by Mr. John Materu assisted by Mr. Ombeni Kimaro, both learned advocates. On the other hand, Mr. Mpaya Kamara together with Ms. Neema Mutayangulwa, learned advocates appeared for the respondents.

Upon being invited to argue the appeal, Mr. Materu adopted his written submissions and proceeded to highlight his arguments by way of oral clarifications. As regards the first ground of appeal, he argued that the appellants were court brokers duly appointed by the court to execute the decree. As such, they complied with the court order (exhibit D5) and issued a 14 days' notice (exhibit D2) to the judgment debtor as per Order XXI rule 20 of the Civil Procedure Code (the CPC) and rule 4 (2) of the Appointment of Court Brokers and Court Process Servers Rules GN No. 299 of 2000. He submitted that; the judgment debtor received the said notice on 31st August, 2006.

It was further argued by Mr. Materu that, the eviction was carried on smoothly against the judgment debtor and other occupants in the suit premises. He added that, although the court had allowed the use of force to obtain the decree holder's possession of the suit premises, neither was force used nor was there any breaking into the suit premises as the tenants vacated at their own free will. He contended that the respondents failed to prove the allegations that force was used in that exercise since PW1 and PW2 said that they did not witness the eviction but were only informed by the watchman who was not called to testify.

The learned counsel also submitted that the report of the execution (exhibits D3 and D4) evidenced that the eviction was conducted on 22nd February, 2007 and not 25th February, 2007 which was a Sunday as held by the trial Judge.

In response to the foregoing submission, Mr. Kamara argued that the execution process contravened Order XX1 of the CPC and the Court Brokers and Process Servers (Appointment, Remuneration and Discipline) Rules, 1997 (the 1997 Rules). He enumerated the following reasons for that assertion. *One*, since the respondents derived title from the judgment debtor, the first appellant ought to have issued a 14 days' notice of execution to them as they were not parties to Commercial Case No. 7 of 2003 whose decree was subject of the eviction order. He added that, as the first appellant did not issue the notice, the respondents were not aware of the eviction so that they could make alternative arrangement for relocation of their offices or otherwise.

Two, the eviction was discriminatory in the sense that out of 30 tenants in the suit premises, three of them were not evicted and this scenario was not stated in the execution report. *Three*, the eviction was forcibly carried out by breaking into the respondents' offices as evidenced by PW1, PW2, PW3 and PW4. *Four*, the handing over report was signed

by the Chairman and Secretary of Pangani Street whilst the suit premises is located at Sokoine Street. *Five*, there was no independent witness who testified to prove that the eviction was conducted on 22nd February, 2007 and that the same was done smoothly without breaking into the respondents' offices.

Six, although it was not an issue before the trial court as it was only an oversight, there was no certificate of appointment showing that the first appellant was appointed by the Registrar of the High Court, Commercial Division to carry out the execution of the impugned decree which is contrary to rule 8 (3) of the 1997 Rules. To support his arguments, Mr. Kamara referred us to the decision of the Court in the case of **Balozi Abubakari Ibrahim & Another v. MS Benandys Limited & Two Others**, Civil Revision No. 6 of 2015 (unreported), to the effect that execution of decrees is a judicial function which ought to be carried out transparently, efficiently and judiciously.

On our part, the issue coming out of the first ground is whether the eviction process against the respondents was improper and unlawful. We wish to begin with the law relating to execution of decrees. Section 42 of the CPC which empowers the court to enforce execution of decrees using various modes provides thus:

"Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree—

- (a) by delivery of any property specifically decreed;*
- (b) by attachment and sale or by sale without attachment of any property;*
- (c) by arrest and detention in prison;*
- (d) by appointing a receiver; or*
- (e) In such other manner as the nature of the relief granted may require."*

Whereas Order XX of the CPC provides the procedure to be followed by the court upon receipt of an application for execution of the decree by the decree holder thus:

"(1) Where an application for execution is made—

- (a) more than one year after the date of the decree; or*
- (b) against the legal representative of a party to the decree,*

the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause on a date to be fixed why the decree should not be executed against him:

Provided that, no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the

application is made within one year from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him.

(2) Nothing in subrule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice."

Now, pursuant to this provision, upon an application for execution of the decree by the decree holder, the High Court issued an eviction order dated 24th August, 2006 against the judgment debtor, TASEMA to be executed by the court broker, the first appellant herein. Upon receipt of the order, the first appellant issued a 14 days' notice dated 30th August, 2006 which was received and duly endorsed by TASEMA on 31st August, 2006. It is therefore our considered view that the eviction order was issued against the judgment debtor and the first appellant was legally authorized to serve notifying it to vacate from the suit premises. The first appellant was not expected to have knowledge of the type and number of the occupants of the suit premises. That was wholly within the

knowledge of the judgment debtor. It is the judgment debtor who had agreement with the tenants and therefore, if she was served with the order of eviction, she was duty bound to inform them of the same. The court named the judgment debtor in the eviction order upon whom the 14 days' notice was supposed to be served.

In his further contention, Mr. Kamara referred us to Order XX1 rule 34 of the CPC in relation to the decree for delivery of immovable property when in occupancy of tenants. For ease of reference, this provision is reproduced thus:

"Where a decree is for the delivery of any immovable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property and proclaiming to the occupant the substance of the decree by such means as are used locally to make public pronouncements." [Emphasis added]

It is plainly clear that, the cited provision relates to court decree concerning immovable property occupied by a tenant or any other person

entitled to occupy it and not bound by the decree to relinquish the occupancy. In the case at hand, even though the respondents were tenants in the suit premises, the eviction order from the court to the first appellant did not mention them and there was no indication that the suit premises had tenants in it so that they could have equally been served with the notice to vacate. That is why we are convinced beyond doubt that it is the judgment debtor who was well placed to know what was in her premises and the one who was expected to take necessary steps after being served with the 14 days' notice to vacate.

From the foregoing discussion, if the respondents had any claims flowing from the execution of the decree on the suit premises, they were supposed to take them to their landlord, TASEMA and not the appellants. In other words, the respondents had no cause of action against the appellants who were only executing the eviction order directed to TASEMA. There is no way the first appellant could have issued a notice to the respondents or any other occupants who were not mentioned in the eviction order. We find thus that the first ground has merit.

Having decided the first ground in the affirmative, we find no need to determine the remaining grounds as they have become redundant. We

therefore, find the appeal meritorious and we proceed to allow it with costs.

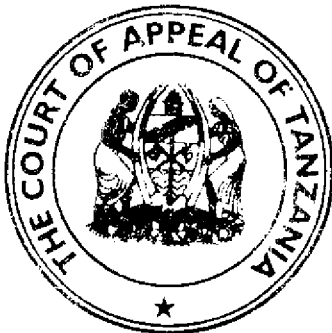
DATED at ARUSHA this 05th day of December, 2022

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 06th day of December, 2022 in the presence of Mr. Henry Simon holding brief for Mr. John Materu, counsel for Appellants and Mr. Henry Simon holding brief for Mr. Mpayya Kamara, counsel for the Respondents, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL