IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CIVIL APPEAL NO. 32 OF 2004

HAMISI MWANGI.....APPLICANT

VERSUS

TAZARA.....RESPONDENT

JUDGEMENT

Date of last order: 1/8/2006
Date of Judgment: 4/8/2006

Mlay, J.

The appellant Hamisi Mwangi, being aggrieved by the ruling and order of the court of the Resident Magistrate of Dar es Salaam at Kisutu (E. Mbaga RM), in an application for execution of the decree in Employment Cause No. of 1998, which ruling was delivered on 2/1/2004, has appealed to this court on the following grounds:

1. That the Honourable Magistrate erred in law and fact in her decision by considering and basing her decision only on the respondents submission without taking into consideration the submission by the applicant.

2. That the Honourable Magistrate erred in law and facts in deciding that there was an oral agreement to satisfy the decree

by payment of the lesser sum of Tanzania Shillings eight million only (Tshs 8,000,000/=) having found that there was no any registered agreement and there being no any proof to the effect that there was such an agreement.

3. That the Honourable Magistrate erred in law and facts in disallowing the application for execution of the decree dated 12th day November, 1999 which has never been set aside nor there being any agreement to satisfy the same in any other way.

4. That the Magistrate erred in law and fact by finding that the disqualification of Mr. Hamisi Mwangi as the leader and or representative of the nineteen other decree holders in original suit and receipt of the lesser sum of Tanzania shillings eight million only (Tshs 8,000,000/=) by the same extended to forfeiture of Mr. Hamisi Mwangi's right to enforce a decretal sum thereby disregarding the fact that Mr. Hamisi Mwangai did not accept the same as satisfaction of the decretal sum.

5. That the Honourable Magistrate misdirected himself and thus erred in law by deciding that the court had no jurisdiction and that it was **functus Officio** to allow execution of the decree passed by the same court.

The subject – matter of this appeal has gone through a long and winding road, to reach this court in the form of the present appeal. The appellant with ten (10) others, filed a claim against TAZARA the respondent, who is their former employer, in Employment Cause No. 18 of 1998 in the Court of the Resident Magistrate of Dar es Salaam, at Kisutu. The claim was for payment of retrenchment benefits in the form of underpaid repatriation allowances, subsistence allowances, interest and costs. The 10 plaintiffs were all being represented by Jundu and Semgalawe Advocates. The Defendant having failed to appear for the hearing of the suit, the Plaintiffs were granted leave to prove their claim exparte and on 17/9/99, the trial court entered an exparte judgment in favour of the Plaintiffs. Subsequently, the decree holders obtained an order for execution and an application by the judgment debtor for stay of execution and enlargement of time in which to file an application for setting aside the exparte judgment and decree, was dismissed.

Upon failure of the judgment – debtor to satisfy the decree, the decree holders, at this juncture, through the services of S.O. Komba and Co. Advocates, filed an application for the arrest and detention of certain members of the Management of the Judgment Debtor. The application which was made on 6/11/2000 was withdrawn on 21/11/2000 but reinstituted on 23/11/2000. When the application came up before Mrs. A. Kabuta RM on 1/12/2000, Mr. Komba

advocate for the Plaintiffs (decree-holders), in the presence of representatives of the Judgment Debtor, informed the Court that both parties had reached an out of court settlement to satisfy the decree by installments. He prayed for time to finalize and file the relevant deed of settlement in Court. He prayed for a near date and specifically, asked the matter to come up on 5/12/2000. When the matter came up on 5/12/2000 as prayed by Mr. Komba, he informed the Court that it had not been possible to file a deed of settlement on that date and prayed the matter to be given another date of mention. The matter came up for mention on 26/1/2000 and again on 6/2/2001 when an order was made for *"hearing on 9/3/2001 for recording settlement".*

On 9/3/2001 there was a turn of events. Mr. Semgalawe the original advocate representing all the plaintiffs now appeared to represent all the decree-holders, except Mr. Hamis Mwangi, who was represented by Mr. Komba. For the purpose of this appeal, it is not relevant to consider the reasons leading to this situation. It will suffice to state that Mr. Semgalawe informed the Court that **"negotiations are still going on"** while Mr. Komba told the court that he was "**not aware of negotiations**". The trial Resident Magistrate then set the matter for mention on 6/4/2001.

On 6/4/2001 Mr. Komba and Mr. Sengalawe appeared for their respective camps. Mr. Komba informed the Court that the

respondents had yet to file counter affidavit, presumably, referring to the application which had been reinstated but not yet disposed of. He also stated that the court had yet to decide the prayer that the respondent (judgment debtor) be summoned to show cause why execution should not proceed. At the end of it all, Mr. Komba prayed that the judgment debtor be summoned and show cause why they should not be committed to prison for disobeying a court order. Mr. Semgalawe advocate for the other camp of decree holders complained to the court that he had been the advocate of the complainants from the beginning up to the stage of execution when Mr. HAMIS MWANGI without the consent of the other decree holders, disqualified Mr. Semgalawe. He also informed the court that when it reached the execution stage, the judgment debtor paid shillings twelve million (12,000,000/=) to Mr. Komba and Mr. Komba together with Mr. Mwangi, paid the other decree holders Shs. 200,000/= each and retained the rest of the money. To cut a long story short, there was a heated exchange between Mr. Semgalawe and Mr. Komba and at the end, the trial Resident Magistrate ordered that "*TAZARA be summoned to come and clear what Advocates have said before I make a ruling on all what has been said*".

The matter then came up again on 10/4/2001. Mr. Komba and Mr. Semgalawe were both in attendance while a Mr. Dominic Mbaga appeared to represent TAZARA the Judgment Debtor. In short, Mr. Dominic Mbaga told the court that there was an agreement reached

for each of the decree – holders to be paid shs 8,000,000/= (eight million) and that the first installment of shs 12,000,000/= (twelve million) had been paid to Mr. Komba, while another tranch of sh. 10,000,000/= (ten million) in two installments, had been paid to the decree – holders through Mr. Sengalawe. Mr. Dominic Mbaga also told the court that the agreement had yet to be reduced to writing.

Mr. Komba Counsel for Mr. Hamis Mwangi informed the court that his client was no longer interested in the discussion with the Judgment debtor and all he wanted was to be paid the decretal sum of shs. 71,134,750/= and he also prayed that the court should order that other decree holders to refund Mr. Hamis Mwangi the sum of shs 200,000/= each, which he had given them as a loan, out of the sum of shs 12,000,000/= he received from the Judgment debtor.

Mr. Semgalawe counsel for the remaining decree holders informed the court that there was an out of court settlement that each decree – holder be paid shs. 8,000,000/= in full satisfaction of the whole decretal sum and that the agreement was about to be put in writing. Mr. Semgalawe also contended that his clients were not involved in an agreement of being given shs. 200,000/= each and that only three of his clients had signed to have received such sum. He argued that if Mr. Hamis Mwangi had any claim against the other decree holders, he should file a civil suit.

Having considered the matter and the arguments put forward by the two learned counsels, on 23/4/2001 the trial Resident Magistrate Mrs. Kabuta delivered her ruling.

In the said ruling the trial Magistrate ruled in part, as follows:

> *"I am therefore made to believe that the 1st complainant Hamis Mwangi has been paid over and above what he is claiming.* ***This court is bound by the order dated 1/12/2001 that settlement had*** *been reached.* ***I cannot change the order of the court. Only the*** *superior court* ***can do so****.*
>
> *The application is an after though and aimed at safeguarding interest of one party* ***who has already been paid*** *more leaving the rest starving.* ***The court recognizes each complainant is to be paid 8 million as per agreement.***
>
> *The 19 complainants to continue to be paid the same. The agreement to that effect should be filed forthwith. The mode of*

payment should duly been communicated to the court.

The first complainant is ordered to file the agreement as ordered. If the agreement is to the effect that he be paid the decretal sum the court will make sure that he is paid.

1. *The application/prayers by Mr. Komba (Esq.) that he be paid instruction fees by 19 complainants (i.e) 20% of the total payment is accordingly disallowed.*

2. *The application by the 1st complainant (Hamis Mwangi) to summon the Authority of TAZARA to come and* ***show cause why execution should not proved has been overtaken by events and is accordingly dismissed.*** *The Authority should not be harassed.*

3. *The prayer by Hamisi Mwangi to be refunded shs 200,000/= by each of the rest of the complainants has no merits and is accordingly thrown out.*

4. *The prayer by Hamis Mwangi that he be paid the decretal sum of Shs 71,234,280/= has been over taken by events and the same is thrown out.*

5. *The Court recognizes the oral agreement between the 19 complainants (2nd complainant to 20 complaint) on one hand and the Judgment Debtor, TAZARA in the other hand that each of the complainant to be paid Tshs 8 Millions. Payment to continue be effected to the 19 Complainants. The agreement to that affect to be filed in court forthwith. Mode of payment to be duly communicated to the court.*

6. ***The first Complainant to register his agreement if any so that the court can see if he has any claim"*** (emphasis mine).

The importance of the emphasis put on the relevant parts of the ruling will be made apparent, in the events which followed after the ruling was delivered. Immediately after Kabuta RM delivered the ruling, the portion of which has been quote in extenso above, HAMIS

MWANGI through his advocate Mr. Komba, filed an application for revision in this court. The application Civil Revision No. 40 of 2001 came up for hearing before my brother Luanda J, who in a ruling dated 30/6/2002, declined to exercise resivisonal powers and dismissed the application with costs. In that ruling his Lordship Luanda stated in the last but one paragraph, as follows:

> *"Reading the application and the affidavit in support thereof it comes out very clearly that the applicant is aggrieved with the order of the trial cause dated 23rd April, 2001. But a trial Court duly constituted can go right or wrong.* ***If one is aggrieved with a decision, then the appropriate step to take is to appeal*** *to a higher court and not make an application as in this Case.* ***To entertain the application of this nature is tantamount to hearing an*** *appeal".* (emphasis mine)

Not to be deterred and aggrieved by the ruling of Luanda J, the appellant again through his advocate Mr. Komba applied for leave to appeal to the Court of Appeal of Tanzania, against the said ruling.

The application for leave to appeal to the Court of Appeal was heard by Oriyo J, who, in a ruling dated 4/3/2003 dismissed the application with costs. In her ruling Oriyo J, referring to section 5 of the Appellate Jurisdiction Act, 1979, Stated in part, as follows:

"The purpose of section 5 (1) (c) above is to spare the Court of Appeal of unnecessary and frivolous matters so that it can concentrate on meritorious issues of importance. It is on that basis that I am of the considered view that no useful purpose will be served if leave is granted. The Applicant has failed to convince this court that his intended app3eal stands a reasonable prospect of success. ***He has intentionally avoided any mention on why he opted not to appeal against the Lower Courts Ruling****" (emphasis mine).*

After the door to the Court of Appeal had been closed to the appellant on the attempt to challenge the ruling of Kabuta RM through revision, the Appellant did not wish to challenge the ruling of Kabuta RM by way of an appeal, as advised earlier in the two rulings of this court. Instead, he opted to go back to the trial Court, where he filed an application for the execution of the decree in Employment Causes No. 18 of 1998 for Shs 81,865,542.90 by arrest and detention of the Managing Director – TAZARA Mr. Charles Phiri, as a Civil Prisoner.

The respondent trough their advocate Mr. Maleta objected to the application for execution of the decree on grounds that the matter was **res judicata** as the application for the execution of the

decree dated 12th September, 1998 in Employment Cause No. 18 of 1998, was conclusively determined by the court and for that reason, the court **is functus officio.**

The trial Magistrate ordered the parties to file written submissions and in a ruling dated 2/1/2004, dismissed the application, on the ground that the court was **functus officio.**

It is that decision in the ruling which is now being challenged through the present appeal. The parties were ordered to file written submissions on the grounds of appeal. This time around, the appellant engaged the services of Mr. BARNABAS LUGUWA while MR. MALETA Advocate acted for the respondent. In the written submissions filed on behalf of the appellant, Mr. Luguwa learned counsel spent the first three pages out of the 8 pages long submissions, dwelling on the proceedings and the ruling before Kabuta R.M to justify the bringing of the application before Mr. Mbaga RM, which is the subject of this appeal. In the course of the written submissions beginning at the last paragraph of the fist page, Mr. Luguwa had this to say:

> *"My lord, I was not a party to the said proceedings which ensured upon the trio receiving a summons of the Court, but I must confess, to date I have failed to appreciate, what took place because it raised confusions which it did*

not answer any matter before it and left the matter hanging. My Lord Hon. Kabuta SRM instead of determining the application which was before it, she went outside the subject. It seems the Judgment Debtor confused her by claiming that the decree holders had agreed to receive Tshs. 8,000,000/= in full and final settlement of the Case, while in actual fact that was his counter offer which brought the said settlement negotiations to a halt.

Mind you, as it is the position today, the said negotiation did not yield any settlement or compromise agreement but the court executing the decree tried to bail out the Judgment Debtor by trying to force the counter offer to be respected....."

Mr. Luguwa's observations in the above quoted submissions are not without interest, when it is considered that no appeal was preferred against the ruling of Kabuta RM which is the subject of Mr. Luguwas above submissions. It will be remembered that Luanda J, in rejecting the application to revise the same proceedings which Mr. Luguwa has criticized, advised that the matter is appealable. Oriyo, J, indirectly repeated that same advice when rejecting the application for leave to appeal against the ruling of Luanda, J. As I observed earlier on, the appellant decided to go back to the trial court to file

another application for execution which was dismissed and which dismissal, is now the subject of this appeal.

Mr. Luguwa spent the remaining 5 pages of his submissions on the Ruling by E. Mbaga RM, which is the subject of this appeal but in the process, he could not resist the temptation to go back to the Ruling by Kabuta RM. Mr. Luguwa submitted that the

> *"application is aimed to challenging the ruling of MBAGA RM dated the 2nd January, 2004. In his ruling Hon. MBAGA RM rejected the application for two reasons:-*
>
> 1. *At para 5 2nd paragraph he upheld that the matter was res judicator (sic) and the court was founders (sic) officio.*
> 2. *That there was an oral agreement which the court recognized and could not interfere with it".*

Mr. Luguwa contended that MBAGA RM did not consider the fact that the ruling of KABUTA RM stated that:-

> *"The 1st Complainant should file an agreement for the 2nd up to 20 complainants". Mr. Luguwa argued that were the appellant to file that said agreement, it would have*

declared the rights and liabilities of the 2nd up to 20th complainant. He further concluded that MBAGA RM seems to have missed the order that:

"6 The 1st complainant to register his agreement "if any" so that the court can see if he has any claim"

Mr. Luguwa submitted that the words "*if any*" are the guiding words. He contended that the appellant (Mr. Luguwa has throughout his submissions, referred to this appeal as an application and to the appellant as an applicant) did not agree to enter into any agreement to accept a lessor sum of this emoluments than what has been decreed by the court and hence he did not file any agreement. He contended further "*if any*" meant that if there are no terms which have been agreed upon by the parties, then there will be nothing to register, hence there will be nothing to register as it appeared in this case. Mr. Luguwa submitted that on this stand, MBAGA RM misdirected herself when she found that she was **functus officio.** He contended that the Resident Magistrate ought to have researched on the following question:-

"(1) In the absence of the said agreement what was the status of the

parties to the decree.

(2) What is the law governing the situation at hand where orders are left hanging".

Mr. Luguwa went on to answer the two questions. First he contended that under section 63 of the Employment Ordinance, Cap 366, it is unlawful to deduct even a single sent from the wages of the employee. He referred to the DICTIONARY OF LAW by LB Curzon PITMAN PUBLISHING 4th Edition 1995 regarding the definition of "wages" to be:

> *"Any sums payable to the worker by his employer which his employment including any fee, bonus commission, holiday pay or other emoluments referable to his employment whether payable under contract or otherwise".*

Mr. Luguwa contended that any deduction whatsoever from the said wages is illegal. He submitted that Kabuta RM seem to have been lured to compel the parties to enter into an illegal agreement. Mr. Luguwa went on to commend his client for having "*refused to engage himself in the act of entering into an agreement to receive reduced wages contrary to section 63 of the Employment Ordinance".*

Let me pose here and say that Mr. Luguwa's submission here is sliding into irrelevancies. The payments involved in the ruling by Kabuta RM are payments by a judgment debtor in execution of a decree of the court. They are not therefore in my considered opinion,

wages payable by an employer to an employee. Although Kabuta RM did not refer to any provisions of the law when dealing with the purported agreement between the decree holders and the Judgment Debtor, Order XXI Rule 2 makes provision for the payment of money under "**a decree which is otherwise adjusted in whole or in part to the satisfaction of that decree holder".**

Since a decree can be "**adjusted**" payment of money under a decree which has been so adjusted, is not illegal, if the law has been complied with. Be that as it may, Mr. Luguwa went on to argue that as regards the appellant, the status of the decree is intact as there is no any agreement to the contrary. Mr. Luguwa went on to quote the following passage from the ruling of Mbaga RM:

> *"In my perusal through the file, I have found no registered agreement which has been filed in court what I have discovered is that there were offers and counter offers. In the last offer given to the respondent by the decree holders offers that they are ready to be paid the sum of Tshs 8,000,000/=.*

Mr. Luguwa went on to criticize the trial Magistrate by saying that the only error which Hon. MBAGA made is to make generalization in reading the said file. He contended that in actual fact the words *"They are ready to be paid the sum of Tshs 8,000,000/= the ruling is very clear that the appellant is not among*

those who were ready to be paid that said sum of Tshs. 8,000,000/=."

At this juncture, let it be noted that, if Mr. Luguwa had quoted the whole paragraph of the ruling by Mbaga RM, the position would have been clearer to him. The whole paragraph as it appears at page 5 of that ruling states:

> *"On the issue as to whether there was an agreement between the parties I have decided to go through the ruling delivered by the previous honourable Magistrate. In my perusal through the file I have found no registered agreement which has been filed in court. What I have discovered is that there were offers and counter offers. In the last offer given to the Respondent by the decree holders offers that they are ready to be paid the sum of eight million.* ***According to the ruling of honourable Kabuta she has stated clearly that there was an oral agreement and that it got the blessing of the court. This court therefore already recognized this oral agreement and as far as I am concerned I can not interfere with such decision"*** *(emphasis mine).*

From the above paragraph, I have not seen any ground in support for Mr. Luguwa's contention that the agreement to be paid

shs 8,000,000/= clearly excluded the appellant. Secondly, the finding that there was such an agreement was not made by Mbaga RM but according to the ruling, it was a finding made by Kabuta RM, a finding which Mbaga RM found she could not interfere with.

Earlier on in this judgment, I quote part of the ruling by Kabuta RM in which she started categorically that:-

> ***".....This court is bound by the order dated 1/12/2001 that settlement has been reached. I can not change the order of the court. Only the superior court can do so.***
> ***.....The court recognizes that each complainant is to be paid 8 Million as per agreement....."***

Looking at what was actually decided by Kabuta RM, Mr. Luguwa submission that Mbaga RM, was in error by making generalization in reading that file, cannot be justified. Kabuta RM clearly decided that that that there was an agreement reached under which each complainant is to be paid shs eight million. Mrs Kabuta did not single out the appellant as not being a party to the said agreement. This decision was not made by Mbaga RM through an error of generalization, but by correctly reciting the decision in the ruling of KABUTA RM.

To conclude his submission on the two questions, Mr. Luguwa submitted that the decision that the matter was res judicata or **functus officio** was not against the appellant and that the decision of KABUTA RM is clear on that. Although I will return to this issue later on, on the face of the decision of Kabuta RM, the portion of which I have reproduced earlier on in this ruling, it clearly shows that the decision of Kabuta RM did not exclude the appellant and that fact will not change no matter how many times Mr. Luguwa chooses to reiterate that proposition.

Lastly, Mr. Luguwa raised two arguments the first relating to the procedure of executing decrees and the second regarding payment of a lessor, sum than that decreed by, the court. I will first deal with the second issue relating to payment of a lessor sum. Mr. Luguwa contended that the lower court wishes the appellant to receive a lesser sum than what was decreed by the court. He submitted that the laws which govern the matter is derived from English cases. He referred to the decision of BRIAN CJ in the famous PINNELS Case which Mr. Luguwa said it is adopted in the book CHESHIRE, FIFOOT AND FURMSTONS LAW OF CONTRACT. He quoted the passage which states: _

"Payment of a lessor sum on the day due in satisfaction of a greater sum cannot be satisfaction for the whole. Because it appears to the judges that by no possibility a

lesser sum can be a satisfaction to the plaintiffs' greater sum".

Mr. Luguwa went on to state that the principle was amplified in of FOAKES Vs BEER (1884) App. CASES. 605. He submitted that "**it is very clear that rejecting of a lesser sum in satisfaction of a large sum was not tantamount to satisfaction of the decree".**

Assuming the quotation of the principle in the PINNELS CASE to be correct, it is clear that the decision relating to the payment of a lesser sum than the amount payable under the decree, was not made by Mbaga RM but by Kabuta RM, whose ruling is not the subject of this appeal. The only issue which remains on this issue is whether Mbaga RM had the powers to interfere with the decision of Kabuta RM, even if it was a wrong decision, as Mr. Luguwa seems to imply. I will come back to the issue when deciding on the merits of the appeal.

Coming back to the first point which is on execution procedures Mr. Luguwa referred to the provisions of order XXI rules 9 and 10 (2 of the Civil Procedure Code. He quoted Rule 1 which states:

"When the holder of the decree desires to execute it he shall, (apply) to the court which passed the decree".

Mr. Luguwa submitted that the forum of an application for an application for execution is specified under Rule 10 (2). He submitted that ***"a requirement that a decree holder should file an agreement in order to recover his rights which has been decreed by court, this procedure is strange and I am satisfied that tit is an irregularity of law occasioning justice".***

Mr. Luguwa must have meant "occasioning injustice" but whatever the position, Mr. Luguwa seems to be oblivious of or conveniently ignored, the fact that the order to file the agreement was made not by Mr. Mbaga RM but by Kabuta RM, whose ruling has not been appealed against. The question therefore is whether Mbaga RM could, in a subsequent application for execution of the same decree, overrule the ruling of Kabuta RM.

In reply R.A Maleta Advocate for that Respondent submitted that the preliminary objection which was raised by the respondent and which was upheld by the trial Magistrate (Mr. Mbaga RM) was to the effect that the matter (application for the execution of the decretal sum) is res judicata as it had been conclusively determined and that the trial court is **functus officio** to quash its own decision. He argued that the basis for the said preliminary objection was the fact that the same issue relating to the appellants application for execution of the decretal sum as per the decree dated 12th September, 1998 in Employment Cause No. 18 of 1998, had already

been conclusively determined by the same court (Kabuta RM) in the ruling dated 23rd April 2001. Kabuta RM dismissed the application by pointing out clearly that the said application by Mr. Mwangi (the Appellant) for the execution of the total decretal sum, had been overtaken by events due to the fact that, the court recognizes the settlement agreement reached between the 20 complainants to Employment Cause No. 18 of 1998 (including the Appellant), and TAZARA (the responded), to the effect that, each of the said complainants agreed to be paid Tshs 8,000,000/= in satisfaction of the total decretal sum of Tshs 71,234,250/= each. Mr. Maleta stated that the appellant was aggrieved by the ruling of Kabuta RM and filed Civil Revision No. 40 of 2001 to the High Court which was dismissed by Luanda J on 20/6/2002. He stated further that the appellant filed an application for leave to appeal to the Court of Appeal against the ruling of Luanda J, and the application was dismissed by Oriyo, J on 4/3/2003. He pointed out that, instead of appealing the ruling of Oriyo J, the appellant went back to the trial court and re-filed the same type of application for execution of the total decretal sum, while he was aware that such application had already been conclusively determined by the same court. Mr. Maleta submitted that this is an abuse of the court process. He submitted that it was from the refilling of the application that the respondent raised the said points of preliminary objection that the matter is res judicata and that the trial court is **functus officio.** Mr. Maleta contends that the appellant's counsel has spent much time arguing the merits of the

application which were not determined by the trial court as they were dismissed on a preliminary objection. Mr. Maleta took a lot of pains to explain what res judicata means and also referred to the case of BIBI KISOKO MEDRAD VERSUS MUNISTER FOR LANDS HOUSING DEVELOPMENT AND ANOTHER (1983) TLR 25 on the meaning of **functus officio.** The court held that:

> *"In a matter of judicial proceedings once a decision has been reached and made known to the parties the adjudicating tribunal thereby become functus officio".*

Except for the issue of the trial court being **functus officio**, I do not think that the issue of **res judicata** should detain us much longer. Although both counsels are under the impression that the trial court (Mr. Mbaga RM) ruled that the matter before him was **res judicata**, the clear wording of the ruling is to the contrary. At page 5 second paragraph of the typed ruling the trial Magistrate (Mr. Mbaga RM) stated:

> *"Mr. Maleta has submitted that this application should be dismissed on grounds that the suit is **Res Judicata**, since the matter which is the application of execution of the decree has already been finally determined, On this objection I join hands with the applicant that the court is not **Res Judicata** since one of the elements of **Res Judicata** is that there must be one suit pending and*

another one conclusively determined as according to sect. 9 of the Civil Procedure Code. I am satisfied that this is not a fresh suit but this is an application made in the same suit....."

It is clear from the above statement that the preliminary objection on grounds of **res judicata** was not upheld by Mbaga RM. It appears Cleary from that ruling that the preliminary objection was upheld on the ground that the court was **functus officio**. The trial Magistrate stated starting from the last paragraph of page 5 as follows:

"On the objection as to the court being ***functus officio I do join hands with counsel for the Respondents that this court is functus officio.*** *I have given such decision because the application brought by the applicant is for execution of the decree passed by this court. However this application had already been thrown out by the previous honourable Magistrate and since it was thrown out by a Resident Magistrate I cannot go further and reverse that decision of the Previous Magistrate.....The applicant has submitted that there are a lot of contradictions in this case* ***as far as I am concerned by hands are tied I can therefore not rectify anything since the court is functus officio*** *if*

there are any contradictions then the court with power to rectify them is the High Court".

For the purposes of this appeal therefore, the matter for consideration is whether the trial Magistrate Mbaga RM, was functus officio, to determine the application for execution brought by the appellant, after the same application had been dismissed by Mrs. Kabuta RM. In the memorandum of appeal this issue appears as ground No. 5. I propose to dispose of it before reverting to the remaining four grounds".

In the ruling of Kabuta RM she stated in part, as follows:-

"fourthly the question that the 1st complainant (Appellant) wants to be paid the decretal sum of Shs 71,234,280/= has also been overtaken by events. ***Indeed find that such amount no more exists*** *following his claim that settlement had been reached and that he needed time to file settlement, as indicated above. This indeed shows lack of seriousness and if I am allowed to comment I would say that its indeed intended to serve interests of a person or group of persons....."*

I am therefore made to believe that the 1st ***Complainant Hamis Mwangi has been paid over and above what***

already been paid and was in fact paid more than he was entitled to?. In my considered opinion Mbaga RM faced with the ruling of Kabuta RM would have been sitting on appeal on the ruling of Kabuta RM, if she had entertained the second application for execution. In so far as what amount was payable to the appellant under the decree and whether such amount had already been paid to the appellant was concerned, the matter had finally been determine by Kabuta RM. This decision had been communicated to the appellant and in the circumstances, the court was **functus officio**. The Resident Magistrates Court could no longer look at the decision made by Kabuta RM ad decide otherwise. To do otherwise the court would have been sitting on appeal on its own decision.

Mr. Luguwa has referred to the provisions of section 38 of the Civil Procedure Code which provides:

> *"38 (1) All questions arising between the parties to the suit in which the decree was passed and relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing that decree and not by a separate out".*

Applying the above provision to the present case, the question arising between the parties to the suit as to the amount payable under the decree, in so far as the appellant is concerned, was

determined by Kabuta RM. In fact, even the issue as to whether the decree has been satisfied in so far as the appellant was concerned, was also determined by Kabuta RM. The appellant could not therefore, with the ruling of Kabuta RM undisturbed, go back to the court which passed the decree to seek the settlement of issues which that court had already settled.

Mr. Luguwa has also made much about the decision that an agreement was to be filed. To find out what the trial Magistrate meant one needs to look at what she stated in her ruling:

> *"The fist complainant (appellant) is ordered to file the agreement as ordered.* ***If the agreement is to the effect that he be paid the decretal sum, the court will make sure that he is paid"*** (emphasis supplied).

By the above statement, it appears that Kabuta Rm left the door open to the appellant to bring to the Court any agreement which contradicts the agreement which the court had already recognized for the payment of Shs 8,000,000/= to each complainant.

It seems to me that in the circumstances of this case, section 38 of the Civil Procedure Code could only be resorted to, if there was any problem regarding payment or satisfaction of the agreed sum of

Tsh. 8,000,000/= to each complainant, but not as a basis to file an application for the payment of the whole decretal sum.

Mr. Luguwa has also invited this court to apply the principle in the PINELS case, about payment of a lessor amount in satisfaction of the whole. I have already earlier on stated that the principle would not apply in the application before Mr. Mbaga RM as the court was **functus officio**. It was not Mbaga RM who decided on acceptance of payment of a lesser amount than the decretal sum. The decision was made by Kabuta RM. So the principle can only be raised in an appeal against the decision of Kabuta RM.

For the above reason the 5th ground of appeal which this court finds is the only ground of substance in this appeal, is dismissed.

I will now go through the remaining grounds starting from the 1st ground. In this ground the appellant has alleged that the trial Magistrate only considered the respondents submissions without taking into consideration the submissions by the applicant. Looking at the Ruling of Mbaga RM from the middle of page 2 up to the end of the first paragraph ending at the bottom of page 4, he has dealt at length on the applicant's submissions. The 1st ground of appeal has no factual basis and if I may say so, Mr. Luguwa who chose to argue the appeal generally, did not touch on this ground. In the

circumstances the first ground of appeal has no merit and it is accordingly dismissed.

In the 2nd ground of appeal the appellant has claimed that the court erred in deciding that there was an oral agreement to satisfy the decree by payment of a lessor sum. As I have already pointed out earlier, the decision that there was an oral agreement for the payment of shs. 8,000,000/=, was not made by Mbaga RM but by Kabuta RM. Mbaga RM did not deal with the merits of the application but dismissed it on a preliminary objection that the court was **functus officio**. The appellant for the reasons best known to him, chose not to challenge the decision of Kabuta RM by way of an appeal. He cannot now be allowed to appeal against that ruling under the cover of appealing the ruling of Mbaga RM, who did not make that decision. The second ground of appeal is therefore without merit and it is dismissed.

In third ground of appeal the appellant has alleged that the magistrate erred in disallowing the application for execution of the decree dated 12th day of November, 1998 which has never been set aside nor there being an agreement to satisfy it. This ground is also misconceived. Mbaga RM did not disallow the application. He just stated that the court was **functus officio** and therefore could not look at it. The application was, to use the language of the appellant, disallowed" by Kabuta RM on grounds that there was an agreement

for the payment of the lesser sum. This was not the decision made by Mbaga RM whose ruling is the subject of this appeal. The 3rd ground of appeal is therefore dismissed.

In the 4th ground, the appellant claims that the magistrate erred by finding that the appellant as a representative of the 19 other decree holders by accepting a lesser sum of Tshs 8,000,000/=, extended to forfeiture of Mr. Hamisi Mwangi's right to enforce the whole decretal sum. Like the 2nd and 3rd grounds of appeal, the 4th ground of appeal is a disguised attempt by the appellant to appeal against the ruling of Kabuta RM, when the subject matter of this appeal is the ruling of Mbaga RM. Mbaga RM made no decision on the merits of the application because she found that the court was "**functus officio**", in the light of the ruling of Kabuta RM. She correctly decided not to take a second look at the decision of that court as contained to the ruling of Kabuta RM. Since Mbaga RM did not make the decision complained of, the 4th ground of appeal has no merit and it is also dismissed.

In the final analysis the whole appeal has no merit and it is dismissed in its entirety.

Before ending this judgment something needs to be said about the exercise of the powers of revision of this court. Mr. Luguwa both in his main submissions and more specifically, in his rejoinder to the

submissions by Mr. Maleta Counsel for the Respondent, has invited this court to exercise its revisional and its powers of supervision under section 44 of the Magistrate's Courts Act to determine the rights of the decree holders and perhaps also, of the appellant, who have accepted a lessor amount than the decretal sum. Mr. Luguwa has either chosen to close his eyes or has a very short memory of the fact that the decision on the acceptance of a lesser sum was made by Kabuta RM and not by Mbaga RM. Secondly, the appellant tried to challenge that decision of Kabuta RM by way of an application for revision, which was dismissed by Luanda J, and the appellant was advised to appeal the ruling. To ask this court now to revise the decision of Kabuta RM, when this court has already dismissed an application to revise the same ruling, is ridiculous. The door to revision, in so far as this court is concerned, has been closed. The door to an appeal, subject to the law of limitation, has from the very beginning, been open to the appellant. For reasons unknown to this court, the appellant has been making all efforts not to walk through that door. I am afraid, that is the only door open to the appellant now, if he can overcome the obstacle of the law of limitation.

This appeal is dismissed in its entirety, and the respondent will have the costs.

J.I. Mlay

JUDGE

Delivered in the presence of Mr. Luguwa advocate for the appellant and the appellant himself and in the absence of the respondent with notice, this 4th day of August 2006. Right of Appeal is explained.

J. I. Mlay

JUDGE

4/8/2006