

**IN THE HIGH COURT OF TANZANIA  
DAR ES SALAAM DISTRICT REGISTRY  
AT DAR ES SALAAM**

**MISC. CIVIL APPEAL NO 71 OF 2019**

*(Arising from the ruling of matrimonial Misc. Application No 132 of 2018 emanating from the execution order in Matrimonial cause 75 of 2014 at Kinondoni District Court)*

**FORTUNATA EDGA KAUNGUA.....APPELLANT**

**VERSUS**

**GEORGE HASSAN KUMBURU.....RESPONDENT**

**JUDGEMENT**

**MASABO, J.L.:-**

This is appeal emanates from the ruling of Matrimonial Misc. Application No.132 of 2018 in which the appellant being a judgment holder in sought execution of decree arising from Matrimonial Cause No. 75 of 2014. The brief facts leading to the appeal are that, sometimes in 2014, the Respondent (now deceased) filed a matrimonial cause No. 75 of 2014 at Kinondoni District Court praying for decree of divorce and incidental orders of distribution of matrimonial property. After full hearing, on 25<sup>th</sup> November 2015 the court dissolved the marriage and ordered division of matrimonial assets at a ratio of 60% for the Respondent and 40% for the Appellant. The assets, for which the division was ordered were: a house at Mbezi Beach in Dar es Salaam, goats and chicken at Bagamoyo, Cars (make Toyota Rav4 and Suzuki) and a plot at Karatu. Unfortunately, the husband died prior to the distribution of matrimonial execution of the court order. According to the Appellant she her application for files an application for execution but the

same was not determined until in 2017 and by then the Respondent had died and his estate distributed amongst his heirs. During the execution Proceedings, the Administrator of the Respondent's estate appeared in defence of the Respondents interests whereby he informed the properties listed in the court that the Respondent represented by its administrator told the court, the properties subject for execution were no longer existent save for the house at Mbezi Beach. According to the ruling, the rest of the properties could not be distributed because (i) the plot at Karatu was subject to a decision of Mwambao Primary Court in Bagamoyo dated 13<sup>th</sup> July 2012 in matrimonial proceeding between the Respondent and another person named Elizabeth Ngulumu; (ii) the vehicles did not belong to the Respondent as per a report filed in Court by the Tanzania Revenue Authority which indicates that Toyota RAV 4 belonged to Ratina Parima Lakhan and Suzuki Wagon was in the name of Mohamed Fanyeje Matasi; (iv) part of the land at Bagamoyo had already sold by the judgment debtor and the goats and chicken were no longer existent.

Having considered these circumstances, the executing court held that, although its role is ordinarily to give effect to the decree, the circumstances of the case renders the decree inexecutable in its original form. Consequently, it ordered the execution to be confined on the existent properties, to wit the house at Mbezi Beach evaluated at Tshs 215,000,000/= and the remaining the remaining part of the farm at Bagamoyo in the same ration decreed by the court in Matrimonial Cause No 75 of 2014. Unhappy with the order, the Appellant filed for a review in Misc. Application

No.132 of 2018 but the same was dismissed hence this appeal. Her ground for appeal is that the trial Magistrate erred in both law and fact for failure to distribute matrimonial properties as it was ordered in the judgment and decree in the Matrimonial Cause No 75 of 2014.

The appeal was heard orally both parties were represented. Advocate Godian Binamungu appeared for the Appellant and Mr. Hashim Mziray, advocated for the Respondent. Mr. Binamungu submitted that the execution order granted by the District Court of Kinondoni was made in total disregard of the judgment and the decree filed for execution. That, the holding that some of the asserts liable for distribution such as cars, goats and a house at Karatu are not existence was inconsistency with the judgement and decree especially because there was no objection proceeding filed against the execution application. Mr. Binamungu cited the case of **Ramswami V T.N.V Kailash Thayer** AIR 1951 S.C 189 (192) and reasoned that as stated in this case the duty of the executing court is to give effect to the terms of the decree and it has no power to go beyond. He submitted that, if it is true that the assets are inexistent, then, it is possible that the administrator of the estate misused the estate by selling the car, disposing off the goats and chicken contrary to section 8 and Section 5 of the Probate and Administration of Estates Act, Cap 352 RE 2002.

In response, Mr. Mziray did not address the merit of the application. He confined his submission to a procedural issue whereby he submitted that the application is incompetent as the order appealed against is unappealable. He reasoned that the appeal emanates from Misc. Application for review,

pursuant to order 42 rule 7(1) of the Civil Procedure Code [Cap 33 R.E 2002] which provides that an order rejecting the application shall not be appealable hence the appeal before Court is incompetent. Mr. Mziray further submitted that execution marks the end of the case hence this appeal should be dismissed. He further submitted that Mr. Binamungu's reference to the conduct of the administrator is misconceived as it an administration matter which can only be raised before a probate court.

In the rejoinder, Mr. Binamungu submitted that the Respondent's counsel has misdirected himself on the position of the law. He reasoned that, matters pertaining to matrimonial cause, the division of matrimonial assets being inclusive, are regulated by the Law of Marriage Act, 1971 and not Civil Procedure Code. Section 80(1) of The Law of Marriage Act provides for appeal in matrimonial proceedings which allows a person aggrieved, to appeal against any order to the High Court and the same is stated in GN NO 136/1971 Rule 77(1). Any matter covered by the Marriage Act is to be dealt in compliance with this. On the issue of misappropriation of the estate he submitted that the issue of estate administration is relevant because the appeal cannot be addressed without touching it.

I have carefully considered the submission by both parties. The main issue for determination is whether or not the execution court erred in its decision. Before embarking on this issue, I will first address myself to the issue raised by the Mziray pertaining the competence of the application. The choice to start with this issue rests on a very simple test. The issue raised by Mr Mziray

is a legal one and if resolved in the affirmative will, automatically, dissolve the matter.

Having regarded the submissions by both counsels on this point, I have noted that, the submission of each of the counsels is centered on the correct position of law. The submission by Mr. Mziray reflects the general position of law as provided for under Order XLII Rule 7 which specifically states that an order rejecting an application for review is non appealable. This ruled is however not free of exceptions and one of such exception is found under Section 80 of the Law of Marriage Act, which as correctly submitted by Mr. Binamungu applies to appeals of matrimonial nature. Under this provision, any order made by the district court is appealable to this court. The order appealed against having emanated from a matrimonial cause, is in my settled view, covered under this section. Therefore, the issue raised by Mr. Mziray, is by virtue of this provision, resolved in the negative.

Having resolved this, I now turn to the main issue for determination on whether or not the executing court erred in its decision. At first let me traverse albeit briefly on execution and the role of an execution court. Roughly, execution can be defined as the enforcement of a decree by a judicial process which enables the decree- holder to realize the fruits of the decree passed by the competent Court in his favour. In our jurisdiction, execution and processes thereto are provided for under Order XXI of the Civil Procedure Code, Cap 33 RE 2002. Being a procedural law, this provision exclusively does not expressly define the role of the executor. However, the

same can be discerned from Rule 10(2), Rule 10(3) and Rule 15(1), all of which are reproduced below.

10.-(2) ".....every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely-

- (a) the number of the suit;
- (b) the names of the parties;
- (c) the date of the decree;
- (d) whether any appeal has been preferred from the decree;
- (e) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree;
- (f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results;
- (g) the amount with interest (if any) due upon the decree or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed;
- (h) the amount of the costs (if any) awarded;
- (i) the name of the person against whom execution of the decree is sought; and
- (j) the mode in which the assistance of the court is required.."

10.- (3) The court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree.

15.-(1) On receiving an application for the execution of a decree as provided by rule 10, sub-rule (2), the court shall ascertain whether such of the requirements or rules 10 to 12 as may be applicable to the case have been complied with; and, if they have not been complied with, the court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it.

15.-(4) When the application is admitted, the court shall enter in the proper register a note of the application and the date on which it was made and shall, subject to the provisions hereinafter contained, order execution

What is discernible from these provisions is that upon the application being made in the executing court and upon the execution court being satisfied that the application complies with the format provided by the law, all what the court can do is to order execution save where there is an objection an objection that the property being attached is not liable for attachment in case the execution court shall conduct objection proceedings pursuant to Order Rule 57 of this order.

The role of the execution court articulately stated in two Indian cases which I find to be highly enlightening. The first authority is the case of **The Lahore Bank, Limited, In Liquidation v. Ghulam Jilani**, (1924) I.L.R. V Lah. 54 where it was held that executing Court has no jurisdiction to criticize or go behind the decree, all that concerns it is the execution of the respective decree. And, if the decree should be annulled, that is not the function of the executing court. The Court in this case was addressing the refusal by the

execution court to execute the decree on the ground that a minor had not been represented before the Liquidation Court and therefore no decree existed. The second is the case of **V. Ramaswami Ayyangar And Others vs T.N.V. Kailasa Thevar** 1951 AIR 189. Commenting on the role of the executing judges, the court held that:

“The learned Judges appear to have overlooked the fact that they were sitting only as an executing court and their duty was to give effect to the terms of the decree that was already passed and beyond which they could not go. It is true that they were to interpret the decree, but under the guise of interpretation they could not make a new decree for the parties.”

Based on these authorities, it can safely be concluded that the role of the execution court is to finalize the case, that is, to deal with the orders and decrees as decided by the trial court. In the instant case, the decree for which execution was sought decreed that the matrimonial assets acquired by the parties during the subsistence of marriage which comprised of (a house located at Mbezi Beach, 25 acres of land with goats and chickens located at Bagamoyo; a plot at Karatu and two motor vehicles make Rav 4 and Suzuki) be divided in a ratio of 60% for the Respondent and 40% for the Appellant. At execution the execution court ruled that the decree could not be executed in its original form and, consequently, modified the same, by reducing the number of assets liable for distribution on the ground that some of the properties had either been sold or are registered in the names of third parties and are therefore not liable to the execution proceedings. Based on the authorities above cited, I find the departure and modification



thereto to, to have surpassed the legal powers of the execution court more so because there no record that there was an objection from the persons who are deemed to be owners of the properties which were found by the execution court to be ineligible for execution.

It need not to be emphasizes that, the judgment debtor had the right to challenge the inclusion of certain assets in the decree by preferring an appeal against the decree but there is no record that he appealed which implies that he was satisfied by judgement and the decree thereto. Equally, it must be noted that the death of the judgment debtor does not render nugatory the decree of the court nor does it operate to change it. It similarly does not give an avenue for his/her heirs or administrator of his/her estate, as the case may be, to temper with properties to which, as in this case, a decree of the court subsists.

Based on these accounts, I have found merit in this appeal. I hereby quash and set aside the decision of the execution court and I subsequently invoke the revisional powers vested in this court by the Section 44(1) of the Magistrate Court Act, Cap 11 RE 2002 and order that the case file be remitted to the execution court for execution of the trial court's decree.

DATED at DAR ES SALAAM this 20<sup>th</sup> day of February 2020



**J.L. MASABO**

**JUDGE**

Judgment delivered this this 20<sup>th</sup> day of February 2020 in the presence of Mr. Mziray counsel for the Respondent and the Appellant present in person.



**J.L. MASABO**

**JUDGE**