

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA
CIVIL APPEAL NO. 09 OF 2018

*(From the Resident Magistrates' Court of Mbeya Misc. Civil Application
No. 50 of 2017. Originating from Civil Case No. 18 of 2003 in the Resident
Magistrates' Court of Mbeya)*

AGRICULTURAL INPUTS TRUST FUND.....APPELLANT

VERSUS

STEPHANO SIMON MWAMPASHI.....RESPONDENT

JUDGEMENT

Date of Last Order : 10/12/2019
Date of Judgement: 05/03/2020

MONGELLA, J.

The Respondent filed Misc. Civil Application No. 50 of 2017 in the RMs Court for Mbeya seeking to execute a decree issued in Civil Case No. 18 of 2003. The Appellant raised a preliminary objection to the effect that the Respondent was time barred to execute the decree. The RMs Court overruled the preliminary objection and ordered the Appellant to surrender the title deed on the property in dispute to the Respondent. Aggrieved by that decision, the Appellant through legal services of Mr. Sambwee Shitambala, learned Advocate, has appealed to this Court on three grounds being:

1. That the trial Magistrate erred in law and facts when he overruled the preliminary objection raised by the counsel for the Appellant and therefore neglecting limitation of time on execution of decree as a point of law just because the trial Court had declared the mortgage loan contract null and void.
2. That the trial Magistrate erred in law and facts when ordered the Appellant to return the title deed to the decree holder Stephano Simon Mwampashi who has never been a party to the suit and no decree has been issued in his favour.
3. That the trial Magistrate erred in law and facts when held that a decree could be prepared at any time and executed at any time.

The appeal was argued by written submissions. Mr. Shitambala in his written submissions argued generally on ground one and three. He contended that the Respondent's Application in the RMs Court had contravened the Law of Limitation Act, Cap 89 R.E. 2002 under item 20 Part III to the Schedule which provides that the limitation for execution of a decree is 12 years. He argued thus that the trial Magistrate erred in law and fact in overruling a preliminary objection on a pure point of law. He cited the case of **Mukisa Biscuits Co. Ltd v. West End Distributors Ltd.** [1969] EA 696 in which it was held:

"So far as I am aware, a preliminary objection consists a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the suit to arbitration."

He argued that had the trial Magistrate been aware of this case he wouldn't ignore and or overrule the preliminary objection so raised by the Appellant. He ought to have worked on it to see whether the application before him is in compliance with necessary provisions of the law. He said that a mere contravention of the Limitation Act suffices to dismiss the application and that a decree cannot be prepared and executed anytime with no regard to limitation as ruled by the trial Magistrate. He added that even though the trial Court had declared the mortgaged loan contract null and void this point only could not suffice to overrule the preliminary objection on point of law.

Responding to Mr. Shitambala's submissions Mr. Isack Chingilile, learned Advocate for the Respondent argued that the Respondent filed in the trial Court an application for execution of a decree in Civil Case No. 18 of 2003 which was determined ex parte. The Appellant then filed an application seeking for the ex parte decision to be set aside but the same was dismissed for being incompetent in a ruling delivered on 22nd April 2009. Thereafter, the application for execution of decree was made on 27th December 2017. Mr. Chingilile contented that following the dismissal of the application to set aside the ex parte decision, the computation of time ought to start from 22nd April 2009 whereby the 12 years limitation time would end on 22nd April 2021. He concluded that the trial Magistrate was thus correct in dismissing the preliminary objection and if the Appellant keeps holding the title deed it shall render failure of justice.

On ground two Mr. Shitambala argued that in the original case and decree, the decree holder was one Mary Nzunda who was the plaintiff and one Saimon Mwampashi (deceased) whose estate is now being administered by the decree holder/the Respondent in this matter was the

1st defendant/judgment debtor. He argued that in the circumstances the so called decree holder in this matter is not a decree holder rather a judgment debtor as he is not representing one Mary Nzunda. In conclusion he prayed for the appeal to be allowed with costs.

Responding to this ground, Mr. Chingilile contended that the issue of locus standi was not raised in the trial Court. That, the Appellants only raised an issue of time limitation. He was of the view that raising an issue of locus standi as a ground of appeal is a misconception by the Appellant because the same was never raised and determined in the trial Court and it constitutes no point of law. In support of his argument he cited the case of **Abeid Mpanzi v. Republic**, Criminal Appeal No. 476 of 2016 (CAT-Iringa, unreported); **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 416 of 2013 (CAT-Bukona, unreported) and that of **Abdul Athumani v. Republic** [2004] TLR 151 whereby in these cases the CAT ruled that matters not raised and entertained at the trial stage cannot be dealt with at an appellate stage. He prayed for this ground of appeal to be dismissed.

I have considered the arguments by both parties and proceed to determine as follows:

On the first and third ground regarding time limitation, Mr. Shitambala argued that the application for execution of the decree in Civil Case No. 18 of 2003 was out of the prescribed time limitation of 12 years. Mr. Chingilile countered this argument and argued that Civil Case No. 18 of 2003 was decided ex parte and the Appellant applied to set aside the ex parte decision but the same was dismissed on 22nd April 2009. This fact was never disputed by the Appellant's Advocate because he opted not to file

a rejoinder thereof. In my settled view, the ex parte judgment being subjected to an application for it to be set aside, the decree holder thereof was not in a position to execute the said decree. I therefore agree with Mr. Chingilile that time started to run on 22nd April 2009 when the decision dismissing the application to set aside the ex parte decision was delivered. Application No. 50 of 2017 was thus within time limitation. The Hon. trial Magistrate though basing on a wrong reasoning that the trial Court in Civil Case No. 18 of 2003 nullified the loan contract thus overruled the preliminary objection on time limitation, reached a correct conclusion. I thus dismiss ground one and three of the Appellant's appeal.

On the second ground of appeal regarding locus standi of the Appellant in Misc. Application No. 50 of 2017, Mr. Shitambala argued that the Appellant is the administrator of the estate of one Saimon Mwampashi who was the 1st defendant in Civil Case No. 18 of 2003 being sued by his wife one Mary Nzunda. Mr. Chingilile opted not to address this ground substantively on the ground that the same being not a point of law was never raised and determined in the trial Court. However, in my settled view, I do not subscribe to his argument that the issue of locus standi is not a matter of law. The issue of locus standi is in fact a matter of law and has so far been entertained by courts of law as a legal issue. See: **Legal and Human Rights Centre (LHRC) and Others v. Attorney General**, Miscellaneous Civil Case No 77 of 2005. Mr. Chingilile cited a number of cases to support his stance; however he did not tell this court about the issues the CAT was called upon to deal with. That is, whether they were matters of law or of fact. In fact, the CAT and this Court has ruled on several occasions that matters of law can be raised at any stage

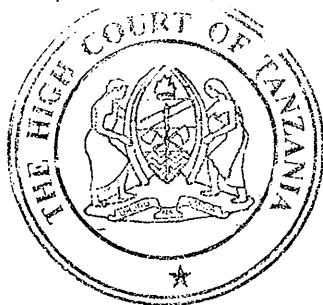
including an appellate stage by either the court or the parties, so long as parties are accorded the opportunity to address the same. See **Tanzania Pharmaceutical Industries Limited v. Dr. Ephraim Njau**, AR-Civil Application No. 05 of 1996 (CAT, unreported. Lubuva, J. A.)


I have also gone through the trial Court records and found as argued by Mr. Shitambala that the Appellant Stephano Saimon Mwampashi applied to execute the decree in Civil Case No. 18 of 2013 as an administrator of one Saimon Mwampashi. The said Saimon Mwampashi was the first defendant in the very same case whose decree was sought to be executed by the Respondent. This is very alien and the trial Court ought to have taken this fact into account even without it being raised by the parties. A defendant cannot in any way apply to execute a decree issued adversely against him. The Plaintiff in Civil Case No. 18 of 2003 was one Mary Nzunda and she is the decree holder. She was therefore the right party to apply for execution of the decree in that case.

Having observed as above I nullify the judgment and proceedings of the RMs Court in Misc. Civil Application No. 50 of 2017. Parties are taken to the position they were in the judgment and decree in Civil Case No. 18 of 2003. If the real decree holder in that case still wishes to execute the decree, she may do so by invoking proper procedures of the law.


Appeal partly allowed. No orders as to costs.

Dated at Mbeya on this 05th day of March 2020




L. M. MONGELLA
JUDGE
05/03/2020

Court: Judgment delivered in Mbeya in Chambers on this 05th day of March 2020 in the presence of both parties' counsels and the Respondent.


L. M. MONGELLA
JUDGE
05/03/2020