

**IN THE HIGH COURT OF TANZANIA  
(IN THE DISTRICT REGISTRY)**

**AT MWANZA**

**PC: CIVIL APPEAL NO.49 OF 2019**

*(Arising from the judgment of the District Court of Nyamagana in PC Civil appeal  
No. 25 of 2019 originating from Civil Case No. 430 of 2018 of Mwanza Urban Primary  
Court)*

**SHIJA ABELI MALIMI ..... APPELLANT**

**VERSUS**

**ENOS HANGI MASAJU ..... RESPONDENT**

**JUDGMENT**

*Last Order: 21.04.2020*

*Judgment Date: 28.04.2020*

**A.Z.MGEYEKWA, J**

This is the second appeal that the appellant is appealing against the decision of the judgment of the District Court of Nyamagana in Primary

Court Civil appeal No. 25 of 2019 originating from Civil Case No. 430 of 2018 of Mwanza Urban Primary court. The District Court dismissed the appellant's first appeal and could not see justice in the decision hence this second appeal to this court. The grounds upon which this appeal is based are as follows:-

- 1. That, the first appellate court erred in law and fact by deciding that the decree in civil case No. 430 of 2018 was not executed without considering the evidence in the trial court records that the said debts claimed by the respondent was paid in full before the trial court and the same marked as paid by the court through the court order dated 25.03.2019.*
- 2. That the appellate trial magistrate erred in law and fact by ordering execution in civil case No. 430 of 2018 be complete while some orders of execution that particular application dated 18.06.2018 already set aside by the same first appellate court.*
- 3. That the first appellate court erred in law and fact by failure to consider the grounds of appeal raised by the appellant.*
- 4. That the appellate court erred in law and fact by revising the orders of the trial court which altering the rights of the appellant without affording any reasons for the orders.*

In prosecuting this appeal, the Appellant afforded the service of Mr. Mathew Kija learned counsel while the respondent was represented by Mutalemwa learned counsel.

Prosecuting the appeal, the appellant learned counsel prays to abandon 3<sup>rd</sup> ground of his petition of appeal and this court to adopt his grounds and form part of his submissions.

Arguing on the first ground, he submitted that the first appellate court misdirected itself by saying that the decree in the civil case No. 430 of 2018 was not executed while there is evidence on record that the appellant paid all the sum and order of the trial court stated the same and it was used to release the appellant from the jail as was a civil prisoner.

On the second ground of appeal, the 1<sup>st</sup> appellate court misdirected itself to issue execution orders in PC Civil Case No. 430 of 2019 and the 1<sup>st</sup> appellate court set aside the Primary Court orders. The trial court issued two orders: the order dated 25.03.2019 and the other made on 18.06.2019. The magistrate was wrong as he was functus official by the first order. The 1<sup>st</sup> appellate court considered that the trial court was wrong and set aside the order but still the 1<sup>st</sup> appellate court ruled out that the

respondent to proceed to execute orders without specifying which order should proceed. It was his submissions that the 1<sup>st</sup> appellate court ordered execution while that order does not exist.

On the 4<sup>th</sup> ground, he submitted that, the trial magistrate did not give reasons for revising the said orders of the trial court that utters the rights of the parties without giving reasons. It was his prayer to this court to set aside the decision of the 1<sup>st</sup> appellate court and this court to decide that the order made on 25.05.2019 to be valid and legal. He prays this court to allow the appeal with costs and any other orders as it thinks just.

Responding to the appeal, Mr. Mutalemwa learned counsel for the respondent submitting for the 1<sup>st</sup> ground he avers that he did not find where the 1<sup>st</sup> appellate court faulted by holding that the order dated 25.05.2019 was executed. He went on that the trial court addressed the parties in absence of the appellant after receiving the later from the respondent praying to change the mode of execution from the appellant being a civil prisoner and instead to attach the appellant's properties. Citing page 7 of the 1<sup>st</sup> appellate court judgment he avers that the trial court was satisfied that the award was certified for the respondent to pay and ordered the respondent to proceed with the execution as no execution

report was filed in the trial court. He went on that the 1<sup>st</sup> appellate court vacated all orders and orders the order including the one which was dated 25.05.2019 for execution. He referred this court to page 3 - 8 of the 1<sup>st</sup> appellate court judgment, and avers that the court acted on its power to revise the proceedings of the trial court and based on justice found that the execution was incomplete as there was no any report evidencing that the loan was paid and the appellant was absent held as a civil prisoner. It was his submissions that, the typed orders dated 25.03.2018 were against the un-typed record and on 11.06.2019 the trial court issued another order correcting itself to the tune that the loan was not paid.

Responding to the 4<sup>th</sup> ground, Mr. Mutalemwa submitted that, the 1<sup>st</sup> appellate court gave reasons that on the trial court records, any execution report was found and no evidence that the awarded sum was paid. He avers that the order made on 25.05.2019 and that the appellant having paid all the money was an error. He added that the order made on 25.03.2018 intended to change of the mode of execution thus, the execution was not completed.

Mr. Mutalemwa prays this court to dismiss this appeal on the ground that the trial court orders of 25.03.2019 do not say that the appellant was

released from jail after payment of all money due and the 1<sup>st</sup> appellate court be upheld as there is no evidence as to the payment. He finally rests praying this court to dismiss the appeal without costs as the error in question was caused by erroneous orders by the trial court.

Rejoining, Mr. Mathew referred this court to the 1<sup>st</sup> appellate court that it was its findings that there were two orders; and the 2<sup>nd</sup> order rectifying the 1<sup>st</sup> order was invalid as the trial court was *functus official*. He urged this court to allow the appeal with costs.

After a careful perusal of the record of the case, the testimonies adduced by the parties and the final submissions submitted by parties. I should state at the outset that, in the course of determining this case I will be guided by the canon of the civil principle set forth in the case of **Hemedi Said v Mohamedi Mbilu** (1984) TLR 113 which require that "*the person whose evidence is heavier than that of the other is the one who must win*".

Addressing the first ground of appeal that, the first appellate court erred in law and fact by deciding that the decree in Civil Case No. 430 of

2018 was not executed without considering the evidence in the trial court records that the said debts claimed by the respondent was paid in full before the trial court and the same marked as paid by the court through the court order dated 25. 03.2019.

I have laboured through the court typed proceedings and the untyped proceedings and I found the orders mentioned by the appellant and the same are attached in Petition of Appeal contently differed with the original records (untyped records) in the court file. In such circumstances, the court needs to resolve or regard order (s) stated in the original court file and not otherwise. It is apparent that, orders attached in the Petition of Appeal which contains the word " *...mdaiwa amelipa deni lote...*" substantively, is unfound in the court file original records, and therefore form no legal basis of determination which is finally disregarded. For this reason, this ground lacks merit.

As to the 2<sup>nd</sup> ground of appeal that, the 1<sup>st</sup> appellate court erred in law by ordering execution in Civil Case No. 430 of 2018 to be completed, though not specifically point out which orders were to be executed exactly, prudence held by the first appellate court that it was the order dated 18<sup>th</sup>

June, 2019. Upon examining the typed proceedings in the original file, it was my findings that, the whole procedure for execution of the decree appealed against was inappropriate and tainted with illegality. I am saying so because the trial court records reveals that the matter was scheduled on 30<sup>th</sup> May, 2019 and the court received an objection letter from the judgment debtor against execution and it was not shown if parties were present and the matter was adjourned until 04<sup>th</sup> June, 2019. From this date, the matter was severely adjourned to 24<sup>th</sup> June, 2019, without stating any reason for the adjournment. Then the matter was called for hearing on 18<sup>th</sup> June, 2019 instead of 24<sup>th</sup> June, 2019 against the court diary, in the absence of judgment debtor and execution was ordered by the court. It is not exhibited if the summons was issued to call upon the judgment debtor on the date when orders were issued, the same, no returned summons which proves the service of summons to a judgment debtor.

I find this a violation of the appellant rights and the abuse of the court process. It is trite law that, the right to adversarial proceedings which is one of the elements of fair hearing as stipulated under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, means that each



party, is given an opportunity to acquite with knowledge of evidence against his course and make comments as it may be, in view to influencing the court's decision. As it was observed by the Court of Appeal in **Mbeya-Rukwa Auto Parts & Transport Limited v Jestina George Mwakyoma**, Civil Appeal No. 45 of 2000. It was from these un-procedural proceedings that the trial court went on revising and correcting its orders without authority to do the same. I am in accord with both learned counsels' submissions that the trial tribunal stands no ground to do the same. In my view, the trial court was *functus official* after issuing its first Order dated 25<sup>th</sup> March, 2019 and any Order made from that was un-procedural and illegal. It is for this reason that the Orders made on 18<sup>th</sup> June, 2019 cannot sustain. I find this ground with merit.

As to the 4<sup>th</sup> ground of appeal, it was the appellant's counsel claim that the appellate court erred in law and fact by revising the Orders of the trial court which altered the rights of the appellant without affording any reasons for the Orders. As I have already discussed the matter, this court in its findings, the order dated 25<sup>th</sup> March, 2019 do not exist in the original records of the trial court thus it was not existing, therefore, the same was

not valid and the Order dated 18<sup>th</sup> June, 2019 which is appealed against, was un-procedural and illegally issued by the trial court. It was also the finding of the 1<sup>st</sup> appellate court that there was a procedural irregularity. I agree that the 1<sup>st</sup> appellate court can exercise its powers to revise the lower court's decision, though I do not agree with the last Order of the 1<sup>st</sup> appellate court as I see no justice on the decision. The same, this ground lacks merit.

For the reasons discussed above the appeal is allowed to the extent that, this court vitiates the entire trial Court Orders dated 18<sup>th</sup> June, 2019 for being illegal and unfair. The whole process of execution is declared a nullity and I order execution to start afresh before another competent Magistrate. No order as to costs.

Order accordingly.

DATED at Mwanza this 28<sup>th</sup> day of April, 2020.

  
A.Z Mgeye

**JUDGE**

28.04.2020

Judgment delivered on 28<sup>th</sup> day of April, 2020 via audio teleconference, and both parties were remotely present.



A.Z Mgeyekwa

**JUDGE**

28.04.2020

Right to appeal full explained.