

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL REFERENCE NO. 07 OF 2020

(Arising from Application for Execution No. 07 of 2020, Original, Civil Case No. 17 of 2011 in
the High Court at Arusha)

NATIONAL INSURANCE CORPORATION OF

TANZANIA LIMITED.....APPLICANT

VERSUS

STEVEN ZAKARIA KITEU.....1ST RESPONDENT

EDMUND D. NZELA.....2ND RESPONDENT

GEORGE NZELA.....3RD RESPONDENT

RULING

04/03/2021 & 24/05/2021

GWAE, J

The applicant herein above was a third party in a Civil Suit No. 17 of 2011 where the 1st respondent sued the 2nd and the 3rd respondent for damages both specific and general damages due to permanent disability suffered as a result of an accident caused by the 2nd respondent's motor vehicle driven by the 3rd respondent employed by the 2nd respondent.

Upon hearing of the suit, the trial court's findings were in favour of the 1st respondent who was to be paid specific damages to the tune of Tshs. 2,409,000/=, compensation for the loss of income arising out of permanent total disablement Tshs. 100,000,000/= and general damages at the tune of Tshs. 50,000,000/=. After the judgment was pronounced, the 1st respondent thereafter filed an application for execution where he appeared as a decree holder and the 2nd, 3rd and the applicant appeared as judgment debtors. In her affidavit opposing the application for execution the applicant who was the third party in the main case raised a concern that the judgment and decree to be executed do not order the ~~applicant, third party to pay the decree holder, 1st respondent therefore the~~ applicant was of the view that she was wrongly joined in the application for execution as her liability was only limited to the indemnification of the 2nd respondent. Nevertheless, the objection by the applicant was found to be baseless and consequently the application for execution was granted and a garnishee order nisi was issued for Tshs. 250,721,640/= on the applicant's bank accounts held at Exim Bank and NMB Bank.

Dissatisfied by both the decision and order the applicant is now before this court by way of a reference seeking an order to quash and set aside the decision of the Deputy Registrar of the court, according to her, it was against the judgment and decree in Civil Case No. 17 of 2011. In her supporting affidavit sworn by Ms.

Doris Barnabas, Ag. Chief Legal Counsel, the applicant stated that, the ruling of the Deputy Registrar was against the judgment and decree of this court (**Maghimbi, J**) vide Civil Case No. 17 of 2011 as it was the 2nd and 3rd respondents who were required to pay the 1st respondent and the applicant herein was to indemnify the 2nd respondent.

When the matter came for hearing, the applicant was represented by the learned counsel, **Mr. Christopher Bulemo** while the 1st respondent enjoyed legal services from the Legal and Human Right Center under the representation of **Mr. Hamis Mayombo**, the learned counsel, the 2nd and 3rd respondents appeared in person.

Supporting his application Mr. Bulemo adopted the applicant's affidavit and added that the aim of this reference is to question legality of the ruling delivered by the Deputy Registrar of the court in the application for execution as the applicant's liability is only limited to indemnification to the 2nd respondent.

Opposing the application, Mr. Mayombo adopted their counter affidavit and further stated that, the third party is obliged to pay the decree holder, and in support of his argument he cited the case of **Hasnain M. Murji vs. Abdulrahim A. Salum t/a Abdulrahim Enterprises**, Civil Appeal No. 06 of 2012 (Unreported).

Having considered the application before this court, despite the fact that original records in Civil case No. 17 of 2011 and those in Application for Execution were not attached in this application but judgment, decree and ruling were attached and I think they are of much assistance to determine as to, whether the execution order was in conformity with the judgment and decree of the court vide Civil Case No 17/2011.

From outset, this court subscribes the argument advanced by Mr. Bulemo that, the Deputy Registrar misdirected himself to have ordered execution against the applicant. My reading from the judgment in Civil Case No. 17 of 2011 reveals that, the High Court Judge adjudged that the 2nd and 3rd respondent to pay the 1st respondent the awarded damages while the applicant herein will be liable to indemnify the 2nd respondent. For easy of reference, part of the holding is hereby quoted;

“The point I am trying to drive home here is that of the damages that will be later awarded to by this court, payment of those damages to the plaintiff by the defendant and the third party should be strictly in line with the provisions of the section 5 (b) of the Act (Cap 169 R.E 2002) cited above. The defendants will be liable to pay the damages as awarded and the third party shall be liable to indemnify the 1st defendant to the extent required under the Act.”

From the above quoted part of the holding, it is the view of this court that, the Deputy Registrar ought to have directed the execution order in accordance with the judgment and the decree issued and not otherwise. Although the decree is silent on the liabilities of the parties as it only directed what was awarded to the plaintiff and not by whom and to what proportions such costs are to be paid, however with the provisions of Order XX rule 6 of the Civil Procedure Code Cap 33 R. E. 2019 this court is of the view that the judgment and the decree should be read together as one and not in piecemeal and the decree must reflect the judgment.

Even if Mr. Hamis might be correct for thinking that, the third party now applicant should be held liable following the principle that, when a defendant brings a third party so that he or she could be held liable for any contribution or indemnity or any relief or remedy relating to the subject matter of the suit, in the event such defendant loses a case (See a judicial jurisprudence in **Hasnain M. Murji v. Abdulrahim A. Salum t/a Adburahim Enterprises**, Civil Appeal No. 2 of 2012 (unreported-CAT). It is my firm view that, the case at hand is distinguishable from the above position of the law for the reason that the High Court Judge in awarding damages clearly specified that, the 1st respondent to be paid damages by the 2nd and 3rd respondent whereas the applicant's liability was limited only to the extent of indemnification to the 2nd respondent. Hence, issue

whether the trial judge was right or wrong should not be dealt by this court be it by the Deputy Registrar or a judge of this court in the application for execution or this reference.

To this end, this court is of the opinion that, the order made by the Deputy Registrar saddling the applicant with liability to pay the 1st respondent the awarded damages was a total misdirection since the execution of the 1st respondent's decree ought to have been in conformity with judgment and decree thereto and not from what perhaps ought to be. I hold that view simply because an executing court has no power to entertain an objection or validity of the decree or as to legality or correctness of the decree. Rationale for the above rule being that, although a decree may not be in accordance with the law, however, it is binding and conclusive as between the parties to the suit unless it is set aside in an appeal or revision by appellate or revisional court. I would perhaps wish to be guided by a persuasive decision in **Topanmal vs. M/S Kundomal Gangaram** reported in 1960 SC 338 where the Indian Supreme Court held that;

"An executing court must take the decree as it stands. The executing court cannot go behind the decree. It can neither add something in the decree already passed nor alter the decree.

That being told and said, the impugned decision and orders made by the Deputy Registrar of the court in the application for execution are hereby quashed

and set aside. The execution application should therefore proceed in conformity with the court's decree excluding the applicant. Given the background of the case giving rise to this reference, this court orders that each party shall bear its own costs.

It is ordered.




M.R. GWAE
JUDGE
24/05/2021