

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

MISC. CIVIL APPLICATION NO. 66 OF 2021
(Arising from Civil Case No. 4 of 2017)

ABEED M. MANJIAPPLICANT

versus

EXIM BANK (TANZANIA) LIMITEDRESPONDENT

RULING

28th & 30th July, 2021

RUMANYIKA, J.:

Under the provisions of Order XXI Rule 40 and Section 68 (e) of the Civil Procedure Code RE. 2019, with a view to facilitating and expedite execution of judgment and decree in Civil Case No. 4 of 2017, the application is for an order compelling the respondent's Chief executive Officer to disclosed the judgment debtor's assets to satisfy the decree.

Messrs Emmanuel John and M. Tairo learned counsel appeared for Abeed M. Manji and Exim bank (Tanzania) Limited (the applicant and respondent) respectively.

When the application was, by way of audio teleconference called on 28/7/2021 for hearing, I had to hear them on a jurisdictional based

preliminary point of objection formally raised on 12/7/2021 by Mr. M. Tairo learned counsel for the respondent and now taken by him. That for two reasons herein after stated, this court lacked jurisdiction to entertain the instant application; **(a)** that following the impugned decision of 27/2/2021, under Rule 83 (1) (2) (3) & (6) of the Court of Appeal of Tanzania Rules, 2009 (as amended) one having had lodged a notice of appeal to the Court of Appeal of Tanzania, from there the court ceased to have jurisdiction except where the application was for leave or certification of points law (case of **Mohamed Enterprises Tanzania Limited v. The Chief Harbour Master TPA**, Civil Appeal No. 24/2015 CAT at Dar es salaam, unreported and the case of **Aero Helicopter Limited v. FN Jansen** (1990) TLR 142 CA quoted with approval **(b)** That unless the application was one for review which is not the case here, the moment the court pronounced the impugned decision it was so *functus officio* that it could not now re open the proceedings and, at this stage entertain interlocutory applications of any kind (the case of **Benedict v. Martin Benedict** (1993) TLR 1 (CA) much as Order XX1 Rule 40 of the Code concerned only with execution. That unless there was a pending main case, the instant application could not stand alone. We humbly submit and

pray that the application be dismissed with costs. Mr. M. Tairo learned counsel further contended.

In reply, Mr. Emmanuel John learned counsel submitted; **(a)** that the principle of *functus officio* would not be applicable under the circumstances because because the instant application was not intended for alteration or amendment of the impugned decision. That the provisions of Section 68 (e) of the Code squarely applied under the circumstances **(b)** that actually the matter was at execution stage given the enabling provisions of the law cited and the requisite criteria set forth in the case of **Law Associate Advocates v. M/s Independent Power (T) Limited** (2004) TLR 276 (CA) especially where, a notice of appeal had been lodged in the Court of Appeal of Tanzania.

The central issue is whether the application is tenable under the circumstances. I think it is dictated both of law and logic like it is the case here that once, with respect to decision of the High court a notice of appeal was lodged, jurisdiction of this court ceases unless there was, with respect to the impugned decision an application for leave or a certificate of point of law (case of **Mohamed Enterprises Tanzania Limited (supra)**). It is intended therefore that any attempts for whatever reasons

by this court to reopen the proceedings it may pre-empt the highest fountain of justice thus most likely resulting into mockery of the long established and accepted doctrine of precedent notwithstanding the principle that a mere appeal bars no execution suffices the point to dispose of the entire application.

With regard to the issue of need to reopening the proceedings and the court being *functus officio*, I would agree with Mr. Emmanuel John learned counsel that the issue of *functus officio* is neither here nor there under the circumstance because be it directly or indirectly the court had not adjudicated upon or ordered for the judgment debtor to be examined on the means and capacity to satisfy the decree at issue (Order XXI Rule 40 (a) of the Code).

Last but not least, I am not sure if Mr. Emmanuel John learned counsel really meant that the provisions of Section 68 (e) of the Code were applicable under the circumstance because it reads thus:-

Section 68 – In order to prevent the ends of justice from being defeated **the court may, subject to any rules in that behalf**

- (a) ... (not applicable)
- (b) ... (not applicable)
- (c) ... (not applicable)
- (d) ... (not applicable)
- (e) **Make such other interlocutory orders** as
may appear to the court to be just and
convenient (the underline is mine).

The words "interlocutory orders" mean any orders in the interim made but they had no effects of finalizing the matter Civil Case No. 4 of 2017 for that matter as said one concluded on 27/2/2021. It means therefore if anything, with all intents and purposes the instant application was respectfully long ago over taken by events.

With regard to powers of this court to orally examine the respondent judgment debtor on his means and property to satisfy the decree, the provisions of Order XXI Rule 40 read as under: -


40 – where a decree is for the payment of money **the decree –holder may apply** to the court for an order that: -

- (a) ... (not applicable).
- (b) In the case of a corporation, any officer thereof; ...
- (c) ... (not applicable) ... **and the court may make an order for the attendance and examination of suchjudgment debtor, or officer or other person, and for the production of any books or documents.**

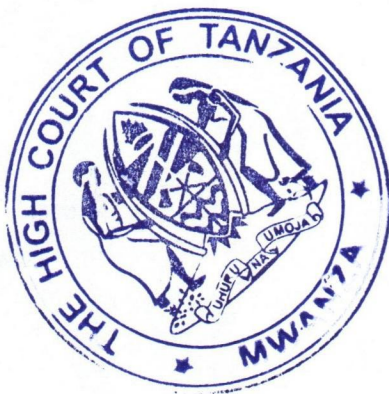
From the above quotation therefore, the implication was that judges were sort of put on temptation and or being reduced into court annexed investigators. There is no wonder the court's powers were only discretionary. It is very unfortunate that be it in the supporting affidavit or something, Mr. Emmanuel John learned counsel did not tell the court as to what happened that for purposes of execution of the decree holder had failed to identify property of the judgment debtor a re-known financial institution. I think if at all, and just in case the respondent was proven judgment proof, if need be this was a fit case, on application end of the day respondent being committed as a civil prisoner.


In totality, the application is dismissed with costs. It is accordingly ordered.

Right of appeal explained.


S.M. RUMANYIKA
JUDGE
29/07/2021

The ruling delivered under my hand and seal of the court in chambers this 30/07/2021 in the absence of the parties.




S.M. RUMANYIKA
JUDGE
30/07/2021