**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MWANZA DISTRICT REGISTRY**

**AT MWANZA**

**CIVIL REFERENCE NO. 04 OF 2021**

(Arising from Civil Execution 25 of 2020, Originating from Land Case No. 17/2016)

**UK CONSTRUCTION & GENERAL SUPPLIES LTD.....1ST APPLICANT**

**MUGORE MIRAJI KIGERA.....2ND APPLICANT**

**PILLY RAMADHANI SHENYE.....3RD APPLICANT**

**UDAH MIRAJI KIGERA.....4TH APPLICANT**

**VERSUS**

**STANBIC BANK TANZANIA LIMITED.....1ST RESPONDENT**

**KASSANGA H. KASSANGA t/a ROCKY**

**CITY TAKERS LTD.....2ND RESPONDENT**

**RULING**

30th August & 17th September, 2021

**TIGANGA, J.**

In this application, the applicants under the service of Mr. Mashaka Fadhili Tuguta, Advocate of Extreme Attorney, filed this application under certificate of urgency seeking for this court to grant the following reliefs;

1. That it be pleased to examine the validity of execution of the decree in respect of the amount specified in the warrant of attachment

which varies broadly with the amount agreed upon in the Deed of Settlement whose terms were recorded as decree of the court.

2. Costs of the application be provided for, and
3. Any other relief as it may deem fit and just to grant under the circumstances.

That was done by a chamber summons which was preferred under section 38 and 95 of the Civil Procedure Code [Cap 33 R.E 2019] and any other enabling provision of the law.

The application was supported by the affidavit sworn by the learned counsel, Mr. Tuguta, in which he deposed that, the applicants who were the parties in Land Case No. 17/2016 entered into a deed of settlement with the first respondent to settle the debt arising from a Bank overdraft facility which the applicant obtained from the 1st respondent.

In the said deed of settlement parties agreed to the decretal sum of Tshs 87,000,000/= and the same was recorded by the Court and a decree was extracted therefrom which became binding to the parties.

The applicant failed to satisfy the decree, consequence of which, the 1st respondent filed execution proceedings through Civil Execution No. 25

of 2020 in which on 19/07/2021, the Hon. Deputy Registrar upon hearing the parties, ordered the attachment and sale of the properties specified in the application for execution. That property is on Plot No. 14 "J" Mukendo Street Musoma Municipality with Certificate of Title No. 13269 and registered in the name of Miraji Selemani Kigera. The Deputy Registrar appointed one Kassanga H. Kassanga t/a Rock City Takers Ltd, Court Broker to carry out the intended execution.

The centre of complaint in this application is that, the 1st respondent instead of executing the decree worth Tshs 87,000,000/= as agreed in the Deed of Settlement and subsequent decree, he seeks to recover Tshs 202,055,442/46.

It was deposed that the amount sought to be recovered in the execution application is beyond what was decreed after the deed of settlement. Also that if the execution will be left to proceed, it will cause injustice to the applicant.

The application was countered by the respondent by filing the counter affidavit sworn by Dr. George Mwaisondola - Advocate for both respondents. In that counter affidavit, Dr. Mwaisondola deposed that, by

seeking to recover Tshs 202,055,442/46 the respondent was invoking Clause No. 5 of the Deed of Settlement which has been reproduced in Clause No. 3 in the Decree of the Court.

That since the applicants are admitting the default, they are estopped from contesting execution.

Hearing of the application was conducted orally where Mr. Tuguta in his submission in chief reiterated the contents of the affidavit filed in support of the application, which I have already summarised, and asked the Court to rely on Order XXI Rule 5 read together with Section 42 (b) of CPC [Cap 33 R.E 2019] which insist that, what is executed should be the decree passed by the court not otherwise.

In reply submission, Dr. Mwaisondola adopted the content of the counter affidavit filed in opposition of the application. He insisted that recovery of 202,055,442/46 is based on the fact that, item 5 at page 8 of the deed of settlement, provide that in default of the parties, the usual default clause shall apply. He admitted that the decree which resulted into the deed of settlement contains Tshs 87,000,000/= as the decretal sum,

but the applicant defaulted and for a period of almost one year, the applicant has never cleared his obligation to pay satisfying the decree.

He submitted further that, the applicants were given or served with the Notice to Show Cause but they did not challenge the amount.

He asked the court to find that the application was an abuse of Court process. He asked me to adopt the stands of the Court, as held in the case of **General Tyre East Africa Ltd vs HSBC Bank PLC** [2006] TLR at page 60, where my Senior Sister Sheikh, J, spoke loudly the role of the Court in sustaining the Bank's unscrupulously borrowers who want to use the Court as a shield. He also cited the case of this Court, Hon. Mtulya, J, in the case of **SAB-Impact Fund TB & 2 Others vs Agro Serve Co. Ltd,** HC - Bukoba, Civil Appeal No. 09/2019 (unreported) at page 15, where he insisted that, counts should not be used as a shield.

He furthermore submitted that, the application has no merit; the Court should find that there is no evidence to prove otherwise that the applicants are indebted.

In rejoinder, it was submitted that the application is not an abuse of Court process and the applicants do not want to take shield of the Court order.

The counsel submitted that the cases cited by Dr. Mwaisondola are distinguishable as they based on completely different circumstances and based on different sets of facts. He submitted that, they are not challenging the attachment, they are challenging the amount sought to be recovered in execution which is beyond what was decreed.

He submitted that the usual default clause means that the agreed amount which formed the decree ought to be executed and recovered not any other amount.

Further to that, he referred this Court at page 2 of the order of the Deputy Registrar that, the execution which was by attachment was aiming at satisfying the decree, and the decree had Tshs 87,000,000/=. He referred this Court to invoke its powers to allow an application under Section 38 of CPC, he also prayed for costs.

That being a summary of the application, it is instructive to find that, the matter before me is civil reference, arising out of the execution which

was before the Deputy Registrar in Execution No.25 of 2020, arising from Land Case No. 17 of 2016.

The decree sought to be executed was a result of the compromise reached by the parties to that case in which, parties compromised the original claim, thereby reaching the agreement which was reduced in writings into a deed of settlement, in which the parties agreed the decretal amount to be Tshs 87,000,000/=. That deed was recorded and a decree was extracted therefrom. It was that decree which was the subject of the proceedings in Execution No. 25 of 2020.

Since the execution was intending to execute the decree, then the relief fought or the amount to be recovered must be that one which are prescribed by the decree.

That means, the decree which was supposed to be executed is that one with Tshs 87,000,000/= as the decretal sum, as opposed to the amount of Tshs 202,055,442/46 which is not stated anywhere in the decree. It is not said that the same has been obtained as a result of the computed interest or penalty which if it is so, ought to have been included

in the deed of settlement, and consequently in a decree sought to be executed.

That said, I find the Deputy Registrar to have made an order of execution against the amount which was not part of the decree. I thus find that he erred in law and therefore such error is hereby revised and a direction is made that respondent should rectify the application for execution, and ask for execution of the amount agreed in the deed of settlement and decreed in the decree. The Deputy Registrar should re examine the said execution after receiving the rectified form of execution.

Since the matter was not raised at trial where the Deputy Registrar would have made it good, then the applicants are also at fault, which entitles them not the prayers to costs. That said, no order as to costs is made.

It is accordingly ordered.

**DATED** at **MWANZA,** this 17th day of September 2021.

THE HIGH COURT OF TANZANIA MWANZA

**J. C. TIGANGA**
**JUDGE**
**17/09/2021**