IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

LAND APPEAL NO. 64 OF 2020

(Arising from DLHT of Mwanza at Mwanza in Application No. 115B of 2020)

GERVAS MABULA---------- APPELLANT

VERSUS

ANNA JOHN KUMALIJA (the administratrix of the Estate of the late John J. Kumalija) ---------- RESPONDENT

JUDGMENT

Last Order: 08.09.2021

Ruling Date: 28.10.2021

M. MNYUKWA, J.

The Appellant Gervas Mabula is appealing against the decision of the District Land and Housing tribunal (DLHT) of Mwanza in Application No. 115B of 2020 that was dismissed.

In the record, it goes that the appellant and the late John Kumalija were relatives and the late John Kumalija owned unsurveyed piece of land

at Nyegezi. He agreed with the appellant to survey the land in his name and developed a business structure. In the process, the late John Kumalija leased the property without involving the appellant. The late John Kumalija sued the appellant before the DLHT in Land Application No. 115 of 2010 which was decided in favour of the appellant on 11.09.2012 before the Honourable Chairperson, C.H Mwashambwa. The appellant, a decree-holder was awarded Tsh 20,000,000/= being the loss of anticipated business gain, he was also given an order that valuation for the costs of renovation be carried out to ascertain the amount used, and had the respondent failed to honor with the orders given above, the appellant be allowed to renovate the suit premises and carry-on business to cover his costs incurred as shall be calculated after valuation report and in case the late John Kumalija manages to satisfy the decree of the DLHT, the appellant will have to surrender the certificate of occupancy entered on his name for the purpose of changing the ownership. In June 2020, the appellant applied for execution of the decree to the DLHT, vide application No.115B of 2020 in the DLHT for Mwanza at Mwanza before the Hon. Chairperson, Masao, E.

The administratrix of the estate of the late John Kumalija, Anna John Kumalija, through her advocate objected to the application. After the

hearing, the Chairperson ordered that the appellant could not execute the decree for he has been benefiting from the disputed premises from 2012 to the date he applied for execution. And, the decree could not be executed as there was no valuation as required and has already recovered all costs and ordered that the decree-holder to surrender the title document in respect of plot No. 1364 Block B Nyamalango to the judgment debtor. The appellant did not see justice and therefore, decided to file this instant appeal and on his memorandum of appeal, he fronted 18 grounds of appeal.

By the order of the court this application was argued orally, vide audio teleconference where by the appellant via mobile No. 0756414141 appeared in person remotely, unrepresented and the respondent afforded the services of Mr. Majid Kangile, the learned counsel who remotely appeared via mobile number 0752175415.

From the 18 grounds of appeal which I find others being repetitive, it was the appellant who was the first to address this court. Submitting on his first ground of appeal, he avers that, the DLHT erred in dismissing the application for execution without having justifiable reasons to do so.

On the second ground, he avers that, the DLHT erred in law by quashing and setting aside the decree delivered which decreed that the

respondent should pay the appellant Tsh 20,000,000/= being the loss of anticipated business, valuation of the costs spent by the appellant and if the respondent failed to pay the appellant be allowed to develop the suit premises and carry-on business to compensate his costs which will be done after valuation.

He went on that the DLHT erred by dismissing the execution without consideration of the valuation report that was expected to be conducted and also the tribunal erred by not considering the need to have an evaluation to know the exact costs incurred by the appellant.

He submitted on the sixth ground that, the act of the DLHT revising the decision of Hon. C. H Mwashambwa who is also a Chaiperson is against the principle of law and it shows that the Hon. Chairperson interfered with the power of the High Court.

He went on claim that the tribunal erred by deciding that the act of the appellant to stay in the disputed land and doing his business equals to the notion that the appellant had recovered costs for the chairperson did not state which kind of business was done and how much the appellant was earning from the business. He insisted that the DLHT award the order which was not prayed for.

He went on that the tribunal erred for not considering that there was a long-time dispute between the parties which resulted the appellant not to be able to carry out his business that prompted the appellant to apply for execution and therefore DLHT issued its decision on assumption without considering the evidence.

Submitted further, he claims that the DLHT erred for failure to show when the renovation was completed and it was the appellant who was to renovate and not the respondent. He went on that the tribunal did not take into consideration that the judgement debtor died in 2014 and the respondent is the administratrix who was appointed in 2019.

He insisted that the tribunal was supposed to dismiss the application and direct the respondent to the appropriate actions to be taken. He claims that the chairman of the tribunal did not do justice and he was biased.

He finally prays this court to allow the appeal with costs, the decision of the DLHT be quashed and set aside, and grant an order that the appellant be paid Tshs. 20,000,000/= as awarded, 110,655,750 as a renovation cost which makes a total of 130,655,750/=, and also an order for valuation for the costs for development of the premises and any other relief this court may deem just to grant.

Responding to the applicant's submissions, the counsel for the respondent brings into attention that the appellant's grounds of appeal are repetitious and he objected to the grounds. On the first ground of appeal, he avers that it has no legs to stand for the decision of the DLHT delivered on 13.11.2020 assigned reasons at page 5. Going to second ground, he contends that the appellant did not state reasons rather copied the order of the DLHT.

Submitting on the third ground, he avers that it was the duty of the appellant to submit the valuation report for he knew how much he spent in valuation.

On the sixth ground, he avers that the Chaiperson was correct and did not interfere with the powers of the High Court rather determined the application in accordance with the law. On the seventh ground, he submitted that the appellant executed the decision impliedly for he still renovating the suit premises and carry-on business to include renting the same to tenants including businessmen.

On the ninth ground, he avers that DLHT decided according to law and evidence and not according to the wish of the judgment debtor. On the tenth ground, he insisted that even though the appellant claims that

there was the dispute but to date, the appellant is using the suit premises and there is no order which stop him from using the same.

On the thirteenth ground, he avers that the tribunal was right for it was not the duty of the tribunal to state when the renovation was completed.

On the fifteenth and sixteenth grounds, he submitted that the presence of probate case did not interfere the appellant's use of the suit premises.

On the seventeenth ground, he averred that the DLHT was correct to dismiss the application but it was not duty-bound to inform the appellant what was required to do. On eighteenth ground, he insisted that there was no evidence by the appellant which shows that the Tribunal was biased and therefore, this ground is an afterthought.

In rejoinder, the appellant reiterates what he had submitted in chief and added that he used the suit premises from the year 2014 after the decision of the High Court delivered by Hon. Mruma, J.

After the long and rival submissions of the parties, I proceed to determine this appeal. From what is the subject to this appeal that originated from the execution proceeding, which is governed by the

provision of order XXI of the Civil Procedure Code, Cap. 33 RE: 2019, the appellant on second and sixth grounds of appeal raised the ground that touches the issue of jurisdiction. For that reason, I find obliged to first deal with the appellant's grounds of appeal as to whether the Chairperson of the tribunal was right to quash and set aside the decree of his co-chairman. I have decided so because that is the main issue in the present appeal.

Going to the records, it is clear that in application No. 115 of 2010, the trial tribunal determined the matter to its finality and decreed the same. In the application No. 115B of 2020, the appellant applied for execution of the decree which earlier decreed by the tribunal and which stood valid and legal for it was not legally challenged. It appears that, the tribunal before Hon, Masao, Chairman dissented and disregard what was decreed by the same tribunal for the reasons that he gave forth.

In the case of **Fanuel Mantiri Ng'unda v. Herman M Ngunda**, Civil Appeal No. 8 of 1995, CAT (unreported) it was held that

> *"The jurisdiction of any court is basic; it goes to the very root of the authority of the court to adjudicate upon cases of different nature.... the question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement*

of the trial. It is risky and unsafe for the court to proceed on the assumption that the court has jurisdiction to adjudicate upon the case."

It is without doubt that, the chairman has no jurisdiction to alter, disregard or ignore the orders of the tribunal for he was already functus officio. In the case of **Malik Hassan Suleiman Vs S.M.Z**. [2005] T.L.R. 236 the Court held that,

"A court becomes functus officio when it disposes of a case by a verdict of guilty or by-passing sentence or making orders finally disposing of the case."

In this case at hand, the honourable Chairperson Masao E. was functus officio for the alteration of the decree of the Tribunal delivered by Hon. C. H. Mwashambwa for he lacks jurisdiction to do so.

As it was rightly stated by the appellant, it was incorrect for the Chairperson of the DLHT to alter the original decree which has been issued by the same DLHT. The executing court when executing decree is required to adhere to the requirement of Order XXI Rule 10(2) (3) and 15(1) of the Civil Procedure Code Cap 33 R.E 2019.

Moreover, by virtue of the provision of Order XX Rule 6 of the Civil Procedure Code Cap 33 R.E 2019, it is clear that the judgement and the decree should be read together because the decree is emanated from the

judgement. In other words, the existence of the decree depends on the presence of the judgement. This is due to the fact that execution of decree simply means the enforcement of the judgement or giving effect to the judgement in order to help the decree holder to enjoy what he has been awarded so long as the same was not challenged by the judgement debtor.

Thus, it is my considered view that, the act of the Honourable Chairperson to dismiss the decree that emanated from the judgement of the DLHT which sought to be executed, is contrary to the functions and mandate of the executing court which is duty bound to execute what has been provided for in the decree.

In the case of **Fortunate Edgar Kaungua vs George Hassan Kumburu,** Misc. Civil Appeal No 71 of 2019. HC (Unreported) when cited an Indian case of **V. Ramaswami Ayyangar and Others vs Kailasa Thevar** 1951 AIR 189, commenting on the role of the executing Judges, it was held that:

> *"The learned Judges appear to have overlooked the fact that they were sitting only as an executing court and their duty was to give effect to the terms of the decree that was already passed and beyond which they could not go. It is true that they were to interpret the decree, but under the*

guise of interpretation they could not make a new decree for the parties."

Again, in the book titled **Civil Procedure with Limitation Act, 1963** written by **C.K Takwani,** seventh edition, Eastern Book Company at page 624 elaborating on the fundamental principles that need to be borne in mind with regard to the powers and duties of the executing court, one of the important principles is to the effect that;

"An executing court cannot go behind the decree. It must take the decree as it stands and executing it according to its terms. It has no power to vary or modify the terms. It has no power to question its legality or correctness. This is based on the principle that a proceeding to enforce judgement is collateral to the judgement and, therefore no inquiry into its regularity or correctness can be permitted in such a proceeding."

The logic behind the above persuasive decisions and the above principle is that, the executing court is obliged to finalize the case in the manner it was intended by the unchallenged Judgement. If any party wish to challenge the decree, one of the remedy available to him is to challenge it through appeal. If it is not challenged the same will still remain valid, binding to the parties when enforced.

In our present case, even if the original decree debtor died, the executing court is bound to execute it to the administratix of the deceased estate as if the original judgement debtor is alive. In the book of **Civil Procedure by Takwani** (supra) at page 625 it was pointed out that;

> *"A decree which is otherwise valid and executable does not become inexcusable on the death of the decree holder or of the judgement debtor and can be executed against his legal representative.*

Much as the decree in Application No 115 of 2010 was not executed, and the modes of executing decree as they are provided for under the CPC, Cap. 33R.E 2019 were not effected, the same remain valid and is not subject to change. Therefore, I am settled that in our case at hand the important thing for executing court is to execute the decree in its original condition. If the need arise that may necessitate to examine to what extent the decree has been executed, the executing court is duty bound to consider the evidence adduced by both parties which may substantiate to what extent the execution of the decree was satisfied and not to decide by assumptions.

In the final analysis, I have found merit in this appeal, the impugned decision and orders in Misc. Land Application No 115B OF 2020 delivered

on 13/11/2020 before the DLHT for Mwanza at Mwanza are hereby quashed and set aside.

I subsequently invoke the power given to this court by virtue of section 43 of the Land Disputes Courts Act, Cap 216 R.E 2019 and order that the case file be remitted to the DLHT of Mwanza at Mwanza and execution application should therefore proceed in conformity with the court decree. Given the fact that the litigants are relative, this court ordered that each party shall bear its own costs.

It is so ordered

M. MNYUKWA
JUDGE
28/10/2021

Right of appeal explained and guarantee to the parties.

M. MNYUKWA
JUDGE
28/10/2021

Judgment delivered on 28/10/2021 via audio teleconference whereby all parties were remotely present.

M. MNYUKWA
JUDGE
28/10/2021