

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

**IN THE DISTRICT REGISTRY OF SONGEA**

**AT SONGEA**

**CIVIL REVISION NO. 03 OF 2021**

*(Originating from Civil Appeal No. 04/2021, District Court of Songea,  
Original from Civil Case No. 144 of 2020 Songea Urban Primary Court)*

**FAUSTINE SHIRIMA ..... APPLICANT (ORIGINAL PLAINTIFF)**

**VERSUS**

**IRENE BERNARD ..... RESPONDENT (ORIGINAL DEFENDANT)**

**RULING**

**Date of Last Order: 21/10/2021**

**Date of Ruling :11/11/2021**

**BEFORE: S.C. MOSHI, J**

The genesis of this revision is a complaint letter written by the original respondent to the office of Judge in charge on 06/08/2021. She complained against execution proceedings which were pending before Songea Urban Primary Court. The High court has supervisory and inspection powers over all Resident Magistrates' courts, District courts and Primary courts under section 79 of the Civil Procedure Code, cap. 33 R.E. 2019 and sections 30 (1), 31 (2), 44 of the Magistrates court Act, Cap. 11 R.E. 2019, hence I called the relevant files for inspection. In the course of inspection, I noted irregularities which go to the root of the case. Thus,

the parties were notified to appear and address the court before it makes orders to rectify the errors.

Brief facts of the case are that, the applicant was a plaintiff in civil case no. 144 of 2020 before Songea Urban Primary court. He sued the respondent for division of properties which were acquired through their joint efforts; he specifically requested for division of a house acquired through their joint efforts. The trial court divided equally all the properties the parties acquired together, including other properties which weren't pleaded, namely the house at Mkuzo, two plots located at Mshangano, a vehicle make Mark II, and a farm located at Luhira Seko. The primary court ordered division of the properties, each of them was to get 50%. Aggrieved by the trial court's decision, the original plaintiff appealed to the District court which reversed the decision of the Primary Court where it ordered that, the original plaintiff should get 60% whereas the original defendant to get 40% and it further ordered that , the car Toyota mark II to remains in the hands of the applicant/original plaintiff if it exists, the respondent was given 100% of Ruhila seko farm and custody of the children was placed under the original defendant and the original plaintiff was allowed to visit them at any time and he was ordered to provide basic needs.

Both parties were satisfied with the decision of the first appellate court, they did not appeal to this court. The original defendant approached the primary court for execution of the decree, specifically regarding the house on plot no. 1615 Block 'SS' at Mkuzo area in Songea Municipality. Where after valuation of the property was conducted, the respondent was ready to pay the applicant 60% of the value of the house. The trial court ordered the respondent to pay 60% of the value of the house to the applicant but before payment was effected, the respondent did not accept the 60% of the estimated value of the house. He stated that he too can compensate the respondent. He further complained to the District Court Resident Magistrate in charge, who gave the direction to the trial court that the execution be done through a court broker who was to sell the house through a public auction and the parties could get their respective shares after the sale. The trial court acting on the direction given by the District court ordered the sale to be conducted by way of public auction. When the order was given the trial court complied with it, it ordered the sale to be conducted by the court broker, this ignited the respondent's complaint to this court, on the ground that the court issued two conflicting decisions on execution processes.

After the perusal of the trial court's record and first appellate court's



record I found some irregularities and I drew the following issues: -

- 1. Whether it was proper and legally correct for the District Court at its appellate jurisdiction to decide on matters which were not pleaded nor decided at the trial court and which were not pleaded at the appellate District court.*
- 2. Whether it was proper for primary court to issue two conflicting decisions in its execution proceeding.*
- 3. Whether the primary court had jurisdiction (pecuniary) to entertain the matter.*

The parties were asked to address the court however, when the case came for hearing the parties appeared in person and they had nothing to submit on the irregularities which were pointed by the court.

Starting with the first irregularity, it is a settled position of the law that cases must be decided on the framed issues on record. And if it is desired by the court to raise other issues either founded on the pleadings or arising from the evidence by the witnesses or arguments during the hearing of the suit, parties are to be afforded an opportunity to submit on them. In the case at hand, the first appellate court in its judgement dealt with the issues of the parties which they were blessed with when living together. This was a new issue since it was not pleaded and it was not dealt with by the trial court. In the case of **Juma vs. Manager of PBZ**

**Ltd and Others** [2004] 1 EA 62, It was held that:-

*".... The 1<sup>st</sup> appellate judge, therefore erred in deliberating and deciding upon an issue which was not pleaded in the first place."*

The resultant effect is that such finding and orders given in respect to the children cannot be allowed to stand; hence it was a nullity.

On the second irregularity, perusal of the trial court record has revealed that, when executing its decree, the trial court overturned its own decision. In the first instance it allowed the respondent to pay the original plaintiff his share of the house, that is 60%. However, later on, after receiving directives from the District Resident in Charge vide a letter with reference number BA.44/162/01/12 dated 21/06/2021 through which the original plaintiff had complained about the execution processes and stated that he was also ready to compensate the respondent, it ordered the sale of the house to be effected through a court broker vide a public auction and the proceeds to be divided to the parties according to the percentages awarded by the trial court. This was contrary to the settled principle of the law, after the trial court had ordered the respondent to compensate the plaintiff his share it was functus officio to give other orders on that issue. If at all the applicant was aggrieved by that order, he ought to have challenged it through an appeal or any other available

remedies of challenging a decree. The District court Resident Magistrate in charge was to advise the applicant to take necessary legal steps or she should have exercised her revisionary powers, it was procedurally wrong for her to order the trial court to reverse its decision.

In the case of **Scholastic Benedict vs. Martin Benedict** [1993] TLR 1, it was held thus: -

*"As a general rule, a primary court like all other courts has no jurisdiction to overturn or set aside its own decision as it becomes functus officio; after making its decisions."*

Guided by the above authority, the trial court was tied up in entertaining execution processes after it had ordered the respondent to compensate the plaintiff since it was functus officio.

Lastly, the issue of jurisdiction. Jurisdiction means courts power and limit within which it can entertain a certain matter. The issue of jurisdiction is of great importance as failure to observe it renders the proceedings a nullity. See the case of **Desai vs. Warsaw** [1967] EA 351 and the case of **Masoud Mbita and 2 others Vs Daria Rutihinda**, Miscellaneous Civil Application No. 85 of 1998, High Court of Tanzania at Moshi (Unreported) where it was held that: -



*"The issue of jurisdiction is fundamental and lack of jurisdiction renders proceedings a nullity".*

Therefore, any award or judgement arising from such proceedings of the court without jurisdiction is also a nullity. In the case at hand the statement of the claim didn't state the value of the properties to be divided to the parties. For easy of reference it is hereby quoted: -

*"Nakumbuka nimeishi na mdaiwa toka mwaka 2013-2018. Ninaomba mgawanyo wa mali ambazo tumechuma kipindi chote tulichoishi Pamoja ambayo ni nyumba iliopo mkuzo.*

*Kiasi kinachodaiwa.....*

*Sahihi ya mdai"*

Looking at the above claim, it is evident that the value of the house was not stated and the court proceeded to hear the case without satisfying itself on the issue of pecuniary jurisdiction as provided under section 18(1) of the Magistrate Court Act, Cap. 11 R.E 2019 where the jurisdiction of the primary court on immovable properties is Tshs. 50,000,000/= and 30,000,000/= for movable properties.

That said and done, I nullify both the decisions of the first appellate court and of that of the trial court as they are both based on a nullity.

It is so ordered.

Right of appeal explained.



*[Signature]*  
**S.C. MOSHI**

**JUDGE**

**11/11/2021**