

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(ARUSHA DISTRICT REGISTRY)**

AT ARUSHA

PC CIVIL APPEAL NO. 49 OF 2019

(C/F Arusha District Court Civil Revision No. 4 of 2019, Originating from
Arusha Primary Court Civil Case No. 91 of 1977)

EDWARD LENJASHI..... APPELLANT

VERSUS

NASI MURUO.....REPOENDENT

JUDGMENT

04/08/2021 & 21/09/2021

KAMUZORA, J.

The appellant being aggrieved by the decision of the district court on Civil Revision No. 4 of 2019, lodged this appeal. The appeal is premised on the following grounds;

- ~~1. That, the learned magistrate erred in law and in fact in initiating,~~ hearing and deciding revisional proceedings against the appellant who was reported dead way back in August, 2018.
2. That, the learned magistrate erred in law and in fact in not finding that the execution order dated 4th October, 2018 issued against the late Edward Lenjashi who died on 25th August, 2018 without joining his legal representative in the application is null and void.
3. That, the learned magistrate erred in law and in fact in not finding that the execution order was erroneously passed.

In alternative, another ground raised is that, the learned magistrate erred in law and in fact in quashing the order for stay of execution.

The background of this matter can be traced way back in 1977. The appellant Edward Lenjashi filed a land dispute and that was registered as Land Dispute No. 91 of 1977 against the respondent Nasi Muruo. The application was lodged at the Customary Land Tribunal of Arusha in 1977 claiming the plot of land allegedly encroached by the respondent. Upon the application being heard on merit it was resolved in favour of the respondent. The appellant was quite uncomfortable with the decision and therefrom knocked to the Appellate Tribunal in Dar es salaam vide Appeal No. 101 of 2000 whereby the decision of the Customary Land Tribunal for Arusha was upheld.

Having found the tribunals' queue tough to penetrate, the appellant recourse to normal courts. This time, the resident magistrates court of Arusha was the preference vide Civil Case No. 19 of 2001. The matter was decided to be res judicata. Being aggrieved with the decision of the Resident Magistrate Court, the appellant unsuccessfully appealed to this Court in Civil Appeal No. 09 of 2016. The push and pull remained mute for a while until 4th October, 2018 when the respondent Nasi Muruo approached the doors of Arusha Urban primary court and sought to enforce an award which was pending for more than 41 years. The primary court granted the application for execution and issued eviction order against Edward Lenjashi, the appellant. Before the order could be executed, the appellant's wife one Vicky Edward Molllel moved the primary court to stay execution of the decree, the fruit of the Land

Dispute No. 91 of 1977. The ground raised by her letter to move the court was that, there was a pending appeal before the Court of Appeal challenging the decision of this Court in Civil appeal No. 09 of 2016. The primary court granted an order staying the execution process on the basis of pending appeal before the Court of Appeal. The order for stay of execution triggered a complaint that was posed before the district court. The Resident Magistrate in charge of the district court having considered the circumstances of the case, opted to open a revision proceeding. The district court called upon the parties to address the court on the illegalities, if at all existed. Upon hearing the parties, the district court overruled the order of stay and directed the execution process to proceed. Dissatisfied with that decision the appellant landed into this Court through this appeal.

Hearing of the appeal was done through written submissions. John F. Materu Learned Advocate, serviced the appellant whereas the respondent enjoyed legal service of Lengai Nelson Merinyo, Learned Counsel.

Arguing ground one Mr. Materu faulted the decision of the district court that it couldn't had been entertained the said revision because at the time the respondent sought to enforce the decree on 4th October, 2018 she was aware that Edward Lenjashi was dead. He quoted the percept of the ruling of the district court specifically at page 4 where the advocate for the respondent informed the court on the demise of Edward Lenjashi. That, the matter wouldn't have proceeded without joining the legal representative. Bolstering his argument, Mr. Materu referred to the case of **Godwin Charles Lemilia vs. Slim Maikoko &**

Another, Civil Appeal No. 28 of 2016 (Unreported). In this case, the Court among other things aird that, everything done or decision made after the death of the first respondent and after the suit had abated against him is null and void. Reasonably therefore, Mr. Materu is asking this court to declare the entire proceedings, rulings and orders of two subordinate courts nugatory. Mr. Materu has also urged this Court to invoke section 44(1)(b) of the Magistrates' Courts Act, [Cap. 11 R.E. 2019] to revise the ruling of the district court in Civil Revision No. 04 of 2019.

The second and third grounds were combined and argued together. Mr. Materu argued that, it is apparent that Edward Lenjashi passed away on 25th August, 2018 and the execution process was put on motion on 4th October, 2018. That, on that date Edward Lenjashi did not appear on the obvious reason that he was dead. Because of that anomaly he argued that, as the district court was informed on the demise of the deceased, it would have been expected to address the said anomaly which unfortunately was not addressed. Mr. Materu further argued that, because Edward Lenjashi was dead definitely, he wouldn't had permitted the wife Vicky Edward to represent him in both the execution application and in the revision application in terms of provision 33(2) of the MCA as it was held by the resident magistrate in the district court.

Ground four was argued in alternative and that, in case the application of execution and revision were competent before both two subordinate courts, still the matter wouldn't left to stand. The reasons given by Mr. Materu are two. One that, the order of execution issued on

4th October, 2018 was issued without the appellant and he was not served and therefore he was condemned unheard. Two that, the application for execution of the decision of Civil Case No. 91 of 1977 was filed beyond statutory period of 12 years provided for under item 7 of the schedule to the Magistrates' Courts (Limitation of Proceedings under Customary Law) Rules, G.N No. 311 of 1964.

On his part Mr. Lengai stated that, the appellant who was alleged to have been died is complaining against the ruling of the district court, the complaint which is steaming from the decision of the primary court to stay execution on 23/11/2018. Mr. Lengai submitted that, Vicky Edward the heir of the appellant rightly moved the court under rule 58(3) of the Magistrate's Courts (Civil Procedure in the Primary Courts) Rules, GN No. 310 of 1964. That, the reason adduced by her in order to convince the court to stay application for execution was not that the judgment debtor is dead, but that there was a pending appeal in the Court of Appeal. He contended that, that was also the only reason considered by the district court to allow the revision proceedings in favour of the respondent.

Arguing ground one, Mr. Lengai submitted that, neither in the proceedings of the primary court nor those of the district court where it is reported that the appellant is dead. To substantiate his argument, he referred this Court to pages 2 and 3 of the district court ruling. He said that, it was until this Court's order for the submission of the death certificate of the Edward Lenjashi but before, records of the subordinate courts do not feature such document. To fortify the argument, he cited the case of **The Registered Trustees of the Shadhily vs Salim**

Omary [2017] T.L.S. LR 262. In that case it was held that, whether the respondent was a deceased was a question of fact which required proof.

On the argument that the appellant was not heard and therefore deprived of his right to be heard, Mr. Lengai cited paragraph 3 of page 3 of the district court ruling which shows that the appellant was represented by Mr. Mutabuzi, learned Advocate. To him, the cardinal principle of right to be heard was adhered.

On grounds two and three the learned counsel prayed this court not to interfere with the order of execution because even Mr. Materu has agreed that the revision was subject to the order of stay given on 23rd November, 2018 and not about the order of execution given on 4th October, 2018. The counsel insisted that, the appellant correctly stepped in the court under rule 58(4) of the of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules, GN No. 310 of 1964 because, she was a deceased' spouse and therefore an heir. He said, the argument by Mr. Materu that the wife of the appellant had no permission to represent his husband in the execution application and or in the revision should be ignored because she is the one who appeared in pursuant to rule 58(3) of the Civil Procedure Rules in Primary Courts. The learned counsel argued further that, owing to the fact that this appeal filed by the appellant's counsel does not disclose who instructed the counsel to act upon it, it is improperly instituted or caused to be instituted by the ghost appellant. Mr. Lengai Distinguished the case of **Mr. Godwin Charles Lemilia vs Slim Ndikoko and another** (supra) cited by Mr. Materu as the facts of the case with this one is not the same.

On the alternative ground, Mr. Lengai is of the view that, the same has no merit. The reason behind is that, there is no pending appeal in the Court of Appeal. To bolster his argument, he referred this Court to pages 9 and 10 of the impugned ruling. Commenting on the ground that the execution is time barred he submitted that, the submission by the appellant counsel is silent and the computation dated are not stated anywhere. However, he went on submitting that, if the time is to be computed it should start after the conclusion of Appeal No. 101 of 2000.

In the rejoinder, Mr. Materu reiterated his submission in chief. He further added that, the complaints by the appellant are founded on the order of stay issued by the primary court on 23rd November, 2018. That, the order of execution was erroneously issued without joining legal representative of the deceased. That, when the order for execution was issued on 4th October, 2018 the judgment debtor was already dead and therefore, he could not be evicted from the disputed land. Mr Materu contended further that, during the hearing of the revision the fact that the respondent was already died was conveyed to the Resident Magistrate on 18th March, 2019 by the spouse of the appellant. That, Vicky Edward Mollel informed the Court that she has petitioned to be appointed administratrix of the estate of the late Edward Lenjashi which was yet to be determined. Mr. Materu urged this Court to quash and set aside the decision and orders of the two lower courts with costs as they were found on errors which are apparent.

I have considered the grounds of appeal and length submissions by the counsel for the parties. I also had ample time to go through the

records of this case at all court levels. As the first three grounds will be jointly pondered as they have similar end result.

Before deliberating on the grounds of appeal, this court find it appropriate to point out matters which are not in dispute. Basing on the records for the case it is undisputed that, the source of this matter is Land Dispute No. 91 of 1977 that was instituted by the appellant Edward Lenjashi but decided in favour of the respondent Nasi Muruo. It is also undisputed fact that, such decision is still valid and unexecuted until now. It is also a fact that on 4th October, 2018 the respondent Nasi Muruo applied before Arusha Urban primary for an order for execution of the award and the same was granted on. However, before the order could be executed, the appellant's wife one Vicky Edward Mollel moved the primary court to stay execution of the decree and such order was granted by the primary court. The district court in revision proceedings nullified the primary court order that stayed the execution. It is also in record that, the time the two orders for execution and for stay of execution were issued by the primary court, the appellant Edward Lenjashi had already demised. Now the matter in contention is whether the proceedings of the primary court as well as that of the district court were correct.

From the records it is obvious that, the proceedings for execution commenced in the absence of the appellant Edward Lenjashi. On the first date when the matter was called in court, only the respondent was present and upon addressing the court on her prayer to execute the award that was pending for so long, the court granted the order for eviction against the appellant. It is unfortunate that, no notice was

issued for the appellant to appear and show cause why execution should not take place. **The Magistrate Courts (Civil Procedure in Primary Courts) Rules GN No. 310 of 1964** governs procedure for recovery of immovable property and requires the court to issue notice to the party against whom the award is issued upon receiving an application to enforce the award. Rule 58 (2) and (3) is relevant to our case and the same reads;

58 (3) In any other case, the court shall, on receipt of an application under subrule (1), summon the person in occupation of the land or in actual possession of the property to appear and show cause why he should not be evicted from the land or disposed of the property, as the case may be, and shall cause notice of the day and time of the hearing to be served on the party to whom the land or property was awarded and on any other person whom it has reason to believe to have any interest in the land or property.

~~*(4) If the person in occupation of the land or in actual possession of the property fails to appear or having appeared fails to show cause to the contrary, the court may direct an officer of the court to evict such person from the land or to seize the property, as the case may be and to deliver the same to the party to whom it was awarded. (Emphasis Added)*~~

The above provision is very clear and it is couched on mandatory terms that a summons to appear and show cause must be issued before eviction order could be issued. It must also be noted that, the matter in question had a long history to which several cases were filed in different

courts thus, commencing the execution proceedings and issuing orders without first notifying the party against whom the order is issued was a practice that could prejudice the parties. In my view, issuing notice/summons to the party of the intended execution process is necessary to ensure that the court do not issue an order against the decree already satisfied. Thus, by issuing the order for eviction without first issuing summons for the appellant to appear and show cause, the primary court contravened the mandatory requirement of the provision of the law as above cited.

It was contended by the respondent's counsel that, when the execution order was issued on 04th October, 2018 and an order staying the said execution on 23rd November, 2018, the primary court was not aware of the facts on death of the judgment debtor. That, even at the time of the wife of the appellant moved the court to stay execution such fact was not communicated to the court. While I agree that at the time an order for execution was issued the court was not aware of the demise of the deceased, I do not agree with the contention that at the time an order staying execution was issued the court was not aware of the demise of the deceased Edward Lanjashi. The records show that, one Vicky Edward Mollel moved the primary court through a letter dated 14/11/2018. It is through that letter the primary court issued an order for stay of execution. The contents of the letter reveal that, Vicky Edward Mollel was informing the court of the pending appeal and the demise of her husband who was a party to the case. Her letter clearly indicate that she attached the marriage certificate and the burial permit, logically because she was yet to obtain the death certificate. The death

certificate was submitted latter proving that the deceased Edward Lenjashi died on 25th August 2018.

From the above analysis it is clear that, an order for execution was issued on 4th October after the demise of the appellant Edward Lenjashi who died on 25th August 2018. For that reason, the execution order was issued against the dead person. As the hearing and the order was given ex-parte and no indication that a summons to appear and show cause was issued, there was violation of the law and I agree with the counsel for the appellant that the right to be heard was infringed for that matter. The right to be heard oftentimes has been stated to be of paramount engagement of which its denial renders the proceedings nugatory. In the case of **Onesmo Nangole versus Dr. Steven Lemomo Kiruswa**, Civil Appeal No. 129 of 2016 (Unreported) quoted the case of **Mbeya - Rukwa Auto Parts and Transport Ltd Vs. Jestina George Mwakyoma**, Civil Appeal No. 45 of 2000 (Unreported) which observed that;

"In this country, natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of the equality before the law"

And the case of **Abbas Sherally and Another Vs. Abdul Fazalboy**, Civil Application No. 33 of 2002 (Unreported) which stated;

"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if

the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."

The district court overlooking this error on the face of the record of the primary court, this Court finds it prudent to address it as improper.

Again, the order staying execution was issued illegally for the court was moved by the person with no locus to move it. At the time Vicky Edward Mollel addressed the court to stay execution, she was not a legal representative of the deceased Edward Lenjashi. She admitted herself at that time that she had applied for letters of administration but she was yet to be appointed.

It is the requirement of the law that, in any legal proceedings where a party dies before the conclusion of the proceedings, a legal representative/administrator of the estate of the deceased can apply to be joined and stand for the deceased. In the present matter, that was not considered. Edward Lenjashi (the deceased) was recorded as a party to the case before the primary court, district court and even before this very court without any representation of the administrator as if he is still alive.

It was contended that, the fact that Edward Lenjashi was a deceased was not communicated to the lower courts as no death certificate was presented. I however, do not agree with such assertion as the records are well clear that, the notice on the deceased's demise was communicate to the primary court at the time Vicky Edward Mollel was praying for stay of execution. The same was also communicated to

the district court and even the district court acknowledged the same and that is why it went beyond discussing the legality of representation by the deceased's wife. The district court in justifying the legality of the proceedings held that Vicky Edward Mollé had a legal capacity to move the court to stay execution before the primary court. The magistrate based his reasoning on the provision of section 33 (2) of the Magistrate Court Act which reads;

*“(2) Subject to the provisions of subsections (1) and (3) of this section and to any rules of court relating to the representation of parties, a primary court may permit any relative or any member of the household of any party to any proceedings of a civil nature, **upon the request of such party**, to appear and act for that party”*(Emphasis Added)

The above provision imposes a requirement that a person standing on behalf of a party to the case has to be requested by such party to represent him/her in court proceedings. In my view, the party in the present case one Edward Lenjashi could not have requested Vicky to represent him as he was dead. That being the case, the district court erred in relying on the provision of section 33 (2) of the MCA to justify the appearance by Vicky Edward Mollé. In my conclusion, the proceedings of the primary court and that of the district court that was conducted after the demise of the deceased and without joining the legal representative of the deceased was null and void.

Having determined the first three grounds, I see no reason to venture into the alternative ground because its discussion was much

centred on whether the proceedings of the two lower courts were proper and sustainable.

In the final analysis, I invoke section 44(1)(b) of the Magistrate's Courts Act [Cap. 11 R.E 2019] to revise proceedings of both the district and primary courts. I hereby nullify proceedings and decisions emanated therefrom except for the application of execution. Let the primary court records be remitted back for the application to be reconsidered by the court upon involving the legal representative of the deceased Edward Lenjashi. Due to the circumstance of this case, I make no order as to costs.

Order accordingly.



A handwritten signature in blue ink, appearing to read "D.C. Kamuzora", is written above a horizontal dotted line.

D.C. KAMUZORA

JUDGE

21/09/2021