

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**(ARUSHA DISTRICT REGISTRY)
AT ARUSHA**

EXECUTION APPLICATION NO. 65 OF 2020

(C/f The High Court of the United Republic of Tanzania, Land case No. 65 of 2016)

ALIAMINI JUMA MNARO APPLICANT

Versus

HUSNA SAKALA RESPONDENT

RULING

19th November & 10th December, 2021

Masara, J.

The Applicant has preferred this application under Order XXI Rule 9 and 10(2)(j)(iii) of the Civil Procedure Code, Cap. 33 [R.E 2019] (hereinafter "the CPC"), moving the Court to arrest and detain **Husna Sakala**, the Respondent, as a civil prisoner until she pays the sum of TZS 31,000,000/= plus interest. That amount was awarded by this Court in Land Case No. 65 of 2016. It remains outstanding to date. The application is supported by the affidavit of the Applicant, and the same is contested through a counter affidavit deposited by the Respondent.

Brief facts giving rise to this application can be narrated as follows: In October 2014, the Respondent applied for and was advanced a loan of TZS 4,000,000/= from Tanzania Postal Bank. She defaulted payments of the loan instalment amounting to TZS 1,751,642.11 together with interest

thereon. In the loan agreement, she pledged as security a house located at Plot No. 159, Block "FF", Sakina within the City of Arusha, with title No. 11246, L.O No. 131891 (hereinafter "the landed property"). After defaulting repayment of the credit facility, she was issued with a default notice, but still the amount due was not paid. The Bank in realising the outstanding balance, resorted into selling the security. Mak Recovery Limited was appointed by the Bank to sell the landed property. The landed property was auctioned and subsequently sold to the Applicant.

Thereafter, one Mr. Ahmed Hassan Sakala (deceased by now), who was the husband of the Respondent, filed Land Case No. 65 of 2016 before this Court against the Respondent, the Tanzania Postal Bank, the Applicant and Mak Recovery Limited (the 1st, 2nd, 3rd and 4th defendants respectively). He challenged the sale of his house, claiming that it was neither mortgaged nor placed as security to secure the said loan. The case did not go to a full trial. At the mediation stage, parties agreed to settle. In the settlement deed that was filed in Court on 29/9/2017, Mr. Ahmed Hassan Sakala (the Plaintiff) and Husna Sakala (the 1st defendant) committed to pay a total of TZS 31,000,000/= to the Applicant herein. They further agreed that the sum of TZS 15,867,132.11 that was in the Respondent's Bank account, be remitted to the Applicant's account. The

remaining balance of TZS 15,132,642.11 was to be paid to the Applicant by the late Ahmed Hassan Sakala and the Respondent herein within six months. Unfortunately, the whole amount was not paid to the Applicant.

On 28/8/2018, the Applicant filed an application in this Court seeking to execute the decree issued in his favour. In the midst of the execution proceedings, Mr. Ahmed Hassan Sakala, who was the 1st Judgment debtor, died. After hearing the parties, in a ruling delivered on 7/10/2019 this Court (Nkwabi DR), allowed execution to proceed. Nutmeg Auctioneers and Property Managers Co. Ltd was appointed to execute the decree of the Court. In the process of executing the decree, the same landed property was attached and proclamation of sale was issued. While in the process of auctioning the house, one Amina Hassan Mkali, the co-wife of the late Ahmed Hassan Sakala filed objection proceedings vide Misc. Land Application No. 42 of 2020, challenging attachment and sale of the landed property, since it was a matrimonial home. Her application was successful; therefore, sale of the house could not proceed.

Thereafter, the Applicant seems to have persistently claimed payment of the decreed amount but in vain. He later decided to execute the decree by an alternative means. He opted execution through arresting and

detaining of the Respondent as a civil prisoner until the money is repaid. That is when he filed this application.

At the hearing of the Application, the Applicant was represented by Mr. Allen Godian, learned advocate, while the Respondent opted for legal aid rendered by Mr. Richard E. Manyota, learned advocate from the Legal and Human Rights Centre. Hearing of the application proceeded through filing written submission. Both parties filed their written submissions as directed. However, the Applicant's submissions in chief and rejoinder present an issue that I find it imperative to deal with. The question that behoves me is whether there are written submissions by the Applicant worth the consideration of this Court.

In the course of composing this ruling, I noted that both the submission in chief and the rejoinder submission by the Applicant were drawn and filed by a law firm and not by an individual advocate. They were drawn and filed by *Haraka Law Partners*. In terms of sections 41 and 42 of the Advocates Act, Cap. 341 [R.E 2019] a law firm cannot draft documents for the purposes of a hearing as such. Both this Court and the Court of Appeal have repeatedly held that a law firms cannot draw and file documents in Court. In **Lucas A Nzegula (Son and Heir of Zuhura**

John) vs. Isaac Athuman and Royal Insurance (T) Ltd, Civil Appeal

No. 66/2008 (unreported) this Court held inter alia:

*"Two, I have said above, the submissions by the respondent were filed by C&M Advocates. It would appear the advocate who signed as Advocate for the second respondent is one Oscar Epaphra Msechu telling by the rubber stamp used. Now, C&M Advocates is not an Advocate in terms of section 2 and 6 and 8 of the advocates Act (Cap 341 R.E 2002). **C&M Advocates cannot therefore file a document. The document must be filed by an individual advocate having the conduct of the matter "for and on behalf of C&M Advocates."** (Emphasis added)*

Similarly, in the case of **Paulo Joseph Mnyavano vs. Andrew**

Mkangaa, Revision No. 281 of 2016 (H.C Labour Div. DSM), it was held:

"The Counter Affidavit drawn and filed by the respondent's law firm which obviously have registered Advocates according to Sections 2 and 3 of the Advocates Act ought to have shown his/her name thereto for the same be endorsed by a qualified person. As it is D.K.M Legal Consultants (Advocates) is not a qualified person as required under the Advocates Act Cap 34(L RE £002."

Similarly, in the application at hand the submissions were drawn and filed by a law firm by the name of Haraka Law Partners in contravention of the law. The said submissions ought to be expunged from the record. Such expungement leaves no material for this Court to consider in terms of hearing. It means that the Applicant failed to file written submissions as directed by this Court. Such failure has adverse consequences in law. It is trite law that failure to file written submissions as ordered by Court is tantamount to failure to enter appearance on the day fixed for hearing. This is what was decided by the Court of Appeal in **National Insurance**

Corporation of (T) Ltd & Another vs. Shengena Limited, Civil

Application No. 20 of 2007 (unreported) where the Court observed:

"The Applicant did not file submission on due date as ordered. Naturally, the court could not be made impotent by a party's inaction. It had to act. ... It is trite law that failure to file submission(s) is tantamount to failure to prosecute one's case."

From the above, it is the holding of this Court that the Applicant has waived the right to prosecute his application. This alone is sufficient to dispose the Application. However, taking into consideration the potential injustice that may befall the Applicant following the omission that he had no control of, I find it imperative to allow him to reinstitute the Application. Dismissing the execution application due to the fault explained herein may not work in tandem with the pursuit of justice that courts in this Country hold dear. There is no doubt that the Applicant engaged the services of a lawyer, that lawyer appeared in Court and was expected to prosecute the Application to finality. Instead of doing it himself, he gullibly handed the same to a legal firm, which according to law has no legal capacity to draft such documents. Obviously, the Applicant would be harshly treated, if such error was to be adjudged against him, considering that the money he innocently gave out as purchase price remains unrefunded. In line with the overriding objective principle, which calls courts to consider justice

over technical hiccups, it is my view that the errors observed should be rectified through filing of a fresh application.

Before I conclude, I note that this Application was filed against the Respondent after failure to execute the Court decree through selling the landed property mentioned in the decree. Further, that the Applicant had no other alternative after he searched and found out that the Respondent has no any other property that can be attached and sold to cover the decreed sum. While the Applicant is correct in premising this Application under sections 44(1), 46, Order XXI Rule 10(2)(j)(iii) and Order XXI Rule 36 of the CPC, which confer powers on this Court to order arrest and detention of a judgment debtor as civil prisoner, his decision to prefer the same against the Respondent alone is not very well premised. It was not disputed by the Respondent's husband who had also committed to pay the decreed money died before the execution application was filed. However, without evidence that the Respondent assumed the whole responsibility, bringing the Application against the Respondent alone may not be right.

Further, I note the submissions of Mr. Manyota regarding the other parties in the dispute. Although that submission remains irrelevant after expunging the Applicant's submissions, the assertions made therein

makes a lot of sense. The decree which the Applicant seeks to execute was not entered against the Respondent alone. It involved other parties; namely, Ahmed Hassan Sakala, Husna Sakala, Tanzania Postal Bank and Mak Recovery Limited. Mr. Manyota also mentions that the Respondent has alternative property, 2 acres of land at Temeke Dar es Salaam, that can be used to discharge the decree.

I have scrutinised the documents filed in support of this Application and noted that Land Case No. 65 of 2016 was filed against four defendants. Parties in that case were as follows:

"Ahmed Hassan Sakala Plaintiff
Versus
Husna Sakala 1st Defendant
Tanzania Postal Bank 2nd Defendant
Aliamini Juma Mnaro 3rd Defendant
Mak Recoveries Limited 4th Defendant"

According to the record, the settlement deed filed in Court on 29/9/2017, both the Plaintiff and the 1st Defendant committed, that they would indemnify the 3rd Defendant. For clarity, the settlement deed reads as follows:

"The Plaintiff and the Defendant agree to settle this matter as follows:
1. The Plaintiff agree to a pay (sic) the total of 31,000,000.00 to the 3rd Defendant, Aliamini Juma Mnaro.
2. Since there is a balance of Tshs 15,867,357.89 in the 1st Defendant account, Husna Sakala, at the Bank, Tanzania Postal Bank.

3. The Plaintiff and the 1st Defendant irrevocably agree to pay Tshs 15,132,642.11 to make a total of Tshs 31,000,000.00 within six months from the date of signing this settlement agreement.”(Emphasis added)

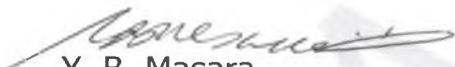
In the execution application, parties were Aliamini Juma Mnaro, as the Applicant against Ahmed Hassan Sakala, Husna Sakala, Tanzania Postal Bank and Mak Recovery Limited as the 1st to 4th Judgment Debtors respectively. That record speaks for itself; that both the main Land Case and the Execution Application were not filed against the Respondent alone.

In this application, the total sum of TZS 31,000,000/= plus accrued interest is shouldered on the Respondent. Order XXI Rule 10(2)(i) of the CPC provides that application for execution shall disclose the name of the person against whom execution of the decree is sought. Suffice it to say that if the decree intends to be executed against one or more persons, the names of such persons must appear in the application. I understand that it may not be possible to incarcerate a legal person, but such legal persons are represented by officers who cannot be immune from orders sought in the Chamber summons. The Applicant may, thus, in the course of presenting a fresh application above stated, include other necessary parties as he deems appropriate.

Having so stated, this Application is accordingly struck out with leave to refile the same. The Applicant should file an appropriate Application within thirty (30) days of this Order. Considering that the Respondent enjoyed pro bono services from the Legal and Human Rights Centre, I make no order as to costs.

Order accordingly.




Y. B. Masara
JUDGE

10th December, 2021