

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CIVIL REVISION NO. 14 OF 2020**

(Arising from the decision in execution No. 25 of 2017 by Hon. Mhina K, SRM in the Resident Magistrate's Court of Dar es salaam at Kisutu, dated 18th February, 2020)

BETWEEN
JOSEPH GEOFFREY JIMBIKA.....APPLICANT
AND
ELIZABETH JAMES MCHAI.....RESPONDENT

RULING

08th October & 3rd December, 2021

ITEMBA, J:

This application is made under section 79 (1) (c) of the Civil procedure Code (CPC) Cap. 33 R. E. 2019.

The orders sought by the applicant are:

1. That the Honourable Court be pleased to call for records and revise the decision of the Resident Magistrate's Court of Dar es salaam at Kisutu for any material irregularity.
2. Costs of this application

Facts which gave raise to this application are that; the applicant and the respondent were spouses. As per the records, the applicant had filed a Matrimonial Cause No. 64/1997 seeking for a decree of divorce. The said Matrimonial Cause happened to end upon the spouses entering a

settlement on terms that their marriage was no longer reparable and so divorce was inevitable. A consent decree was entered. In respect of matrimonial properties, the two settled that the same be divided to the issues of their marriage. As for the two houses which appears to be main concern in execution, the parties in consensus agreed that were to be transferred to their son, one Brian Geoffrey Jimbika.

When execution was initiated before the trial Court to give vacant possession of the house to their son Brian, the applicant lodged an application of revision No. 5 of 2011 challenging the consent judgment but it was unsuccessful. The court records were remitted back to the trial Court. Again, the applicant made another move by filling an application for stay of execution pending application for extension of time to file his review. Both applications were dismissed for want of merit. Tirelessly, the applicant appealed before this Court in Civil Appeal No. 76 of 2013, challenging the decision by the trial Court in respect of denial of the said two applications of extension for filing review and stay of execution, however, the appeal was fruitless and it was dismissed for being devoid of merit.

It is apparent from the records that the respondent lodged an application for execution before Kisumu Resident Magistrate Court, indexed as execution no. 25/2017 and the mode from which the assistance of the

trial court was requested, was by way of eviction of the applicant (the Judgment debtor therein) from the two houses located at Plot No. 36 Block 20 Mwananyamala, Dar es Salaam and House No. 52 Mlalukwa Dar es salaam and handing over the same to their son, Brian Geofrey. The applicant happened to resist the application but his points of objections were dismissed and the trial Court ordered the execution to proceed.

That the applicant was dissatisfied with the decision of the trial court, hence this application on reasons to wit: -

- 1. That the respondent had no locus standi to execute the decree entered by the Resident Magistrate Court of Dar es Salaam at Kisutu in Matrimonial Cause No. 64 of 1997,*
- 2. That the properties were matrimonial properties that could not be awarded to the issue of marriage.*
- 3. The respondent is not a Tanzanian hence could not execute as the properties were landed properties.*

When the application stood for determination by the court for hearing, Mr. Mashaka E. Mfala, learned counsel represented the applicant whilst the respondent enjoyed the services of Mr. Deogratius Mwarabu, learned advocate. The matter was agreed to be disposed by way of written submission and the parties complied accordingly. For purpose of brevity, I will pick the arguments that I find to have substance connected

to the application as submitted by the respective counsels.

Mr. Mfala for the applicant in the essence of his submission did accentuate that in respect of ground one, the respondent had no *locus standi* to execute the decree because she was not the one who was awarded the properties but rather her son Brian who was the issue of their marriage, and at the time when the respondent lodged the application of execution, Brian had already attained the age of majority. It was Mr. Mfala's contention that Brian was the one who could execute the decree and not the respondent.

On the second ground, Mr. Mfala submitted that the Court is limited to divide matrimonial properties only to the parties. For that reason, the learned brother challenged the consent judgment which gave the rights to the 3rd party. He cemented his argument that the execution is in violation of section 114 (1) of the Law of Marriage Act, Cap 29 R.E: 2019.

On the third ground as witnessed under paragraph 8 of the applicant's affidavit and explicated furthermore by Mr. Mfala, it is contended that the respondent is a Kenyan by Nationality which makes her a foreigner and now she stays in the United Kingdom. For that reason, it was submitted by the applicant's counsel that the respondent cannot execute a landed property as section 20 (1) of the Land Act Cap 113 restricts non-citizen to occupy land unless for investment purpose.

In rebuttal, Mr. Mwarabu in respect of the first ground, argued that the respondent and the applicant were the parties in the Matrimonial Cause no. 64/1997 and Brian Godfrey has never been the party in such proceedings. It was the respondent's counsel submission that Brian was only a beneficiary of the outcome of the Matrimonial Cause, thus the respondent had all the rights and duty to execute the consent judgment.

On the second ground, Mr. Mwarabu submitted briefly that the Consent judgment was a result of parties' agreement and thus to challenge it is against the law. It was his contention that the applicant had tried in number of occasions to challenge the same but all his efforts proved futile, hence this ground should be dismissed for lack of merit.

On the third ground, the counsel for the respondent contends that nothing has been produced by the applicant to prove that the respondent is a foreigner. He further articulated that section 20 (1) of the Land Act (*Supra*) cited by the applicant is not applicable in the instant scenario since the applicant herein is not intending to occupy the land but rather to execute the decree in respect of the rights therein and handing the landed property to Brian Geoffrey. The learned brother cemented that section 20 (1) of the land Act does not restrict a foreigner to claim and ultimately execute for his or her rights in land matters. He then prayed for the application to be dismissed with costs.

In his rejoinder, Mr. Mfala persistently emphasised on what he had submitted prior in his submission in chief and he supplemented that the matrimonial properties are properties belonging to the spouses/parties to a marriage and not to the issues. To bolster his argument, he cited the case **Mohamed M. Salum vs. Jack O. Othumani**, Civil Appeal No. 130/2004, High Court of Tanzania at Dar es Salaam (Unreported) in which the Court reversed the Order of the trial Court which required the Matrimonial properties to be given to the children.

I have examined the court record and the rival submissions by the parties, the central issue of determination is *whether the application has merit*. I have enlightened the following observations which will assist me to easily determine the raised issue.

One, for the purpose of clarification it is to the view of this court to first have a proper look on what the term "revision" connotes. The applicant herein is praying for the court to exercise its revisionary power to call and satisfy itself on the correctness of the ruling and order issued by Hon. Mhina K.D, SRM in execution **No. 25 of 2017** delivered on 18/02/2020.

The meaning of the term revision given in the book by **C. K Takwani, titled Civil Procedure with Limitation Act, 1963, 7th Edition** at **Page 588** while quoting different meaning of the term

"revision" he stated as follows:

"According to the dictionary meaning, to "revise" means "to look again or repeatedly at"; "to go through carefully and correct where necessary", "to look over with a view to improving or correcting" and "revision" means "the action of revising, especially critical or careful examination or perusal with a view to correcting or improving".

Two, the applicants and the respondent were parties in respect of **Matrimonial Cause No. 64 of 1997**. The two had entered into a consent judgment from which it benefited the issue of their marriage. Thus, the two houses, located at Plot No. 36 Block 20 Mwananyamala, Dar es Salaam and the House No. 52 located at Mlalakuwa Dar es salaam, were agreed by the parties to be transferred to their son Brian Geoffrey. It is an obvious fact that through the consent judgment, the Court assists and facilitates parties to meet the ends of Justice.

It is a well settled principle that parties to a Civil Suit are free to consent to a judgment. They may do so orally before a judge who then records the consent or they may do so in writing and affix their signatures on the consent. In that case, still the Court has to sign that judgment. A consent judgment unless set aside is binding on the parties. (see **Hirani v. Kassam** [1952] EA 131 and **Brooke Bond Liebig (T) Ltd v. Mallya** [1975] 1 EA 266.

Three, the applicant as evidenced from the records, has tried in several occasions to challenge the validity of the consent judgment but his efforts bared no fruits. When execution no. 25 of 2017 stood for determination before the trial court, the consent judgment in respect of the consent decree which was to be executed was yet to be reversed. I believe the applicant move to challenge the validity of the consent judgment either before the execution Court or before this forum by way of the instant revision, technically, was and is a wrong move. It is a well-established principle by the Apex Court of the land in the decision of **Arusha Planters and Traders Ltd & 2 Others Vs. Euro African Bank (T) Ltd**, Civil Appeal No. 78 of 2001 (unreported) that a consent judgement can be challenged by way of review which would allow the court to vacate its previous decision or through an appeal if there is a claim of fraud.

In the case at hand, neither the appeal nor review avenue was exhausted by the applicant. The applicant herein had unsuccessfully applied for an extension of time to file a review against the consent judgement. He then appealed before this Court against such ruling of the trial Court in which the trial Court's decision was upheld. From that point, he became reluctant to seek for further remedies but waited until execution was initiated by the respondent to which he unsuccessfully objected, hence

this revision. Depending on the circumstances of this case, I believe if the applicant was unsatisfied with the decision of enlargement of time to file his review by the High Court, he could have appealed against it to the Court of Appeal of Tanzania vide the provisions of section 5 (1) (c) of the Appellate Jurisdiction Act, [Cap 141 R.E: 2019]. Again, if the applicant had wished to appeal against the judgement in Matrimonial Cause No. 64 of 1997, still he could appeal against the same. Nevertheless, both avenues are still available subject to law of limitation.

It therefore goes without saying that the consent judgment in Matrimonial Cause No. 64 of 1997 stands unchallenged up to date and this Court being firmly determining the execution of it as a revisionary Court; it cannot go behind the decree to oust the jurisdiction of the appellate Court and the trial Court as premised by the decision of the Apex Court in **Arusha Planters and Traders Ltd & 2 Others (Supra)**. As regards the duty of executing court, I will borrow a leaf from Indian jurisdiction, whereas the case of **V. Ramswami Vs T.N.V.Kailash Theyar** reported in AIR 1951 S.C,189 (192), it was observed that,

"the duty of an executing Court is to give effect to the terms of the decree. It has no power to go beyond its terms. Though, it has power to interpret the decree, it cannot make a new decree for the parties under the guise of interpretation "

Also, in **Topanmal Vs M/s Kundomal Gangaram** reported in AIR 1960, SC 388, it was held by the Supreme Court that, *an executing Court must take the decree as it stands. An executing Court cannot go behind the decree. It can neither add something in the decree already passed, nor alter the decree. It cannot grant relief which is not contemplated by the decree.*

Therefore, determining the validity of the consent judgement at this stage, will be allowing the applicant to take advantage of proceedings upon evading the proper cause.

Four, the meaning of the term "execution" can simply be found in **Words and Phrases Legally Defined volume 2 and 3rd edition London and Butterworth's 1989** at **page 195-196** where it is written that:

"In its widest sense signifies the enforcement of or giving effect to the judgments or orders of courts of justice."

Furthermore, reference can be made to the holding of Denning MR on the meaning of "execution" and completion of execution in the English case of **Re Overseas Aviation Engineering (GB) Ltd [1962] 3 All ER 12** at page 16 under 325:

"Execution" means, quite simply, the process for enforcing or giving effect to the judgment of the court..."

From those parameters, it is certain that the executing Court from where this application of revision emanates could not in either way alter the consent judgement.

The claims as to the legality of judgement, as held in **Arusha Planters and Traders Ltd & 2 Others** (*Supra*) had no room for determination.

As to who can execute a decree, it goes in parallel with the issue of *locus standi* raised by the applicant herein. The term *locus standi* literally means a place of standing. It means a right to appear in court, and, conversely, to say that a person has no *locus standi* means that he has no right to appear or be heard in a specified proceeding. [See the case of **Njau and others v. City Council of Nairobi** [1976–1985] 1 EA 397].

In respect of execution of Court decrees, principally, the persons entitled to file an application for execution of a decree includes, a decree holder, legal representative of a decree holder, representative of a person claiming under the decree holder and a transferee of the decree holder (in some cases).

The so mentioned individuals are entitled to institute an application

before the Court of law in respect of execution of decree in Civil Matters. The respondent herein was the respondent in Matrimonial Cause No. 64 of 1997. From such path, I believe she was entitled to apply for execution of a decree to which she was a party.

Five, it has been submitted by the applicant's counsel that the respondent is the Kenyan by Nationality and she lives in the United Kingdom hence she is barred by the provisions of section 20 (1) of the Land Act to execute on the landed property.

It is a settled principle of Law that an affidavit is evidence and the annexure thereto is intended to substantiate the allegations made in the affidavit. [See the case of **Bruno Wenceslaus Nyalifa Vs. The Permanent Secretary, Ministry of Home Affairs & The Honorable Attorney General**, Civil Appeal No. 82 OF 2017, CAT, (Unreported)].

After a keen perusal from the records, it has been noted that; **one**, in the affidavit by the applicant, nothing has been annexed to substantiate the applicant's assertions apart from mere allegations. The applicant would have at least attached a proof of respondent's nationality then this Court would have been in a position to consider the so pleaded fact. **Second**, even if the respondent is a foreigner, the proviso of section 20 (1) of the Land Act, (*Supra*) as explicated by the respondent's counsel, does not bar a foreigner from executing a decree in respect of a landed

property for the benefit of the Third party who is a Tanzanian.

The said provision reads;

- (1) *For avoidance of doubt, a non-citizen shall not be allocated or granted land unless it is for investment purposes under the Tanzania Investment Act.*

I believe the provision is so expressive and clear on non-restriction to a foreigner to enforce the judgement in respect of a landed property for the benefit of the 3rd party but rather the restriction is specific on allocation of land to a foreigner by the government authorities. Further, the respondent does not show intention to own the said properties. I have revisited the application form for execution, which openly suggests that the landed properties were meant for Brian Geoffrey who is their son whom of course neither of the parties has mentioned him to be a non-citizen. The application form filed by the respondent reads;

*"By evicting the Judgment Debtor from the House situated at No. 36 Block 20 Mwananyamala Dar es Salaam and House No. 52 Mlalakuwa Dar es Salaam and **Hand it over** to Brian Geoffrey".*

Considering the circumstances herein, this application is devoid of merit and the issue is disposed in the negative. Henceforth, I am

constrained to dismiss the application in it's entirety. The matter being emanated from matrimonial cause, each party bears its own costs.

It is ordered accordingly.

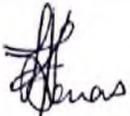


L. J. Itemba

JUDGE

03/12/2021

Rights of the parties have been explained.

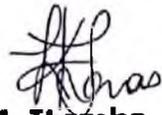


L. J. Itemba

JUDGE

03/12/2021

Ruling delivered under my hand and seal of the court in chambers in presence of Ms. Yustina Odilo counsel for the applicant, Mr. Charles Leonard counsel for the respondent and Ms E. Masilamba, RMA



L. J. Itemba

JUDGE

03/12/2021

