

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT DODOMA

MISCELLANEOUS CIVIL APPLICATION NO. 34 OF 2020

(Originating from Execution No. 6/2020 of the High Court of Tanzania at Dodoma)

NIZAR ABDALLAH HIRJI APPLICANT

VERSUS

REHEMA SALUMU ABDALLAH..... RESPONDENT

RULING

Date of last Order: 07/09/2021

Date of Ruling: 26/11/2021

KAGOMBA, J

NIZAR ABDALLAH HIRJI (the “applicant”) and REHEMA SALUM ABDALLAH (the “respondent”) who were husband and wife respectively, have been in this Court and the Court of Appeal battling on issues of separation, and distribution of matrimonial assets and maintenance. The legal battle in this Courts Matrimonial cause No. 01 of 2015 ended up with granting of order of separation and distribution of matrimonial assets. A decree to that effect was issued by this court on 3/8/2018 (Hon. H. H. Kalombola, J) listing properties distribution between the parties, among other orders.

The respondent was not happy with the property distribution. She preferred an appeal to the Court of Appeal vide Civil Appeal No. 120 of 2018, which was determined in her favour. The conclusive part of the Court of Appeal Judgement bears the order whose execution has led to this

application. It will make my determination of this application easier if I reproduce that part of the Court of Appeal Judgement. The Court Appeal stated.

"In the upshot, we allow the appeal to the extent shown above and order that the appellant be paid Tshs. 100,000,000/= as her 50% share of the two houses transferred by the respondent, that is, houses standing on plots No. 221 Block "V" held under CT No. 14670 DLR and No. 6 Block "B" Mbeya Tabora Avenue. We also order that the appellant is entitled to 50% share of the matrimonial home, the house standing on Plot No. 23 Block "M" Tembo Avenue under CT No. 8870 DLR Dodoma Municipality".

[Emphasis mine]

Following the above decision of the Court of Appeal and the Court Decree that followed, the respondent filed Execution No. 6 of 2020 which was determined by Hon. E. J. Nyembele, DR on 15/7/2020. The execution proceedings were geared, among other things, to enforce;

- i. Payment of an amount to the tune of Tanzania shillings (TZS) one hundred million (TZS 100,000,000/=)
- ii. The respondent to avail 50% of the plot situated at plot No. 23 Block "M" Tembo Avenue Under CT No. 8870 Dodoma Municipality to the applicant (Now respondent herein)

According to the Ruling issued by Hon. E. J. Nyembele, DR the herein proposed that the applicant should give "Vacant possession of the fifty percent (50%) share of the plot comprised at plot No. 23, Block "M" Tembo Avenue Under CT No. 8870 Dodoma Municipality and partition thereof".

With regard to payment of TZS 100,000,000/= the respondent proposed that the mode of execution be by way of summoning the Judgment debtor (the applicant") to show cause why he should not immediately pay decretal amount to the respondent.

The execution Ruling shows that the applicant herein did not oppose the execution but he replied that he was ready to give 50% of the total value of the matrimonial house after valuation. Applicant is in record stating that the said house being a matrimonial home for the applicant and his current wife Razia Hirji and the fact that the applicant is of old age (74 years) and sick, he preferred the mode of paying 50% be by paying half of the value.

Regarding the payment of TZS 100,000,000/= to the respondent, the applicant informed the execution Court that he would be in position of explaining the payment after knowing the value of the house in question. The Deputy Registrar heard the arguments by both sides and ruled that the TZS 100,000,000/= be paid by the applicant to the respondent directly out of Court, within 30 days from the date of that order.

The Deputy Registrar further, ordered partition of the matrimonial house standing on Plot No. 23 Block "M" Tembo Avenue. It is the above decision in the Ruling of Hon. E. J. Nyembele, DR that prompted the applicant to file this application under section 38(1) of the Civil Procedure Code, [Cap 33 R.E 2021] inviting this Court to resolve the question of law as to whether it was lawful for the Deputy Registrar to order partitioning of the matrimonial home located at plot NO. 23 Block "M" Tembo Avenue instead

of conducting valuation so that the respondent could be given her 50% share of the value of the house.

The second question referred for determination by this court is whether the decree can be executed in isolation and not as a whole. The applicant also applied for costs and any other relief(s) this Court shall deem fit and just to grant. I should state that the above application was made with the support of an affidavit of the applicant. The applicant has averred the background of this matter and his prayers as already narrated in full above. He stated in his affidavit that if the application will not be entertained, he would suffer irreparable loss. This is all about the applicant's side.

The respondent on her side filed her submission "in strong opposition to the application". In her strong submission, she raised two crucial questions which she invited this Court to gauge and resolve before digging deep into the merits or otherwise of this application. These questions as stated are:

- i. Whether or not by the nature of the application the Court has jurisdiction to try the same.
- ii. Whether or not the application before the Court was legally brought in time it being pegged under the Civil Procedure Code, and therefore the Court has jurisdiction to entertain the same.

The respondent submitted, in respect to the first above question that a High Court Judge, in their opinion, can not revise the ruling of the District Registrar of the High Court Under the cited provision of section 38(1) of the Civil Procedure Code. She submitted that if the applicant was aggrieved by the ruling of the District Registrar, he should have referred the matter to the

Court of Appeal for redress which Court is empowered to revise such orders. She further added that she was certainly sure that what the applicant is seeking is for the Judge of this court to revise the ruling and order of the district Registrar which is unattainable as the Court has no jurisdiction to do so. It was the respondent's presupposition that the applicant's advocate was misguided by the powers of the High Court Judge in taxation cases while this matter isn't on taxation.

The respondent's advocate further clarified that while the law is clear that a decision of the Taxing Master can be challenged by way of reference to a judge, such a leeway is not available in execution of a decree. The learned advocate submitted that section 38(1) of the Civil Procedure Code Under which the application is made, is instructive as to which Court is mandated. The learned respondent's advocate argued that section 38(2) of the Code subjects the Court to limitation and jurisdiction. It was his further contention that the jurisdiction to execute decree is vested to the Registrar or District Registrar under order XLIII Rule 1 of the Civil Procedure Code, as such all questions arising between parties in such execution must be determined by him or her. In the case at hand, even if there were issues of law, which according to the learned advocate, are not there, it would be the Registrar who would resolve them and not the High Court Judge.

For the above reasons, the learned advocate for the respondent submitted that the court while seated with the Judge has no jurisdiction to interfere with the ruling and order of the deputy Registrar in execution of decree. He concluded that what the applicant seeks is an abuse of Court process and that the application is misplaced.

On the second question, the learned advocate invited the Court to determine whether the application is in time, in view of the fact that the same was brought under the provisions of section 38(1) of the CPC. It was the learned advocates submissions that the application being pegged under the CPC it did not meet the requirement of item 21 of part III to the schedule of the law of limitation Act. He argued that since the ruling was delivered on 15/7/2020 and the application was filed on 10/12/2020 being three months later, instead of the limitation period of sixty (60) days as set by the law, it was thus hopelessly time barred and thus the court had no jurisdiction to determined it.

To argue the above submission, the learned advocate for the respondent quoted from the decision of Samatta, JA (as he then was) in **LOSWAKI'S VILLAGE COUNCIL AND ANOTHER VS. SHIBESH ABEBE** [2000] TLR 204, AT PAGE 208, thus,

"those who seek the aid of the law by instituting proceedings in a court of justice must file such proceedings within the period prescribed by law or, where no such period is prescribed, within a reasonable time. This, I hasten to observe is an elementary rule of law"

[Emphasis added]

He also quoted from the decision of the Court of Appeal in **NBC LIMITED AND ANOTHER VS. BRUNO VITUS SWALO**, Civil Appeal No. 331 of 2019, CAT- Mbeya (unreported), where the Court said;

"The reason for considering this is simple. It is that, Courts are enjoined not to entertain matters which are time barred.

Limitation period has an impact on jurisdiction. Courts lack jurisdiction to entertain matters for which limitation period has expired"

The learned advocate for the respondent reiterated the position of the law that the question of jurisdiction is very fundamental and can be raised at any time. That once raised, the court becomes duty bound to ascertain the same as per the decision in RICHARD JULIUS RUKAMBURA VS. ISAACK NTWA MWAKAJILA AND ANOTHER, Civil Application No. 3 of 2004 (unreported).

Turning to the gist of the application, the learned advocate for the respondent, submitted that the learned advocate for the applicant was entirely unguided by seeking the aid of the court to rule that execution of a decree can not be simultaneously done. He argued that under Section 42 of the CPC, particularly paragraph (e) avails a decree holder with several mode of execution to choose from, depending on the nature of the matter. He clarified that in this matter the decree holder chose to execute the decree by an order of partitioning the property decreed and requiring the immediate payment of the decretal amount. He argued that, the chosen mode of execution augur well with the spirit of the orders of the Court of appeal. It was his further argument that nothing prohibited the decree from being executed simultaneously owing to the fact that part of the decree involved money.

The learned advocate for the respondent further argued that money decree is executable under the provision of Order XXI Rule 28 of CPC read

together with Rule 45, however, it all depends on discretion of the Court how the decree has to be executed. He cited Order XXI Rule 19 of the CPC in this regard and added that it is only at the discretion of the Court and not at the wish of a party that a decree may be executed separately.

Interpreting the decision of the Court of Appeal in the matter subject of this application, the learned advocate for the respondent submitted that the order of the Court of Appeal was very articulate, as it awarded the decree holder 50% of the shares in house on Block "M" Tembo avenue and payment of Tsh. 100million. He argues that under such circumstances it was up to the decree holder to choose how to secure the 50% shares awarded by the court. He argues further that the applicant is not challenging the impracticability of partitioning of the house as a mode of execution but merely asserting that it was wrong for the Deputy Registrar to Order as she did. As such the learned advocate for the respondent concluded that the application is misconceived and deserves nothing than dismissal with costs.

From the above submission, the respondent has raised two question which this Court has to resolve first before embarking into the merits of the Application. These questions are:

- i. Whether by the nature of the application this court has jurisdiction to try the same and
- ii. Whether the application has been brought in time.

If the above issues me not answered in affirmative, then the Court will determine further two issues, namely,

- iii. Whether it was lawful for the Court to order partitioning of the matrimonial house.

iv. Whether the decree can be executed in isolation and not as a whole.

The preliminary issue to be resolved are asking whether the Court has jurisdiction to determine this application. Generally. The answer would be in the affirmative. I however hasten to say that the devil is in the details. Under section 38(1) of the Civil Procedure Code, Cap 33 R.E 2019, all questions arising out of execution such as those raised by the applicant in this application, are to be determined by the court executing the decree. The decision of the Court of Appeal that ordered the appellant/Respondent to be given 50% shares of the matrimonial home on Plot No. 23 Block 2 "M" Tembo Avenue, Dodoma and payment to her of Tsh. 100,000,000/= by the applicant originated from the decree of this Court (Kalombola, J (as she then was). By virtue of the provision of section 32(a) of the CPC, it is this Court which passed the decree. The referred section of the law provides;

32. "the expression "Court" which passed a decree or words to that effect shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include;

(a) Where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance; "

As such this court while presided by Hon. Kalombola, J was the Court of first instance section 33 of the CPC provides that the decree passed by this Court may be executed either by the same Court (which is this Court) or by the Court to which the decree is sent for execution. Now, the decree holder/the respondent herein applied for execution of the decree by specifying how she wanted it to be executed i.e (the mode of execution). This court being the executing Court, presided over by Hon. E. J. Nyembele,

DR in execution No. 6 of 2020 on 15/07/2020 ordered that the decree be executed by way of partitioning of the matrimonial home and by cash payment of Tshs. 100,000,000/=.


Going by the details of the application before the Court, the applicant presents his discontents and dissatisfaction against the decision of this Court, made by the Deputy Registrar. It is my view that, unlike in taxation matters, the decision of the Deputy Registrar being a decision made in execution of a decree by a court which passed the same, is a decision of this Court. As such is unprocedural for the applicant to bring up his application Under Section 38 (1) of the of the CPC challenging it as he has done. Section 38 (1) of the CPC enables the presiding officer of the executing Court, who was the Deputy Registrar, to answer and clarify issues arising from execution. The provision of Section 38(1) of the CPC which the applicant has applied does not empower the presiding officer to determine reference, appeals or reviews.

It is my further view that unlike in taxation matters whether a reference on a decision of a taxing master could lie to a judge of the same court, the deputy Registrar who presides over execution matter in the executing Court is deemed to have concurrent jurisdiction with a judge of the same executing Court. For these reasons, as correctly argued by the respondent's advocate, this Court has no jurisdiction to determine the application before it whose thrust is to challenge the decision of this very court. Having so found, it will be an academic exercise to determine remaining issues raised above.

Accordingly, the application is dismissed. Since the matter originates from a matrimonial dispute, I refrain from ordering costs.

It is so ordered.




ABDI S. KAGOMBA
JUDGE
26/11/2021